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INHABITING AI SYSTEMS IN MODERN CORPORATE ENTITIES: AN INDIAN PERSPECTIVE
Jasel Mundhra & Adya Jha

REVOLUTIONISING SYNERGISTIC INNOVATION: THE INTEROPERABLE REGULATORY SANDBOX IN INDIA
Aayushi Choudhary & Vaibhav Gupta

LEGAL FRAMEWORK CONCERNING ARTIFICIAL INTELLIGENCE AND BORDER SECURITY
Dr. Radhika Jagtap & Nikita Sharma

MASS TORTS BY MULTINATIONAL CORPORATIONS: IS THE INDIAN TORT LAW REGIME ADEQUATELY EQUIPPED?
Dr. Ajay Kumar Sharma

ARTICLE 355: AN UNRESOLVED CONSTITUTIONAL CONUNDRUM
Arunoday Rai

NAVIGATING THE GREY AREA: ANALYZING LOOPHOLES AND AMBIGUITIES IN CRYPTOCURRENCY'S CORPORATE AND TAXATION REGIME
Sachika Vij & Ketan Aggarwal

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VOLUME 10 FALL 2023 ISSUE 1

NLUJ LAW REVIEW

SHORT ARTICLES

Inhabiting AI Systems in Modern Corporate Entities: An Indian Perspective

Jasel Mundhra & Adya Jha..........1

Revolutionising Synergistic Innovation: The Interoperable Regulatory Sandbox in India

Aayushi Choudhary & Vaibhav Gupta..........23

LONG ARTICLES

Legal Framework Concerning Artificial Intelligence and Border Security

Dr. Radhika Jagtap & Nikita Sharma..........51

Mass Torts by Multinational Corporations: Is The Indian Tort Law Regime Adequately Equipped?

Dr. Ajay Kumar Sharma 79

Article 355: An Unresolved Constitutional Conundrum

Arunoday Rai 125

Navigating the Grey Area: Analyzing Loopholes and Ambiguities in Cryptocurrency's Corporate and Taxation Regime

Sachika Vij & Ketan Aggarwal 157

Decrypting Use of News Snippets by Google: - A Potential Abusive Antitrust Concern

Mayank Gandhi 193

Jasel Mundhra & Adya Jha, *Inhabiting AI Systems in Modern Corporate Entities: An Indian Perspective,* 10(1) NLUJ L. REV. 1 (2024)

INHABITING AI SYSTEMS IN MODERN CORPORATE ENTITIES: AN INDIAN PERSPECTIVE

~ Jasel Mundhra & Adya Jha[*]

ABSTRACT

Over time, legal systems have moved from the concept of natural personhood to formulating and recognizing the concept of legal personhood, which, in India, has been bestowed upon entities as varied as corporations, animals, temples, and deities. Arguably, this allows us to make a case for legal personhood for artificial intelligence as well. Although the debate on the grant of legal personhood to artificial intelligence continues, in certain jurisdictions, this debate has shifted from whether artificial intelligence systems should be granted legal status to how and in what form this legal personhood should be granted.[1]

This Article argues that it would be appropriate to grant legal personhood, of a limited form, to artificial intelligence systems. However, until appropriate changes can be made to legal systems, it might be possible to house artificial intelligence within the existing recognized legal personhood of corporate structures, such as the limited liability company as it exists in the United States of America. This is doubtful, however, in the context of the Indian jurisdiction because it might not be possible to have memberless companies under the (Indian) Companies Act, 2013. Finally, this Article addresses another potential issue with accommodating artificial intelligence within the (Indian) Companies

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[1] Shubham Singh, *Attribution of Legal Personhood to Artificially Intelligent Beings*, BHARATI LAW REVIEW, Jul.-Sep., 2017, at 194.

Act, 2013, which is that it cannot perform the role of directors in the Indian context, as directors must be natural persons. This leads to two potential options – either removal of the necessity for a board of directors, as in the American LLC system, or permitting entities with legal personality to act as directors as well.

TABLE OF CONTENTS

I. INTRODUCTION 4

II. LEGAL PERSONHOOD FOR ARTIFICIAL INTELLIGENCE 6

A. ARGUMENTS IN FAVOUR OF GRANT OF LEGAL PERSONHOOD 7

B. ARGUMENTS AGAINST THE GRANT OF PERSONHOOD 9

C. THE CONCEPT OF LIMITED PERSONHOOD 11

III. ARTIFICIAL INTELLIGENCE FUNCTIONING UNDER AN OPERATIVE AGREEMENT 12

A. BAYERN'S PRINCIPLE OF PROCESS-AGREEMENT EQUIVALENCE 13

B. APPLICATION IN THE INDIAN LEGAL FRAMEWORK 15

C. MEMBER-LESS COMPANIES: A VIABLE OPTION? 16

IV. DELEGATION OF POWER OF DIRECTORS TO AN ARTIFICIAL INTELLIGENCE SYSTEM 18

A. WHETHER DIRECTORS HAVE THE POWER TO DELEGATE THEIR FUNCTIONS TO AN ARTIFICIAL INTELLIGENCE SYSTEM? 18

B. WHETHER DIRECTORS HAVE A DUTY TO DELEGATE THEIR FUNCTIONS TO AN ARTIFICIAL INTELLIGENCE SYSTEM? 20

V. CONCLUSION 21

I. INTRODUCTION

Since the advent of contemporary legal systems, human beings have positioned themselves at the pinnacle of this order. The underpinnings of almost any legal system are anthropocentric, rooted in the notion that the purpose of law is to serve human interests above all else.[2] As stated by Jozef Bochenski, humanism – a system of thought upon which contemporary legal systems rest – is the belief that "*each human being with no exception is in significant and fundamental ways different from other creatures, in particular from animals. Human beings live in the natural world but do not belong to it. They are elevated above everything else, and in many cases, they are something sacred*".[3] This view that law revolves around human interests and is based on the belief that human beings are exceptional, has been coined as 'juridical humanism'.[4] Understanding the moral philosophy that underlies a legal system is instrumental in understanding, *inter alia*, personhood in such a system and provides clarity on why legal systems are geared towards ensuring the fulfilment of human needs and interests.[5]

Over time, the law has moved from the concept of natural personhood (recognizing only human beings as 'persons'), to formulating and recognizing the concept of legal personhood. Legal personhood is a fiction used to refer to a bundle of rights and obligations imposed on an entity.[6] For instance, a legal person has the right to own and hold property

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[2] TOMASZ PIETRZYKOWSKI, PERSONHOOD BEYOND HUMANISM: ANIMALS, CHIMERAS, AUTONOMOUS AGENTS AND THE LAW 27 (1st ed. 2018). ("**Pietrzykowski**").
[3] *Id.*
[4] Tomasz Pietrzykowski, *Towards Modest Naturalization of Personhood in Law*, 32 REVUS 59 (2017).
[5] *Id.*
[6] JACOB TURNER, ROBOT RULES: REGULATING ARTIFICIAL INTELLIGENCE 175 (1st ed. 2018). ("**Turner**"); *See also* Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*,70(4) NORTH CAROLINA LAW REVIEW 1231 (1992).("**Solum**").

and the capacity to sue and be sued in its own name.[7] These rights and obligations may vary depending on the entity in question.[8] Legal personhood has been bestowed on various entities, including corporations, animals, and even temples and deities in India.[9] Arguably, the grant of legal personhood to such entities would allow us to make a case for legal personhood for artificial intelligence as well.[10]

This Article argues that it would be appropriate to grant legal personhood, of a limited form, to artificial intelligence systems.

Until requisite changes are made to legal systems, it might be possible to integrate artificial intelligence within the form of legal personhood granted to modern corporate entities such as the limited liability company ("**LLC**") in the United States of America.[11] This, however, may not be permissible under the (Indian) Companies Act, 2013 ("**Companies Act, 2013**") for two primary reasons *viz.*, first, it may not be possible to have member-less companies under the Companies Act, 2013[12] and second, currently, artificial intelligence systems cannot act as directors in Indian companies, as directors must be natural persons.

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7 Illachi Devi (D) by Lrs. and Ors. v. Jain Society, Protection of Orphans and Ors., (2003) 8 SCC 413.
8 *Id.*
9 *Id. See also* Rina Chandran, *In India, Gods "Flex their Muscles" over Scarce Land*, REUTERS (Nov.7, 2019, 6:35 AM), https://www.reuters.com/article/us-india-landrights-religion-analysis-tr/in-india-gods-flex-their-muscles-over-scarce-land-idUSKBN1XH02W.; *In India, Gods, Rivers, and Animals Can Pay Taxes, Hold Property, Sue, and Get Sued – And That's An Important Factor in the Ayodhya Case*, Business Insider India ((Nov.7, 2019), https://www.businessinsider.in/india/news/supreme-court-verdict-on-ayodhya-legal-rights-of-lord-rama-and-other-gods/articleshow/71948927.cms.
10 VISA AJ KURKI, A THEORY OF LEGAL PERSONHOOD 175 (1st ed. 2019).
11 Revised Uniform Limited Liability Company Act, 2006 (United States of America).
12 Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 3(1).

This opens the door for two potential options, either removal of the necessity for a board of directors, as in the American LLC system, or permitting entities with legal personality to act as directors as well.

II. LEGAL PERSONHOOD FOR ARTIFICIAL INTELLIGENCE

Although the debate on the grant of legal personhood to artificial intelligence continues, it is relevant to note that in certain jurisdictions, this debate has shifted from whether artificial intelligence systems should be granted legal status to how and in what form this legal personhood should be conferred. In this respect, the European Parliament, in a resolution on the civil rules of robotics, noted that "*the autonomy of robots raises the question of their nature in the light of the existing legal categories or whether a new category should be created, with its own specific features and implications*".[13] This indicates that certain types of artificial intelligence, which interact with the environment in a largely autonomous manner, should be candidates for legal personhood.[14] The following section will delve into whether such systems can be accommodated within existing legal frameworks. However, this section specifically examines the question of whether it would be appropriate to confer legal personhood upon artificial intelligence.

There exist two conceptions of personhood, i.e., moral and legal. The moral conception is the basis for natural personhood, as given to human beings. This moral conception of personhood is that each human being, only by virtue of being human, is entitled to be treated as a subject, rather than an object, under the law. It is the inherent dignity of human

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[13] European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Riles on Robotics (2015/2103(INL)), EUR. PARL. RES. (2018/C 252/25) (2018).

[14] *Id.*

beings that lies at the heart of this theory.[15] Article 6 of the Universal Declaration of Human Rights, which states that "*Everyone everywhere has the right to be accepted as a person, according to law*", is a legal restatement of this moral conception of personhood.[16] Another aspect of this, as elucidated by John Chipman Gray, is that an entity must possess intelligence and free will before it can genuinely be termed as a 'person'; accordingly, legal personality is fictional.[17] The moral conception of personhood also draws attention to certain aspects of the "*human*" experience as prerequisites for the grant of personhood, such as the capacity to suffer, rationality, desires and interests, the nature of human consciousness, and the ability to choose which moral laws to ascribe to.[18] A few of these characteristics, like the capacity to suffer and consciousness, have also been used in favour of granting personhood to animals.[19]

Apart from the application to human beings, however, moral personhood is not the standard applied for the grant of personhood to other entities like corporations, for example. In order to grant legal personality to such entities, the concept of legal personhood has been adopted, as described earlier.

A. ARGUMENTS IN FAVOUR OF GRANT OF LEGAL PERSONHOOD

It has been argued that the grant of personhood is dependent on the evaluation of two factors: first, the maintenance of the integrity of the

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[15] Pietrzykowski, *supra* note 2, at 31.
[16] G.A. Res 217 (III) A, The Universal Declaration of Human Rights (Dec. 10, 1948).
[17] JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 21 (David Campbell and Philip A. Thomas eds., 2nd ed. 2019). *See also* Solum, *supra* note 6.
[18] PETER SINGER, PRACTICAL ETHICS (3rd ed. 2011). *See also* Ugo Pagallo, *Vital, Sofia, and Co. – The Quest for the Legal Personhood of Robots*, 9 INFORMATION 230 (2018).; Gerhard Wagner, *Robot Inc.: Personhood for Autonomous Systems*, 88 FORDHAM LAW REVIEW 591 (2019).
[19] *Id.*

legal system, and second, the advancement of human interests above all else.[20] The latter correlates with the argument of Joanna Bryson and others who postulate that where the legal interests of two entities, in this case, human beings and artificial intelligence, are in conflict, it is the interest of the human being that must be given due importance.[21]

One reason put forward in favour of granting legal personhood to artificial intelligence is that it would allow both these objectives to be fulfilled. In cases where fully autonomous artificial intelligence is responsible for an action, it would ensure that the integrity of the legal system is maintained by attributing liability for such action to the artificial intelligence system and would further the interests of human beings by finding the appropriate legal person liable for any harm caused.[22] Not granting legal personhood to artificial intelligence would mean that any such liability would fall on the human beings behind the development of such artificial intelligence systems, even where the system is acting autonomously, with no human input. In essence, this could fundamentally disturb the principle of causation in the assignment of liability.[23]

As a consequence, attributing liability to the system itself for its actions would also have the added benefit of incentivizing scientists, programmers, and manufacturers to be more likely to take risks and innovate, thereby increasing economic growth.[24] In the absence of separate liability, creators might stifle innovation due to uncertainty regarding their

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[20] Turner, *supra* note 6, at 185.
[21] Joanna J. Bryson, Mihailis E. Diamantis & Thomas D. Grant, *Of, For and By the People: The Legal Lacuna of Synthetic Persons*, 25 ARTIFICIAL INTELLIGENCE & LAW. 273 (2017).
[22] Turner, *supra* note 6, at 186.
[23] *Id.; See also* Curtis E.A. Karnow, *Liability for Distributed Artificial Intelligences*, 11(1) BERKELEY TECHNOLOGY LAW JOURNAL 147 (1996).
[24] Turner, *supra* note 6, at 187.

legal liability.[25] In addition, drawing from the argument of John Chipman Gray, an entity should be granted personhood if it can display will and intelligence. Liability must be attributable to artificial intelligence systems which are autonomous and self-determining in nature and are capable of creating their own strategy and making decisions without human input. In this, the case for legal personhood for artificial intelligence is even stronger than that for corporations, unlike artificial intelligence systems, no corporation can make decisions without human input.[26]

For instance, granting legal personhood to artificial intelligence systems would also allow for their governance under laws on intellectual property, for instance. If an artificial intelligence system provides significant inputs in the marketplace of ideas, subjecting it to intellectual property law would clarify how the fruits of its creativity should be distributed and would also subject it to liability under the intellectual property regime.[27] Subjection to laws governing freedom of speech would ensure that it can continue making valuable contributions to human knowledge even without the legal protection of its human creators, while the application of laws on hate speech, for instance, would prevent the system from engaging in such discourse.[28]

B. ARGUMENTS AGAINST THE GRANT OF PERSONHOOD

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[25] Andrew Dodd, *"I'm sorry, Dave. I'm afraid I can't do that": Legal liability in the age of Artificial Intelligence* (Oct. 23, 2019), https://www.fieldfisher.com/en/insights/i%E2%80%99m-sorry-dave-i%E2%80%99m-afraid-i-can%E2%80%99t-do-that%E2%80%9D-legal.

[26] Gunther Tuebner, *Rights of Non-Humans?: Electronic Agents and Animals as New Actors in Politics and Law*, 33(4) JOURNAL OF LAW AND SOCIETY 497 (2006).

[27] Rajiv Sharma & Ninad Mittal, *Artificial intelligence lacks personhood to become the author of an intellectual property*, Live Law (Sep. 22, 2023, 11:33 AM), https://www.livelaw.in/law-firms/law-firm-articles-/artificial-intelligence-intellectual-property-indian-copyright-act-singhania-co-llp-238401.

[28] Turner, *supra* note 6, at 188.

One of the most simplistic objections to a grant of legal status to artificial intelligence systems is known as the Android fallacy, the idea that robots are not "*just like humans*" and hence, they do not deserve personhood.[29] This argument may be refuted by ensuring that the rights conferred by the grant of legal personality to robots are not the rights that are conferred to human beings as natural persons.

A second criticism has been that separate legal personality for artificial intelligence would be used as a cover by human beings for their own ends, i.e., that this legal personality would be manipulated to shield human beings from liability.[30] This argument is fallacious, drawing an analogy to corporations, it may be argued that if the grant of legal personhood to artificial intelligence systems is used as a shield to protect human beings from liability, the same argument could be made for corporations as well. Instead, this article suggests that the conception of "*piercing the veil*", i.e., the act of setting aside the concept of limited liability and holding a corporate entity's directors and shareholders personally liable for the actions of the entity,[31] be applied in the case of artificial intelligence as well if it is believed that it is being used fraudulently to protect humans from liability.

Finally, it has also been argued by Koops, Hildebrandt, and Chiffelle ("**Koops**") that artificial intelligence, which lacks the complexity

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[29] NEIL M. RICHARDS & WILLIAM D. SMART, *HOW SHOULD THE LAW THINK ABOUT ROBOTS*, *IN* ROBOT LAW (Ryan Calo, A. Michael Froomkin & Ian Kerr eds., 2015). *See also* P.F. Hubbard, *Do Androids Dream?: Personhood and Intelligent Artefacts*, 83 TEMPLE LAW REVIEW 405 (2011).

[30] Turner, *supra* note 6, at 188.

[31] Legal Information Institute, Piercing the corporate veil, https://www.law.cornell.edu/wex/piercing_the_corporate_veil#:~:text=%22Piercing%20the%20corporate%20veil%22%20refers,most%20common%20in%20close%20corporations.

of human thought and emotions in most cases, tends to follow the literal rule, unable to grasp novel situations which may require thinking out of the box or the application of a purposive interpretation.[32] This criticism is the reason why this paper proposes a limited conception of personhood for artificial intelligence systems, as elaborated on in Part C of this Article.

C. THE CONCEPT OF LIMITED PERSONHOOD

It is argued that on a theoretical basis, artificial intelligence systems should be granted full legal personhood provided they satisfy the criteria of being fully autonomous, capable of decision-making without human interference, and possession of creativity, will, and intelligence. It is, however, true that artificial intelligence today, in most cases, does not fulfil that laundry list of criteria as argued by Koops. It is for this reason that this paper proposes the adoption of a form of limited legal personality for artificial intelligence. As conceptualized by Solum, this would allow the system to take care of routine matters which do not involve the level of discretion and complex thought process as exercised by human beings.[33] Liability can also be affixed to the system for such matters. A critical change in a system of limited personhood would be the ability of artificial intelligence to hold property, this would allow for liability to be discharged. Furthermore, it might be prudent to ensure that although the artificial intelligence can be identified as a legal personality, the creator or owner must also be registered accordingly to ensure transparency.[34]

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[32] B.J. Koops, Mireille Hildebrandt & David-Olivier Jaquet-Chiffelle, *Bridging the Accountability Gap: Rights for New Entities in the Information Society?*, 11(2) MINN. J.L. SCI. & TECH. 497 (2010).
[33] Solum, *supra* note 6.
[34] Tom Allen & Robin Widdison, *Can Computers Make Contracts?*, 9 HARV. JOURNAL OF LAW AND TECHNOLOGY 26 (1996).

To conclude this section, it should be reiterated that a full conception of personhood in the context of artificial intelligence systems remains unattainable, given the current limitations of such systems. This necessitates a limited conception of the form elaborated above, keeping in mind the fact that in several jurisdictions, particularly India, members of corporate entities, unlike directors, are not required to be natural persons.[35] This limited conception of personhood would be most appropriate until the formulation of a *sui generis* system governing artificial intelligence systems with full autonomy. Till this limited conception is incorporated within legal systems, we must determine whether artificial intelligence is capable of inhabiting the corporate structure as it stands today or not.

III. ARTIFICIAL INTELLIGENCE FUNCTIONING UNDER AN OPERATIVE AGREEMENT

This part explores the possibility of artificial intelligence systems exercising control over a company as members. Under the current Indian legal framework, the 'members' of a company are its shareholders who buy and hold shares[36], who are required to be 'persons', and who have ultimate control over the decisions of the company.[37] For companies limited by guarantee that do not have a share capital, members are not shareholders, but still exercise the ultimate control over the company[38] The directors of a company, on the other hand, exercise delegated powers and run the company on the behalf of its members. The Companies Act, 2013 provides for certain decisions to be made by directors individually or the board of

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[35] Ursula Hoffman-Mukherjee, FAQ: Company incorporation in India (Sep. 23, 2022), https://www.roedl.com/insights/india-faq-corporate-incorporation#2.
[36] Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 2(55).
[37] *Id.*
[38] Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 2(21).

directors cumulatively.[39] Certain other decisions are to be made by the members in the form of resolutions passed at general meetings.[40] It also specifies certain decisions that are to be made by the consent of directors as well as shareholders.[41] Control in a company is, thus, exercised in the form of two roles - members and directors.

A. BAYERN'S PRINCIPLE OF PROCESS-AGREEMENT EQUIVALENCE

S. Bayern, in his paper *The Implications of Modern Business-Entity Law for the Regulation of Autonomous Systems*, proposes the idea of creating a functional analogue of personhood in an American corporate structure.[42] He suggests that the principle of 'process-agreement equivalence' can be used to provide legal significance to the features of any system even in the absence of a literal legal personhood.[43] For the principle to work, an agreement is made to the effect that an obligation will be fulfilled only when a condition is satisfied by an artificial intelligence system.[44] To illustrate, an agreement can state that one's obligation is discharged as soon as the system performs X function. Thus, it is a form of indirect delegation of duties to the artificial intelligence system wherein its actions are made equivalent to the actions of a person.

The application of this principle in a modern (closely held) corporations is explained in a scenario where under the Model Business

[39] See Companies Act, 2013, No. 18, Acts of Parliament, 2013, §§ 166 & 179.
[40] See Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 230.
[41] See Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 188.
[42] Shawn Bayern, *The Implications of Modern Business-Entity Law for the Regulation of Autonomous Systems*, 19 STANFORD TECHNOLOGY LAW REVIEW 93 (2015). ("**Bayern**")
[43] *Id.*
[44] *Id.*

Corporation Act promulgated by the American Bar Association[45], Mr. X forms a corporation ABC and signs a process agreement stating that ABC will not have any directors.[46] Instead, all legal actions will be determined by an autonomous artificial intelligence system. However, even in such a case, ABC cannot be termed as a truly autonomous entity. The underlying reason is that while the system's process will discharge Mr. X's obligations, he will continue to remain the shareholder as the Model Business Corporation Act mandates the presence of at least one shareholder who is a legal person.[47] Hence, Mr. X continues to exercise control over the corporation.

Greater flexibility exists in the case of an LLC to house an artificial intelligence system.[48] Bayern explains it through a procedure wherein specific individuals form an LLC as its members. The control over management and conduct of the LLC is conferred upon the members under Section 407(b) of the Revised Uniform Limited Liability Company Act, 2006 ("**RULLCA, 2006**").[49] Pursuant to such an authority, the members, along with the LLC, enter into an operating agreement to govern the management of the LLC, agreeing that the decisions of the LLC will be founded upon a course of action determined by an artificial intelligence system. After equating the process of the artificial intelligence system with the LLC, the members withdraw from the corporation. Thus, the LLC becomes a member-less entity run entirely by an autonomous system. However, Section 701(a)(3) of the RULLCA, 2006, allows an LLC to exist

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[45] Model Bus. Corp. Act § 6.0(b) r/w § 7.32(a) (1969) (Am. Bar Ass'n, amended 2002)
[46] Bayern, *supra* note 42.
[47] Model Bus. Corp. Act § 6.0(b) r/w § 7.32(a) (1969) (Am. Bar Ass'n, amended 2002).
[48] *Id.*
[49] Revised Uniform Limited Liability Company Act, (2006), § 407(b), (United States of America).

without a member for only ninety days. [50] Thus, it is only in this period that the entity can be governed entirely by an artificial intelligence system.

Bayern posits that the flexibility could extend beyond ninety days when the provisions of RULLCA, 2006, are looked at more closely. This is because Section 110(c) of RULLCA, 2006 lists mandatory provisions that cannot be waived, such as dissolution due to fraud or oppression,[51] but does not include Section 701(a)(3) as a mandatory provision. Therefore, it may be possible to override non-mandatory stipulations of the RULLCA, 2006, such as the member requirement, through an operating agreement. This is similar to how alternate agreements can alter the distribution order of the surplus upon winding up of an LLC, [52] even though RULLCA, 2006 provides for a default distribution order (as a non-mandatory provision). [53]

Thus, the law as it stands today offers a possibility of a member-less LLC being run by an artificial intelligence system beyond the statutory period of ninety days by an overriding operative agreement.[54] Consequently, a functional alternative of legal personhood is granted to the artificial intelligence system by inhabiting it in a modern corporate structure such as an LLC.

B. APPLICATION IN THE INDIAN LEGAL FRAMEWORK

The legal framework in India presents a more complex scenario. Section 3 of the Companies Act, 2013 mandates that a public company

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[50] Revised Uniform Limited Liability Company Act, 2006 § 701(a)(3) (United States of America).
[51] Revised Uniform Limited Liability Company Act, 2006 § 110(c) (United States of America).
[52] Revised Uniform Limited Liability Company Act, 2006 § 708(b) (United States of America).
[53] Bayern, *supra* note 42.
[54] *Id.*

must have seven or more persons as members, and a private company must have two or more members.[55] However, this requirement is only mentioned at the stage of formation. Thus, a literal interpretation of the statute suggests that Indian laws also provide a platform for a member-less company to be solely governed by an artificial intelligence system through an process agreement as discussed above in Part 3.1 of this Article, in the context of LLCs.

While the erstwhile Companies Act, 1956, empowered the tribunal to pass an order of winding up if the number of members fell below the prescribed numbers,[56] the provision does not find a place in the Companies Act, 2013. Section 3A of the Companies Act, 2013 clarifies that whenever the number of members falls below the minimum standard, then the concept of separate liability will continue to exist only for six months.[57] Post the expiry of this period, the existing members will be severally liable for payments arising out of all obligations undertaken in the period. Thus, based on Section 3A, an Indian company can be controlled solely by an artificial intelligence system only for a transitional period of six months.

C. Member-less Companies: A Viable Option?

Bayern's hypothesis leads to two conclusions *viz.*, first, an artificial intelligence system can be housed in a company through an operative agreement wherein the members continue to exist and second, the effect of the operative agreement can be stretched till a period after the withdrawal of all members. While the first conclusion seems like a viable possibility in the present legal framework, as shown above, there exist counter-

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[55] Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 3.
[56] Companies Act, 1956, No. 1, Acts of Parliament, 1956, § 433(d).
[57] Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 3(A).

arguments against the possibility of member-less companies. Even in the case of an LLC, the law exists to hold the individual members accountable for their actions by lifting the corporate veil.[58] Mathew Scherer argues that a member-less LLC would gain active immunity from such suits as the absence of personhood suggests that nobody can be held legally liable for any such injuries.[59] Therefore, even if Bayern's hypothesis is correct in law, it will lead to a worrying situation where an unaccountable artificial intelligence system will be running a corporate entity.

It may also be contended that, even if we set aside the possibility of an unaccountable artificial intelligence, Bayern's argument for a member-less company is unlikely to succeed in a court of law since it relies on conflicting provisions in the law. However, whenever the judiciary interprets ambiguous or conflicting provisions, it always does so in light of the legislative purpose behind enacting the same. In the case of the United States, an LLC can exist without members for a maximum of ninety days, providing a safe harbour for situations where the last remaining member dies.[60] Therefore, it may not be correct to interpret the provision as allowing for a scenario where all members dispose of their interest in the LLC. Similarly, in India, the purpose behind establishing a company is to create a separate legal entity that limits, rather than extinguishes, the liability of individual members.[61] Thus, it would be difficult to argue that the legislature intended to provide for the creation of a member-less company.

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[58] *In re* JNS Aviation (LLC), 350 N.D. Tex. L.B.R. 283 (2006).
[59] Mathew Scherer, *Of Wild Beasts and Digital Analogues: The Legal Status of Autonomous Systems*, 19 NEVADA LAW JOURNAL 259 (2019).
[60] Ador Realty (LLC) v. Division of Housing and Community Renewal*,* 802 N.Y.S. 2d 190 (N.Y. App. 2005).
[61] Mahanagar Telephone Nigam v. Canara Bank, (2019) SC 4449.

Based on the abovementioned observations, artificial intelligence can inhabit an Indian company through an operative agreement only in cases where the number of members does not fall below the statutory threshold. Thus, such a company would have both presently recognized persons as members and artificial intelligence systems as decision-makers.

Having established that, artificial intelligence systems can be legally equipped to govern the decisions of a company. The next question which must be addressed is to what extent can the system perform such functions in light of the presence of the other powerhouse of control based directors.

IV. DELEGATION OF POWER OF DIRECTORS TO AN ARTIFICIAL INTELLIGENCE SYSTEM

A. WHETHER DIRECTORS HAVE THE POWER TO DELEGATE THEIR FUNCTIONS TO AN ARTIFICIAL INTELLIGENCE SYSTEM?

Every Indian company is mandatorily required to have a Board of Directors ("**BoD**") which comprises of natural persons. Section 149(1) of the Companies Act, 2013 expressly states that a public company must at all times have a minimum number of three directors (or two directors in the case of a private company).[62] A wide range of powers has been conferred upon the BoD to exercise functions of control, direction, and management of the company.[63] The BoD can then delegate such power to an individual director or a principal officer subject to Section 179(3) of the Companies Act, 2013.[64] There does not exist any law that supports a general power of

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[62] Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 49.
[63] M L Sharma, *Position, Function And Powers Of The Board Of Directors Under The Companies Act, 1956*.
[64] R. K. Goel, *Delegation of Directors' Powers and Duties: A Comparative Analysis*, 18(1) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 152 (1999); Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 179(3).

sub-delegation by directors.[65] However, this may be done in cases where the Articles of Association ("**AOA**") provide for it.[66] Therefore, the opportunity and scope to delegate powers of the BoD are extremely restricted.

Furthermore, even in cases where such delegation is permitted, it must be subject to the supervision of the director.[67] The degree of the obligation to supervise is not entirely clear and is subject to the factual matrix of individual cases. However, it is understood that when the delegation pertains to artificial intelligence systems, it will necessarily carry the burden of two obligations, first, the exercise of prudence in selecting the artificial intelligence systems and second, the selection of specific tasks.[68]

The obligation might also extend to reviewing the quality of significant decisions taken by the artificial intelligence system. For instance, under German law,[69] a company that deals in any form of security and operates on algorithmic trading is required to run risk checks for the prevention of market abuse, disturbances in the market owing to malfunctions and erroneous orders, etc. In substance, comparative benchmarks can be applied to corporate executives in India when they utilize artificial intelligence systems to perform functions of management, control, or direction. Thus, directors may delegate their duties to an artificial

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[65] *Id.*
[66] GK KAPOOR & SANJAY DHAMIJA, COMPANY LAW AND PRACTICE: A COMPREHENSIVE TEXT BOOK ON COMPANIES ACT 2013 (19th ed., 2016).
[67] Re Barings plc (No 5), [2000] 1 BCLC 523.
[68] Florian Moslein, *Robots in the Boardroom: Artificial Intelligence and Corporate Law,* RESEARCH HANDBOOK ON THE LAW OF ARTIFICIAL INTELLIGENCE (William Barfield & Ugo Pagallo eds., 2018) ("**Moslein**").
[69] A. Fleckner, *Regulating Trading Practices,* THE OXFORD HANDBOOK OF FINANCIAL REGULATION (Moloney & J. Payne eds., 2015).

intelligence system in a restricted manner, subject to the fulfilment of the obligations set out above.

B. WHETHER DIRECTORS HAVE A DUTY TO DELEGATE THEIR FUNCTIONS TO AN ARTIFICIAL INTELLIGENCE SYSTEM?

Once it is demonstrated that directors have the power to delegate their functions to artificial intelligence systems, the question arises as to whether directors have a corresponding duty to delegate their functions to such systems?

Florian Moselin posits an interesting theory. Directors owe a duty of loyalty and a duty of care when managing the affairs of the company.[70] This suggests that at all times, a director will act in good faith, and make decisions on an informed basis, and in consonance with the best interest of the company.[71] On this basis, we may argue that if an artificial intelligence system has, for instance, superior data processing capabilities, a director's duty to act on an informed basis encompasses the duty to deploy the services of such an artificial intelligence system if this is in the best interest of the company. The Delhi High Court in *Globe Motors v. Mehta Teja Singh* [72] had discussed the concept of prioritizing the interest of the company above all in the context of directors. Thus, it may be said that a duty to delegate functions to an artificial intelligence system may arise owing to the existing duty of care of directors towards a company.

A significant problem that accompanies the argument is that in collecting information through an artificial intelligence system there is a cost for a company. A director must prudently choose between different

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[70] Moslein, *supra* note 68.
[71] Cede v. Technicolor Inc., 884 A.2d 26 (Del. 2005).
[72] Globe Motors v. Mehta Teja Singh, 24 (1983) DLT 214.

costs and conclude the amount of information that is required before making a decision. Consequently, a director can choose not to delegate a function to an artificial intelligence system if the cost involved does not align with sound business judgement. A court of law cannot question the same as it defers to the wisdom of the directors as long as a minimum standard of care is met.[73] Therefore, there does not exist a duty of directors to delegate functions to an artificial intelligence system under their duty of care and loyalty.

Since directors are required to be natural persons, the functioning of artificial intelligence systems in an Indian company will be limited to the scope of delegation allowed under the AOA and with necessary checks in place. If the Indian legal framework permits companies to be modelled as American LLCs, artificial intelligence systems will have great flexibility in their operations as LLCs do not have to be mandatorily managed by a Board of Directors. Furthermore, if the suggestion of granting limited personhood is accepted, India also has the option to amend its laws and permit non-executive director positions to be filled by any person. Thus, an artificial intelligence system could potentially act in an advisory capacity without the power to vote.

V. CONCLUSION

This Article argues that contemporary artificial intelligence systems are entitled to limited legal personhood. This may, of course, change to a conception of full legal personhood as such systems advance and develop functional equivalence with human beings. However, until this conception

[73] In re Supreme Bank of India Ltd (In Liquidation), (1964) 34 Comp. Cas. 34.

of limited personhood is incorporated into legal systems, we must consider whether artificial intelligence can play a role in corporations today, with their legal status as it stands.

Although Bayern's argument regarding housing artificial intelligence within an LLC as in the United States might be a solution to the problem at hand, it is doubtful whether such a system could be implemented in the Indian context. A member-less company is unlikely to be implemented in India considering the nature of the corporate sector, the decline in investor confidence, and the need to pin liability on specified person(s). Furthermore, this was not the intention of the legislature and is unlikely to be accepted by a court of law. Since directors are required to be natural persons under Indian law, artificial intelligence systems cannot act as directors in the current regime. However, regardless of the law, modern artificial intelligence does not yet possess a sufficient degree of autonomy or creativity, which may hinder their prospects in this context.

However, this Article suggests a stop-gap measure could be to allow artificial intelligence systems to serve as non-executive directors in cases where they can provide utility, such as Deep Knowledge Ventures' VITAL system.[74] To conclude, while artificial intelligence systems may be classed as members of companies if provided with a limited conception of personhood, such systems cannot currently be housed in Indian companies as directors, a *sui generis* regime might be considered to facilitate this.

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[74] *About*, DEEP KNOWLEDGE VENTURES, https://deepknowledgeventures.com/#page_about.

Aayushi Choudhary & Vaibhav Gupta, Revolutionising Synergistic Innovation: The Interoperable Regulatory Sandbox in India, 10(1) NLUJ L. REV. 23 (2024).

REVOLUTIONISING SYNERGISTIC INNOVATION: THE INTEROPERABLE REGULATORY SANDBOX IN INDIA

~ *Aayushi Choudhary & Vaibhav Gupta*[*]

ABSTRACT

Over the past several years, the Indian banking industry has seen considerable change. Fintech companies are becoming more and more prominent in a market dominated by large banking institutions and other significant participants in the banking industry. Many authorities around the globe have created a regulatory sandbox, which functions as a kind of laboratory for Fintech companies with flexible rules and regulations to evaluate their company framework and effects on end-users, to accomplish the dual goals of fostering technological advancement in finance and protecting customer interests. The sandbox aids the regulatory body in creating regulations for emerging technology, safeguarding public interests, and keeping up with industry advancements. This Article looks at how an interoperable regulatory sandbox was implemented in India. It focuses on how it enabled cross-sector testing and improved consumer protection. The Article begins by outlining the drawbacks of prior regulatory sandboxes in India, which mostly concentrated on testing within certain industries. It draws attention to the difficulties faced by innovators working in various industries. The Article also includes case studies of

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effective sandboxes developed in various nations with different objectives, drawing on international experiences. The report also highlights how crucial consumer protection is in an interoperable regulatory sandbox.

TABLE OF CONTENTS

I. INTRODUCTION 26

II. THE IMPORTANCE OF INTER-SECTORAL REGULATORY SANDBOX: BREAKING BARRIERS, UNLOCKING POTENTIAL..................................30

A. A CLOSER LOOK AT THE PROCEDURAL FRAMEWORK OF THE INTER-REGULATORY SANDBOX..32

III. EXPLORING THE EFFECTS AND ADVANTAGES OF THE INTER-OPERABLE REGULATORY SANDBOXES: CHARTING A PATH TO SUCCESS ……………………………………………………………...39

IV. DISCOVERING GLOBAL EXAMPLES TO IMPROVE INDIA'S REGULATORY SANDBOX : CROSSING BORDERS AND PROMOTING INNOVATION 40

A. UNITED KINGDOM 41

B. SINGAPORE:..42

C. TAIWAN: 44

V. UNLEASHING INNOVATION WITH CONSUMER SAFEGUARDS: UNVEILING THE POWER OF REGULATORY SANDBOXES AND RBI GUIDELINES 45

VI. CONCLUSION 49

I. INTRODUCTION

Rapid developments have taken place in the last decade, resulting in the unusual growth of innovative digital financial products and services. The Fintech market in India has expanded significantly during the past several years. Private capital companies have made substantial investments in the field. For instance, recently Google has announced to invest $10 billion in Indian digitalisation.[1] Many of these developments have taken place in developing digital products and services, mainly relying on state-of-the-art information technologies and telecommunications, which have led to fast and convenient services at lower costs and added value because of the rapid growth of innovative fintech globally.[2] We now have innovative ways to make payments, access credits, budget our finances, and use many other services, thanks to the rise of fintech. With the success of fintech in providing services to many sectors that weren't included within the formal financial system, this success has become associated with risks that are a result of the absence of clear regulatory, legal, and supervisory frameworks.[3] There have been lots of fintech products that have ended up fronting for underlying scams or having business models that end up ripping off the public and causing systemic risks. These have been seen particularly in

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[1] BL New Delhi bureau, *Modi's US Tour: Google, Amazon commits $25 Billion investments in India*, Business Line (Jun. 26, 2023), https://www.thehindubusinessline.com/info-tech/google-amazon-commit-25-billion-investments-in-india-after-meeting-modi/article67004404.ece.

[2] EY Global, *What is Next for Asia in FinTech adoption,* EY Global (Apr.12, 2023), https://www.ey.com/en_gl/banking-capital-markets/what-is-next-for-asia-in-fintech-adoption.

[3] Central Bank of Jordan, (Dec. 12, 2023), https://www.cbj.gov.jo/EchoBusV3.0/SystemAssets/9328fddf-3f3d-40d8-9ed3-d98bbc89db20.pdf.

crypto solutions and in the space of digital credit.[4] Now that's where the regulator steps in. Traditionally, the regulator has always been a step behind the innovative space of financial services, this means that fintechs largely went unregulated because there weren't any specific regulations drawn out for them. Therefore, most of their products were experimented with by the general public, and anyone with a tech-enabled finance solution could call themselves a fintech. However, in recent times, there has been proactivity from regulators with specific policies focusing on fintechs. For instance, Ghana Central Bank has gone the extra mile to set up fintech and innovation departments to licence and regulate fintechs and announced the creation of fintech sandboxes, which were intended to provide a testing ground for fintech solutions in a controlled environment.[5]

One of the most used terms in the fintech sphere is "sandbox". The phrase describes a process for formulating laws that match development speed. Fintech sandboxes are a secure and supervised testing space that enables companies and innovators to evaluate newly proposed fintechs without completely being governed by legislative and supervisory standards and without initially incurring legal expenses, thereby promoting and allowing them to enter the marketplace faster.[6] In addition, the provision of suitable protections helps in minimising the effects of failure. This allows financial institutions and fintech businesses to experiment with innovative

[4] Aditya Narain & Marina Moretti, *Regulating Crypto*, International Monetary Fund, (Apr.12, 2023), https://www.imf.org/en/Publications/fandd/issues/2022/09/.

[5] Victoria Bright et al, *Fintech 2023: Ghana*, Chambers and Partners (Apr. 12, 2023), https://practiceguides.chambers.com/practice-guides/fintech-2023/ghana/trends-and-developments.

[6] Sheersh Kapoor, *Regulatory Sandbox Explained: How RBI is moderating FinTech's Disruption in BFSI*, Economic Times (Apr. 12, 2023), https://bfsi.economictimes.indiatimes.com/news/policy/regulatory-sandbox-explained-how-rbi-is-moderating-fintechs-disruption-in-bfsi/87098591.

financial goods and services within an established timeframe.[7] The sandbox enables preliminary evaluation of newly developed technology. In the fintech industry, where there is a rising need to create regulatory frameworks for new types of companies, these trial places are particularly important.[8] The purpose of the sandbox is to adapt compliance with strict financial regulations to the growth and pace of the most innovative companies in a way that doesn't only smother the fintech sector with rules but also doesn't diminish consumer protection.[9] With the rising fintech solutions, there are increasing levels of risk in circumstances where it is unclear whether a new financial product or service complies with existing banking standards. Some financial institutions may err on the side of caution, thereby hindering innovation further.

In 2015, there was only one known regulatory sandbox, which was introduced in the UK, and two years later, there were 17 globally. Now, in 2023, there are over 70 countries that have either launched or announced their intentions to launch a regulatory sandbox. It's probable that some regulators that introduce these sandboxes are influenced by their peers and do so to appear up-to-date and avoid falling behind in the innovation sector. Regulators might, instead, end up introducing a new layer of complexity or putting up a new hurdle for fintechs to clear if they don't

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[7] Telecom Regulatory Authority of India, *Encouraging Innovative Technologies, Services, Use Cases, and Business Models through Regulatory Sandbox in Digital Communication Sector*, Consultation Paper No.09/2023, (Jun. 19, 2023), CP_19062023.pdf (trai.gov.in).

[8] World Bank, *Global Experiences from Regulatory Sandboxes: Finance, Competitiveness & Innovation Global Practice*, (Nov. 20, 2020), https://documents1.worldbank.org/curated/en/912001605241080935/pdf/Global-Experiences-from-Regulatory-Sandboxes.pdf.

[9] *What is a regulator sandbox?*, BANCO BILBAO VIZCAYA ARGENTARIA ("**BBVA**"), https://www.bbva.com/en/what-is-regulatory-sandbox/#.

carefully evaluate the local environment and the unique needs of fintechs and customers. Regulators would not want to alienate any inventors in the process if this isn't carried out efficiently. The primary objective of the fintech sandbox is to combine compliance and regulation with the explosive expansion of fintech businesses without encumbering them with regulations and restrictions while guaranteeing that consumers are safeguarded.[10]

The authors examine the recently implemented inter-regulatory sandbox in India and provide a thorough analysis of its importance. Part I discusses the need for such a sandbox and outlines the process involved in its implementation. They also explore the challenges faced during the establishment of the sandbox and the strategies employed to overcome them. Part II of the Article presents best practices that India can use to improve its sandbox by drawing on international examples from diverse nations. To improve the Indian ecosystem, they analyse successful sandbox activities, highlighting significant characteristics and lessons that might be applied. The authors then focus on the critical component of consumer protection inside the regulatory sandbox framework in Part III. They discuss how regulatory bodies may support innovation while preserving customer safety and confidence. The authors stress the importance of adopting a comprehensive approach that safeguards customers without limiting technical developments. The inter-regulatory sandbox in India has been thoroughly examined in this Article, which also covers its need,

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[10] Giulio Conrelli,Sebastian Doerr, Leonardo Gambacorta and Quarda Merrouce, *Regulatory Sandboxes and FinTech Funding: evidence from the UK*, (No.901, Working Paper, BIS, Apr. 2, 2023).

implementation procedure, global examples, and consumer protection considerations.

II. THE IMPORTANCE OF INTER-SECTORAL REGULATORY SANDBOX: BREAKING BARRIERS, UNLOCKING POTENTIAL

There are numerous financial sector regulators in the Indian finance industry, and each regulator has introduced its regulatory sandbox. Evolving and novel innovations open up markets for goods and services that need cross-sector examination. The previous regulatory sandbox structure failed to realise the full potential of fintech advances by failing to acknowledge their fundamental structure.[11] As a result, only a small number of beneficial ideas falling under the scope of a single operator have a chance of reaching consumers.[12] Consequently, the technological advances that were approved did not include the ones that best met consumers' demands but instead were those that fit particular financial sector regulators' criteria. A new company that is constantly struggling with the difficulty of producing goods and attracting finances will probably face extra challenges due to this type of regulatory structure. The arrangement in place for sandbox screening in India shows that distinct authorities have varied regulation strategies.[13] With minimal synergy between different authorities, the complex legislative environment is likely to cause confusion for firms

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[11] Apoorva Chandra, *Regulatory Sandbox: History, Uses & Key Takeaways*, KING STUBB & KASIVA (Jul. 25, 2022), https://ksandk.com/regulatory/regulatory-sandbox-history-and-uses/#:~:text=RBI's%20Sandbox,occurring%20in%20the%20fintech%20business.

[12] Anushka Sengupta, *Interoperable digital platforms, RBI and SEBI's SOP,* ECONOMIC TIMES (Apr. 16, 2023), https://bfsi.economictimes.indiatimes.com/news/fintech/explained-interoperable-digital-platforms-rbi-and-sebis-sop/94902339.

[13] Reena Zachaiah, *SEBI Issues Guidelines for Inter-operable Regulatory Sandbox*, ECONOMIC TIMES (Apr. 20, 2023), sebi guidelines: Sebi issues guidelines for inter-operable regulatory sandbox – The Economic Times (indiatimes.com).

and impede the development of such technologies. By raising costs, risks, and work, administrative ambiguity and inconsistency can impede and deter funding for technological advancement. Companies that want to create cross-sector advances need to approach every authority individually to request distinct waivers under the previous structure, as well as fulfil various prescribed requirements and pay corresponding adherence fees.[14] To address these issues, the Inter-operable Regulatory Sandbox: Standard Operating Procedure was created in 2022 as a coordinating platform for cross-sectoral inventions.[15] The proposed regulation will allow financial industry regulators to create a uniform policy for addressing cutting-edge technologies by establishing minimum criteria for fundamental aspects of a sandbox and by offering a legal method of collaboration.

Even though such a structure might enable the growth of inventions that come under the purview of one authority, it will probably obstruct the creation of potentially beneficial cross-sectoral technologies that need not strictly follow specific supervisors' criteria.[16] Digital advancements such as distributed ledger technology, the Internet of Things, big data, and Artificial Intelligence impact the financial sector. As a result of these advances, there will be more ideas that profit from cross-sectoral screening.[17] The revised regulation, which envisions a cross-sectoral

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[14] Asian Development Bank, *FinTech Policy Tool Kit for Regulators and Policy Makers in Asia and the Pacific*, (Mar. 2022), https://www.adb.org/sites/default/files/publication/780806/fintech-policy-tool-kit-regulators-policy-makers.pdf.

[15] Dayita Kanodia, *Inter-Operable Regulatory Sandbox: A Playground for Fintechs?*, VINOD KOTHARI CONSULTANTS (Apr. 15, 2023), http://vinodkothari.com/2023/06/inter-operable-regulatory-sandbox-a-playground-for-fintechs/.

[16] World Trade Organisation, *Policy Approaches to Harness Trade Digitalization*, (Apr. 12, 2022), https://www.wto.org/english/res_e/booksp_e/tradtechpolicyharddigit0422_e.pdf.

[17] Giulio, *supra* note 12, at 22.

sandbox, is expected to inspire companies to create goods or services that can effectively meet the needs of customers and spur future industrial development.[18] According to a recent survey, the percentage of businesses operating across the three sandboxes has risen. This is due to connecting the three sandboxes, which previously offered one point of entry for fintech innovation experiments.[19] Sandbox assessment will be more efficient in terms of time and expense because of the new regulation; a single point of access to various regulated areas is provided. A simplified procedure with clear deadlines is also likely to shorten the duration it takes for a good to reach the market and ensure that it complies with several rules at once.

A. Closer Look at the Procedural Framework of the Inter-Regulatory Sandbox

Under the revised regulation, members of the Inter Regulatory Technical Group whose company practices, operations, or other functions fall within the purview of several financial industry regulators can be screened for financial goods or services. There are differences in the eligibility requirements of different regulators.[20] For instance, Securitie and Exchange Board of India ("**SEBI**") prohibits participation in the sandbox by firms not licensed under it.[21] Therefore, in an instance where SEBI is the principal regulator, the candidate must sign a Memorandum of

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[18] Vidhi Centre for Legal Policy, *Blueprint of a Fintech Regulatory Sandbox Law Preparing for the Future of Fintech Innovations*, (Mar., 2020), 20200313_Blueprint-of-a-Fintech-Regulatory-Sandbox-Law.pdf (vidhilegalpolicy.in).

[19] Ahmad Alaasaar, *Exploring a new incubation model for FinTechs: Regulatory Sandboxes,* Vol.103, Technovation ScienceDirect, 2021, ISSN 0166-4972.

[20] Ankit Mishra, *Standard Operating Procedure for Inter-Operable Regulatory Sandbox*, FINTECH (Oct. 26, 2022), https://enterslice.com/learning/standard-operating-procedure-for-inter-operable-regulatory-sandbox/#Background_of_the_Notification.

[21] Anand Singh, Understanding the SEBI Sandbox regulation framework, IPLEADERS BLOG (Dec. 10, 2023).

Understanding ("**MoU**") with an authorised company before applying to the interoperable regulatory sandbox ("**IoRS**").[22] The criteria might be challenging to meet because candidates may have difficulty locating an authorised company that is interested.

S. No.	**Regulator**	**Minimum Net Worth**	**Entity registered with**	**Any other criteria**
1.	RBI	Rs 10 Lakh	Limited Liability Partnership, Partnership firm registered in India, companies established and registered in India, banks authorised to conduct business in India.	-

[22] FE Bureau, *RBI announces SOP for Interoperable regulatory sandbox,* FINANCIAL EXPRESS (Oct. 13, 2022), https://www.financialexpress.com/economy/rbi-announces-sop-for-interoperable-regulatory-sandbox/2708468/.

2.	SEBI	-	According to Section 12 of the SEBI Act, 1992,[23] an organisation must register with SEBI to do business there or apply to associate with one of the SEBI-registered firms.	1. The business must explain all SEBI laws, regulations, instructions, circulars, etc. that could be obstacles to the suggested creative method along with a thorough justification. 2. The organisation must explain whether SEBI will waive any particular rules and regulations during the sandbox period and why.
3.	IRDAI	Rs 10 Lakh	Any organisation	-

[23] Securities and Exchange Board of India Act, 1992.

			certified by the Insurance Regulatory and Development Authority of India ("**IRDAI**").	
4.	IFSCA	-	If the candidate resides in India: a corporation under the Companies Act of 2013, an Limited Liability Partnership ("**LLP**") under the Limited Liability Partnership Act of 2008,[24] or an organisation acting under the	To offer financial services that are anticipated to be governed by the Authority, the candidate must offer to apply innovation in its primary service or good, corporate strategy, or procedure.[25]

[24] Limited Liability Partnership Act, 2008, No. 6, Acts of Parliament, 2009.
[25] International Financial Services Centres Authority, F.No. 521/IFSCA/FinTech/FE Framework/2022-23, (Apr. 27, 2022), https://giftsez.com/documents/Circular/Framework_for_FinTech_Entity_in_the_International_Financial_Services_Centres.pdf.

			supervision of a national banking supervisor. Applicant outside of India: incorporated entity or a branch of an incorporated entity from Financial Action Task Force ("**FATF**") compliant countries.	

The RBI's FinTech Department, also called the "*Coordination Group*", will serve as the focal point for proposal submission.[26] In contrast to the previous approach, where submissions were centred on the window system, the application submission method this time is "*on tap*".[27] The

[26] Asheeta Regidi, *The India Policy Series: Cross-sectoral innovation under the new interoperable regulatory sandbox*, FINEXTRA (Nov. 10, 2022), https://www.finextra.com/the-long-read/536/the-india-policy-series-cross-sectoral-innovation-under-the-new-interoperable-regulatory-sandbox.

[27] Atmadip Ray, *Inter-Operable Regulatory Sandbox to be on "On-Tap" basis,* ECONOMIC TIMES (Oct. 12, 2022), https://economictimes.indiatimes.com/industry/banking/finance/banking/interoperabl

number of applications was restricted due to the window system, and the scope of inventions was also confined to frameworks as and when introduced by the regulator. This is a positive move.

The new regulation classifies regulators into two types: "*Principal Regulators*" and "*Associate Regulators*". The 'dominant element' of the good will determine the authority under whose purview it is, who will be known as the 'Principal Regulator'. The dominant element will be identified based on two criteria:

1. Present services such as loans, deposits, capital market instruments, insurance, G-sec instruments, pension products, etc. may be improved in several ways.
1. The number of exemptions the applicant requested to conduct the IoRS test.[28]

Associate Regulators will be the authorities that will be in charge of other elements of goods besides the dominant one.[29] The Group shall perform a preliminary review of the application, considering the minimum eligibility requirements of the regulator under whose purview the dominant element of the application falls. It will send the information to the relevant Principal Regulator and Associate Regulators under whose jurisdiction the proposed invention falls. The Principal Regulator will examine the application thoroughly using its framework. The Principal Regulator must

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e-regulatory-sandbox-to-be-on-on-tap-basis-says rbi/articleshow/94816036.cms?from=mdr.

[28] Insurance Regulatory and Development Authority of India, *Inter-operable Regulatory Sandbox: Standard Operating Procedure*, (Oct. 12, 2022), https://irdai.gov.in/documents/37343/991043/SoP_Inter-operable+Regulatory+Sandbox.pdf/b5071dff-15b5-8c4c-0ff1-98f619870ffc?version=2.0&t=1665570465522&download=true.

[29] Press Trust of India, *SEBI Issues SOP for IoRS,* BUSINESS STANDARD (Oct. 12, 2022), https://www.business-standard.com/article/markets/sebi-issues-std-operating-procedure-for-inter-operable-regulatory-sandbox-122101201104_1.html.

work with the Associate Regulators regarding the characteristics of the goods that fall within their purview. International FinTechs requesting entrance into India as well as Indian FinTechs with overseas ambitions must be directed to the International Financial Services Centres Authority ("**IFSCA**") for consideration of their bids. The Principal Regulator for any of these proposals will be the IFSCA.[30]

After successfully completing the sandbox testing, the applicant must contact the Principal Regulator and/or Associate Regulators to request authorization and administrative clearance before releasing the goods in the marketplace. In addition, if the good is legally admitted, the relevant authority must disclose it via a press statement. It must expressly state that it is covered by the IoRS of Inter-Regulatory Technical Group ("**IRTG**") on FinTech.

Interoperable regulatory sandboxes will improve the national competitiveness and sustainability of fintech goods. This will ensure that any obstacles faced by applicants while obtaining permission to produce a fintech service that operates under a number of regulators are validated and examined. The statutory authority for the operation of these regulatory sandboxes is important since the regulators have the power only to grant some regulatory waivers. But the present legislative structure does not explicitly acknowledge a regulator's ability to run a sandbox. It does not grant waivers or concessions from legal requirements or, in some circumstances, related laws. However, authorities like SEBI and the IRDAI have established their authority to run a regulatory sandbox and an

[30] TeamLease, *PFRDA Issued Notification on SOP for IoRS*, REGTECH (Oct. 12, 2022) https://www.teamleaseregtech.com/updates/article/19537/pfrda-issued-a-notification-on-standard-operating-procedure-for-inter/.

innovation sandbox through their broad responsibilities to advance the sectors they are governing, in addition to their authority to give instructions in the public interest or for the benefit of the relevant market, financiers, or their authority to issue rules for the expansion of the marketplace.

The examination of innovative fintech goods by a number of authorities, including SEBI, RBI, IFSCA, and more, will improve their performance and give the public, certified goods. Under the auspices of the Inter-Regulatory Fintech Group, the Principal Regulator and Associate Regulator(s) will ensure that the applicant receives a regulated framework to evaluate innovative financial services. The IoRS will improve fintech governance and use in the Indian market.

III. EXPLORING THE EFFECTS AND ADVANTAGES OF THE INTER-OPERABLE REGULATORY SANDBOXES: CHARTING A PATH TO SUCCESS

The revised regulation offers one a place of admission for testing, which lowers expenses, boosts performance, and eliminates uncertainty over cross-sectoral approval. It is accessible to both domestic and international firms. However, following a successful exit from the sandbox, every regulator will still need to grant separate formal authorizations before cross-sectoral services may be launched in the marketplace. Despite similarities, there may be overlap in the authorities' issues regarding cross-sector technological advancement, or the specifics of those issues may alter. Resolving regulators' issues and creating synergies are top priorities for the IoRS. Thus, both local and foreign participants could learn from the Indian IoRS model in terms of regulatory principles. As seen by the numerous successful exits from the different cohorts of the RBI's regulatory sandbox

("**RS**"), sandboxes are essential regulatory and economic instruments for fostering development.[31] In the context of shared and evidence-based experiences throughout areas for authorities and applicants, enhanced safety for consumers, decreased goods development risks, and a common understanding between authorities of each other's needs and problems, a cross-sectoral sandbox will eliminate administrative barriers.

The World Bank's 'Global Experiences from Regulatory Sandboxes' study showed that themed sandbox models support particular innovations and government agendas.[32] The RBI has made available various cohorts of its Regulatory Sandbox structure, covering topics including payments across borders, SME financing, and financial fraud reduction. In order to avoid limiting the possibility of technological advancement, the IoRS framework may likewise benefit from a similarly themed release of cohorts paired with a generic cohort for any invention that is not included within the specified subjects (like the one featured in RBI's 5th cohort). The financial services sector could flourish, as the interoperable regulatory sandbox's priority lies not only in advancing in fintech but also in business adherence, supervisory disclosure, digital assets, and the application of regulatory technology and suptech technologies. Additionally, bilateral license agreements and automated licensing can lower adherence and operational fees incurred by participant firms. This can also remove regulatory arbitrage.

IV. DISCOVERING GLOBAL EXAMPLES TO IMPROVE INDIA'S REGULATORY SANDBOX : CROSSING BORDERS AND

[31] Regidi, *supra* note 26.
[32] *Id.*

PROMOTING INNOVATION

Identifying effective practices that are feasible to use in the Indian environment can be aided by researching successful global regulatory sandbox projects. These methods may include expedited and simpler registration processes, customised eligibility standards that take into account Indian stakeholders' particularities, and robust coordination among authorities, business stakeholders, and customer activists.[33] India may improve the effectiveness and supportiveness of its framework for upcoming developments by adopting best practices. The transformational impact of adopting a fintech sandbox is illustrated by numerous global examples. The creation and operation of the Fintech Sandbox in India must involve numerous participants, including IT companies, educational institutions, and nonprofit organisations.[34] India may encourage a comprehensive strategy to solve the distinctive challenges faced by its FinTech sector by encouraging the sharing of concepts and expertise between various players. Understanding how regulatory sandboxes operate in various nations is of utmost significance.

A. UNITED KINGDOM

In 2014, the Financial Conduct Authority ("**FCA**") of the UK launched "*Project Innovate*", a program aimed at advising companies, including both FinTech startups and traditional banks, on the applicable

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[33] RP et al, *Building FinTech Ecosystems: Regulatory Sandboxes, Innovation Hubs and Beyond*, (University of Luxembourg Law, Working Paper No. 2019-010, Sep. 2019).

[34] L.B Narayan, *Emergence and Growth of FinTech Startups in India*, INTERNATIONAL FINANCIAL LAW REVIEW (Jun. 15, 2021), https://www.iflr.com/article/2a646h8nupzg381v8xs00/emergence-and-growth-of-fintech-start-ups-in-india.

regulations for their cutting-edge products.[35] This initiative helped establish the FCA's reputation as a promoter of competition and part of the post-crisis agenda to challenge banking monopolies. Concurrently, the United Kingdom ("**U.K**") government has been actively supporting London's FinTech sector, which includes notable companies like TransferWise, Funding Circle, and Super. Project Innovate features a sandbox where companies can test their products under temporary authorization.[36] The FCA's Innovation Hub has assisted over 500 companies, with more than 40 receiving regulatory authorization. This approach has been emulated worldwide, and the FCA allied with 11 foreign watchdogs to establish a global sandbox, allowing products to launch in multiple jurisdictions. Over 70 foreign regulators and groups make up the Global Financial Innovation Network ("**GFIN**") group.[37] The FCA has also signed ten cooperation agreements, including those in Australia, Singapore, and notably the United States Commodity Futures Trading Commission.[38] The innovation it supports spans across regtech, retail investments, and virtual asset sectors, among others.

B. SINGAPORE:

[35] Kieran Garvey et al, *Guide to Promoting Financial and Regulatory Innovation,* CAMBRIDGE CENTRE FOR ALTERNATIVE FINANCE, (Mar. 10, 2018), https://assets.publishing.service.gov.uk/media/5adeee2840f0b60a9a985a02/UK_financial___regulatory_innovation.pdf.

[36] David Strachan, *A Journey through the FCA Regulatory Sandbox: The benefits, challenges and next steps*, DELOITTE (2022).

[37] Aabir Acharjee, *Regulatory Sandboxes in FinTech: Existential Need or Overhyped Appendage*?, Artha (Apr.2022).

[38] Christopher Woolard, *Regulating Innovation: A Global Enterprise,* FINANCIAL CONDUCT AUTHORITY (Mar. 19, 2018), https://www.fca.org.uk/news/speeches/regulating-innovation-global-enterprise.

The Monetary Authority of Singapore ("**MAS**") launched a fintech regulatory sandbox in 2016,[39] demonstrating its constant support for technological advancement. The MAS places a high priority on allowing organisations to test inventive financial products while ensuring customer safety and market stability. Around 300 businesses have participated in the MAS sandbox since its creation, several of which have obtained administrative certification and introduced profitable goods.[40] The MAS sandbox's main characteristics are an easy registration procedure, a total experimental duration of a year, detection and control of dangers, and the requirement that applicants show dedication to safeguarding consumers.[41] A peer-to-peer transmission business that uses blockchain-based technology to offer affordable, overseas payments to migrant employees, the majority of whom stay without a bank account, is an outstanding instance of the sandbox's significance.[42] This innovation demonstrates the revolutionary potential of technological advances in boosting economic integration. This is because it not only significantly decreased remittance expenses but also provided a safe and accessible method for the unbanked to transfer funds to their relatives. For instance,

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[39] *A Guide to Regulatory Sandboxes Internationally*, Baker McKenzie, (2018), https://www.bakermckenzie.com/-/media/files/insight/publications/2020/05/a_guide_to_regulatory_fintech_sandboxes_internationally_8734.pdf?la=en.

[40] Peiyang Hicks et al., *MAS Enhances FinTech Regulatory Sandbox*, MONDAQ (Dec. 21, 2021) https://www.mondaq.com/financial-services/1143662/mas-enhances-fintech-regulatory-sandbox.

[41] Telecom Regulatory Authority of India, *supra* note 7.

[42] APEC Economic Committee, *FinTech Regulatory Sandboxes Capacity Building Summary Report*, ASIA-PACIFIC ECONOMIC COOPERATION, (Mar., 2021), https://www.apec.org/docs/default-source/publications/2021/3/fintech-regulatory-sandboxes-capacity-building-summary-report/221_ec_fintech-regulatory-sandboxes-capacity-building-summary-report.pdf?sfvrsn=387b04bc_1.

1. the inclusion of initial users of technological development in the eligibility requirements
2. a grant-funded, simplified registration process with up to $500,000 in financing at the fifty percent financing level.
3. engagement in the "*Deal Fridays*" scheme, a venue for business deals[43]

Although it is yet unclear how the improved initiative is improving financial inclusion and innovation, the MAS Sandbox is a noteworthy case study as it was one of the first to go into operation and helped several FinTechs launch their goods. While safeguarding the interests of customers and economic stability, MAS promotes development in the fintech sector. This approach has aided in the development of cutting-edge financial solutions geared towards different societal groups, especially the unbanked.

C. TAIWAN:

Taiwan has passed a comprehensive legislation for establishing and governing regulatory sandboxes. With the aim of "*developing a secure framework for testing advanced financial technologies*,"[44] Taiwan introduced the Financial Technology Development and Innovative Experimentation Act in 2018.[45] The statute explains the procedure for examining cutting-edge financial innovations in a regulatory sandbox. It is managed by the Financial Supervisory Commission, Taiwan's authoritative regulator for the banking

[43] Mark Waters, *National Study on Central Bank Digital Currency and Stablecoin in the Maldives*, United Nations ESCAP (Apr. 24, 2023) https://www.unescap.org/sites/default/d8files/knowledge-products/ESCAP-2022-MaldivesNationalStudy-CBDC-Stablecoins-GordonClarke-EmiHrnjic_1.pdf.

[44] Kuo Hua Fan, *FinTech FDI in Taiwan: Outlook, Incentives & Legal System,* LEXOLOGY (Apr. 23, 2023) https://www.lexology.com/library/detail.aspx?g=fb7daa2c-36ef-4be0-a681-18ba02f4417e.

[45] The Financial Technology Development and Innovative Experimentation Act, 2018 (Taiwan).

industry's growth and supervision.[46] The Financial Supervisory Commission can approve a waiver from these laws, guidelines, or norms after negotiating with the relevant authorities or other administrative departments. This is where creative experimentation is governed by laws, guidelines, or norms. Yet, exceptions are not allowed to the Anti-Money Launder ("**AML**") and Combating the Financing of Terrorism ("**CFT**") legislation.[47] Technological testing is explicitly exempt from fines under specified statutes, according to the regulation.

V. UNLEASHING INNOVATION WITH CONSUMER SAFEGUARDS: UNVEILING THE POWER OF REGULATORY SANDBOXES AND RBI GUIDELINES

In his book 'Finance and the Good of Society', Robert Shiller stated that while structure and procedure might shift, purpose never does.[48] There is a rationale for why there are fundamental protections, fair financing, and customer welfare legislation.[49] Many of them were enacted as an immediate consequence of economic marginalisation and prejudice. It is a poor transaction to exchange essential safeguards in hopes of new technology. Any new innovation should ultimately benefit consumers, but it sometimes needs to be protected from its own risks. Self-management, co-regulation, and legislative control are the three main administrative frameworks for

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[46] Shehnaz Ahmed & Krittika Chavaly, *Fintech Regulatory Sandbox Law: Preparing for the Future of Fintech Innovations*, VIDHI CENTRE FOR LEGAL POLICY, 23-24(2020).
[47] Abe TS Sung & Eddie Hsiung, *The Financial Technology Law Review: Taiwan,* 2nd ed. The Financial Technology Law Reviews (Apr. 2021), https://thelawreviews.co.uk/title/the-financial-technology-law-review/taiwan.
[48] ROBER J. SHILLER, FINANCE AND THE GOOD SOCIETY, (Princeton University Press 2012).
[49] Douglas W. Arner et al., *Fintech and RegTech in a Nutshell, and the Future in a Sandbox*, Vol. 3 Issue 4, RESEARCH FOUNDATION BRIEFS, (2017).

safeguarding consumers.[50] They develop, exist together, and are not antagonistic in various jurisdictions. Similar to how too much legal oversight can stifle innovation, too much optimism about self-regulation might endanger the banking industry or hurt consumers. Co-regulation may work effectively in the fast-paced fintech industry when regulatory agencies and commercial companies interact constantly.[51]

Regulatory sandboxes are a proactive form of regulation designed to address consumer protection concerns by overseeing innovative developments before they are made available to the public. Recent studies (Consultative Group to Assist the Poor and World Bank study) indicate that 70% of regulators prioritise consumer protection during the testing phase of regulatory sandboxes.[52] An illustrative example of the implementation of a regulatory sandbox can be found in 'The U.S. Project Catalyst', a program established by the Consumer Financial Protection Bureau in 2012. This initiative aimed to foster customer-friendly advancements and facilitate the growth of startups in the financial services sector.[53] By providing a controlled environment for experimentation, regulatory sandboxes enable consumers to discover transparent, dynamic, and contemporary marketplaces. A specific instance of this is seen in the Fourth Cohort Regulatory Sandbox of the RBI, which centred around the

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[50] Beni Chaugh, *Financial Regulation of Consumer Facing FinTech in India: Status Quo and Emerging Concerns*, (Apr., 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3520473.

[51] Wrag, "*Tradeteq Partners with XinFin in First Trade Finance NFT Transactions*", GLOBAL TRADE REVIEW (Apr. 25, 2023).

[52] Ivo Jenik, *Do Regulatory Sandboxes Impact Financial Inclusion? A Look at the Data*, CGAP (Jun. 2, 2023) https://www.cgap.org/blog/do-regulatory-sandboxes-impact-financial-inclusion-look-data.

[53] Consumer Financial Protection Bureau, *Project Catalyst Report: Protecting Consumer-Friendly Innovation* (Oct. 2016), https://files.consumerfinance.gov/f/documents/102016_cfpb_Project_Catalyst_Report.pdf.

theme of "*Prevention and Mitigation of Financial Frauds.*"[54] Among the notable submissions was 'Trident FRM' by enStage Software Private Limited ("**Wibmo**"). This innovative product offers a risk-based authentication solution that eliminates the need for one-time passwords ("**OTPs**"). By utilising transaction and fraud patterns through a feedback model, Trident FRM significantly enhances consumer protection. Its robust risk assessment capabilities and real-time scoring system enable swift identification and mitigation of potential risks, thereby reducing the likelihood of unauthorised transactions and fraudulent activities.[55] With a steadfast commitment to delivering a seamless and secure transaction experience, Trident FRM actively contributes to building consumer confidence and trust in digital banking. By safeguarding their interests and minimising financial fraud, this solution can play a vital role in ensuring consumer protection within the digital ecosystem.

Even though a sandbox may help the fintech sector in many ways, there are also significant threats and difficulties to consider. Protecting consumers is one of the primary threats and difficulties to consider.[56] In order to defend consumers from possible adverse effects, such as data theft, deception, and additional privacy threats, it must be certain that the necessary measures exist. The RBI has implemented numerous measures to protect customers. Since accessibility to the Regulatory sandbox system does not reduce a company's responsibility to its consumers, compliance with the necessary and current standards governing customer

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[54] RBI, *Regulatory Sandbox- Fourth Cohort on Prevention and Mitigation of Financial Frauds- Test Phase* (Jan. 5, 2023).
[55] *Id.*
[56] Ishan Shah, *RBI's Regulatory Sandbox: Balancing Innovation and Consumer Interest*, Economic Times (Jun. 2, 2023) https://bfsi.economictimes.indiatimes.com/news/fintech/rbis-regulatory-sandbox-balancing-innovation-consumer-interest/69337252.

confidentiality is the top criterion for companies testing.[57] Companies accessing the sandbox are required to fully and in advance inform sample users of any possible threats and appropriate indemnification. In this regard, they must get their express approval. Furthermore, the firms must provide a suitable plan for clients to opt out of the screening process, as per the RBI guidelines. To protect consumers' well-being, companies are expected to take responsibility and compensate.[58] A sufficient amount of indemnity coverage depending on the estimation of the maximum responsibility based on:

1. Maximum risk for a single consumer.
2. The anticipated proportion of claims over the plan's duration.
3. The number of claims that might result from a particular incident (possibility of several complaints).

FinTech companies begin their trial when customer safety indemnity insurance coverage kicks in. The agreement expires 90 days after the FinTech startup leaves the Regulatory Sandbox.[59]

While RBI has relaxed certain requirements for entities testing in a sandbox, the requirement for customer privacy and data protection compliance has not been waived, demonstrating that RBI is protecting consumer interests while encouraging innovation and for this, RBI's efforts are admirable on many levels. It still has to keep up with technological advancement, which is almost certainly well in advance of supervision, and

[57]Department of Banking Regulation Banking Policy Division, *Enabling Framework for Regulatory Sandbox*, RBI (Feb., 2018) https://www.asianlaws.org/one/content/pdf/others/rbi_sandbox.pdf.
[58]*Id.*
[59]*Id.*

one requires space to monitor and control. Thus in essence, a cautious strategy approach averted a serious crisis.[60] However, considering the speed at which digital transformation and FinTechs are revolutionising the banking sector, its inclusiveness, and the economy as a whole, it is crucial for authorities to demonstrate their support for market dynamics that will quicken innovative production. It is imperative to remember that sandboxes are not the Wild West for fintechs seeking to exploit legal gaps.

VI. CONCLUSION

The favourable findings observed across the nation testify to the many advantages of a Fintech Sandbox. The sandbox can foster development that cuts across traditional financial industry borders and heralds an age of inclusive banking by welcoming multidisciplinary cooperation. To ensure the Fintech Sandbox's success and compatibility with India's economic growth and development objectives, it is imperative to build a strong tracking and assessment mechanism. A regulatory framework that is adaptable and keeps up with the fintech industry's continuous growth can be fostered through regular evaluations and ongoing development. The sandbox can maintain its flexibility and responsiveness to customers' changing requirements by adding feedback mechanisms and learning from both wins and mistakes. Governments and business executives must have an optimistic and forward-looking attitude to efficiently deploy a sandbox in India. India can create a sandbox that fosters inventiveness, teamwork, and economic mobility by learning from nations like the UK, Taiwan, the United States, and Singapore. It can also

[60] Cristina Poncibo & Laura Zoboli, *Sandbox and Consumer Protection: the European Perspective*, 8 INTERNATIONAL JOURNAL ON CONSUMER LAW AND PRACTICE, 14-16 (2021).

apply best practices and lessons acquired to its environment. As this Article draws to a close, the authors politicians, business pioneers, and legal defenders to uphold their dedication to economic inclusion and India's unbanked people. The country may unleash remarkable possibilities by utilising the Fintech Sandbox, creating a better and more equitable economic tomorrow for citizens.

Dr. Radhika Jagtap & Nikita Sharma, *Legal Framework Concerning Oppression and Mismanagement under the Companies Act, 2013: A measure to fortify corporate governance,* 10(1) NLUJ L. REV. 51 (2024).

LEGAL FRAMEWORK CONCERNING ARTIFICIAL INTELLIGENCE AND BORDER SECURITY

~ Dr. Radhika Jagtap & Nikita Sharma *

ABSTRACT

*As artificial Intelligence-based border control technologies have the potential to enhance security and efficiency, their implementation must be governed by a robust legal framework that protects human rights standards. To ensure that artificial intelligence ("**AI**") applications in border surveillance are reliable and equitable, and safeguard the rights of migrants, refugees, and travellers, governments should prioritise transparency, accountability, and compliance with existing international and national regulatory frameworks. The right to privacy, non-discrimination, and freedom of movement are essential concerns that must be upheld, and AI systems must be designed and implemented with these rights in mind. When using AI systems to evaluate refugee status, the non-refoulement principle, which prohibits individuals from returning to regions where their life or freedom is at risk, must be carefully considered. Finding the appropriate balance between border security and human rights protection is a significant challenge for policymakers, requiring ongoing review, modification, and international collaboration.*

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TABLE OF CONTENTS

I. INTRODUCTION 53

II. INTERNATIONAL FRAMEWORK ON DIGITAL TECHNIQUES IN BORDER PATROLLING 56

III. NATIONAL FRAMEWORK ON DIGITAL TECHNIQUES IN BORDER PATROLLING..63

IV. WHAT ABOUT HUMAN RIGHTS IN AI-POWERED BORDER CONTROL?...67

V. CRITICAL ANALYSIS 71

VI. CONCLUSION 75

I. INTRODUCTION

Traditional security elements are rapidly expanding as technological advances create emerging issues such as hybrid warfare and cybersecurity. The main objective of border patrols is to safeguard the nation by mitigating the potential risks posed by individuals and resources attempting to enter the country outside of designated ports of entry. Various surveillance techniques have been developed by governments and corporations, with the rationale of addressing genuine security concerns and highlighting the pressing necessity to counteract criminal behaviour both in digital and physical realms. The monitoring industry has experienced significant growth in the absence of essential levels of national and global oversight and regulation. The emergence of a mysterious surveillance technology industry, devoid of legal regulation and public scrutiny, has been observed in both totalitarian and democratic nations. Owing to the versatile nature of AI-based tools, which can serve both beneficial and potentially harmful purposes, coupled with the absence of comprehensive international regulations, these tools have become more accessible across various domains. Technology has always played a role in border and immigration enforcement, with tools ranging from passports to literal border fences as examples. This trend has been exacerbated by the COVID-19 pandemic, which has encouraged people to rely on technological solutions to migration issues. To combat the spread of the virus, the "*border industry*" has advocated for "*contactless biometrics*" technology,[1] and public health and national security concerns are being used

[1] Petra Molnar, *Migration Management Experiments and Reflections from the Ground Up*, TECHNOLOGICAL TESTING GROUNDS, (Nov., 2020), https://edri.org/wp-content/uploads/2020/11/Technological-Testing-Grounds.pdf.

to justify increased surveillance and data collection on migrants.[2] By automating repetitious and less imaginative tasks, border security officers will be able to concentrate on more pressing issues. Physical tasks can be accomplished by heterogeneous robotic systems, consisting of numerous unmanned systems of varying capacities and capabilities for use on land, sea, and air. Researchers in a variety of disciplines, including border control and anti-terrorism, are interested in these technologies. However, current capabilities are limited to individual systems and limited platform and sensor data integration. Taking for instance, the operation of unmanned systems necessitates significant human labour. Numerous developers and border security authorities are diligently preparing to implement a diverse robotic system. In the context of India, where land borders, notably the Line of Actual Control ("**LAC**"), assume strategic significance, there is a contemplation of deploying unmanned and automated land and aerial vehicles. This consideration aims to augment patrolling capabilities and establish persistent surveillance over the movements of patrols and troop activities conducted by neighbouring countries.[3]

In recent years, the question of whether or not border patrol agents should make use of digital tools has been one that is debated.[4] Because of advances in technology, government organisations charged with border protection now have access to cutting-edge techniques that improve the reliability and effectiveness of border crossings. Nevertheless, the

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[2] Toronto Metropolitan University, openDemocracy, https://www.opendemocracy.net/en/pandemic-border/ /.

[3] Sharath Kumar, *Artificial Intelligence Capability in Securing the LAC*, Centre for Land Welfare Studies, (Aug. 16, 2021), https://www.claws.in/artificial-intelligence-capability-in-securing-the-lac/.

[4] Economic Commission for the Latin America and the Caribbean (ECLAC), Digital Technologies for a New Future, (Apr. 12, 2023), https://www.cepal.org/sites/default/files/publication/files/46817/S2000960_en.pdf.

utilisation of these technologies raises many ethical and legal considerations that need to be thoughtfully contemplated. Privacy and data protection are key ethical concerns about border patrol digital tools. The usage of surveillance technologies and biometric information generates privacy and security concerns. In particular, there is a requirement for a regulatory framework that would assure the transparency, accountability, and non-discriminatory application of these technologies.[5] In addition, deploying these technologies presents a number of ethical considerations, including justice, non-discrimination, respect for human rights, accountability, and responsibility.[6] To ensure that human rights are maintained and discriminatory practices are avoided, it is necessary to give special attention to the ethical implications of the digital technology employed for border patrol. By employing a variety of ethical frameworks and implementing ethical solutions, it becomes possible to minimize potential harm and promote ethical behaviors.[7] It is crucial to balance the advantages of employing digital tools in border patrol with the necessity to defend the rights of persons, i.e., inclusive of providing transparent decision-making processes. Ethical considerations in such technology necessitate careful

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[5] Denise Almeida, Konstantin Shmarko & Elizabeth Lomas, *The ethics of Facial Recognition Technologies, surveillance, and accountability in an age of Artificial Intelligence: A comparative analysis of US, EU, and UK Regulatory frameworks AI and ethics*, NATIONAL LIBRARY OF MEDICINE, NATIONAL CENTRE FOR BIOTECHNOLOGY INFORMATION, (Apr. 12, 2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8320316/.

[6] *Recommendation on the ethics of Artificial Intelligence*, UNESCO, (Jun. 12, 2023) https://en.unesco.org/about-us/legal-affairs/recommendation-ethics-artificial-intelligence.

[7] *Id.*

consideration to bias, discrimination, privacy, data protection, accountability and transparency.[8]

II. <u>INTERNATIONAL FRAMEWORK ON DIGITAL TECHNIQUES IN BORDER PATROLLING</u>

In accordance with international human rights law, states are in violation of their obligations if they fail to adopt or enforce anti-discrimination legislation governing the conduct of both public and private actors; fail to amend, rescind, or nullify any laws and regulations that have the effect of creating or perpetuating discrimination;[9] or fail to adopt all appropriate immediate and effective measures to prevent, lessen, and eliminate the conditions, attitudes, and prejudices that contribute to

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[8] Julian Laufs and Herve Borrion, *Technological Innovation in Policing and Crime Prevention: Practitioner Perspectives from London*, 24 (2) IJPSM 190, 202-204 (2022).

[9] UN Committee on Economic, Social and Cultural Rights ("**CESCR**"), General comment No. 20: Non-discrimination in Economic, Social and Cultural Rights, (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights*),* Jul. 2, 2009, E/C.12/GC/20, ¶¶11,37,39,40 https://www.refworld.org/docid/4a60961f2.html;UN Human Rights Committee, General comment No. 31 [80] The nature of the general legal obligation imposed on States Parties to the Covenant, (May 26, 2004), CCPR/21/Rev.1/ Add/13, ¶8, https://www.refworld.org/docid/478b26ae2.html.

discrimination.[10] A protected human rights remedy[11] is a remedy that states are obligated to implement when necessary. This remedy takes the form of specific steps taken by a state to achieve equality in effect, correct inequality, and discrimination, and/or secure the advancement of disadvantaged groups or individuals.[12] Special measures, also known as *"affirmative action*", are specific steps taken by a state.[13]

The right to privacy,[14] and the elimination of discrimination,[15] are two of the many civil and political rights guaranteed by the International

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[10] UNGA, International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, UN Treaty Series, Art. 7 UN Committee on the Elimination of Racial Discrimination ("**CERD**"), General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination, Sep. 24, 2009, CERD/C/GC/32; U.N. Committee on the Right of Persons with Disabilities, 13th Session, Concluding Observations on the Initial Report of the Dominican Republic, May 8, 2015, CRPD/C/DOM/CO/1, ¶50; U.N. Human Rights Committee, General Comments No. 18, Nov. 21, 1989, CCPR/C/21/Rev.1/Add.1, ¶10; UN Committee on Economic, Social and Cultural Rights ("**CESCR**"), General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), 11 Aug. 2005, E/C.12/2005/4, ¶15; UN Committee on Economic, Social and Cultural Rights ("**CESCR**"), General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), Jul. 2, 2009 2009, E/C.12/GC/20, ¶¶8(b),9 and 39; UN Committee on the Elimination of Discrimination Against Women ("**CEDAW**"), General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004.

[11] Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies, May 27, 2008, HRI/GEN/1/Rev.9 (Vol.I); CESR, *id*., ¶9 and 39.

[12] CEDAW, supra note 10, art. 4(1); Convention on the Rights of Persons with Disabilities, art. 5(4); ICERD, supra note 10 art. 2(2); General Comments No. 6 (2018), para 29; and UN Human Rights Committee ("**HRC**"), CCPR General Comment No. 18: Non-discrimination, Nov. 10, 1989, ¶10.

[13]ICERD, supra note 10, art. 2(2); CERD, supra note 10, ¶30; CESCR, supra note 9, ¶ 8(b) and 9; UNHRC, CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), Mar. 29, 2000, CCPR/C/21/Rev.1/Add.10, ¶3.

[14] United Nations General Assembly, International Covenant on Civil and Political Rights, Dec. 16, 1966, Treaty Series 999, p. 171, art. 17.

[15] *Id.* art. 26.

Covenant on Civil and Political Rights ("**ICCPR**"). States that have ratified the ICCPR have accepted the responsibility to ensure that their domestic policies and procedures align with the document's provisions. If digital tactics used for border patrol lead to discrimination or violations of individuals' right to privacy, the ICCPR may apply. The International Convention on the Elimination of All Forms of Racial Discrimination ("**ICERD**")[16] is a convention that calls for the complete end of racism everywhere. Racism, sexism, and bigotry of any kind fall under this category. States that have ratified the ICERD are expected to implement policies to prevent and eradicate discrimination wherever it occurs, including using digital tools in border patrol. The United Nations Guiding Principles on Business and Human Rights,[17] are standards that give organisations and state a road map for upholding human rights. The employment of digital tools in border patrol is one example of an area where firms and governments must investigate and address potential human rights consequences.[18] The General Data Protection Regulation ("**GDPR**") of the European Union ("**EU**") establishes standards for handling personal information[19] inside the union. It mandates data collection and processing transparency and provides individuals with specific rights.[20] If personal information is gathered and processed during border patrol operations, GDPR may apply.

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[16] ICERD, supra note 10, art 1 and 2.

[17] The UN Guiding Principles on Business and Human Rights, The UN Working Group on Business and Human Rights, (2011) https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf.

[18] *Id.*, principles 1 and 18.

[19] The EU General Data Protection Regulation, EU 2016/679, Apr. 27, 2016, art. 5 ("**GDPR**").

[20] *Id.* arts. 13, 14, 15 and 17 (2016).

Autonomous technologies are also increasingly being used in border surveillance and security.[21] For example, the European Border and Coast Guard Agency ("**Frontex**") has been testing unpiloted military-grade drones in the Mediterranean and Aegean Seas to observe and interdict vessels carrying migrants and refugees attempting to reach European ports.[22] In October 2020, an investigation found credible evidence that Frontex was complicit in "*pushbacks*",[23] (the forced return of refugees and migrants across a border without regard for the individual's circumstances and without the ability to apply for asylum or file an appeal). Pushbacks are likely to breach states' non-refoulement duties under international law; nonetheless, they are carried out with the use of surveillance technologies. Legal advancements in Greece have allowed police to utilise drones to monitor irregular migration in border regions but without securing the necessary legal protections for the human rights of the subjects of this surveillance. The employment of autonomous military or quasi-military technology strengthens the link between immigration, national security, the increasing criminalisation of migration, and the use of risk-based taxonomies to demarcate and flag situations. States, particularly those facing high numbers of refugee and migrant arrivals, have used a variety of

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[21] E. Tendayi Achiume, *Racial and xenophobic discrimination and the use of Digital Technologies in border and immigration enforcement*, A/HRC/48/76, United Nations General Assembly, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/379/61/PDF/G2137961.pdf?OpenElement.

[22] Hannah Tyler, The Increasing Use of Artificial Intelligence in Border Zones Prompts Privacy Questions, Migration Policy Institute, (Feb. 2, 2022), https://www.migrationpolicy.org/article/artificial-intelligence-border-zones-privacy.

[23] European Border and Coast Guard Agency, Frontex Consultative Forum on Fundamental Rights, (2020) https://frontex.europa.eu/assets/Partners/Consultative_Forum_files/Frontex_Consultative_Forum_Annual_Report_2020.pdf.

techniques to pre-empt and prevent people wanting to petition for asylum lawfully. This normative shift toward the criminalisation of asylum and migration serves to justify increasingly harsh and intrusive border enforcement mechanisms, such as remote sensors and integrated fixed towers with infrared cameras, to mitigate the *"threat environment"* at the border.[24] These technologies have the potential to have far-reaching consequences. While so-called "*smart-border*" technology has been promoted as a humanitarian alternative to traditional border enforcement regimes, their usage along the US-Mexico border has increased migrant mortality. Since the introduction of this new technology, migrant deaths have more than doubled,[25] producing a *"land of open graves*."[26]

International refugee law establishes the rights and safeguards of refugees and asylum seekers, specifically the 1951 Refugee Convention and its 1967 Optional Protocol.[27] These legal instruments underline the principle of non-refoulement, which forbids individuals from returning to a region where their life or freedom would be jeopardised. Border patrol AI must adhere with refugee law responsibilities, allowing asylum seekers to have their claims reviewed properly and individually.[28] AI systems in establishing an individual's eligibility for refugee status should be addressed

[24] Sameul Norton, et al., *Mortality Surveillance and the Tertiary 'funnel effect' on the US-Mexico Border: A gepspatial Modeling of the Geography of Deterrence*, 36, No. 3 Journal of Borderland Studies, 443-468 (2019).
[25] *Id.*
[26] Jason De Leon, THE LAND OF OPEN GRAVES: LIVING AND DYING ON THE MIGRANT TRAIL, University of California Press (2015).
[27] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137; UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.
[28] Mirca Madianou, *Technocolonialism: Digital Innovation and Data Practices in the Humanitarian Response to Refugee Crisis,* 5(3) SOCIAL MEDIA+SOCIETY, (2019), https://journals.sagepub.com/doi/full/10.1177/2056305119863146.

with caution since such technologies may fail to account for the nuances and complexities of particular cases.

Various regional agreements, such as the European Convention on Human Rights ("**ECHR**") and the American Convention on Human Rights ("**ACHR**"), supplement the global human rights framework. Individuals living inside the domains of these regional agreements benefit from enhanced safeguards. For example, the General Data Protection Regulation ("**GDPR**") of the European Union provides severe standards for handling the European Union, for example, profound standards for handling personal data, including data obtained using AI technologies. Any AI-based border control measures used within EU member states are bound by the GDPR standards, with a focus on data protection and privacy rights.[29] The establishment of European Border Surveillance Legal advancements in Greece have allowed police to utilise drones to monitor irregular migration in border regions but without securing the necessary legal protections for the human rights of the subjects of this surveillance systems. For instance the European Border Surveillance System ("**EUROSUR**") in 2013 which was meant to protect migrants is one such example.[30] However, mitigating biases and discrimination in datasets is difficult, particularly when the data is severely biased against specific groups. Before adopting automated tools, thoroughly analyse the extent of

[29] *The Impact of the General Data Protection Regulation on Artificial Intelligence*, Panel for the Future of Science and Technology, (Jun., 2020), https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641530/EPRS_STU(2020)641530_EN.pdf.

[30] European Commission, *EUROSUR: Protecting the Schengen External Borders-Protecting Migrants' Lives*, Jul. 1, 2023, https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_13_1070.

bias in predictions and its influence on real-world applications, particularly in areas with minimal algorithm experience. Migrant populations are vulnerable to violations of human rights due to the fact that their nationality, legal position, and economic situation place them in danger.[31] It has been established that AI contributes to the perpetuation of prejudice by routinely producing decisions that are detrimental to some populations. If the data used to train an algorithm for machine learning is biased, it can lead to discriminatory outputs. Similarly, training border patrol officials to identify certain qualities or actions as suspicious might lead to profiling and prejudice against certain groups, such as minorities or individuals from certain countries. Canada, for instance, uses automated decision-making technologies to monitor its borders.[32] While assessing refugee applications, these systems do not consider the weaknesses and overlapping identities, part of which may be immigrant women.[33] Particularly, the use of discriminating and biased algorithms substantially affects the integrity, life, freedom, and security of the human person. Due to the nature of a particular software program, it impedes human migration, reducing it to a mere set of variables. Some inbound passengers have been subjected to racial discrimination due to the Australian border authorities' implementation of an automated, processing system based only on their

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[31] Nafees Ahmad, *Refugees and Algorithmic Humanitarianism: Applying Artificial Intelligence to RSD Procedures and Immigration Decisions, and Making Global Human Rights Obligations Relevant to AI Governance,* Vol. 28(3), INTERNATIONAL JOURNAL ON MINORITIES AND GROUP RIGHTS (Dec. 2020).

[32] Roxana Akhmetova, *How AI is Being Used in Canada's Immigration Decision -Making*, University of Oxford (Jul. 1, 2023), https://www.compas.ox.ac.uk/2020/how-ai-is-being-used-in-canadas-immigration-decision-making/.

[33] Achiume ,*supra* note 21.

biometric data, such as fingerprints, iris, and facial recognition.[34] In 2017, the New Zealand Immigration Department started implementing a system that uses immigrants' age, gender, and ethnicity to find people who might start a riot. This is another way that immigrants are treated unfairly because of their race.[35] In airports in Hungary, Latvia, and Greece, a new project by iBorderCtrl had been introduced. This project contains lie detectors operating by artificial intelligence at border checkpoints, and it can contribute to the imposed prejudices.[36]

National laws and regulations would play an important role in shaping the usage of AI in border patrols. Individual country legal frameworks govern immigration and border control strategy. National governments would be required to guarantee that AI systems deployed for border patrolling comply with domestic legislation and are in accordance with the country's international human rights commitments. Furthermore, national laws must include accountability, transparency, and oversight procedures to prevent the misuse and abuse of AI technologies.

III. NATIONAL FRAMEWORK ON DIGITAL TECHNIQUES IN

[34] Steve Dent, *Facial Recognition to Will Replace Passports in Australia*, ENGADGET (Jan. 23, 2017), https://www.engadget.com/2017-01-23-facial-recognition-will-replace-passports-in-australia.html.
[35] Petra Molnar and Lex Gill, *Bots at the Gate, A Human Rights Analysis of Automated Decision-Making In Canada's Immigration and Refugee System,* UNIVERSITY OF TORONTO INTERNATIONAL HUMAN RIGHTS PROGRAM AND THE CITIZEN LAB, MUNK SCHOOL OF GLOBAL AFFAIRS (2018), https://citizenlab.ca/wp-content/uploads/2018/09/IHRP-Automated-Systems-Report-Web-V2.pdf.
[36] Petra Molnar, *Emerging Voices: Immigration, Iris- Scanning and iBorderCTRL- The Human Rights Impacts of Technological Experiments in Migration*, OPINIOJURIS (2019), http://opiniojuris.org/2019/08/19/emerging-voices-immigration-iris-scanning-and-iborderctrl-the-human-rights-impacts-of-technological-experiments-in-migration/.

BORDER PATROLLING

In February, 2018, the Ministry of Defence ("**MoD**") convened a task force of diverse stakeholders to strategise the application of AI in the defence sector. The task force report was finalised in June of the same year. The MoD worked to implement the task force's recommendations by establishing an institutional framework for policy implementation, providing guidance to defence institutions, and delineating a vision for capacity-building.[37] In 2018, the N. Chandrasekaran Task Force was established to investigate the national security implications of AI.[38] In February 2019, the MoD instituted a Defence AI Council ("**DAIC**") led by the MoD, and based on the recommendations of the Task Force, the DAIC and the Defence AI Project Agency ("**DAIPA**") were established. DAIPA's objectives include a greater emphasis on AI in Defence and creating an AI road map for each Defence Public Sector Undertakings ("**PSU**") and Ordnance Factory Board to produce AI-enabled products. The DAIC was created to provide essential guidance and structural support for the deployment of artificial intelligence for military applications. The primary responsibility of the DAIC is to provide strategic direction for the defence sector's AI implementation. It promotes government-industry collaboration and reviews concepts for technology acquisition and startup alliances. In addition, the DAIC anticipates the formation of the Defence AI Project Agency, a central executive entity.

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[37] Ambuj Sahu, *Artificial Intelligence in Military Operations: Where does India Stand?* , YOUNG VOICES OBSERVER RESEARCH FOUNDATION (2019), https://www.orfonline.org/expert-speak/artificial-intelligence-military-operations-where-does-india-stand-54030.

[38] Ministry of Defence, *Task Force for Implementation of AI*, PRESS INFORMATION BUREAU (Mar. 28, 2022), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1810442.

The Indian Constitution's provisions on privacy, personal liberty, freedom of speech and expression, and equality play an essential role in protecting the rights of individuals when AI systems are used for border patrol. Article 21 of the Indian Constitution protects the right to life and personal liberty, which is pertinent when considering the privacy implications of AI-based border patrolling techniques. In 2017, the Supreme Court of India established the right to privacy as a fundamental right in Article 21.[39] The majority of the court stressed that the right to privacy encompasses a number of elements, including the freedom to manage one's own decisions and information. As previously said, AI systems, like Facial Recognition Technology ("**FRT**"), require processing massive amounts of data. FRT systems primarily identify individuals through the processing of biometric data points such as face images. However, this functionality of FRT systems raises worries about potential privacy infringement. Article 19 ensures that AI systems are designed and deployed in a way that respects and upholds individuals' free expression and privacy rights. Article 14, which guarantees the right to equality, is relevant to AI-based border surveillance techniques. Discrimination and bias can be perpetuated by AI systems and algorithms, affecting individuals traversing borders. Individuals may invoke Article 14 to challenge such practices and demand equitable treatment and non-discriminatory decision-making if AI systems produce biased outcomes or discriminatory practices.

In India, the Information Technology Act, 2000 oversees the usage of electronic documents and digital signatures. It protects computer systems and information from unwanted access and modification. Also, it

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[39] Justice K. Puttaswamy (Retd) v. Union of India, (2017) 10 SCC 1.

prohibits the printing or communication of explicit or vulgar information. Border patrol agents who employ digital techniques must adhere to these regulations. The Foreigners Act, 1946 regulates foreigners' entry, stay, and exit from India. It grants immigration officials the authority to inspect passports and travel documents and to force individuals to disclose information regarding their identity and travel history. This information may be collected and processed using digital methods. India's strategy for securing its key information infrastructure is in its National Cyber Security Policy, 2013.[40] It acknowledges AI's value and promotes the creation of AI-based tools and strategies to bolster cyber defences. Border patrol officials may use Aadhaar data to authenticate the identities of those crossing the border.[41] The Indian Ministry of Home Affairs revealed its intentions to utilise face recognition technology to track and identify people at airports and other border posts in 2019. Travellers' faces would be compared to a database of criminals, terrorists, and other suspects. The Information Technology (Reasonable Security Policies and Procedures and Sensitive Personal Data or Information) Regulations, *2011*, require *"reasonable security methods and processes"*[42] to protect sensitive data from theft, loss, and misuse. The recently enacted Digital Personal Data Protection Act, of 2023, governs personal data protection in India. Individuals have been granted rights over their data, and organisations are required to get consent before

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[40] Ministry of Electronics & Information Technology, *National Security Policy*, 2013, https://www.meity.gov.in/writereaddata/files/downloads/National_cyber_security_policy-2013%281%29.pdf.

[41] The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits, and Services) Act, 2016, No. 18, Acts of Parliament, 2016.

[42] Ministry of Communications and Information Technology, Information Technology (Reasonable Security Policies and Procedures and Sensitive Personal Data or Information) Rules, 2011, DEPARTMENT OF INFORMATION TECHNOLOGY (Apr. 11, 2011), Rules 4(v) and 8.

collecting and processing personal information. Agents at the border who use AI to gather and process personal data are also subjected to the law.

India's primary human rights law is the Protection of Human Rights Act, 1993. This statute establishes the National Human Rights Commission and outlines its functions and powers. As previously mentioned, AI-usage raises numerous human rights concerns, such as privacy, non-discrimination, due process, freedom of expression, accountability and transparency. FRT, for example, may collect and analyse personal information, prompting the protection of privacy rights. Hence, it is crucial to ensure that AI-algorithms do not discriminate against individuals based on race, religion, gender, or nationality. When AI systems make decisions, there should be safeguards in place to protect human liberties. Freedoms of expression and association should not be restricted through AI technologies. Furthermore, transparency and accountability systems must be established to correct potential abuses or mistakes. Despite the fact that these human rights considerations apply to the use of AI in border security, it is essential to examine the applicable laws and regulations in India to comprehend the specific legal and human rights context surrounding AI and border security.

IV. WHAT ABOUT HUMAN RIGHTS IN AI-POWERED BORDER CONTROL?

National laws and regulations can be developed or revised to ensure that the use of digital techniques in border patrolling complies with relevant legal standards, such as data privacy, non-discrimination, and due processes, especially in a country such as India where there are not only legislative

drawbacks but technological developments to be required as well. These solutions can be implemented to ensure that digital techniques are used in a manner that is compliant with applicable legal standards. The integration of AI (biometric systems, big data analytics, etc.) provides unprecedented border surveillance, identification, and threat detection capabilities. However, these developments are accompanied by concerns about privacy invasion, data protection, human rights abuses, and potential discrimination:

a. Data Privacy and Security Issues: Data privacy and security concerns might arise from collecting and storing personal data in digital border patrol processes. This is especially true when data is shared across agencies or with third-party contractors. Using digital techniques in border patrol has ethical repercussions for border security agencies and policymakers. These repercussions include balancing security concerns, respect for human rights and dignity, and the significance of addressing social inequalities and biases in applying these techniques.[43] Authorities must ensure they comply with data protection rules, such as the GDPR in the European Union when collecting and processing the personal data of individuals. For instance, the GDPR mandates that individuals have the right to access[44] and control their data and be notified regarding the collection and use of their data. A biometric data collection system has been implemented by the Australian Border Force ("**ABF**") at airports and other border passages. The system uses facial recognition and biometric scanners to verify the identities of

[43] *Id.* at 22.

[44] GDPR, *supra* note 19, art. 15

travellers. The ABF has stated that the system is essential for enhancing border security and reducing identity deception.[45] For instance, the Department of Homeland Security in the United States has developed guidelines for using face recognition technology in airports. These rules include safeguards to preserve individuals' privacy and to address bias.[46] It is essential to have regulations in place to protect the data rights of persons.[47]

b. Bias and Discrimination Issues: Digital border patrolling systems may promote bias and discrimination based on race, ethnicity, religion, and gender.[48] This could result in erroneous identifications and unnecessary detentions if it is used in these situations. To ensure justice and equal treatment, discriminatory activities such as racial profiling and bias in decision-making should be avoided. It can be difficult to detect and combat these practices.[49] For instance, if the data used to train an algorithm for machine learning is biased, it can lead to discriminatory outputs.[50] Similarly, training border

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[45] Asha Barbaschow, *Australia has a new biometric border processing system*, ZDNET (Jun. 3, 2020) https://www.zdnet.com/article/australia-has-a-new-biometric-border-processing-system/.

[46] Gabriela A. Gallegos, *Border Matters: Redefining the National Interest in U.S. Mexico Immigration and Trade Policy*, 92(4) CALIFORNIA L. REV, , 1729 (2020); Bennie G. Thompson, *A Legislative Prescription for Confronting 21st Century Risks to the Homeland*, 47(2) HARV. J. LEGISLATION, 277-326 (2010), pp. 277-326.

[47] Ayush Raj, *Analysing the Interplay between End-to-End Encryption & Privacy: Symbiotic Association or a Mere Faciliation?*, RGNUL, FINANCIAL AND MERCANTILE L. REV. 99-118. (2022).

[48] Michael Gentzel, *Biased face recognition technology used by government: A problem for liberal democracy Philosophy & technology*, NATIONAL LIBRARY OF MEDICINE, 34(4), 1639-1663. (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8475322/.

[49] V.G. Hegde, S*tate Practice of Asian Countries in International Law 23*, ASIAN YEARBOOK OF INTERNATIONAL LAW, 227-54, (2019).

[50] Achiume, *supra* note 21.

patrol officials to identify certain qualities or actions as suspicious might lead to profiling and prejudice against certain groups, such as minorities or individuals from certain countries.

c. Due Process and Transparency Issues: It is possible that the employment of digital technologies in border patrol would bring about complications regarding due process and transparency when decisions are made based on algorithms and automated processes without adequate human monitoring and accountability. Developing transparent accountability procedures and guaranteeing that decision-making processes are open is vital to prevent power abuses.[51] Authorities need to be accountable for their activities and forthcoming with information regarding their usage of digital tools. Automated decision-making systems, for instance, need to be subject to auditable norms and used by transparent procedures.[52] Furthermore, when people's rights are violated, they need reliable options for justice. The government must ensure that any such measures are justified by law and adequate to accomplish the legitimate goal of securing the borders.[53] Through establishing laws and regulations, ensuring transparency and accountability in the usage of digital means, can be instituted as pre-requisite for their application.

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[51] Recommendations, *supra* note 6.

[52] Nafees Ahmad, *Refugees and Algorithmic Humanitarianism: Applying Artificial Intelligence to RSD Procedures and Immigration Decisions, and Making Global Human Rights Obligations Relevant to AI Governance,* INTERNATIONAL JOURNAL ON MINORITIES AND GROUP RIGHTS (2020)

[53] *Impact of Digital Technology on Discriminatory Policies in the Border Management*, MAAT FOR PEACE, DEVELOPMENT AND HUMAN RIGHTS (May 2020).

V. CRITICAL ANALYSIS

As a result of the rapid advancements being made in artificial intelligence technology, there is an urgent requirement for in-depth research into the plethora of threats, challenges, and possibilities that are posed to the safety of the nation. The imperative of global cooperation emerges as a key theme, emphasising the necessity for nations to collaborate in establishing common standards, sharing best practices, and constructing frameworks for responsible AI use. This collaborative approach aims to prevent a disjointed, unregulated landscape and foster a unified response to potential threats. The dual-use nature of AI technology surfaces as a critical aspect, prompting an exploration of the ethical implications associated with innovations having both civilian and military applications. This necessitates discussions involving diverse stakeholders to ensure a balanced consideration of dual-use scenarios. As a result of its application as a tool for weaponisation, AI has the potential to modernise the military entirely. This would make it feasible to automate weapon systems and strengthen the military's capability for cyber warfare. Hence, AI has the ability to transform the military completely. Given the multifunctional nature of AI, state and non-state actors can exploit AI technologies, raising questions about the reliability of strategic operations and the effectiveness of deterrence. The development of a successful ecosystem for AI has a number of significant issues, including those pertaining to governance, ethics, data bias and regulation. The use of AI systems that are discriminatory and biased has put in jeopardy the human rights that are guaranteed by international conventions such as the International Covenant on Civil and Political Rights, the International Convention on the

Elimination of All Forms of Racial Discrimination, and the Convention Relating to the Status of Refugees, if adequate safeguards are not put into place. The use of AI systems that are biased and discriminatory puts these fundamental human rights at risk. It is of the utmost importance to bear in mind that the execution of international frameworks is only sometimes simple and straightforward. A different interpretation of the law would apply in a number of other scenarios. In addition, there may be challenges related to the deployment of these frameworks. In spite of these obstacles, it is of utmost importance to ensure that AI systems employed for the purpose of border security are developed and implemented in a manner that is compliant with human rights. It is possible to lessen the risks that AI poses to national security by ensuring that these systems are transparent, responsible, and non-discriminatory. This will also increase the possibility that technology will be used to advance human rights. These benefits can be achieved simultaneously. Migrant populations are particularly vulnerable to violations of human rights due to the fact that their nationality, legal position, and economic situation place them in danger. It has been established that AI contributes to the perpetuation of prejudice by routinely producing decisions that are detrimental to some populations. It is possible that a machine, rather than a human, may be employed while evaluating migrants, which raises the possibility that they will not acquire an acceptable individual assessment.

AI algorithms' opaqueness and lack of transparency constitute a significant challenge, particularly for decision-makers who desire assistance comprehending the reasoning behind automated decisions. This misconception is to blame for the general prevalence of doubt regarding implementing automated decision-making systems. In addition, the absence

of international rules limiting the development and deployment of AI-enabled weapon systems, particularly Lethal Autonomous Weapons Systems ("**LAWS**"), raises the possibility of enhanced international competitiveness and an acceleration of the arms race. Understanding the core principles that govern automated decision-making can be difficult due to the opaque nature of AI systems in and of themselves. This lack of transparency presents a significant obstacle for decision-makers, who must work hard to decipher the logic and reasoning underneath the judgements provided by AI systems. Consequently, decision-makers face a significant hurdle. This lack of openness presents a significant challenge for those responsible for making decisions. As a direct consequence of this, questions have been raised regarding the criteria utilised in the automated decision-making process, contributing to a widespread sense of unease and suspicion towards installing such systems. Concerns regarding global security dynamics are made worse by the lack of comprehensive international rules controlling the development and deployment of AI-enabled military weapons, particularly the highly contentious LAWS. This lack of regulation has the potential to increase the likelihood of a catastrophic event occurring significantly. In the fast approaching weapons' race involving AI, there will be a need for well-established laws and processes, which will lead to fierce competition between nations as they try to gain an advantage over one another. This competitive environment not only raises the possibility of the spread of dangerous technologies but also makes it more likely that there will be a disparity between nations, which is inherently unstable. This is due to the fact that countries are engaged in a race against one another to create and deploy AI-enabled military weapons before their rivals. Public perception and acceptance represent another pivotal dimension in the

analysis, with a focus on how societal attitudes towards AI. The perceptions shaped by media portrayals and cultural influences, can impact the acceptance of AI in defence systems. Transparency and ethical considerations play a vital role in building public trust and acceptance of AI technologies. The ethical dimensions of AI in warfare constitute a distinct area of scrutiny, involving discussions on principles governing the development and deployment of autonomous weapons, adherence to international humanitarian law, and the concept of "*meaningful human control*" over AI systems in military contexts. The socioeconomic impact of widespread AI adoption in defence systems emerges as a significant consideration, prompting exploration of potential job displacement, strategies for upskilling the workforce, and the equitable distribution of AI-related benefits. Cultural and regional variances introduce a layer of complexity, underscoring the need to respect diverse perspectives on governance, privacy, and human rights. Unintended consequences associated with the deployment of AI in military and security contexts form another critical focus, necessitating ongoing monitoring, feedback loops, and continuous improvement to address evolving challenges.

In order to put AI into practice in a responsible and productive manner, one must give serious thought to a number of different concepts, recommendations, proposals, and opinions. Civilian oversight and accountability represent crucial aspects of the analysis, emphasising mechanisms for ensuring transparency, ethical use of AI, and the involvement of non-governmental organisations to safeguard against potential abuses within military and intelligence agencies. The application of AI in India faces a significant number of challenges, most notably in the field of national security and especially in the area of border monitoring.

This is due to the fact that AI development is still in its infancy in that region. The misuse of it and the violation of human rights have escalated due to the constraints placed on it by law and technology. India needs to invest in key infrastructure, take advantage of the innovation environment provided by the private sector, and capitalise on the breakthroughs in AI achieved by leading nations to build a climate suitable to AI. Recognising and handling the obstacles and hazards related to AI technology while simultaneously establishing trust through education, policy and regulatory frameworks, and human capital development is vital. This can be accomplished only if one recognises and addresses these issues and dangers. In order for the process of supplying value to defence systems to be successful, the growth of indigenous communities is an absolute necessity. If India promotes the growth of indigenous expertise and innovation, it will be able to expand its capabilities and increase the degree to which it is self-sufficient in the field of defence. In addition, to properly adopt AI technology, cooperation on both a multilateral and bilateral level is essential. Activities involving collaboration, such as cooperative technology creation, technology sharing, and active engagement in global policy formulation and standardisation, have the potential to encourage innovation, resolve shared challenges, and guarantee the ethical and responsible utilisation of AI across borders.

VI. CONCLUSION

The integration of AI within the field of security has unveiled indications of its intricacy and the necessity for sufficient readiness to assimilate it. The ongoing expansion of Al's operations will lead to a heightened level of both threats and opportunities in relation to national

security. Given these circumstances, it is plausible for nation-states and global organisations to perceive AI as a disruptive force, signalling the emergence of a new era reminiscent of the Cold War. The implementation of this approach can be achieved through a collective global endeavour, which aims to avoid exacerbating the already delicate state of global trust. Irrespective of the prevailing conditions, it is imperative for India to actively participate in the burgeoning technological advancements within the defence sector. India ought to formulate a well-defined strategic framework for AI in the context of defence, while considering the strategic, sociological, and cultural implications associated with AI. In order to promote equal digital opportunities and inclusivity for all members of society, it is imperative that the Indian government integrates a culturally appropriate comprehension of algorithmic fairness into the development and deployment of facial recognition technology systems for public purposes. Simultaneously, the principle of corporate responsibility plays a crucial role in shaping the ethical landscape of AI development. Encouraging technology companies to adopt responsible AI practices and adhere to ethical guidelines becomes paramount. Such encouragement can be achieved through proactive engagement with private enterprises, urging them to align their AI development processes with ethical standards. Moreover, establishing partnerships between government bodies and technology companies is pivotal to jointly addressing challenges and collectively ensuring that ethical benchmarks are met. This collaborative effort establishes a framework where the ethical considerations of AI in defence are not only acknowledged but actively integrated into the development and deployment stages. Furthermore, human rights impact assessments emerge as a key component in the responsible development

and deployment of AI systems. To embed human rights considerations into the very fabric of AI technologies, integration of impact assessments becomes imperative. Collaboration with human rights organizations adds an additional layer of independent scrutiny, ensuring that AI applications align with established international human rights conventions. This collaborative process seeks to safeguard against potential infringements on fundamental human rights, fostering an ethical and accountable environment within the development and implementation of AI in defence systems. In essence, these three interconnected pillars, viz., interdisciplinary research and innovation, corporate responsibility, and human rights impact assessments – collectively contribute to a more comprehensive, ethical, and responsible integration of AI within the realm of national security. This entails taking into account factors such as gender, ethnicity, class, caste, and religion. Increased investment will be allocated to develop a supportive system and enhance critical infrastructure. India, recognising the importance of actively participating in technological advancements within the defence sector, must formulate a strategic framework for AI that accounts for strategic, sociological, and cultural implications. This involves a proactive stance in addressing legal and ethical challenges, necessitating collaboration among governments, law enforcement agencies, civil society organisations, and technology companies. Emphasising openness, accountability, and the preservation of human rights, such a framework should adopt a holistic approach, considering the legal, ethical, and social ramifications of modern technologies. The presence of legal and ethical challenges necessitates the establishment of a collaborative framework among governments, law enforcement agencies, civil society organisations, and technology companies. This framework aims to effectively utilise digital

tools in the context of border patrol. This framework should stress upon openness, accountability, and the preservation of human rights. It should also be based on an all-encompassing approach that considers the legal, ethical, and social ramifications of modern technologies.[54] Technology, as seen from above, is everything but neutral. It represents societal norms, ideals, and power. Technology develops in certain areas that are not accessible to everyone, and its benefits are not distributed fairly.[55] Decisions about implementation are made without consultation, and in certain cases, without the consent of the impacted parties.[56] There is also deliberate misunderstanding surrounding the growth of technology, which serves to conceal debate, regulation, and any incursions into innovation that lead to profit.[57] In order to guarantee that the technology will be applied in a manner that does not infringe upon the rights of individuals, human rights frameworks can be used to direct its development and application.[58] Ongoing dialogue between governments, technology developers, civil society, and other stakeholders is essential to navigate the evolving landscape of AI in security while safeguarding human rights and promoting ethical practices.

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[54] Ruben Andersson, Ti*me and the Migrant Other: European Border Controls and the Temporal Economics of Illegalit*y, 116(4), AMERICAN ANTHROPOLOGIST, 795-808 (2014).
[55] Madianou, *supra* note 28.
[56] Molnar, *supra* note 35.
[57] E. Benevenisti, *EJIL Foreword: Upholding Democracy Amid the Challenges of New Technology: What Role of Global Governance?,* THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (Global Trust Working Paper No. 13/2018, Jan. 2018)
[58] *Id.* at 16.

Dr. Ajay Kumar Sharma, *Mass Torts by Multinational Corporations is the Indian Tort Law Regime Adequately Equipped,* 10(1) NLUJ L. REV. 79 (2024).

MASS TORTS BY MULTINATIONAL CORPORATIONS: IS THE INDIAN TORT LAW REGIME ADEQUATELY EQUIPPED?

~ Dr. Ajay Kumar Sharma *

ABSTRACT

*Four decades ago, India suffered the world's deadliest industrial disaster till date, the Bhopal catastrophe, due to a toxic gas leak by an Indian subsidiary of a United States ("***US***") Multinational Corporation ("***MNC***"), the Union Carbide Corporation ("***UCC***"). What was the state of law and the judicial responses in the US and India at that time? An exploration of the writings of Professors Baxi and Galanter is indispensable while seeking an answer to this historical question. Did the law and policy to deal with the mass torts including, the industrial disasters evolve in India after this tragedy? Is it efficacious at present to deal with the current and future challenges of mass torts, particularly posed by foreign MNCs having business operations in India? These are some challenging and pressing questions that this Article attempts to analyse and answer.*

Mass Torts risks pose a challenge to the host states, particularly from the Global South, which need to efficaciously protect the rights and interests of their various domestic

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*stakeholders by creating preventive legal and institutional safeguards, apart from creating swift and effective remedial mechanisms triggered after such tortious acts. At the same time, these host states need to delicately balance their preceding concerns with an economic policy of continuing to attract foreign MNCs and the much-needed foreign direct investment ("***FDI***") by such MNCs, by affording them requisite protection under the domestic and international legal instruments. Examining India's Model Bilateral Investment Treaty ("***BIT***") of 2015 and the subsequent developments in India's BIT Programme also helps understand India's economic policy in this domain. This Article deconstructs and demystifies the preventive and remedial law and policy framework and the measures taken by India to deal with the above challenges.*

Towards the end, this article indulges in a critical analysis of the pertinent provisions of the Factories Act of 1948, the Public Liability Insurance Act of 1991, the recently enacted Occupational Safety, Health and Working Conditions Code of 2020, and the Consumer Protection Law & Practice. A legal analysis of some important attributed inhibiting factors to Tort Litigation in India like, the court fees, litigation delays and, prohibition upon lawyers for charging contingency fees is also helpful to understand the law and policy landscape. Insights into comparative law, by comparing with the position in the United States, and appreciating the inter-disciplinary 'law and economics' approach to deal with the mass tort challenges can offer valuable lessons and are thus provided here. This is followed by the conclusion and pointed suggestions for Indian law and policymakers.

TABLE OF CONTENTS

I. INTRODUCTION 82
II. THE BHOPAL DISASTER: ADEQUACY OF INDIAN LEGAL SYSTEM THEN 84
III. THE MARCH OF LAW POST BHOPAL DISASTER: ADEQUACY OF THE INDIAN LEGAL SYSTEM NOW 89
A. AMENDMENTS TO THE FACTORIES ACT 90
B. PUBLIC LIABILITY INSURANCE REGIME 96
C. CONSUMER PROTECTION REGIME 103
D. SOME FACTORS INHIBITING TORT LITIGATION IN INDIA 106
IV. HOW TO REGULATE THE MNCS?: SOME INSIGHTS FROM LAW AND ECONOMICS AND INDIAN BIT PROGRAMME 110
V. THE US MASS TORT REGIME AND CHALLENGES 116
VI. CONCLUSION AND SUGGESTIONS 122

I. INTRODUCTION

No one should forget the 'world's deadliest industrial disaster' which happened in the early hours of December 3, 1984 in Bhopal (Madhya Pradesh, India), leading to the death of almost ten thousand people, causing injury to around a quarter of million more, due to a toxic industrial gas leak; crippling many in the future generations, who were born with birth deformities, apart from causing severe and long-lasting environmental damage due to the chemical pollution.[1] The law and institutional mechanisms in India were found wanting to efficaciously address the mass tort of this magnitude, and provide an adequate redressal to the victims then. Have the lessons been learnt by the law and policymakers now? Are the laws and institutions in India adequately equipped at present to effectively deal with such mass torts committed particularly by foreign MNCs? These are some of the key questions that this Article attempts to explore and answer. The term "*mass tort*" lacks formal legal classification; instead, it refers to a scenario where numerous tort claims arise out of a singular incident or the utilisation of a specific product.[2]

This Article is structured in the following manner. The first part discusses the inadequacies in the legal and institutional frameworks that were unravelled in the litigations relating to the Bhopal Gas Tragedy. The writings of both Professors Upendra Baxi and Marc Galanter, who played pivotal activist-cum-academic roles in this matter are examined, apart from

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[1] DOMINIQUE LAPIERRE & JAVIER MORO, FIVE PAST MIDNIGHT IN BHOPAL: THE EPIC STORY OF THE WORLD'S DEADLIEST INDUSTRIAL DISASTER (2002); Upendra Baxi, *Writing about Impunity and Environment: The Silver Jubilee' of the Bhopal Catastrophe*, 1(1) J. HUM. RIGHTS ENVIRON. 23-44 (2010); Anup Dutta, *No End to Victims' Sufferings Even after 30 Years of Bhopal Gas Tragedy*, INDIA TODAY (Nov. 2014), https://www.indiatoday.in/india/north/story/bhopal-gas-tragedy-union-carbide-plant-chemical-229159-2014-11-30.

[2] ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 268 (6th ed. 2016).

some important judicial imprimaturs. It is followed by a section discussing the salient legal reforms to tackle such future challenges that were done by India post-Bhopal catastrophe, and a critical examination of the evolved legal regime.

In this regard, the key provisions of The Factories Act, 1948 (inserted by way of amendments), The Public Liability Insurance Act, 1991 and the recent Occupational Safety, Health and Working Conditions Code, 2020, apart from some other statutory provisions are critically analysed. The judicial response and attitude of the Supreme Court of India are also examined in detail by an elaborate discussion and critique of some landmark decisions relating to mass torts in India. The state of consumer protection law, which may be invoked in certain contexts, is also briefly discussed. At the end of this section, a detailed discussion of certain important factors attributed to inhibiting Tort litigation in India like court fee and prohibition on the lawyers from charging contingency fee are analytically commented upon.

A section on an exploration of the interdisciplinary 'law and economics' approach and the general legal and regulatory issues concerning the MNCs follows. This Article also allows us to gather some insights from the current Indian Bilateral Investment Treaty Programme based on the 2015 Model Bilateral Investment Treaty,[3] which are useful for showing how India is factoring these domestic regulatory concerns in its economic policy. This is supplemented by the penultimate section bringing in the comparative law elements from the US law and policy in this area, to appreciate its mass tort law along with the challenges faced there, drawing

[3] Department of Economic Affairs, Government of India, *Model Text for the Indian Bilateral Investment Treaty* (2015), https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf.

some takeaways for India. The concluding part contains useful suggestions for law and policymakers in India.

II. THE BHOPAL DISASTER: ADEQUACY OF INDIAN LEGAL SYSTEM THEN

The tort law remains largely uncodified in India and mass tort is often a neglected or undermined area in the tort law curriculum in the law schools in India. It remains largely an unchartered territory so far as legal practice and adjudication is concerned in India. The varied reasons for this are lack of interest, apathy, inadequate mass tort legal education and training and, the peculiar, unique and complex nature of mass torts, where the generalised tort law principles have obvious limitations. This is despite the horrific Bhopal Gas Tragedy, which caused mass suffering around four decades ago, as mentioned in the prolegomenon. Hence, the reason for this complacency and apparent indifference in India towards this important area of law practice seems difficult to understand.

The company law, procedural law and private international law concepts *inter alia* imbricate with the tort law when we explore the Mass Tort law, where the tortfeasor is an MNC.[4] Often, the cause of action in such cases can trigger the criminal justice system as well, and thus corporate criminal liability law also assumes importance in such industrial disasters.

One of the prompt, sustained, passionate, and in-depth legal scholarships in response to the Bhopal disaster was by Professor Upendra

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[4] MUZAFFER EROGLU, MULTINATIONAL ENTERPRISES AND TORT LIABILITIES: AN INTER-DISCIPLINARY AND COMPARATIVE EXAMINATION, CORPORATIONS GLOBALISATION AND THE LAW, 1–22, Edward Elgar, 2008.

Baxi.[5] His works on Bhopal Gas Tragedy remain profoundly critical of the inadequacy of the executive and judicial response to this calamity, and the impunity with which the multinational corporations violate the human rights of their mass tort victims first and, then limit their civil and criminal liability on technical grounds on the one hand, and also appreciate the spirit and activism of the 'valiant victims' of the Bhopal Gas Tragedy on the other hand.[6]

This viewpoint is also reflected in the writings of Professor Marc Galanter, a Professor at the University of Wisconsin Law School. He has equally passionately, consistently, and tirelessly worked on the Bhopal Gas Tragedy, beginning with his affidavit submission before the District Court, Southern District of New York ("**SDNY**"), and has initiated the Bhopal digital archive, a repository of documents and publications available on his law school website.[7] His affidavit of December 5, 1985 reveals the shortcomings in the Indian civil litigation system in general and tort law in particular.[8]

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[5] UPENDRA BAXI, INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE (1986); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India II. Country and Area Studies: Asia*, THIRD WORLD LEG. STUD. 107 (1985); UPENDRA BAXI & AMITA DHANDA, VALIANT VICTIMS AND LETHAL LITIGATION: THE BHOPAL CASE, 1990; Upendra Baxi, *Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?,* 1(1), BUS & HUM. RIGHTS J., 21-40 (January, 2016) ("**Baxi: Human Rights**"); UPENDRA BAXI & THOMAS PAUL, MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE, 1986.

[6] BAXI AND DHANDA, *supra* note 5, at i–lxix.

[7] Marc Galanter, *Bhopals, Past and Present: Changing Responses to Industrial Disaster*, 10, WINDSOR YEARBOOK OF ACCESS TO JUSTICE, 151-179 (1990); Marc Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 TEX. INT. LAW J. 273 (1985); Marc Galanter, *Bhopal: Law, Accidents, and Disasters in India*, UNIVERSITY OF WISCONSIN LAW SCHOOL DIGITAL REPOSITORY (Dec. 24, 2023), https://repository.law.wisc.edu/s/uwlaw/page/bhopal-collection: Marc Galanter, *Second M.K. Nambyar Endowment Lecture 2014 on From Bhopal to Saha: The Elusive Promise of Effective Legal Remedy*, 5 J. INDIAN LAW SOC. 139 (2014) ("**Galanter: Bhopal to Saha**").

[8] BAXI AND PAUL, *supra* note 5, at 161.

This detailed affidavit not only shows that the delays and backlog are a "*permanent feature of the Indian legal system*",[9] but also argues that "*[t]ort law in India is undeveloped*", which is substantiated on various other grounds *viz.*, tort claims in India have been discouraged[10] and "*tort doctrine is largely absent*"[11] and undermined by the Indian legal professionals and text writers on the area, for instance it has been stated that "*there are few tort cases and none deal with problems arising from complex technologies*".[12] The inadequancy of the bar has been a contributing factor as it has been noted that the Bar in India lacks investigative skills, requisite experience due to the absence of specialization, and organisational capacity to pursue complex and massive litigation efficiently and effectively.[13] It has been suggested by some commentators, that the Government of India possibly also knew about the potential safety threat due to the extremely hazardous substances in the Union Carbide India Limited ("**UCIL**") plant, as it had accorded approval for this foreign collaboration, and also reportedly, prior to the Bhopal disaster the central and state governments overlooked safety hazards issue raised in the media reports, and by the UCIL workers' union in its protests.[14]

In his introduction of the 'Valiant Victims' in 1990, Baxi calls the Bhopal case, conducted till then, the "*second Bhopal catastrophe*".[15] He delineates and analyses the salient arguments of the Union of India in the matter before the SDNY District Court, presided by Judge Keenan in the

[9] *Id.* at 175.
[10] *Id.* at 178–79.
[11] *Id.* at 179–80.
[12] *Id.* at 180–83.
[13] *Id.* at 183–87.
[14] Vijay K. Nagaraj & Nithya V. Raman, *Are We Prepared for Another Bhopal?*, 544 SEMINAR (Dec. 2004), https://www.india-seminar.com/2004/544/544%20nagaraj,%20raman.htm.
[15] BAXI AND DHANDA, *supra* note 5, at i.

United States ,who represented all the victims discharging the *parens patriae* role after enactment of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. Baxi also attempted to make the UCC liable, being in the 'driving seat', exercising control over the latter.[16]

He analysed the UCC's counterarguments which persuaded Judge Keenan to deliver his order of dismissing the case on May 12, 1986, mandating it to the Indian courts on the ground of *forum non conveniens,* finding them to be in a better position to determine the cause of the catastrophe, fix liability, and award damages/compensation apart from stand(ing) tall before the world.[17] Baxi is equally critical of the Indian government's indeterminacy in assessing the scale of human suffering and dimensions of damage before Judge Keenan. The criticism extends to the Supreme Court of India's five-judge bench issued an order endorsing the settlement between the Indian government and the UCC for a sum of USD 470 million for over two hundred thousand Bhopal victims.[18]

A constitution bench of five judges in *Charan Lal Sahu v. Union of India,*[19] ("**Charan Lal Sahu**") upheld the constitutional validity of the above Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 ("**Bhopal Act**") based on the *parens patriae* jurisdiction of the Government of India to represent the Bhopal victims against the multinational corporation before the American Courts. The Hon'ble Supreme Court inferred that the victims under the situation were under a "*disability*", and the State was duty bound to protect and control these persons under disability.[20] The "d*isability*" of

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[16] *Id.,* at iv-vii.
[17] *Id.,* at ii, v–xix.; re: Union Carbide Corpn. Gas Plant Disaster at Bhopal, India in December 1984, 634 F Supp 842 (S.D.N.Y. June 10, 1986).
[18] *Id.* at iii.; Union Carbide Corpn. v. Union of India, (1991) 4 SCC 584.
[19] Charan Lal Sahu v. Union of India (1990) 1 SCC 613.
[20] *Id.* at 650.

the victims here refers to the 'legal disability' in the Hohfeldian sense, which was induced by the Bhopal Act, as indicated in the top court's judgment, which under the circumstances considered the victims as incapable of pursuing their claims 'fully and properly'.[21]

Although it was conceded in *Charan Lal Sahu*, that not giving notice to the victims before entering into the settlement was "*not quite proper*" in accordance with the principles of natural justice, it did not consider it in the "*ultimate interest of justice*" to now give notice for post decisional hearing. It was also considered that the justice has been done to the victims through the said settlement, though not appeared to have been done; and considered, that this was 'one of those rare occasions' where *"[t]o do a great right*" after all, it is permissible sometimes "*to do a little wrong*".[22] Another constitution bench reviewing this decision in the *Union Carbide Corporation* case endorsed this settlement and did not set it aside in review.[23]

In *Mass Disasters*, which was published earlier in 1986, under the auspices of the Indian Law Institute ("**ILI**"), Baxi, the then Director (Research) at the ILI, again solely authored its introduction, like the 'Valiant Victims*'*, and called Bhopal Gas Tragedy, caused by the UCC, an "*industrial Hiroshima*".[24] Baxi even courageously criticised the legendary doyen of the Indian Bar; Nani Palkivala who espoused UCC's stance before Judge Keenan, when he stated, that Palkivala did not consider any relevance of the rule of law for the conduct and operations of MNCs.[25] On the other hand, according to Baxi, raising the 'absolute liability' concept before the

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[21] *Id.* at 650; Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE LAW J. 710 (1917).
[22] Charan Lal Sahu v. Union of India, *supra* note 19 at 705.
[23] Union Carbide Corporation (II) v. Union of India, (1991) 4 SCC 584.
[24] BAXI AND PAUL, *supra* note 5, at i.
[25] *Id.* at iv.

District Court SDNY by the Union of India clearly furthered *"not just the cause of Bhopal victims but also all the emergent values of international justice concretized through instruments of human rights and of the New International Economic Order"*, which in microcosm symbolises the movement of entire Third World in taming the might of the MNCs in dealing with the Third World nations and their peoples.[26]

He thus praises the plaintiff India's submission which emphasised on the "*primary, absolute and non-delegable duty*" of the multinationals towards the people and country in which they cause to be undertaken any "*ultrahazardous or inherently dangerous activity*" submitting, that "*the UCIL was no more than the implementing arm of the UCC*". Thus, he proposes an argument to pierce the corporate veil despite the autonomy and independence of its subsidiary emphasised upon by the parent UCC.[27] This aspect is explored in detail in section IV of this Article.

III. THE MARCH OF LAW POST BHOPAL DISASTER: ADEQUACY OF THE INDIAN LEGAL SYSTEM NOW

Has there been any capacity building, skills acquisition, and attitudinal change as part of the mass tort law and policy reforms in India over the last few decades post-Bhopal Gas Tragedy? Neither the writings of Baxi nor Galanter three decades after the Bhopal catastrophe show any major development in this direction.[28] In fact, the parochial judicial attitude of the Supreme Court of India was reflected in this regard in its more recent verdict in 2011 in the *Uphaar* case,[29] relating to the major fire in a cinema

[26] *Id.*
[27] *Id.* at v.
[28] Baxi: Human Rights, *supra* note 5; Galanter: Bhopal to Saha, *supra* note 7.
[29] MCD v. Uphaar Tragedy Victims Assn., (2011) 14 SCC 481 ("**Uphaar**"); Galanter: Bhopal to Saha, *supra* note 7, at 149.

hall in Delhi in which fifty-nine people died and over a hundred were injured and yet, it substantially reduced the damages awarded by the Delhi High Court. This does not portend well for the quantum of damages awarded to the mass tort victims in India, unlike in the US where punitive damages form a major component of the damages awarded to the victims apart from the compensatory damages, and settlements are also huge.

Thirty years after the Bhopal Gas Tragedy, Baxi is equally disenchanted with how the Bhopal case(s) ran in India, terming the Supreme Court settlement orders as "*scandalous*" and, while discussing the four Bhopal catastrophic moments ("**The four Bhopal catastrophes**") he laments the lack of hard laws for making the MNCs morally responsible and legally liable for their actions.[30] Let us now critically explore legislative developments after Bhopal Gas Tragedy.

A. <u>AMENDMENTS TO THE FACTORIES ACT</u>

We now begin the discussion on the salient legislative developments post-Bhopal Gas Tragedy to tackle the safety and environmental issues caused due to the hazardous industries. First, the Factories Act of 1948 ("**Factories Act**") was amended in 1987 ("**1987 Amendment**") and *inter alia* Chapter IVA entitled 'Provisions relating to Hazardous Processes' was inserted in the said legislation.[31] The term 'hazardous process', which was defined for the first time in the Factories Act of 1948, encapsulates any process or activity, relating to an industry specified in the First Schedule, which, without proper precautions, could lead to significant health impairment among workers or environmental

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[30] Baxi: Human Rights, *supra* note 5.
[31] The Factories Act 1948, No. 63, Acts of Parliament, 1948, Chapter IVA.

pollution.[32] The definition of the 'occupier' in Section 2(n) was also modified to include within its ambit any one of the directors of the company that controls the affairs of the factory.[33]

The 1987 amendment brought the following salient amendments to the Factories Act of 1948 in Chapter IVA:

a. Provision was introduced for the State Government to constitute a 'site appraisal committee' with the statutorily prescribed officials and representatives from the various departments to inspect the sites for initial setting up or expansion of factories involving hazardous processes.[34]
b. Section 41B very importantly introduced a legal obligation on the 'occupier' of such a factory to make certain disclosures relating to the hazardous processes involved in the factory to various stakeholders including, the designated government officer, the workers of that factory, the local authority and the general public in the vicinity. Similarly, the said Section provides for the occupier's obligation to lay down and make disclosures of a detailed policy concerning the health and safety of the workers in such a factory; an on-site emergency plan and detailed disaster control measures for such factory; and lay down previously government approved measures for "*handling, usage, transportation and storage of hazardous substances inside the factory premises*" and their disposal outside it, with publicity of the same in the prescribed manner to "*the workers and the general public living in the vicinity*".[35]

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[32] *Id.,* § 2(ca).
[33] *Id.,* § 2(n).
[34] *Id.,* § 41A.
[35] *Id.* § 41B.

c. Various other specific responsibilities were also prescribed on the occupiers of such factories through the above amendment.[36]

d. Under Section 41D, the Central Government in an extraordinary situation involving such a factory can constitute an 'inquiry committee' for inquiring into the *"standards of health and safety observed in the factory with a view to finding out the causes of any failure or neglect in the adoption of any measures or standards prescribed for the health and safety of the workers employed in the factory or the general public affected, or likely to be affected, due to such failure or neglect and for the prevention and recurrence of such extraordinary situations in future in such factory or elsewhere."*[37]

e. As per Section 41E the Central Government "*may direct the Director-General of Factory Advice Service and Labour Institutes or any institution specialised in matters relating to standards of safety in hazardous processes*" to lay down 'emergency standards', having statutory standing of the Rules, until rules in this regard are made, if the current standards of safety with regard to a hazardous process or a class thereof is inexistent or inadequate.

f. Section 41-F prescribes in the Second Schedule to the Factories Act permissible limits (as amended from time to time on the basis of expert advice) the "*maximum permissible threshold limits of exposure of chemical and toxic substances in manufacturing processes (whether hazardous or otherwise) in any factory*". For example, Methyl isocyanate ("**MIC**") Skin permissible limits of exposure in time-weighted average concentration (8 hours) in the said schedule is 0.02 ppm and 0.05

[36] *Id.* § 41C.
[37] *Id.* § 41D.

mg/m³. Just to put this in perspective, 47 tonnes of MIC was released on December 3, 1984 in Bhopal Gas Tragedy.[38]

g. The Factories Act now also provides for the workers' participation in the safety management in such factories with equal representatives of both workers and management in the 'safety committee' to be constituted by the 'occupier' of such a factory for "*maintaining proper safety and health at work and to review periodical the measures taken in that behalf*".[39]

h. As pointed out above, though the UCIL workers' union warnings went apparently unheeded prior to the Bhopal Gas Tragedy, now the Factories Act statutorily recognises the right of workers to warn about imminent danger.[40]

i. Contravention and failure to comply with Sections 41B, 41C and 41H are made punishable with mandatory imprisonment of up to seven years and a prescribed fine, and the punishment is enhanced further if contravention continues.[41]

j. Section 7-A, which was also inserted through the 1987 Amendment, imposes certain 'general duties' on the occupier of all factories to ensure, "*as far as it is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory*". The general penalty provision prescribing certain imprisonment terms and/or fines for contravention of the provisions of the Factories Act is contained in Section 92.

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[38] Baxi, *supra* note 1, at 23.
[39] *Supra* note 31, § 41G.
[40] *Id.* § 41H.
[41] *Id.* § 96A

Despite the 1987 Amendment(s) in the Factories Act there has been criticism by some commentators, who view the law in Section 118, which remains unamended, as antithetical to the said Chapter IVA, as it punishes an inspector with specified imprisonment and/or fine, except for certain statutorily recognised exceptions, to disclose information "*relating to any manufacturing or commercial business or any working process*", without previous written consent of the owner, if such information has come to the inspector's knowledge in course of official duties.[42] This criticism loses sight of the fact, that Section 118 exempts disclosures "*in connection with the execution, or for the purposes*" of the Factories Act. Thus, the discharge of statutory duties by the inspector is not punishable as an 'unauthorised disclosure'. Further, immunity from civil, criminal and other legal proceedings is provided for under Section 117 to protect all persons for anything done or intended to be done by them in good faith under this Act. However, the criticism of the Factories Act in spite of the 1987 Amendment(s) on the ground that it has not "*made it mandatory for industry to disclose all information that may help mitigate the effects of the disaster*" is reasonable.[43]

The Factories Act is slated to be repealed in the near future, after notification of The Occupational Safety, Health and Working Conditions Code, 2020 ("**2020 Code**") enacted by the Parliament, receiving Presidential assent on September 28, 2020.[44] The preliminary reading of the 2020 Code shows a more extensive coverage of the above subject matter in comparison to the Factories Act. For example, 'hazardous' is generally defined to include within its ambit both danger as well as potential danger,

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[42] Nagaraj and Raman, *supra* note 14; The Factories Act, 1948, *supra* note 31, § 118.
[43] Nagaraj and Raman, *supra* note 14.
[44] The Occupational Safety, Health and Working Conditions Code, 2020, No. 37, Acts of Parliament, 2020, https://dgfasli.gov.in/sites/default/files/2018-12/OSH_Gazette.pdf.

and both 'hazardous process' and 'hazardous substance' are defined separately.[45]

One other change is in respect of the requirement of having 'Safety Officer(s)' in the factories, which under the Factories Act as per Section 40B, was a requirement imposed as per the discretion of the state government *inter alia* "*wherein, in the opinion of the State Government, any manufacturing process or operation is carried on, which process or operation involves any risk of bodily injury, poisoning or disease, or any other hazard to health, to the persons employed in the factory*". The *pari materia* provision in the 2020 Code under Section 22 applying to an 'establishment' (not merely a 'factory') *inter alia* requires the appointment of such number of safety officers as prescribed by the 'appropriate government' in case of a "*factory carrying on hazardous process wherein two hundred fifty workers*" work.

Though the mandatory nature of the new provision is an advance, the threshold requirement of two hundred fifty workers in such establishments that carry on hazardous processes is a retrograde step. Another important observation is that, though there are *pari materia* provisions in the 2020 Code imposing the duties on the 'occupier' of the factory involving a hazardous process, the penalty for contravention of these provisions has been reduced from the imprisonment extendable to seven years, as discussed above, to a mere monetary penalty which would vary from fifty thousand rupees to one lakh rupees.[46] This radical mollification of penalty may appear to be pro-business, but it does not move in the direction of making hazardous industries more responsible by creating an effective deterrence to ensure statutory compliance.

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[45] *Id.* § 2.
[46] *Id.* § 97.

B. PUBLIC LIABILITY INSURANCE REGIME

Now, let us converge our attention to the enactment of another important legislation post Bhopal Gas Tragedy by the Indian Parliament *viz.,* The Public Liability Insurance Act of 1991 ("**1991 Act**").[47] This legislation has been considered as a legislative sequel to the landmark *Oleum Gas Leak* case decided by a constitution bench of five justices of the Supreme Court on December 20, 1986.[48] This judgment dealing with another gas leak in Delhi, a year after the Bhopal Gas Tragedy, was initiated through a Public Interest Litigation ("**PIL**") under Article 32 of the Indian Constitution, and is attributed as the originator of 'absolute liability', which departed from the strict liability principle of the mid-19th century case of *Rylands v. Fletcher*.[49] Before discussing the 1991 Act, let us succinctly discuss the strict liability and absolute liability principles. As summarised in the *Oleum Gas Leak* case, under the rule in *Rylands v. Fletcher*, strict liability is imposed when any person brings and keeps hazardous item onto their land that could cause harm if it escapes, making them accountable for ensuing damages, irrespective of their awareness, knowledge or intentional actions related to its release, save for certain exceptions like natural presence, acts of God, or statutory permissions.[50]

And then, boldly departing from the 'strict liability' principle, the Supreme Court in the same case introduced the 'absolute liability' ("**Mehta Principle**"), emphasizing that 'hazardous or inherently dangerous' industries owe 'an absolute and nondelegable duty to the community' to ensure utmost safety, being absolutely liable for any harm resulting from

[47] The Public Liability Insurance Act, 1991, No. 6, Acts of Parliament, 1991.
[48] M.C. Mehta v. Union of India, (1987) 1 SCC 395 ("**Oleum Gas Leak**")
[49] Rylands v. Fletcher, UKHL 1 (1868) (House of Lords).
[50] M.C. Mehta v. Union of India, *supra* note 48, at 419.

their hazardous activities, irrespective of precautions or lack of negligence.[51] The Supreme Court of India after reaffirming the strict and absolute liability of corporations conducting such hazardous activities, stated their obligation to compensate all affected by resulting harm without exceptions, and highlighted that the compensation should correspond with the enterprise's scale and prosperity for a greater deterrent effect.[52]

However, surprisingly, this salient indigenous contribution in the form of 'absolute liability' to the tort law in India was viewed as a mere *obiter* by the Supreme Court in the previously mentioned *Union Carbide Corporation Case*, or *Oleum Gas Leak Case* where *"no compensation was awarded as this Court could not reach the conclusion that Shriram (the delinquent company) came within the meaning of "State" in Article 12 so as to be liable to the discipline of Article 21 and to be subjected to a proceeding under Article 32 of the Constitution"*.[53]

Thus, in the *Union Carbide Corporation case*, the Supreme Court viewed the above excerpts in *Oleum Gas Leak case* as merely a "*good guideline for working out compensation in the cases to which the ratio is intended to apply*".[54] A two-judge bench in *Indian Council for Enviro-Legal Action* Case, through B.P. Jeevan Reddy, J., expressed some disagreement with the preceding observation on the *Oleum Gas Leak* case in the concurring judgment of the then Chief Justice of India Justice Ranganath Misra in the above *Union Carbide Corporation* case, stating, *"we on our part find it difficult to say, with great respect to the learned Chief Justice, that the law declared in Oleum Gas Leak Case is obiter."*[55]

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[51] *Id.* at 420-21.
[52] *Id,* at 421.
[53] Union Carbide Corporation (II) v. Union of India, *supra* note 23, at 607-08.
[54] *Id.* at 608.
[55] Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 SCC 212 ("**Indian Council for Enviro-Legal Action**").

The National Green Tribunal ("**NGT**") based on the media reports took *suo moto* cognisance of the Styrene gas leak that happened during the early hours of May 7, 2020, from the LG Polymers Chemical Plant at Vishakapatnam, Andhra Pradesh that led to the death of 11 people and hospitalisation of over 100 persons apart from environmental damage.[56] Despite prompt action by the NGT under the NGT Act of 2010 in this incident, which somewhat resembles the Bhopal Gas Tragedy and could have been of similar magnitude had the leaked gas been similar in nature and toxicity to the MIC,[57] invoking the 'strict liability' principle instead of 'absolute liability' doctrine by the NGT has led to its criticism, being a step backwards.[58] Baxi concludes his recent article by proposing that India should stress upon 'absolute liability' of hazardous MNCs as a core justice and human rights principle.[59]

As India had accepted the Code of Conduct on Transnational Corporations based on the report of the Commission on Transnational Corporations established by the U.N. Economic and Social Council the Supreme Court in *Charan Lal Sahu c*ase recommended to the Government of India, that *"…it is necessary that the Government should take effective measures to translate the provisions of the Code into specific actions and policies backed by appropriate legislation and enforcing machinery to prevent any accident or disaster and to secure the*

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[56] In re: Gas Leak at LG Polymers Chemical Plant in RR Venkatapuram Village Visakhapatnam in Andhra Pradesh, (O.A. 73/2020, National Green Tribunal, Prinicipal Bench, New Delhi, Order of May 8, 2020).
[57] Dhara, *35 Years Later, Bhopal Gas Leak Failures Resurface in Vizag*, HINDUSTAN TIMES (May 8, 2020), https://www.hindustantimes.com/india-news/35-years-later-bhopal-gas-leak-failures-resurface-in-vizag/story-blOMncph2Az8RJO4yKTvUO.html.
[58] Filzah Belal, *Bhopal Gas Tragedy to the Vizag Gas Leak: Reducing Liability on Enterprises in India*, THE ROUNDTABLE (PENN UNDERGRADUATE LAW JOURNAL) (Jul. 8, 2020), http://www.pulj.org/4/post/2020/07/bhopal-gas-tragedy-to-the-vizag-gas-leak-reducing-liability-on-enterprises-in-india.html.
[59] Baxi: Human Rights, *supra* note 5, at 37.

welfare of the victims of any industrial disaster"..[60] The long title of The Public Liability Insurance Act, 1991 ("**PLIA**") reads: *"An Act to provide for public liability insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance and for matters connected therewith or incidental thereto"*.

This legislation through Section 4 obligates an 'owner' to take out an insurance policy, of not less than 'paid-up capital' of the undertaking handling hazardous substances and up to a maximum of fifty crore rupees, before handling any 'hazardous substance' to cover its 'no fault' liability imposed under Section 3 towards any person (other than the workmen) who dies, suffers 'injury' or whose property is damaged as a result of an accident while handling 'hazardous substance'. As the term 'hazardous substance' in the PLIA incorporates by reference the definition of the term in the Environment (Protection) Act, 1986 and that too exceeding the quantity specified in its notification by the Government of India,[61] there is a justified criticism by some commentators that PLIA unjustifiably excludes victims of accidents caused by un-notified hazardous substances.[62]

Also, since the insurance companies were reportedly reluctant to provide insurance without the ceiling on overall liability to provide the interim compensation under PLIA, the 1992 amendment fixed the ceiling to fifty crore rupees (around USD 65 million) as above. Apart from the premium paid for the said insurance the 'owner' is obligated to pay to the insurer (i.e., the insurance company) such sum as prescribed, but not

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[60] Charan Lal Sahu v. Union of India, *supra* note 19 at 713.
[61] The Public Liability Insurance Act, 1991, *supra* note 47, § 2(d).
[62] S.N. Singh, *Public Liability Insurance Act 1991-Scope for Making Provisions More Effective*, 5 CORP. LAW ADVIS. 233 (1991); Vikram Raghavan, *Public Liability Insurance Act: Breaking New Ground for Indian Environmental Law*, 39 J. INDIAN LAW INST. 96 (1997).

exceeding the premium of the insurance policy, to be credited to the 'Environment Relief Fund' ("**ERF**") established by the government.[63]

In pursuance of Section 7A (inserted in 1992) of the PLIA, the central government established the said Relief Fund, and formulated a scheme managed and administered by a fund manager, which is a certain government insurance company.[64] The award of relief under the PLIA ordered by the Collector, disposing of the claim within three months, can require payment up to the limit prescribed by the insurer; from the 'environment relief fund'; and ultimately, from the 'owner'.[65] The payment under the award of relief is to be first met by the insurer under the insurance policy, and if it exceeds the total amount of insurance then payment has to be made from the ERF; and even then if it falls short, then it has to be paid by the owner.[66] An important point often missed is, that the interim compensation paid from the ERF to the injured victims or the legal representatives of the deceased persons has to be refunded upon payment of the award of compensation later on, and an undertaking in this regard is to be furnished at the time of receiving the relief from the relief fund under PLIA.[67]

Despite the overall ceiling of fifty crore rupees on the insurance policy to be taken out by the 'owner' the liability of the insurer (i.e., insurance company) under a policy is limited in one accident in one year or during the currency of the policy, whichever is less, to only five crore

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[63] The Public Liability Insurance Act, 1991, *supra* note 47, § 4(2C).
[64] *Id.* at § 7A; Ministry of Environment and Forests, Government of India, Environment Relief Fund Scheme, 2008, G.S.R. 768 (Nov. 4, 2008), https://upload.indiacode.nic.in/showfile?actid=AC_CEN_16_18_00006_199106_1517807323502&type=rule&filename=GSR_768_E.pdf.
[65] The Public Liability Insurance Act, 1991, *supra* note 47, § 7.
[66] The Public Liability Insurance Rules, 1991, Rule 10(3).
[67] Environment Relief Fund Scheme, 2008, *supra* note 64.

rupees, and fifteen crore rupees in aggregate for multiple accidents in the said period.[68] Though arguably this aggregate relief may be adequate to cater for the mini-Bhopals, that are a regular occurrence in India,[69] this ceiling may make the interim remedy under the PLIA insufficient in large industrial disasters, like the Bhopal Gas Tragedy. The mere prospect of 'immediate payment of minimal amounts as an interim measure' [70] in the PLIA should not lead us to accept uncritically the said ceiling. The Constitution Bench in the *Union Carbide Corporation* Case (to approbate the settlement reached) conceded the protracted and sluggish nature of India's civil justice system, foreseeing a prolonged litigation of around two decades for the litigation, if it were to continue, thereby affirming the systemic impediments and intricacies as formidable barriers to prompt justice delivery, even in exceptional incidents such as the Bhopal Gas Tragedy.[71]

The aforementioned overall ceiling is also matched with the ceiling of relief under PLIA to the individual victims under the Schedule to the PLIA. At present, it caps relief for each individual victim of fatal accidents to Rs 25,000 (around USD 304 at present) apart from medical reimbursement capped at Rs 12,500. Of course, persons who suffer permanent disability or a lesser injury get even a lesser specified amount. For loss of wages the capping of relief is of Rs 1000 per month (around USD 12 at present) for 3 months maximum, and the relief for damage to private property is capped at Rs. 6000 (around USD 73 at present).

Now, let us judge the adequacy and reasonableness of these ceilings of relief under PLIA, in light of the above observations of a five-judge

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[68] The Public Liability Insurance Act, 1991, *supra* note 47, § 4 (2B); The Public Liability Insurance Rules, 1991, *supra* note 66, Rule 10.
[69] Nagaraj and Raman, *supra* note 14.
[70] *Id.*
[71] Union Carbide Corporation (II) v Union of India, *supra* note 23, at 608-09.

bench of the Apex Court decades ago in the unprecedented Bhopal Gas Tragedy case. Putting these scheduled capping in PLIA in perspective, the minimum wage per day even under the Mahatma Gandhi National Rural Employment Guarantee Act of 2005, which guarantees at least 100 days of wage employment to at least one member of a rural household in India, varies from Rs. 204-333 in the different states and union territories in India.[72] One would expect to procure nothing more than a rudimentary home appliance for Rs 6000 in the present day.

Even around a decade ago, the median out-of-pocket medical and non-medical expenditures for a pedestrian involved in a road accident in Hyderabad (India) was estimated to be USD 169 and USD 163 respectively.[73] Most importantly, though these rates of statutory damages may have been material in 1991, they have become illusory after 30 years, and the executive through the legislature has lost sight of amending them.[74] In fact, the cumulative inflation in India from 1992 until 2021 has been 583.9%; and so, the value of Rs 25,000 in 1992 would be equivalent to Rs 1,70,975 in 2021.[75] So, these fixed individual reliefs under PLIA, which have remained static, are quite inadequate. There has been a criticism also on the account, that the compensation under PLIA particularly for death is paltry in comparison to the one available under the ordinary labour laws, as well as given to road accident victims under the motor vehicle laws and to those

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[72] The Mahatma Gandhi National Rural Employment Guarantee Act, 2005, No. 42 of 2005, S.O. 1427(E) [Ministry of Rural Development, Government of India] 2022.

[73] G Anil Kumar et al., *Burden of Out-of-Pocket Expenditure for Road Traffic Injuries in Urban India*, 12 BMC HEALTH SERV. RES. 285 (2012).

[74] Debadityo Sinha, *The Management of Environment Relief Fund*, VIDHI CENTRE FOR LEGAL POLICY (2020), https://vidhilegalpolicy.in/wp-content/uploads/2020/06/Management_of_ERF_Debadityo_Sinha_VCLP_2020.pdf.

[75] Value of 1992 Indian Rupees today, INFLATION TOOL, https://www.inflationtool.com/indian-rupee/1992-to-present-value.

who die in railway accidents under the railways law.[76] Thus, reasonably putting questions on the efficacy of the relief under the PLIA.

There are penalty provisions though, for non-compliance with the provisions of the PLIA, and a mandatory imprisonment for the repeat offenders.[77] Corporate criminal liability is also provided for in PLIA.[78] Despite this, implementation of PLIA, according to its administrative ministry *viz.,* Ministry of Environment, Forest and Climate Change, is a challenge, and many owners appear to have failed in their obligation under PLIA to take out insurance policies, as prescribed; and there was no expenditure from the ERF till March 2019 in spite of accumulated corpus having reached INR 810 crore, apart from no comprehensive records of the accidents covered by the PLIA.[79]

C. CONSUMER PROTECTION REGIME

Now let us digress a little bit into the consumer law in India to see the trend in the individual tort cases arising thereunder in India. A salient legislative achievement in India was the enactment of the Consumer Protection Act, 1986, now repealed after the 2019 Act came into force. The coverage of the 1986 Act was largely limited, and class actions under the Act were unheard of, though a separate redressal machinery based on largely informal procedure was statutorily created. Unlike the 1986 Act, the 2019 Act has provisions relating to addressing the 'violation of rights of consumers as a class'. But it remains to be seen how mass tort cases affecting the consumers as a class will be handled under the new Act.

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[76] Raghavan, *supra* note 62, at 111; Singh, *supra* note 62, at 236.
[77] The Public Liability Insurance Act, 1991, *supra* note 47, at §§ 14, 15.
[78] *Id.*, at § 16.
[79] SINHA, *supra* note 74, at 1.

The practice under the 1986 Act showed, that the large individual cases after a tedious litigious journey through the tiers of forum ultimately land up before the Apex Court, the Supreme Court of India. Here two cases viz., of *Prashant Dhanaka,*[80] and *Saha,*[81] need to be discussed briefly. In the former case, the Supreme Court's three-judge bench awarded a paraplegic medical negligence victim the highest compensation paid to such a victim till then, rupees ten million. In the latter case, discussed in detail by Galanter, among an Indian-American couple the wife died due to medical negligence, and the husband after a long consumer litigation of around *fourteen years* including the remand of the case to the National Consumer Disputes Redressal Commission ("**NCRDC**") by the Hon'ble Supreme Court, and later an appeal back to the Supreme Court against the NCRDC decision, awarded around eighty million rupees with certain interest ultimately.[82] Galanter astutely contrasts the Bhopal case with *Saha* juxtaposing them, highlighting their differing valuation of lives: Bhopal underscored the low monetary worth of Indian lives, whereas *Saha* portrayed a high value placed on an Indian life in an American setting, prompting an inquiry about the potential application and transferability of this evaluation within India.[83]

Based on the preceding discussion let us now contemplate on some probable reasons for the low compensation awarded to the Indian victims in practice. Is it possible that our judges' mindset is still shackled by the facts of low per capita income and high poverty in the country at the time of awarding compensatory relief? The estimation of economic productivity,

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[80] Nizam Institute of Medical Sciences v. Prasanth S. Dhananka, (2009) 6 SCC 1.
[81] Balram Prasad v. Kunal Saha, (2014) 1 SCC 284.
[82] *Id.*; Galanter: Bhopal to Saha, *supra* note 7, at 150–52.
[83] Galanter: Bhopal to Saha, *supra* note 7, at 151–52.

value of life and health of a victim then may get pegged to these facts. The so-called exemplary or punitive damages/compensation also appears to be moderate when compared to the US practice. The relevant question to be raised then is the significance of this criterion whilst awarding damages more so, the punitive damages, particularly when the same MNC is having operations in India and abroad say, in the US.

This posits the next issue viz., the concern and doubt that with the current attitude of the Indian Judiciary a large MNC, like Union Carbide may negligently cause a tortious genocide in India and can escape lightly after paying a moderate compensation by the US standards, after years of incident. Delays and enforcement problems of the Indian legal and judicial system being well known, they are also exploited advantageously by the corporate injurer defendant. Galanter also opines about the Indian courts that, "…*judges often feel so fearful of bestowing windfalls that they keep levels of awards too low to project strong deterrent signals.*"[84]

He rightly points out, that there is 'too little deterrence of tortious conduct' in India presently, and for causing useful deterrence 'enhanced', 'substantial' and 'quick' recovery of damages from the violators and providing help to the injured need to be done, which would require a 'thoroughgoing reform of judicial and professional practices', perhaps by introducing certain experimentation and pilot projects in this regard.[85] Baxi showed some optimism for the Bhopal victims seeking additional compensation after the revival of a 2010 curative petition by the Central Government in October 2022.[86] But, he was disappointed later on at its

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[84] *Id.,* at 154.
[85] *Id.,* at 156.
[86] Upendra Baxi, *Redemption in Bhopal*, THE INDIAN EXPRESS (Dec. 2, 2022), https://indianexpress.com/article/opinion/columns/four-decades-on-bhopal-gas-tragedy-8301245/.

dismissal by the Supreme Court's Constitution Bench, whose order was elaborately critiqued by him.[87]

D. <u>SOME FACTORS INHIBITING TORT LITIGATION IN INDIA</u>

Galanter attributes the reasons for inhibiting tort litigation in India to: steep ad-valorem filing fee i.e., the court fee, the 'long delays' and modest awards, which are often difficult to collect.[88] Galanter also notes, that the mass torts acts are instead usually redressed in India through *ex gratia* payments generally announced and paid by the State without regard to any legal obligation to pay the same.[89] It must be mentioned here that, The Code of Civil Procedure, 1908, the Indian procedural law governing civil suits including, tort actions, does have a provision of "*Representative Suit*" under Order I Rule 8. However, the skepticism is real about its use, and perhaps it has fallen into disuse and remains largely neglected in tort litigation. In most of the above Indian cases, we have seen the writ petition under Article 226 or 32 is filed either by the affected person or by a public-spirited petitioner who files a PIL.

Though steep court fee is not an issue in these proceedings unlike, the ordinary suit, as the violation of fundamental rights under Part III requires seeking the public law remedy against the 'State', as defined under Article 12 of the Indian Constitution, from the Supreme Court and the High Courts, though the High Courts can provide a remedy for violation of legal rights as well while adjudicating a petition under Article 226. The distinction between PIL/writ petition and normal civil remedy ("**suit**")

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[87] Upendra Baxi, *A Lack of Closure*, THE INDIAN EXPRESS (Mar. 22, 2023), https://indianexpress.com/article/opinion/columns/upendra-baxi-on-sc-ruling-on-bhopal-gas-tragedy-curative-petition-where-did-the-constitutional-sympathy-for-the-victims-vanish-8511141/.

[88] Galanter: Bhopal to Saha, *supra* note 7, at 146.

[89] *Id.,* at 147.

should be thus clear. Due to some salient differences in the nature and scope of these actions, though they have some overlap, it can be said that PIL is not a substitute pill for a civil suit instituted for torts. In PIL as well, though compensation has been awarded on several occasions but as aforesaid, it should not be considered as a substitute for a regular suit. Moreover, under the provisions of Order XXXIII of the Code of Civil Procedure, 1908, indigent persons are permitted to file suits in *forma pauperis*, thereby exempting them from the obligation to pay court fees.

Ranganathan, J. in *Charan Lal Sahu* also discusses the need to learn from the 'traumatic experience' of Bhopal and have a 'fresh look at the century old' Fatal Accidents Act, 1855, modeled on the Fatal Accidents Act, 1846 of the U.K. (also known as Lord Campbell's Act) – which has 'undergone a substantial change' though 'our law has remained static' – evolving safeguards for the future, and advising the Central Government "*to insist on certain safeguards before permitting a transnational company to do business in the country*".[90] The 1855 Act however remains as it is even after *Charan Lal Sahu,* permitting the institution of suit for compensation to the family of a person for loss occasioned to it by his death caused by wrongful act, neglect or default which are considered therein as actionable wrongs.[91]

The legal standards also theoretically make a difference to the amount of litigation, as 'strict liability' should lead to more litigation than mere 'negligence' standard.[92] But, it is a paradox, despite the adoption of strict liability and absolute liability doctrines in India there is hardly any mass tort litigation. Galanter argues that there is no basis for presuming

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[90] Charan Lal Sahu v. Union of India, *supra* note 19 at 729.
[91] The Fatal Accidents Act, 1855, No. 13, Acts of Parliament, 1955.
[92] THOMAS F. MICELI, ECONOMICS OF THE LAW: TORTS, CONTRACT, PROPERTY, LITIGATION 44 (1997).

that India is highly litigious, and the congestion and docket pressure in the Indian courts is because of fewer courts and 'deeply ingrained wasteful patterns of indulging delay'.[93] Perhaps the said paradox can be understood by a perceived judicial policy to discourage litigation and encourage settlement. This is apparent from the previously excerpted observations of the Supreme Court in the *Union Carbide* case, where in spite of the case involving an unprecedentedly massive industrial disaster (a mass tort) the Supreme Court tacitly admitted its helplessness to fast-track the tardy adjudicatory process and grant an efficacious relief speedily to the victims. If that is so in a case of the magnitude of Bhopal Gas Tragedy, what is to be expected in the relatively lesser mass torts cases.

Another reason for less tort litigation in India could also be due to the nature of norms governing the professional conduct of the Advocates (the only authorized class of legal practitioners who can litigate in India), which prohibit charging contingency fees by the Indian advocates. Rule 20 of the Bar Council of India Rules on Professional Conduct, Chapter II, Part VI reads: "*An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof*". This prohibition has been perceived as necessary to protect the objectivity of the lawyers, as the officers of the court, and the contingent fee agreements are perceived to hinder the administration of justice tempting lawyers under such agreements to have recourse to unscrupulous tactics in such cases, thereby not only behaving in an unethical manner but also lower the dignity of the noble profession;[94]

[93] Galanter: Bhopal to Saha, *supra* note 7, at 154.
[94] Shubhangi Maheshwari, *Allowing Lawyers to Charge Contingency Fees: Impact on the Legal Services Market*, II GNLU J. LAW ECON. 79 (2019).

and have been held to amount to professional misconduct, meriting severe disciplinary action against the Advocate concerned.[95]

The contingency fee, which is barred and punishable in India due to the above policy reasons, appears to be precisely the motivation for the US attorneys to develop their class action litigation practice in Mass Torts. This historic prohibitive norm is not pragmatic in modern India, as in modern practice the profession of law in essence is like any other legal service industry, a law market and not a mere noble profession, as the courts in India have consistently held to distinguish it from a business.[96]

Contingency fee has been shown to be economically efficient, increases access to justice, decreases the burden on the State providing legal aid under the Legal Services Authorities Act, 1987, solves the principal-agency problem caused due to information asymmetry between an attorney and her client, passes on risks to the lawyer providing the legal service thereby reducing frivolous litigation, and reduces the entry barriers for the new lawyers into the legal services market.[97]

The skepticism in allowing contingent fee agreements appears to be unfounded. Drawing from his American experience, Galanter is in fact, supportive of removing the prohibition on the Advocates in India to enter into contingency fee agreements.[98] In fact, this would have been the incentive for the scores of American attorneys who came to India after the Bhopal catastrophe and went back to institute numerous lawsuits, which were later on consolidated and heard together to be finally dismissed.[99] Baxi,

[95] Rajendra Pai v. Alex Fernandes, (2002) 4 SCC 212; Munni Kuwar v. State of Bihar, 2016 SCC OnLine Pat 2540.
[96] *S*Bar Council of India v. A.K. Balaji, 2018 SCC OnLine SC 214.
[97] Maheshwari, *supra* note 94.
[98] Galanter: Bhopal to Saha, *supra* note 7, at 155.
[99] *Id.,* at 142.

on the other hand, was skeptical of the "*swarm*" of US "*contingency fee lawyers*" who initiated as many as 144 lawsuits for the Bhopal Gas Tragedy victims in the US, and thus he supported and helped author the said Bhopal Act of 1985 that was also "*aimed at short-changing of the Bhopal-violated peoples by the 'King of Torts'*", and thereby in his opinion, "*secure complete justice for them*."[100]

IV. HOW TO REGULATE THE MNCS?: SOME INSIGHTS FROM LAW AND ECONOMICS AND INDIAN BIT PROGRAMME

From the 'law and economics' standpoint, if the injurer tortfeasor suffers no threat of liability for causing injuries to the victims, there will be no incentive for it to take precautions to prevent a mass tort.[101] Most mass torts will fit into the 'unilateral care version' of the accident model where only the injurer can take precautions to reduce the expected damages from an accident.[102] Various statutory obligations imposed on the 'owner' of an establishment in India under the Factories Act and the PLIA for preventing and minimising injuries due to the mass torts caused by accidents in handling hazardous substances, and the risk allocation by insurance have been already discussed above. The liability rules applicable, whether 'no fault', 'strict liability', 'negligence', or 'absolute liability', 'specifies how the damages from an accident will be allocated'.[103] The standard of care imposed on a potential injurer is linked to the costs entailed in taking adequate precautions in this regard, and the fundamental legal policy problem in torts from an economic perspective is to induce the injurer to choose the 'optimal care level' by selecting an appropriate liability rule.[104]

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[100] Baxi, *supra* note 1, at 36.
[101] MICELI, *supra* note 92, at 15.
[102] *Id.,* at 16.
[103] *Id.*
[104] *Id.,* at 16–17.

The initial landmark in economic analysis of tort law for the determination of negligence is of course what is termed as the 'Hand Rule' propounded in the 1947 decision of the US Court of Appeals for the Second Circuit by the Judge Learned Hand.[105] According to the 'Hand Rule' the injurer is negligent if the accident is caused by its failure to take a particular precaution and the inequality $B < PL$ holds, where B is the burden or cost of taking the said precaution which was not taken resulting in the accident, P is the probability of the occurrence of accident because of the failure to take the said precaution, and L is the resultant injury due to the accident.[106] The causal link and the proximity of the negligent act and injury both are to be established generally, unless the plaintiff can successfully invoke the doctrine of *res ipsa loquitur*.[107]

The sophisticated economic analysis of tort law has progressed much beyond the 'Hand Rule' and apart from care, it takes into account the 'activity level' of the injurer to assess the accident risk,[108] as well as the kinds of errors that the courts can make while 'assessing the actual losses of victims'.[109] Litigation costs (relative to the transaction costs) have a bearing on the legal system's ability to 'internalize accident risk' and add a significant dimension to the comparative analysis of the efficacy of the liability rules to mitigate the 'social costs of accidents', and also play a role in promoting settlements in comparison to the court verdicts after the dispute has arisen.[110] Litigation costs also indicate the social desirability of lawsuits in a particular jurisdiction.[111] Posner, Landes and Shavell have lent quite a

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105 United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).
106 MICELI, *supra* note 92, at 20.
107 *Id.,* at 21–24.
108 *Id.,* at 27–28.
109 *Id.,* at 34–35.
110 *Id.,* at 39–40.
111 *Id.,* at 41.

sophisticated economic analysis of accident law.[112] The courts in India including the Supreme Court however have neither examined the tort law from the perspective of economic theory nor discussed the Hand Formula even in a single case.

The MNCs from the developed West can commit the same tortious acts in their home jurisdictions and in the home countries, where they have a business presence through subsidiaries, joint ventures, and branches. While victims within their home jurisdiction often receive appropriate redress, in the host countries situated in the Global South, corporate entities often evade liability or face minimal consequences. This occurs due to deficiencies in regulatory systems, legal and judicial culture and practices, as well as social and cultural norms, deviating significantly from the standards set within their home jurisdiction.

Mass torts in the developing host states are also likely to escape detection in dispersed torts where the malefic effects only appear over a period of time, like in pharmaceutical cases, including the drug trials, asbestos cases, which do not occur suddenly and disastrously as a single incident mass tort like the industrial disasters, like the Bhopal Gas Tragedy, which catch eyeballs instantly. These apprehensions also apply to India. Baxi critiques the current scenario where the MNCs are expected to respect and comply with human rights through 'soft law' instruments and debates about Corporate Social Responsibility ("**CSR**"), though they in fact wield enormous economic and political power, particularly in the Global South, and claim "*immunity and impunity from all socially responsive human rights law and*

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[112] William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. LAW REV. 851 (1980); Steven Shavell, *Economic Analysis of Accident Law (Harvard John M. Olin Center for Law, Economics and Business, Discussion Paper No. 396, Jan. 8, 2003)*, http://papers.ssrn.com/abstract=367800.

jurisprudence" and "*do not regard themselves as either under a moral obligation or legal responsibility for preventing mass disasters they cause.*"[113] The Indian Companies Act, 2013 does impose a CSR statutory duty on the directors to act in "*good faith*" inter alia in the "*best interests*" of "*the community and for the protection of environment.*"[114] Apart from this, a specific CSR spending obligation for each financial year is imposed on certain large companies under Section 135 of the Companies Act, 2013, which must be utilized for a range of statutorily prescribed CSR activities including, '*ensuring environmental sustainability, ecological balance'* and, *'protection of flora and fauna.'*[115]

The concept of limited liability is used to the utmost advantage by the corporations, right after the firm recognition of the separate corporate personality in the *Salomon case*,[116] as one of the incidents of incorporation provided for in the company law. However, the courts later on for more compelling policy reasons have pierced the 'corporate veil' in different cases in the US, the United Kingdom ("**UK**") and India. In certain cases, holding and subsidiary companies have been treated as one by the Supreme Court of India also, if factual scenarios justified such a conclusion; and the lifting of the corporate veil can also go in favour of the company itself.[117]

However, the distinct independent corporate personality principle is usually emphasized upon by the parent multinational to escape its vicarious liability where its subsidiary has committed the Mass Tort, as done by Union Carbide in its written statement in the suit before the Bhopal District Court, where it evoked this principle to submit that it and the UCIL were 'independent corporate entities' and stated: "*there is no concept known to*

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[113] Baxi: Human Rights, *supra* note 5, at 25–26.
[114] Companies Act, 2013, No. 18, Acts of Parliament, 2013, , § 166(2).
[115] *Id.* § 135 and Schedule VII.
[116] Salomon v. A. Salomon & Co Ltd, UKHL 1 (1896).
[117] State of U.P. v. Renusagar Power Co., (1988) 4 SCC 59.

law as 'multinational corporation'" and this phrase "*has no relevance, significance, or legal consequence*" in that suit.[118] However, in the Bhopal disaster case the M.P. High Court in its interim order of relief on 4 April 1988 considered it to be its duty to lift the corporate veil on equitable considerations in that tort which led to a mass disaster and the subsidiary UCIL's assets being "*utterly insufficient to meet the just claims of multitude of disaster victims*."[119]

Baxi points out that the economic policy of the states of the Global South where the foreign capital assumes a lot of importance, and the development model, though may impinge upon the rights of the constitutional have-nots, becomes necessary to have any just distribution; and that the state discourse on these matters is fashioned by the Bretton Woods institutions, the MNCs, and international affairs.[120] In fact, the race between the developing countries, including India to enter into more and more BITs, with an expectation to attract FDI as a host state, has been very much there since the 1990s.

India got out of this race only more recently after it realized through some ISDS arbitral awards against it, beginning with the *White Industries* award,[121] that the BITs may, contrary to the host state's expectations, be used by the individual foreign investors to sue the host state successfully in cases where the apparently pro-investor interpretations of the BIT provisions like, the Most-Favoured-Nation ("**MFN**") clause, and the Fair and Equitable Treatment ("**FET**") clauses by the tribunal can require a developing host state to pay millions of dollars. The knee-jerk reaction that

[118] BAXI AND DHANDA, *supra* note 5, at 61–62.
[119] *Id.,* at 378–79.
[120] Baxi: Human Rights, *supra* note 5, at 27–28.
[121] White Industries Australia Ltd. v. The Republic of India (Final Award), UNITRAL (Nov. 30, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

followed these adverse awards led to the unilateral termination of most of the BITs by India — which of course would still protect the existing investors and their investments in India for years under the sunset clauses contained therein — and radically changing its Model BIT, by changing the focus from investor protection to protecting its own interests as a host state.[122]

Notably, the present 2015 Indian Model BIT in its Art. 32, contains 'General Exceptions' for allowing the host state/contracting party to adopt and enforce measures (i.e., to regulate investors and investment) *inter alia* to protect 'human, animal, or plant life or health' as well as to 'protect and conserve environment, including all living and non-living natural resources'; and to 'ensure compliance with law and regulations that are not inconsistent with the provisions' of the Model BIT.[123] These General Exceptions have now been incorporated in the 2020 India-Brazil BIT, which also has a provision regarding, foreign investment to be in accordance with the 'labour, environmental and health law' of the contracting party, and considers it 'inappropriate' to lower the legal standards in these areas to encourage the foreign investment.[124]

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[122] Prabhash Ranjan, *The Present and the Future of the Indian BIT Programme: Throw the Bathwater, but Keep the Baby*, 14 GLOB. TRADE CUST. J. 372 (2019); Prabhash Ranjan & Pushkar Anand, *More than a BIT of Protectionism*, THE HINDU (Dec. 14, 2016), http://www.thehindu.com/opinion/op-ed/More-than-a-BIT-of-protectionism/article16801222.ece; Prabhash Ranjan, *Bit of a Bumpy Ride*, THE HINDU (Jun. 2, 2016), http://www.thehindu.com/opinion/op-ed/Bit-of-a-bumpy-ride/article14378406.ece.

[123] Department of Economic Affairs, *Model Text for the Indian Bilateral Investment Treaty*, *supra* note 3; Prabhash Ranjan et al., *India's Model Bilateral Investment Treaty: Is India Too Risk Averse?*, BROOKINGS INDIA (Aug. 2018), https://www.brookings.edu/wp-content/uploads/2018/08/India's-Model-Bilateral-Investment-Treaty-2018.pdf.

[124] Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and Republic of India, Brazil & India, Arts. 23, 22, Jan. 25, 2020, https://dea.gov.in/sites/default/files/Investment%20Cooperation%20and%20Facilitation%20Treaty%20with%20Brazil%20-%20English_0.pdf.

The Indian BIT Programme at present appears to have incorporated these key domestic regulatory concerns as its core feature, while at the same time encouraging and protecting foreign investors and the investment made by them in India through the BITs. Only time will tell whether this new model BIT template will succeed while negotiating the future Indian BITs, after the mass unilateral termination of its several previously existing BITs, mentioned above. However, recent empirical research has shown a significant decline in the FDI inflows into India from such countries after India unilaterally terminated its BITs with these countries.[125]

V. THE US MASS TORT REGIME AND CHALLENGES

Before discussing some dimensions of the US Mass Torts Law, it is pertinent to ask, why the author chose the US law for exploring a comparative law dimension on mass tort law. Why are the mass tort law and cases from other Asian countries not chosen for discussion in this section? It is not primarily because of the Bhopal suit that was instituted in the US District Court, discussed earlier, that the focus is on the US law here. In fact, to begin with, during the research for the primary materials on Westlaw Asia the cases and legislation on mass tort from some other Asian jurisdictions viz., Singapore, Malaysia, Indonesia, Korea, Myanmar, Philippines, and Cambodia were searched for, but the search yielded zero results. Thus, presumably, the state of mass tort law in these other Asian nations is not better if not worse than in India, where at least a few court

[125] Gretchen Helmke & Elena V. McLean, *Inducing Independence: A Strategic Model of World Bank Assistance and Legal Reform*, 31 CONFL. MANAG. PEACE SCI. 383 (2014); Simon Hartmann & Rok Spruk, *The Impact of Unilateral BIT Terminations on FDI: Quasi-Experimental Evidence from India*, 18 REV. INT. ORGAN. 259 (2023).

decisions are there on Mass Torts, as discussed above, and that too, primarily because of the Bhopal disaster. The UK does have some cases concerning mass torts, but the research for literature on mass torts shows, that undoubtedly the United States is the most mature and advanced in the mass tort law and policy. Thus, this paper ventures to explore some dimensions of US law.

As an Indian academic lawyer, the excitement about the US Mass Tort Law is also fuelled by the portrayal of the high voltage drama in class action lawsuits in popular works of fiction, like in John Grisham's 'King of Torts' and the Hollywood cinema like, in 'Erin Brockovich,' which shows how the victims of large corporations turn millionaires after an arduous legal struggle ultimately, and these powerful corporate tortfeasors are struck decisive financial blows for their misdeeds. You realise that there is not much gap between the fact and the fiction when you watch the highly inspiring YouTube videos of the popular Harvard Law School lecture 'War Stories' by the leading US attorney, Mark Lanier.[126]

The US Federal Judicial Centre's Manual for Complex Litigation has a dedicated chapter on 'Mass Tort' and classifies a mass tort as:

> "*Mass torts litigation "emerges when an event or series of related events injure a large number of people or damage their property." A mass tort is defined by both the nature and number of claims; the claims must arise out of an identifiable event or product, affecting a very large number of people and causing a large number of lawsuits asserting personal injury or property damage to be filed. … The central question*

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[126] PLMSTube, *Mark Lanier- Tort "War Stories"- Part 1*, YOUTUBE (Jan. 30, 2009), https://www.youtube.com/watch?v=HifU89T8_Wo.

is whether the group of claims, whatever its size, calls for special management."[127]

This comprehensive guidance document helps the US judges to do class certification, class aggregation, use of scientific surveys and polls, epidemiological and toxicological studies, and understand and devise approaches depending on the uniqueness of each mass tort e.g., on the basis of the immediate versus latent effects that a tort produces, whether the mass tort is a single incident one or a dispersed one.[128] There is much need to draft a similar comprehensive and sophisticated document in India to guide the discretion of Judges in India in such complex litigations, suiting our needs and meeting our present and future challenges.

The mass tort bankruptcies (referred to as the 'Judgment-Proof Problem' in the 'law and economics' context)[129] which are prevalent in the asbestos and tobacco cases in the US pose challenges of risks allocation, prioritisation and distribution of claims of the tort claimants (both present and future claimants) and the creditors.[130] Despite the useful takeaways from the US for processing mass tort cases, in recent years it appears that the system there is now perceived to be lopsided in the favour of plaintiffs, who despite the merits of their cases are able to derive settlements due to the long-drawn cases.[131]

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[127]FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, FOURTH, Judge Stanley Marcus et. al. (2004), https://www.uscourts.gov/sites/default/files/mcl4.pdf.

[128] Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 UNIV. PA. LAW REV. 2225 (2000).

[129] MICELI, *supra* note 92, at 36.

[130] Kenneth Ayotte & Yair Listokin, *Optimal Trust Design in Mass Tort Bankruptcy*, 7 AM. LAW ECON. REV. 403 (2005).

[131] Christine G. Rolph & Valerie E. Torres, *Evolution of Mass Toxic Tort Litigation: Texas Levels the Playing Field*, 22 NAT. RESOUR. ENVIRON. 12 (2008).

Thus, what has been perceived as an attempt to prepare a more level playing field, the Texas State Supreme Court in *In re Allied Chemical Corp.* introduced the evidentiary requirement for the plaintiffs to show a 'reliable causation evidence' in the discovery phase itself for maintainability of their mass tort suits, otherwise they would not even go for a trial.[132] The US courts like the Supreme Court of Massachusetts in *Donovan v. Phillip Morris USA, Inc.* are now going beyond awarding the traditional damages as remedies to tort victims, granting unconventional reliefs such as medical monitoring of the tobacco users for early detection of lung diseases instead.[133] The well-known Tort textbook 'Winfield and Jolowiz: Tort' also alludes to the debate on 'tort reform' in the United States due to 'compensation culture' advocating legislative measures, capping damages especially, the exemplary damages.[134]

The uncertainties in the scientific evidence and haphazard system of its assessment in medical mass tort litigation like the proliferation of the breast implant litigation in the 1990s in the US, have huge financial costs and expenses for the defendant companies, in spite of their products being ultimately exonerated post-trial or appeal.[135] For a legal system to effectively tackle mass tort litigation the need for having a comprehensive class action or representative suit legislation, and providing for policy choices on the aspects of causation, proof of negligence, compensatory and punitive

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[132] *Id.;* In re Allied Chemical Corp., 227 S.W.3d 652 (Tex. 2007).
[133] *Tort Law — Proof of Harm in Tobacco Cases — Supreme Judicial Court of Massachusetts Recognizes Cause of Action for Medical Monitoring of Tobacco Users. — Donovan v. Philip Morris USA, Inc., 914 N.E. 2d 891 (Mass. 2009)*, 123(7) HARV. LAW REV. 1771-78 (2010).
[134] EDWIN PEEL & JAMES GOUDKAMP, WINFIELD & JOLOWICZ TORT, 19 ed. (2014).
[135] Michael Higgins, *Mass Tort Makeover? After Years of Litigation and Billions of Dollars in Payments, the Lessons from Class Action Lawsuits over Silicone Breast Implants May Be Just What Critics Need to Make Their Case for Reform.*, 84 ABA J. 52 (1998).

damages all assume significance.[136] Though a mass tort action typically comprises of a large number of injury claims, the cause of action may be a single-event mass tort or a dispersed mass tort, as mentioned earlier.[137]

Johnson & Johnson's ("**J&J**") defective Acetabular Surface Replacement ("**ASR**") hip implants globally, including allegedly to around 4700 Indian patients between 2004-2010, with a reportedly high failure rate along with consequential degenerative and dangerous health conditions is a huge mass torts case testing the Indian legal system and regulators.[138] J&J offered USD 4 Billion in the US to settle the claims of 12,000 patients there way back in 2013, but reportedly there was no government response in India till 2017, when the Drug Controller General of India ("**DGCI**") set up a committee in this matter, though many individual patients had instituted cases in the consumer courts by then.[139] J&J offered revision surgeries, and the Central Government's Ministry of Health and Family Affairs accepted the compensation formula suggested by its central expert committee for the ASR hip implants patients (victims) who had suffered varying disabilities with the base amount of Rs 20 Lakh.[140]

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136 Jeff Berryman, *Canadian Reflections on the Tobacco Wars: Some Unintended Consequences of Mass Tort Litigation*, 53 INT. COMP. LAW Q. 579 (2004).

137 Christopher J. Roche, *A Litigation Association Model to Aggregate Mass Tort Claims for Adjudication*, 91 VA. LAW REV. 1463 (2005).

138 Prashant Reddy T, *An Indecent Settlement*, THE HINDU (Jun. 26, 2019), https://www.thehindu.com/opinion/op-ed/an-indecent-settlement/article28138182.ece.

139 *Id.*

140 FORMULA FOR GRANT OF COMPENSATION TO THE PATIENTS WHO WERE IMPLANTED WITH THE ASR HIP AND CONSTITUTION OF THE STATE LEVEL COMMITTEE, DIRECTORATE GENERAL OF HEALTH SERVICES, CENTRAL DRUGS STANDARD CONTROL ORGANISATION, GOVERNMENT OF INDIA, No. 29/MISC/03/2018-DC (388) (Nov 30, 2018), https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/common_download.jsp?num_id_pk=ODM4.

Presently, the Delhi High Court is adjudicating a case where it had awarded in the year 2019 interim compensation of Rs 25 Lakh to each of the verified 67 ASR hip implant patients who had undergone revision surgeries after the said hip implants, and the J&J also agreed to pay such amounts to even more such verified patients if the Central Government provided them such names.[141] J&J ASR hip implants mass tort cases again highlight the stark differences in the attitudes and responses of the regulators and the common tortfeasor MNC in different jurisdictions both in term of the pace of dealing with and disposing of such cases, and providing swift and adequate compensation to the mass tort victims. Such medical mass tort cases including those likely to arise out of clinical trials will continue to test the resilience and robustness of the legal frameworks and, regulatory and adjudicatory institutions in India.

The claims aggregation policy and rules are a nuanced preliminary issue as well that needs to be addressed.[142] Addressing future claims and claimants not only remains a serious concern in the aftermath of the Bhopal disaster. In the US, an equally grave concern arises from the need to address insufficient representation and lower recoveries, which stem from the inadequate 'maturity' of such claims and the potential 'inflation' of such claimants during the ongoing mass tort litigations[143] Baxi is also critical of the US Supreme Court's 2013 *Kiobel* decision, where the US Supreme Court 'ruled that the presumption against extraterritorial jurisdiction extends to

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[141] Prathma Sharma, *Faulty Hip Implants: J&J Agrees to Pay ₹25 Lakh Each to 67 Patients*, MINT (May 30, 2019), https://www.livemint.com/news/india/faulty-hip-implants-j-j-agrees-to-pay-rs-25-lakh-each-to-67-patients-1559225038354.html.

[142] Roche, *supra* note 137.

[143] George Rutherglen, *Future Claims in Mass Tort Cases: Deterrence, Compensation, and Necessity*, 88 VA. LAW REV. 1989 (2002).

the Alien Torts Statute 1789 ("**ATS**"), because of the "*danger of unwarranted judicial interference in the conduct of foreign policy*"'.[144]

VI. CONCLUSION AND SUGGESTIONS

This article makes an attempt to examine the state of mass tort law and policy in India, starting with the legal and judicial system's response to the Bhopal catastrophe, and thereafter, how the law evolved. But, the overall efficacy and maturity of the laws, and institutional approaches and attitudes to deal with such complex legal problems do not appear to have changed much despite the legal reforms which have been critically analyzed. Involvement of the MNCs, like in the Bhopal case exacerbates these issues and raises several law and policy challenges, and makes the fixing of liability and enforcement of remedial imprimaturs even more difficult. Prof. Surya Deva explores the conduct of the MNCs in the larger context of human rights violations.[145]

As discussed above in detail, both Baxi and Galanter are disappointed with how less we have learnt from the Bhopal disaster to make MNCs more responsible and accountable for their tortious wrongs. The moot question then is, whether India can evolve a mature legal response, develop a pragmatic practice model to address these challenges and provide an effective redressal in such cases. The possibility of such a tangible change in the legal and judicial system in India, though currently seemingly remote, will increase, if some effective measures, inter alia, like the following law and policy prescriptions can be implemented:

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[144] Baxi: Human Rights, *supra* note 5, at 21; Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

[145] Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT. LAW 1 (2003).

a) Sensitizing and bringing attitudinal reforms in all the organs of State, and among the legal practitioners and judges, by suitable and tailor-made law and policy formulation and implementation in this area, to meet the present and future challenges, and to protect the rights of all the stakeholders in the society and people in general, who are likely to be affected particularly by the activities of large and heavy industries, whether run by domestic entities or by the foreign MNCs,

b) Regulation of the Foreign MNCs by asserting the economic sovereignty of India balanced with its economic interests through an assertive economic policy, both domestic and international, including through the newly negotiated BITs, leading to investment promotion, protection and economic development, along-with safeguarding of environment, health and other domestic concerns of India as a host state,

c) Creating rights-based awareness amongst the people of the country where poverty and illiteracy is still major problem to enable them to be aware of such violations, and legally assert their rights collectively,

d) Having a normative revolution for reforming the legal and judicial system to meet the contemporaneous and future complex legal challenges in the field of Mass Torts; and introducing some necessary changes in the professional rules of Advocates to permit contingency fees and funding of litigation, with necessary safeguards,

e) Encouraging, developing and propagating the use of class action representative suits as an effective remedy in mass torts, instead of the public law remedies like the PIL,
f) Educating the judiciary and lawyers through judicial academies and workshops about the interdisciplinary and comparative tort law advances in other jurisdictions, particularly in the US, to evolve a more nuanced, speedy and effective judicial process in such cases, and render expedited, adequate, deterrent and efficacious compensatory awards, at par with the home jurisdictions of the MNCs, having their business presence and operations in India,
g) The executive and the legislature need to create more robust monitoring and enforcement mechanisms, and if need be create more regulators (balancing with their commitment towards ease of doing business), in the existing sectors of the economy and under the relevant existing statutes, to deal with such risks, threats and challenges from both preventive as well as remedial angles.

Thus, an efficacious long-term strategy needs to be devised by the lawyers both, academic and practising to bring this much-needed fundamental legal transition. The optimism need not be lost in any case, and then who knows, India will have its own Kings and Queens of Torts.

Arunoday Rai, *Article 355: An Unresolved Constitutional Conundrum,* 10(1) NLUJ L. Rev. 125 (2024).

ARTICLE 355: AN UNRESOLVED CONSTITUTIONAL CONUNDRUM

~ *Arunoday Rai**

ABSTRACT

The Supreme Court is yet to decide on the scope and effect of Article 355 of the Constitution. Although the Article finds its mention under the emergency provisions of the Constitution, the Courts have suggested that its scope can be expanded beyond the situation where an emergency has been declared. This article tries to interpret the wording of Article 355 with the help of Constitution Assembly debates, commission reports, and case laws. It begins by criticizing the case of Sarbananda Sonowal, where the Supreme Court provided legal legitimacy to an ethno-nationalist understanding of our citizenship jurisprudence by striking down the Illegal Migrants (Determination by Tribunals) Act, 1983 as unconstitutional on grounds of Article 355 and 14. Without entering into the wider citizenship debate, this paper tries to restrict the scope of Article 355 to limited circumstances. With the help of the reports of various law commissions, and the court's previous interpretation of the Article, the paper argues that a restrictive interpretation of the Article is necessary for the federal schema of the country. This article argues against the judgment of the court in Sonowal where they declared migrants as external aggressors and tries to highlight how the court could have dealt with the issue of migrants in a better manner. By drawing a brief sketch of how Article 355 can or cannot be interpreted, this

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paper seeks to highlight the opportunity presented before the court to introduce secular and rights-based citizenship jurisprudence in the country.

TABLE OF CONTENTS

I. INTRODUCTION 128
II. CONTEXT AROUND THE CASE OF SARBANANDA SONOWAL 130
III. RELIABILITY OF MIGRANT DATA, AND A COMMUNAL ISSUE? 133
IV. ARTICLE 355: AN UNRESOLVED CONUNDRUM 139
A. CONSTITUTIONAL ASSEMBLY DEBATES AND ARTICLE 355 JURISPRUDENCE 140
B. INTERPRETING 'EXTERNAL AGGRESSION' 147
C. JUSTICIABILITY OF ARTICLE 355 AND JUDGING 'EFFECTIVENESS' OF THE ACT 151
V. POSSIBLE APPLICATION OF ARTICLE 21 AND 29 154
VI. CONCLUSION 155

I. INTRODUCTION

The Supreme Court of India is yet to hear the challenge to Section 6A of the Citizenship Act, 1955[1] ("**Citizenship Act**"). Section 6A was inserted in the Citizenship Act as part of a political compromise made through the Assam Accord in 1985.[2] It granted citizenship to those foreigners who arrived in Assam before 1st January 1966 whereas those who arrived in between 1st January 1966 and 25th March 1971 were disenfranchised but would be granted citizenship after a period of ten years. Section 6A was challenged in the case of *Assam Sanmilita Mahasangha v. Union of India*[3] ("**Assam Sanmilita Mahasangha**") where the Supreme Court mentioned thirteen complex questions on the issue of citizenship to be decided by a higher bench of the same Court. The article focuses on the question of interpretation of Article 355[4] where it is argued that the said Section violates the Union's constitutional duty to protect the State provided under Article 355. The hearing on the issue of migrants and refugees again provides the court with the opportunity to look into the issue with a humanitarian lens, an aspect that may not have been adequately emphasized in previous instances. This article discusses the interpretation of Article 355 through the case of *Sarbananda Sonowal v. Union of India*[5]

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[1] The Citizenship Act, 1955, No. 57, Acts of Parliament, 1955, § 6A.
[2] Accord between AASU, AAGSP and the Central Government on the Foreign National Issue (Assam Accord) (Aug. 15, 1985), https://peacemaker.un.org/sites/peacemaker.un.org/files/IN_850815_Assam%20Accord.pdf.
[3] Assam Sanmilita Mahasangha v. Union of India, (2014) SCC OnLine SC 1017.
[4] INDIA CONST. art 355.
[5] Sarbananda Sonowal v. Union of India, (2005) 5 SCC 665.

("**Sarbananda Sonowal**") where the court had to decide important socio-legal questions on the issue of citizenship.

The *Sarbananda Sonowal* judgment was delivered by the Supreme Court in 2005 striking down the Illegal Migrants (Determination by Tribunals) Act, 1983[6] ("**IMDT Act**") as unconstitutional on the grounds of violation of Article 355 and 14. The Supreme Court held that the government has failed in its constitutional duty under Article 355 to protect the citizens from 'external aggression'. It went ahead to interpret external aggression to include incessant flow of migrants and held that IMDT Act has failed to protect Assam from such aggression and hence failing in its constitutional duty under Article 355. Concerns of national 'security', and economic and political stability overshadowed the rights and apprehensions of 'illegal' migrants that were not given due importance. This article looks into the judgment with a humanitarian lens; i.e., respecting the rights of the migrants, and argues how the judgment violates the basic rights of migrants as it deviates from the intended purpose of Article 355. It also questions the reasoning provided by the court giving the whole issue a communal colour and highlights the consequences of this judgment. This article is divided into five parts: The first part briefly describes the immigration history of the State of Assam. The second part gives a summary of the case of *Sarbananda Sonowal* and the context leading up to it. The third part scrutinizes the judicial determination of the issue and the evidentiary basis relied upon by the court in striking down the IMDT Act. The fourth part criticises the court's interpretation of Article 355 and discusses its possible

[6] The Illegal Migrants (Determination by Tribunals) Act, 1983 No. 39, Acts of Parliament, 1983.

interpretation. The last part briefly shows the possible way in which the court could have struck down the IMDT Act.

II. CONTEXT AROUND THE CASE OF SARBANANDA SONOWAL

The State of Assam has had a peculiar history of migration since the days of Ahom rule.[7] Due to the liberal policies of the British, a huge influx of the Bengali-speaking population from East Bengal was recorded in the early twentieth century.[8] Such influxes of immigrant population created a divide between the migrants and the natives.[9] This issue was further fuelled by the Bangladesh Liberation War of 1971, which led to the creation of Bangladesh and a huge migration crisis for Assam. Post-independence, the Assamese Hindu middle class gained control over the newly formed government, and 'Asom Andolon' was launched as a series of movements against the growing number of immigrants and the protection of Assamese culture. These movements finally led to the signing of the Assam Accord between the Centre and the Assamese groups in which cut-off dates were decided which classified migrants. The growing paranoia in Assam was caused by the fear of loss of dominance by the socially dominant groups.[10] As a result of this accord, the IMDT Act was brought to ensure fair detection and deportation of illegal migrants.

Once the IMDT Act was passed by the government, a minuscule number of deportations under the IMDT Act brought its efficacy into the

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[7] E.A GAIT, A HISTORY OF ASSAM 67 (Thacker, Spink & Co., 2nd ed. 1906).
[8] SANJIB BARUAH, INDIA AGAINST ITSELF: ASSAM AND THE POLITICS OF NATIONALITY 56 (University of Pennsylvania Press, 1999).
[9] Hirein Gohain, *Positions on Assam History,* 45(8) EPW, 37 (2010).
[10] Mohsin Alam Bhatt, '*Doubtful Citizens: Irregularization and Precarious Citizenship in Contemporary India'*, STATELESSNESS IN ASIA (May 16, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4111014 (last visited May 20, 2023).

debate. The matter of illegal immigration from Bangladesh was brought before the Supreme Court via a Public Interest litigation in the case of *All India Lawyer's Forum for Civil Liberties v. Union of India* in 1999.[11] In this case, the Supreme Court expressed concerns over the issue of infiltration and hoped that government would take some steps to tackle the issue. Following this, certain recommendations were also made by the Law Commission in its report suggesting repealing of the IMDT Act.[12] The decision to repeal the IMDT Act was reconsidered because of political changes at the Centre, which forced the court to make a decision on the matter in the case of *Sarbananda Sonowal.* Another important development, which led to this landmark case, was the report sent by the then-governor of Assam to the President of India.[13] The report was titled, 'Report on Illegal Migration in Assam' ("**Governor's Report**") and is used by the supporters of the anti-immigration policy. The Governor's Report has gained immense significance as it was cited in the government affidavit in *Sarbananda Sonowal*, the judgment of *Assam Sanmilita Mahasangha*[14]*,* and in the report of the Joint Parliamentary Committee on the Citizenship Amendment Bill.[15] The Governor's Report has highlighted the threat faced by Assam due to the large-scale migration of Muslims from Bangladesh. Perhaps, this was the first instance where a regional issue of migration was portrayed as an issue of national defence. The Governor's Report has been

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[11] All India Lawyer's Forum for Civil Liberties v. Union of India, (1999) 5 SCC 714.
[12] LAW COMMISSION OF INDIA, REPORT NO. 175: THE FOREIGNERS (AMENDMENT) BILL, 2000, ¶ 6.4 (2000).
[13] SK SINHA, 'REPORT ON ILLEGAL MIGRATION INTO ASSAM' 3-21 (Raj Bhavan, Guwahati, 1998).
[14] Assam Sanmilita, *supra* note 3 at 13.
[15] INDIA, REPORT OF THE JOIN PARLIAMENTARY COMMITTEE REPORT ON THE CITIZENSHIP (AMENDMENT) BILL,2016', Joint Parliamentary Committee Report Number 16 of 2019 ¶1.25.

criticised as it makes blanket assumptions, and sweeping conclusions on the basis of speculative, contradictory, and biased data.[16] The Governor's Report tries to highlight the threat to sovereignty of Assam by relying on statements of leaders like Zulfikar Ali Bhutto and Sheikh Mujibur Rehman where they have advocated for a desire to make Assam a part of Bangladesh. However, the collation of these statements seems to provide a misplaced understanding of the situation. These statements of the aforementioned leaders are merely personal opinions that have never culminated into institutionalised State policies. The Governor's report also substantiates its 'security threat' argument by claiming that Inter-Services Intelligence ("**ISI**") has been actively supporting militant movements in Assam by sending such immigrants. However, such a view has been effectively countered by the deputy director of the National Security Council Secretariat who stated that such activities have remained at best as a fringe movement in Assam.[17] The outbreak of insurgency, a political threat to Assam, and a drastic increase in the population of Muslims shown in the report are based on assumptions that do not hold true. The assumption about the increase in the population of Muslims in Assam has been discussed in the next section where it has been argued that the increase in the population of Muslims cannot be solely attributed to migration as argued by the ex-governor.

The case of *Sarbananda Sonowal* provided the court with the opportunity to look into the economic, political, and social impact of infiltration on the State of Assam.[18] The judgment of the Court highlights

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[16] Angshuman Choudhury, *'India: Ex-Assam guv SK Sinha's report on illegal immigration in tate is riddled with contradictions, dubious data'* , SOUTH ASIA JOURNAL, (July 26, 2019).
[17] *Id.*
[18] Sarbananda Sonowal*, supra* note 5*,* 4.

various reasons behind the infiltration of people from Bangladesh and how it threatens the political integrity of Assam.[19] The Court went ahead to strike down the IMDT Act on two grounds: Article 14 (unreasonable classification between the other migrants and that of the Assam, which has no nexus to the object of the IMDT Act) and Article 355 (the Court's characterization of illegal migration as an external aggression and the failure of the central government in fulfilling its responsibility to safeguard the State led to the invalidation of the Act).[20]

III. RELIABILITY OF MIGRANT DATA, AND A COMMUNAL ISSUE?

The court relied upon the census and India Today's data to view the issue of migrants as a communal one.[21] It was highlighted that the migration into Assam from 1971 till 1991 has been almost exclusively of Muslims.[22] The respondent relied upon the Governor's Report, as discussed above, which states that ISI has been very active in Bangladesh in promoting militant activities through these Muslim migrants.[23] It went on to say that several districts of Assam were turning into Muslim majority zones and that they would soon demand to join the country of Bangladesh taking support from the idea of 'Islamic fundamentalism'.[24] The report supported these religious and stereotyped arguments by looking into the history of migration into Assam, noting how Assam was vulnerable politically based on a sole statement by Mujibur Rehman who had wished

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[19] *Id.*
[20] *Id.* 83.
[21] Sarbananda Sonowal, *supra* note 5 at 16.
[22] Sarbananda Sonowal, *supra* note 5 at 20.
[23] Sarbananda Sonowal, *supra* note 5 at 21.
[24] Sarbananda Sonowal, *supra* note 5 at 24.

for Assam to be a part of Bangladesh.[25] It is clear that Assam did not face any political threat due to ISI working in Bangladesh or a few statements of political leaders expressing their personal views on a certain issue. The court failed to engage and criticise the Governor's report, leaving its status as authoritative as can be seen in the future mentions of this report in the case of *Assam Sanmilita Mahasangha*.[26] The court could have clearly rejected the Governor's Report which was trying to portray an ethnic issue as a religious issue through theatrical arguments based on inconsistent data and assumptions. Since the Governor's Report had developed a 'cult' status among the people who saw the issue of migration in a communal manner, rejecting it could have been the first step taken by the court to move towards a secular refugee jurisprudence in the country. Instead, the court chose to endorse such a view which eventually shaped India's citizenship jurisprudence in an imbalanced manner.[27]

The court assumed in the judgment that increases in the population of several north-eastern states were solely due to migration.[28] However, an issue arises concerning accurately predicting the shift in population characteristics. There are no official records of entry of illegal aliens and calculations of migrants from Bangladesh are mostly based on calculating the difference between the assumed natural rate of population growth and the actual rate of growth. This approach is unquestionably lacking in absolute reliability as it cannot differentiate between immigrants migrating from Bangladesh and those migrating from within the country.[29] V.K.

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[25] Sarbananda Sonowal, *supra* note 5 at 7.
[26] Angshuman Choudhury, *supra* note 16.
[27] Sarbananda Sonowal, *supra* note 5 at 62.
[28] Sarbananda Sonowal, *supra* note 5 at 4-5.
[29] Sanjib Baruah, *Immigration, Ethnic Conflict, and Political Turmoil-Assam, 1979-1985*, 26 Asian Survey 1184 (1986).

Boorah has indicated that the number of Muslims migrating from Bangladesh to Assam is exaggerated as it does not account for the reproductive behaviour of Muslims and whether they are coming from Bangladesh or not.[30]

V.K. Boorah in his piece has proved through empirical analysis that an increase in population cannot be solely attributed to migration as it requires us to assume that both communities grow at similar rates. In fact, between the period of 1950-1971, non-Muslim migration was more than Muslim migration in the State of Assam.[31] The increased population of Muslims is possible because of domestic population growth or internal migration rather than migration from Bangladesh as shown in the 'reproductive hypotheses' presented by the author.[32] The purpose of presenting these statistics is not to undermine the credibility of the census data but to demonstrate that these numbers cannot be substantiated empirically, as acknowledged by the court in the case of *Sarbananda Sonowal*.[33] Thus, relying on these non-empirical and unreliable data to decide the future of lakhs of migrants was an unjustifiable decision by the Supreme Court. Additionally, these numbers have been constantly used to justify the threat faced by Assamese people. It is important to note here that the Court questioned the insufficiency of the IMDT Act by relying on naked statistics where the number of deportations gradually reduced and was very low in number.[34] If the court had been cognizant of the unreliability of these

[30] Vani Kant Boorah, '*Killing Fields in Assam: Myths and Reality of its Muslim Immigration*', 48(4) EPW 43 (2013).
[31] *Id.* 46.
[32] *Id.*
[33] Sarbananda Sonowal, *supra* note 5 at 4.
[34] *Id.* 5.

statistics, it might not have gone into the sufficiency of the IMDT Act as there was a bleak possibility that such minuscule deportations were actually an outcome of a lower level of migration from Bangladesh in light of the doubts raised above in this article and not a result of its insufficiency. Since these census data can never be relied upon in Assam, the courts need to find alternative ways to determine illegal immigrants and their future in the State.

The court should have decided the issue on the basis of region, language, and ethnicity as the migrant history of Assam also pointed out the fact that the history of migration was never communal but was based on ethnicity.[35] The court refrained from basing its judgement on Article 29(1), even when the matter was about Assamese culture and ethnicity and went on to base its decision on the religion of the migrants.[36]

The existing paranoia in Assam during the late 20th century led to a process of the racialization of Bengali-speaking minorities in Assam, who were mostly Muslims, as the 'other'.[37] The narrative was created in such a manner that the difference of ethnicity and religion was blurred. Such fusion resulted in the creation of an ambivalent citizenship solely marked by religious differences. Scholars have similarly indicated that the implementation of Indian citizenship law post-independence has always been marked by religious bias.[38] Niraja Gopal Jayal, in her book 'Citizenship And Its Discontents' states that the constitutional system of *jus soli* has been affected by the inclusion of two *jus sanguinis* components. *Jus soli* is the

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[35] Sanjib Baruah, *supra* note 8.

[36] Parag Sayta, '*Sarbananda Sonowal v. Union of India, A.I.R. 2005 S.C. 2920*', 18(2) Student Bar Review 95 (2006).

[37] Mohsin Alam Bhatt, *supra* note 10 at 3.

[38] Anupama Roy*, 'Between Encompassment and Closure: The 'Migrant'and the Citizen in India'* 42(2) CONTRIBUTIONS TO INDIAN SOCIOLOGY 219 (2008); NIRAJA GOPAL JAYAL, CITIZENSHIP AND ITS DISCONTENTS 63-68, 1st ed., Harvard University Press (2013).

principle of citizenship based on place of birth, while *jus sanguinis* is the principle based on blood or lineage. Niraja Jayal argues that first off, people who have one parent who was an illegal immigrant when they were born in India are not entitled to become citizens. Second, there is a special provision that gives District Magistrates the authority to confer Pakistani citizenship on minority Hindus. These incidents demonstrate the importance of religious identification in influencing citizenship law and a gradual move towards a racial understanding or *jus soli* principle.[39]

Mohsin Alam Bhat, in his upcoming paper, has shown the trends where this racialized identity was fused with the nationalist discourse of national security, legitimizing such exceptional procedures regulating the deportation of these migrants.[40] Once such a discourse is generated, it was easy for the court in *Sarbananda Sonowal* to justify the Foreigners Act, 1946[41] which placed the burden of proving citizenship on these migrants. The due process rights of the migrants under Article 21 were sidelined by the court focussing on the wider nationalized discourse which suggests a social, political, and economic threat to Assam by these Muslim migrants.

The route taken by the Court to brand the issue of infiltration from Bangladesh as communal, admonished any attempt to have secular refugee rights jurisprudence in the country. The approach of the Court was based on a politicized and communal narrative i.e., it was based on the protection of the political integrity and stability of the country from the infiltration of a particular community. The Court did not bother to secularise the issue as it decide purely on the basis of cultural, ethnic, and economic threats faced

[39] Jayal, *supra* note 38 at 67.
[40] Mohsin Alam Bhatt, *supra* note 10 at 13.
[41] The Foreigners Act, 1946, No. 31, Acts of Parliament, 1946.

due to migration. The case laid the legal ground which justified and provided legal legitimacy to such racialized understanding of the migrants where a particular community was regarded as the 'other'. Such justification has been used by the government to draft and implement laws such as the Citizenship Rules, 2003, and the Citizenship Amendment Act, 2019 which tended to discriminate against Muslims as the 'other'.[42] There were several cases reported in the newspapers about the violence against Muslims by the natives as well as the administration.[43] Such a judgment also made the government policy of "*dispossession, dislocation, disenfranchisement and violence*" on Muslim residents of Delhi slums compelling as it supported the narrative of them being 'illegal' migrants.[44] Questions have also been raised on the differential treatment of migrants such as Tamil, Tibetans, and Muslims indicating a discriminatory policy against Muslim refugees.[45] The Supreme Court failed to ground its judgment on an ethnic basis and added a spark to the communal conflict which was emerging from the 'Nellie massacre' and other late 20th century developments. The significance of the Nellie Massacre is that it shows the communal turn the Assam Andolon movement took in spite the immigrants found in India were both Hindus and Muslims. The massacre killed around 10000 people most of whom were Muslim peasants. This attack led the movement from being anti-

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[42] Mohsin Alam Bhatt, *supra* note 10 at 11.

[43] *'Dozens of Muslims Killed in Ethnic Violence in North-East India'* THE GUARDIAN (3 May 2014), https://www.theguardian.com/world/2014/may/03/dozens-muslims-killed-ethnic-violence-north-east-india-assam.; Ujal Kumar Mookherjee, *'Viewing the implementation of National Register of Citizens through a Human Rights Lens: A Critical Study',* NLSIU BANGALORE (2019); Archit Guha, *'The Illegal Immigrant Identity and Its Fragments - From Enemy Foreigner to Bangladeshi Illegal Immigrant in (Post) Colonial India*', 12(1) SOCIO-LEGAL REV 119 (2016).

[44] Anupama Roy, *supra* note 38 at 236.

[45] B.S CHIMNI, INTERNATIONAL REFUGEE LAW: A READER 462 (1st ed., Sage Publications 2000).

immigration or anti-Bengali to anti-Bengali Muslims. It is said to be the first event where the ethnic issue of migration took a communal term as people were massacred on the basis of their religion.

IV. ARTICLE 355: AN UNRESOLVED CONUNDRUM

The true interpretation of Article 355 of the Indian constitution is yet to be decided by the constitutional law bench in the case of *Assam Sanmilita Mahasangha*.[46] The Court has explicitly framed the following issues in relation to citizenship for determination by a higher bench of the Supreme Court:

> " *1. Whether Section 6A violates Article 355? What is the true interpretation of Article 355 of the Constitution?*
>
> *2. Would an influx of illegal migrants into a State of India constitute "external aggression" and/or "internal disturbance"?*
>
> *3. Does the expression "State" occurring in this Article refer only to a territorial region or does it also include the people living in the State, which would include their culture and identity?* "

This article primarily looks at three undecided questions by the court: *First*, how should the words such as 'internal disturbance', 'external aggression', and 'according to the provisions of the Constitution' be interpreted in Article 355? What are the consequences of defining them broadly?; *second*, how does one define the term 'external aggression' provided in Article 355, and was the Court right in using the *Chae Chan Ping* case[47] ("**Chinese Immigration case**") in *Sarbananda Sonowal* to provide an expansive definition of the term external aggression?; and, *third*, is Article

[46] Assam Sanmilita Mahasangha, *supra* note 3.
[47] Chae Chan Ping v. United States, 130 U.S. 581.

355 justiciable? And can a court go into the 'sufficiency' of the legislation to strike it down?

A. CONSTITUTIONAL ASSEMBLY DEBATES AND ARTICLE 355 JURISPRUDENCE

To comprehend the existence of a particular article in the Constitution, it is essential to initiate the analysis with the Constitutional Assembly Debates ("**CAD**"). This initial exploration will aid in comprehending the subsequent arguments expounded in this article. Draft Article 277-A (now Article 355) did not find a place in the draft constitution and was added later by the drafting committee in the backdrop of the Maharajas' request for protecting their provinces.[48] Ambedkar went on to point out the rationale behind this Article by seeing it in conjunction with Article 278 (now Article 356). He noted that Article 355 incorporates the conditions by which the Union can interfere in the governance of the States. The provision ensures that the invasion by the Union is not arbitrary, unreasonable, or unjustified as per the law.[49] The discussion on this Article in the assembly was centered more around allaying the fears of the State and maintaining their autonomy and less on the positive obligation on the Union to protect the State as it was seen as an implicit obligation. This provision was hailed as a bulwark toward maintaining the federal structure of the Constitution by preserving the State's independence. Upon reviewing the assembly debates, it becomes apparent that the framers of the Constitution intended for the inclusion of Article 277-A as a safeguard

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[48] AG. NOORANI, CONSTITUTIONAL QUESTIONS IN INDIA 273 (1st ed., Oxford University Press 2002).

[49] CONSTITUTIONAL ASSEMBLY DEBATES, 3rd August 1949, speech by Dr. Ambedkar 31, Available at https://www.constitutionofindia.net/debates/03-aug-1949/#110389 (last visited Aug. 1, 2022).

against unwarranted intervention from the central government. This provision holds significant importance in preserving the autonomy and freedom of the States.

The state emergencies in six States were challenged in the case of *S.R. Bommai Union Of India*[50] ("**SR Bommai**") where the Court provided guidance on the interpretation of Article 355. The court agreed with the reasoning of Ambedkar that Article 355 is not an independent source of power but needs to be seen in consonance with Article 356.[51] The Court applied a higher standard of judicial review while deciding on the validity of the emergency declared in the States and specified a restrictive set of conditions under which a State emergency can be declared. The Court recognized that Part XVIII was an extraordinary power provided for an extraordinary circumstance. Therefore, the power should be exercised reasonably and only when necessary.

However, several commissions and judgments have viewed Article 355 as a 'power conferring' provision that can be used independently. Sarkaria Commission stated that Article 355 grants the power to the Union to perform all such acts as are necessary to fulfill its duty under the Article.[52] It mentions that the use of the word "*and*" in the Article allows the Union to use them both conjunctively and disjunctively. The Punchhi Commission also highlighted that the situation of 'internal disturbance' under Article 355 should best be tackled through coordination between the State and the

[50] S.R. Bommai v. Union of India, (1994) 3 Supreme Court Cases 1, 57.
[51] *Id.*
[52] INDIA, REPORT OF THE SARKARIA COMMISSION ON CENTRE-STATE RELATIONS, Sarkaria Commission Report (1988), ch. 8.

Union.[53] In the case of *Naga People's Movement of Human Rights v. Union of India*[54] ("**Naga People's movement**"), the Supreme Court had to determine the constitutionality of the Armed Forces (Special Powers) Act, 1958 ("**AFSPA**"). This law enables the Union government to dispatch its armed troops to support state governments' civil authority in regions that are deemed to be "*disturbed*". The court affirmed the enactment and confirmed the Union's legislative competence under Entry 2A of List I of the VIIth Schedule. It was highlighted that the provisions of AFSPA was passed in order to carry out the Union's obligation under Article 355 of the Constitution, which requires safeguarding States from severe internal disturbances and averting the need for drastic measures under Article 356.

The Court in this case rightly used Article 355 as it is the duty of the Union to prevent 'internal disturbance' arising in the State. According to this case, Article 355 can be used to prevent 'internal disturbances' which tend to threaten the security of the State. The use of this Article to declare the validity of AFSPA implies that the internal disturbance was severe enough to threaten the security of the State which might have led to the emergency. As recommended by Punchhi Commission, such powers should be used only in the context of graver public order concerns, with the coordination of the State as far as possible.[55] The Union cannot assume the entire responsibility to deal with such disturbance on its own, sidelining the State, as it would be contrary to the principles of cooperative federalism. Therefore, Article 355 can be used by the Centre to prevent 'internal disturbance' which might lead to the invocation of emergency with the

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53 INDIA, REPORT OF THE COMMISSION ON CENTRE-STATE RELATIONS (PUNCHHI COMMISSION REPORT), Punchhi Commission Report 102 (2010).
54 Naga People's Movement of Human Rights v. Union of India, (1998) 2 SCC 109.
55 PUNCHHI COMMISSION, *supra* note 53.

cooperation of the State. If Article 355 is being viewed independently, the Union should not act without the cooperation of the State due to the absence of any safeguards. In situations where the State refuses to cooperate, Union should first declare an emergency in accordance with Article 356 and then go ahead to interfere with the law and order of the State.

In the case of *H. S. Jain v. Union of India*[56] ("**H.S. Jain**"), the Court was dealing with the imposition of the President's rule under Article 356 in the state of Uttar Pradesh. The court examined whether there was a conceivable method of forming a government after the Legislative Assembly elections. It was held that Article 355 imposes a constitutional duty on the Union to ensure that the government of every state operates in accordance with the provisions of the Constitution. This duty obligated the Union to explore all possibilities of forming a popular government through the democratic process after the new Legislative Assembly was constituted in Uttar Pradesh. However, in this case, it was found that few or no alternative actions were explored before the proclamation under Article 356 was issued. As a result, the proclamation was set aside, and it was emphasized that the duty under Article 355 to uphold the government of the state in accordance with the Constitution was not fulfilled properly.

The interpretability of Article 355 has also been discussed by Jaideep Reddy in his article titled 'Duty of the Union under Article 355 of the Constitution – Remembering the Constitutional Ideal of Co-Operative Federalism'.[57] He traces and argues in support of the disjunctive reading of

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[56] H. S. Jain v. Union of India, 1996 SCC OnLine All 739.

[57] Jaideep Reddy, *'Duty of the Union under Article 355 of the Constitution – Remembering the Constitutional Ideal of Co-Operative Federalism',* 4(3) NUJS LAW REVIEW 371 (2011).

Article 355. The paper seeks to offer an explanation of the departure of the court's interpretation of Article 355 as an emergency provision and attaches merit to it. He argues that the wider interpretation of Article 355 need not be seen pessimistically as it allows the Union to discharge such duty in a co-operative spirit. It does not engage with the concern arising out of such a broad interpretation but highlights that such a broad interpretation would help the Union to prevent the use of Article 352 and/or 356.

This article tries to highlight the possible negative implications of such a broad interpretation given to Article 355. Usage of the Article beyond the situations of 'external aggression' and 'internal disturbance' would lead to grave injustice and violation of autonomy provided to the State. Jaideep Reddy, in his piece, after discussing the *Naga People's movement*,[58] *H.S. Jain*,[59] and the report of several commissions, concludes that such interpretation takes the usage of the Article beyond the 'emergency' provisions. He then goes on to provide examples such as "*unlawful carrying on of Panchayats or Municipalities, or unreasonableness in the State's taxation mechanism*" which have no relation to emergency but can be used to oblige the Union to act under Article 355.[60]

Although Article 355 can be seen in disjunction, it is still a part of the 'Emergency Provisions' of the Indian Constitution. In contrast to the American and Australian constitutions, the duty of the Union to protect the State would arise in cases of 'emergency' and cannot be extended beyond it. Hence, a broad interpretation of the Union's duty in America or Australia cannot be transported in India due to the limited use of Article 355. Even after the interpretation of Article 355 in the *Naga People's Movement*, *H.S.*

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[58] *Naga People*, *supra* note 54.
[59] *HS Jain*, *supra* note 56.
[60] Jaideep Reddy, *supra* note 57 at 382.

Jain, and reports of several commissions, Article 355 cannot be extended beyond the ambit of 'emergency'. In the case of *H.S. Jain,* the Court held that the governor had the duty, as part of Article 355, to look for alternative measures to prevent the invocation of an emergency. The Court in *Naga People's Movement* was dealing with a grave situation of internal disturbance that could have led to an emergency if the Union did not intervene to protect the State or ensure that the State functioned in a democratic manner. However, these judgments cannot be understood to mean that the Union can exercise its power under Article 355 under any circumstances. Although the court stated that Article 355 is a power-conferring provision and can be exercised independently, it was careful enough to restrict its scope as well. Both these judgments have tried to interpret the Article where it can respect the spirit of cooperative federalism as well as deal with those situations which threaten the security of the State. The courts, as well as the commissions, have unequivocally emphasised the need for cooperation between the Union and the State whenever the power is exercised by the Union following its duty under Article 355.[61] It is only in those situations where the State refused to cooperate, the Union should interfere to perform its duty. However, it should be noted that there are no constitutional or statutory safeguards laid down for the exercise of power under Article 355. It is not clear under what circumstances can the Union intervene in Article 355 and where one draws the line to define the term 'internal disturbance' and 'external aggression'. In cases where the State refuses to cooperate, Union should not interfere with the affairs of the State under Article 355 due to lack of any safeguards. Invocation of emergency

[61] SARKARIA COMMISSION, *supra* note 52; PUNCHHI COMMISSION, *supra* note 53.

under Article 356 would be a better alternative as it provides adequate guidelines and restrictions on the power of the Union.

Article 355 was primarily inserted in the Constitution to prevent unwanted interference by the Centre in States' matters. If we allow the Union, thinking optimistically, to intervene in the matters of the States such as that highlighted by the author, which is neither 'grave' nor related to 'emergency', it can severely impair States' autonomy to maintain law and order. Additionally, once Union is allowed to intervene in such matters, the court would be unable to check the 'effectiveness' and 'scale' of intervention done by the Centre, as discussed by the author in the section on 'effectiveness of Article 355'.

The argument of the author that Article 355 can be used to prevent the invocation of the Union's power under Article 352 and 356 is not necessary. It is pertinent to note that there can be situations, "*that are not so grave as to warrant emergency measures but are yet of immediate and pressing concern enough as should justify the taking of alternative statutory and constitutional measures (not amounting to emergency action) towards the fulfilment of this duty*."[62] Therefore, powers of the Union under Articles 249, 251, and 275 can be used towards fulfillment of the Union's duty under Article 355. However, the goal foreseen can be reached without taking recourse to Article 355. Articles such as 249, 251, and 275 allow Union to exercise control over States and such powers can be exercised independently when Union feels that conditions for invoking such Articles are met. Viewing these Articles in conjunction with Article 355, an emergency provision, will only allow Union greater power to interfere in the autonomy of the States when not required. Article 355 can still be seen in conjunction with Article 352

[62] *Id.* 377.

and/or 356, and hence any broad interpretation of the Article should be done keeping in mind such consequences.

The jurisprudence on Article 355 points out toward a common conclusion that it needs to be narrowly interpreted as it is necessary for preserving States' autonomy. In lieu of protection of the States, Union cannot intervene when its presence is unnecessary and uncalled for. Additionally, the text of Article 355 puts a duty upon the Union to ensure that State is governed 'according to the provisions of this constitution' and hence it is argued that the text of Article 355 cannot be interpreted in such a way that will unjustifiably interfere with this duty. Federalism forms a part of the basic structure of the constitution[63] and any interpretation of the terms 'internal disturbance', and 'external aggression' cannot be done in such a manner that will strike at the root of the federal structure of our democracy as it would lead to the violation of the basic structure and failure on the part of Union to ensure that States are governed in accordance with the provisions of this constitution.

This part highlighted the origin of Article 355 and its importance in the Constitution, briefly showing why it is necessary to interpret the provisions narrowly. The next part argues that the expansive definition of external aggression provided by the Supreme Court in the *Sarbananda Sonowal* case could potentially lead to the violation of the basic structure doctrine and how the court committed a blunder by taking the route of Article 355.

B. INTERPRETING 'EXTERNAL AGGRESSION'

[63] Kesavananda Bharati v. State of Kerala, (1973) 4 Supreme Court Cases 225, 915; affirmed later in S.R Bommai, *supra* note 50.

The Supreme Court in the case of *Sarbananda Sonowal* held that the term 'aggression' in Article 355 is of very wide import and is not just restricted to acts of war. It took the help of international law commentaries, the UN's resolution on the definition of aggression, and the *Chinese immigration case* in the USA to establish that the incessant flow of millions of migrants could harm the national interests in several ways and hence amounts to external aggression.[64]

The Court mainly sourced its expansive definition through the Indian representative's views in the UN General Assembly discussion on the definition of aggression where they wished to include the flow of migrants as aggression.[65] However, if one goes into the detail of those debates, the assembly limited its definition to the use of armed force by a state to another state. The reason behind this precise and limited definition was to provide clarity to every nation for them to be able to take action based on this definition.[66] However, the arguments of nations such as Iran and Russia over economic and ideological aggression are worth debating for their inclusion in the definition of aggression.[67] It is because they contain at least one element considered necessary for constituting aggression. Either they are directed by the State or by the non-state actors sponsored by the State or carry the intention of causing harm to the State. Aggression is seen as directed *by* someone and *against* someone. Can an incessant flow of 'millions' of migrants who came to India be considered an act of aggression in respect of the above criteria? Can a non-armed, non-state guided, and non-intentional activity be termed external aggression? The

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[64] Sarbananda Sonowal *supra* note 5 at 67.
[65] Sarbananda Sonowal, *supra* note 5 at 56.
[66] JULIUS STONE, BASIL A. STOLL, CONFLICT THROUGH CONSENSUS: UNITED NATIONS APPROACHES TO AGGRESSION 10 (Johns Hopkins University Press 1977).
[67] *Id.*

answer would be negative due to the lack of non-satisfaction of the above-enumerated criteria of aggression. The judgment has led to widespread discrimination against these migrants and portraying them as aggressors have put them on the same pedestal as someone who falls well within the definition of aggression and provides the Union with additional leverage for arbitrary decision-making. An issue such as migration cannot be termed as external aggression, especially in the light of the fact that its very basis on such a scale in North-East India is questioned as indicated above in the paper.[68]

The court also justified its stand by using the *Chinese Immigration case* which forms an important part of American immigration jurisprudence. The Supreme Court provided the comparative reasoning of this case to highlight the powers of the State to restrict access to migrants when they cause harm to the country. However, the Court committed an error by cherry-picking its expansive approach to the definition of 'aggression' without regard to the circumstances around which the case was decided. The *Chinese immigration case* was decided in the 19th century and was based on xenophobic and stereotypical notions of Asians due to which it has received widespread criticism.[69] There was no discussion on the rights of those Chinese laborers and the court did not look into the capacity of America to hold and absorb these immigrants. The only similarity that one can find is the issue of migration being looked into from a bigoted ethnic perspective in America and a religious perspective in India.

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[68] Boorah, *supra* note 30.

[69] Victor C. Romero, '*Elusive Equality: Reflections on Justice Field's Opinions in Chae Chan Ping and Fong Yue Ting*', 68 OKLA. L. REV. 165 (2015).

The applicability of the American precedent to India is constrained by the inherent differences in the nature of migration between the two countries. The presence of porous borders, insufficient and contested data on migration, and indeterminacy of legal or illegal migrants in contrast to migrants coming from a distant land and belonging to a single race makes the expansive definition of external aggression inappropriate in the Indian context.

Another criticism of this case stems from the fact that it brought the doctrine of plenary powers to American jurisprudence where the executive has unfettered power over the immigration issue with minimal interference from the judiciary.[70] In this case, the court refrained from scrutinizing the law passed by the government and held it valid by the virtue of plenary power doctrine which mandates judicial restraint in such matters. The Indian judiciary has made a regrettable misstep that could be seen as detrimental to its own position, considering India's historical practice of employing rigorous scrutiny when analyzing Part XVIII of the Constitution. And the Centre may find a way through this judgment to curtail judicial power through the court's use of such precedents.[71]

If we see both the sources used by the judiciary to expand the definition of external aggression provided in Article 355, it has increased the powers of the Union to interfere in the matter of State. The expansion of Article 355 can open the grounds for expanding Union's emergency power under Article 356 as both are intrinsically connected.

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[70] Michael Scaperlanda*, 'Scalia's Short Reply to 125 Years of Plenary Power',* 68 OKLA L REV. 119 (2015).

[71] *See* S.R. Bommai, *supra* note 50; Minerva Mills v. Union of India, AIR 1980 SC 1789; State of Madhya Pradesh v. Bharat Singh, AIR 1967 SC 1170.

Hence, it seems that the expansive definition goes against the ratio of the court in *S.R. Bommai* and is *per incuriam* to that extent.[72] It indirectly expanded the scope of the Union to intervene in the matters of States which has made States' autonomy, forming an essential part of Indian federalism, vulnerable and, hence has the potential to violate the basic structure doctrine.

C. JUSTICIABILITY OF ARTICLE 355 AND JUDGING 'EFFECTIVENESS' OF THE ACT

There can be no doubt regarding the justiciability of Article 355. In the context of Part XVIII (under which the emergency powers fall), in the case of *S.R. Bommai*, all the judges agreed that the judiciary has a right to review and rejected the argument that the political nature of the issue immunes the President from any review under Article 356. As argued in the above section, concerning the interconnectedness of Article 355 and 356, there is no doubt about the power of the judiciary to review and obligate the Union to perform its duty under Article 355. The Court went into the detailed analysis of the IMDT Act and held that, "…*created the biggest hurdle and is the main impediment or barrier in identification and deportation of illegal migrants. On the contrary, it is coming to the advantage of such illegal migrants*".[73] Hence, the court struck down the IMDT Act due to its 'ineffectiveness' under Article 355. However, this article argues that review under Article

[72] Sayta*, supra* note 36.
[73] Sarbananda Sonowal, *supra* note 5 at 64.

355 can be done on limited grounds and the court cannot look into the effectiveness of the legislation to determine the duty of the Union.

The Court in the case of *S.R. Bommai* provided limited ground for judicial review due to fear of the judiciary encroaching on the political domain and legislative wisdom. The case of *Sarbananda Sonowal* is a clear example of what the judges in *S.R. Bommai* wanted to prevent and why the judges should exercise reasonable restraint in such a politically contested matter. The Court, in the case of *Sarbananda Sonowal,* looked into the objects and reasons of the IMDT Act and held that it fails to pursue its objective of easy deportation of migrants by having cumbersome procedures. [74] As discussed earlier, the Court was moving on with the idea of migrants being an entity to be removed and not as someone possessing certain fundamental rights. The Court blatantly ignored the word 'fair deportation' from the objective and reasons of the IMDT Act and did not take into account the argument of the respondent that the minimal number of deportations can be proof of fair proceeding provided for in the IMDT Act.[75] Since the whole issue of migration in the northeastern states revolves around the socio-economic impact of infiltration, the Court should have analysed evidence to ascertain such impacts. However, the Court relied on a controversial report submitted by an ex-governor of Assam, and certain inconclusive statements by personalities such as Mujibur Rehman and Zulfikar Ali Bhutto to show the economic, cultural, and political vulnerability of Assamese instead of entertaining expert evidence.[76]

The use of the *Chinese immigration case* as precedent, not realizing the consequence of wide interpretation of the term 'aggression', misreading of

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[74] Sarbananda Sonowal, *supra* note 5 at 64.
[75] Sarbananda Sonowal, *supra* note 5 at 47.
[76] SK Sinha, *supra* note 13.

IMDT Act's objective, and random references to the statement of political personalities indicate that the Court was not able to appreciate the evidence brought forward to it to judge the effectiveness of the legislation.

The courts have generally refrained from adjudicating the effectiveness of the IMDT Act due to the legislature having more wisdom and limited resources present on the part of the States. In the case of *Wasim Ahmed Khan v. Government of Andhra Pradesh,*[77] the Court was dealing with the contention of whether the State has a duty to ensure safe drinking water and prevent an outbreak of diseases and whether it can be constitutionally enforced. Although courts have recognised the right to a 'clean and healthy environment' as part of Article 21, the Court in the present case, holding otherwise noted that, "*it should be borne in mind that in a state or rather a country where the growth of population is in geometrical proportion and the natural resources are not only static but depleting or made to deplete, it will be only utopian to issue a direction as desired by the petitioner.*"[78] Similarly, in the present case, the Court could not have adjudicated on the 'effectiveness' of the IMDT Act as States had limited resources to control migration into the State of Assam, in furtherance of which it had enacted the IMDT Act, whose aim was to ensure fair deportation.

Additionally, if the Court would have been mindful of the schema of Part XVIII of the Constitution granting an extraordinary power to the Union and Article 355 being a part of it, it would have narrowly exercised its power of judicial review to determine the validity of the IMDT Act. Since Article 355 is an emergency provision, the Court could not have

[77] Wasim Ahmed Khan v. Government of Andhra Pradesh, AP 2002 (2) ALD 264.
[78] *Id.* at 7.

entered into a detailed analysis of the provisions of the IMDT Act as highlighted in the case of *SR Bommai*.[79] It would have upheld the validity of the IMDT Act under Article 355 as the Union was aware of its duties and it did take certain steps toward fulfilment of that duty.[80]

The judiciary should perceive this case as a cautionary signal or an indicator of concern to restrain itself from judging the 'effectiveness' of an Act catering to emergency provisions as it goes beyond the power provided to the judiciary and in its inefficiency in determining the political issue by sitting on legislative wisdom. There should be a presumption of constitutionality on the part of the Parliament that it knows the need of its people better and is in a better position than the judiciary to make political decisions.[81] Judicial review should be used on limited grounds, especially for Part XVIII, limiting itself to a preliminary analysis of the legislation.

V. POSSIBLE APPLICATION OF ARTICLE 21 AND 29

If the court wanted to strike down the IMDT Act by analysing its effectiveness as it did, it should not have used Article 355 rather, it should have done so within the ambit of Article 21 and 29 i.e., on the grounds of violation of the right to life and cultural and ethnic rights of the Assamese. The Court ruled that Article 21 would be inapplicable in the present case as identification and deportation cannot amount to deprivation and personal liberty. As per the Foreigners Act and the Foreigners (Tribunals) Order, 1974, the court procedures must be just, fair, and reasonable. However,

[79] Bommai, *supra* note 50 at 57.
[80] *See* Praharsh Johorey, *'The Section 6A Challenge: "Illegal Migration" as "External Aggression*",INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (May 20, 2017) https://indconlawphil.wordpress.com/2017/05/20/the-section-6a-challenge-illegal-migration-as-external-aggression/ (last visited Oct. 10, 2022.)
[81] Kesavananda Bharati, *supra* note 63.

the court overlooked various allegations and reports which have criticized the identification, detention, and deportation process under the Foreigners Act.[82] The court could have tried to balance the right to personal liberty of Assamese citizens and the migrants to reach a decision. For instance, it could have struck down the IMDT Act on the grounds of violation of the Assamese people's rights under Article 21 and at the same time could have created a committee or supervised the process of identification and deportation of these migrants under the Foreigners Act.

Similarly, the court had the opportunity to look into the issue of migrants in a non-communal manner. Article 29 of the Indian Constitution protects the cultural rights of minorities, including the Assam people. The Assam people have the right to conserve and promote their cultural heritage under Article 29. This includes the right to maintain their distinct language, customs, and traditions. The state must take steps to protect and promote the cultural identity of the Assam people. The court could have looked into the issue of migration by considering its grave impact on the language, culture, and ethnicity of Assam. Article 29(1) would have allowed the court to strike down the IMDT Act as it creates unreasonable hurdles in the detection of illegal migration posing a grave threat to minority rights in Assam.

VI. CONCLUSION

The constitutional challenge to Section 6-A provides a significant opportunity for the Supreme Court to harmonize the rights of the migrants with the rights of the citizens. This article provides an alternative

[82] AMNESTY INTERNATIONAL, "BETWEEN FEAR AND HATRED: SURVIVING MIGRATION DETENTION IN ASSAM" (Amnesty International 2018)

interpretation of Article 355 and argues that it should not be used by the courts in line with the ratio of *Sarbananda Sonowal.* Arguing for a restrictive nature of Article 355, it has been argued that Article 355 cannot be used as an independent provision expanding its scope beyond the emergency provisions. The article highlights that the court actively needs to secularise the citizenship jurisprudence in India based on an ethnic and linguistic understanding of the situation in contrast to a communal one. It sheds light on a troubling pattern wherein both the government and the courts have shown a disregard for the rights of migrants, raising concerns. The court should take this opportunity to lay down well-established guidelines for the government concerning deportation in order to preserve migrants' rights under Article 21. The court needs to judge the citizenship legislation related to migration on the anvil of Article 14, 29, and 21 with higher scrutiny as it involves higher stakes instead of bringing it within the ambit of Article 355. The court should intervene in this matter to ensure that the migrants are deported through a fair and reasonable procedure, and are living a dignified life till they are residing in India.

Sachika Vij and Ketan Aggarwal, *Navigating the Grey Area: Analyzing Loopholes and Ambiguities in Cryptocurrency's Corporate and Taxation Regime*, 10(1) NLUJ L. REV. 157. (2024).

NAVIGATING THE GREY AREA: ANALYZING LOOPHOLES AND AMBIGUITIES IN CRYPTOCURRENCY'S CORPORATE AND TAXATION REGIME

~ *Sachika Vij & Ketan Aggarwal**

ABSTRACT

Cryptocurrencies have emerged as a disruptive force in the global economy, introducing new opportunities for individuals and corporate entities alike. This article aims to provide a comprehensive understanding of the corporate and commercial landscape governing cryptocurrencies in India, with a particular emphasis on the taxation regime.

India has also witnessed the rise of cryptocurrencies however, the lack of clear guidelines and legal frameworks for cryptocurrencies has created a grey area, making it difficult for corporate and commercial entities to navigate, and has raised concerns about potential fraud, money laundering, taxation loopholes, and other illicit activities. This could stifle the growth of the crypto industry in India, which is still in its nascent stages.

*Recent developments, such as the Finance Ministry's notification dated 8 March 2023 formally inducting virtual assets under the Prevention of Money Laundering Act, 2002 ("**PMLA**") framework, reflect the government's intent to regulate cryptocurrencies and is a welcome step. In this article, the authors aim to provide a comprehensive understanding of the legal and regulatory landscape governing cryptocurrencies in India. The article begins with an overview of their emergence and growth, setting the stage for*

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analysis of the current laws and regulations. While there are frameworks in place, there are ambiguities and loopholes that present challenges for lawmakers and industry stakeholders alike. The article explores these grey areas, with a particular focus on the taxational frameworks surrounding cryptocurrencies.

Through their analysis, the authors identify strategies and best practices for navigating this emerging market. The article is intended to inform policymakers, regulators, and industry stakeholders, providing a roadmap for navigating the complex and ever-changing landscape of cryptocurrencies in India.

TABLE OF CONTENTS

I. ILLUSTRATION 161

II. INTRODUCTION 163

III. UNVEILING THE DIGITAL FRONTIER: THE GENESIS AND EVOLUTION OF CRYPTOCURRENCY 165

IV. FROM RESISTANCE TO REGULATION: INDIA'S CRYPTO STORY .. 166

V. THE RIPPLE EFFECT: CORPORATE AND COMMERCIAL DIMENSIONS IN CRYPTOCURRENCY TRANSACTIONS 170

A. OVERCOMING THE JURISDICTIONAL HURDLES IN BORDER MANAGEMENT AND REPORTING 170

B. MONEY LAUNDERING THREAT, OWNERSHIP AND LICENSING 171

C. RBI'S EXCLUSION OF CRYPTO FROM REGULATORY SANDBOX 173

VI. CRYPTOCURRENCY TAX MAZE: THE LOOPHOLES AND AMBIGUITIES 175

A. CLASSIFICATION PROBLEM 177

B. AMBIGUITIES AROUND MINING 178

C. NO EXCEPTIONS FOR MINIMIZING THE TAX LIABILITY ... 180

1) No Set-Off 180

2) No Carry Forward of the Losses 180

3) No Set-off From Other Sources of Income 181

4) No Tax Exception 182

D. TDS: TAX DEDUCTED AT SOURCE 183

E. GIFTING CRYPTOCURRENCY 184

F. ENTRY OF GST? 184

VII. COMMERCIAL AND TAX FRAMEWORK RECOMMENDATIONS: A WAY FORWARD 186

A. PROPOSING A TIERED TAX SYSTEM FOR CRYPTOCURRENCY TRANSACTIONS 186

B. IMPORTANCE OF CLARITY IN TAXATION FRAMEWORK FOR CRYPTOCURRENCIES 186

C. THE NEED FOR MULTIPLE REGULATORS FOR EFFECTIVE REGULATION OF CRYPTO ASSETS 187

D. MANDATORY KYC 187

E. IMPLEMENTATION OF TRAVEL RULE 188

F. CLEAR REGULATIONS FOR CROSS-BORDER CRYPTO TRANSACTIONS 188

G. CO-EXISTENCE OF CRYPTOS AND CBDCS 188

H. ASSESSING THE APPLICABILITY OF GST ON CRYPTOCURRENCIES 189

VIII. CONCLUSION & WAY FORWARD 190

I. ILLUSTRATION

Ram is a middle-class man with a salary of 8 lakhs per year. In 2018, he heard about the cryptocurrency boom and decided to invest his savings in it. However, he was always worried about the government's stance on cryptocurrency, which had been inconsistent and unclear. He was confused about whether his investments would be legal or not.

In 2019, the government introduced the Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019,[1] which sought to ban the use of cryptocurrency as a medium of exchange. The bill also imposed a penalty of up to 10 years of imprisonment for violations.

Ram was scared and uncertain about the future of his investments. He wondered if he would be prosecuted for investing in cryptocurrency. However, in 2020, the Supreme Court of India struck down the circulars as unconstitutional when challenged in the case of the *Internet and Mobile Association of India v. Reserve Bank of India.*[2]

However, the ambiguity surrounding the taxation of cryptocurrency still remained. In 2022, the government declared that any revenue from the transfer of virtual digital assets ("**VDAs**") would be subject to a 30% tax, and tax would be deducted at the source ("**TDS**") at 1% for payments made in virtual assets.[3]

Ram was still worried about the lack of clarity surrounding cryptocurrency taxation. He wondered if he would be taxed unfairly for his

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[1] The Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019, Bills of Parliament, 2019.

[2] Internet and Mobile Association of India v. Reserve Bank of India, (2020) 10 SCC 274.

[3] Lalit Munoyat, *Taxation of Cryptocurrency, Virtual Digital Assets, Non-Fungible Tokens*, TAXGURU (Sept. 22, 2022), https://taxguru.in/income-tax/taxation-cryptocurrency-virtual-digital-assets-non-fungible-tokens.html.

investments. He also heard that regardless of holding time, the flat income tax rate of 30% applied to all retail investors, traders, or anyone else transferring cryptocurrency assets in a particular financial year. This meant that there was no distinction between short-term and long-term gains and that business and investment income were taxed at the same rate.

As an investor, Ram felt that the government was not taking into account the distinctive characteristics of cryptocurrencies and the various levels of risk attached to various types of transactions. He was also confused about the taxation of mining and staking activities, as the government had not provided clarity on this matter.

Despite his concerns, Ram continued to hold on to his cryptocurrency investments, hoping that the government would provide more clarity on the taxation regime in the future. He realized that navigating the grey area of cryptocurrency compliance was a challenge, but he was determined to stay informed and make the best decisions for his financial future.

II. INTRODUCTION

The power and potential of the internet could not have been fully realized by someone when it emerged in the 1990s. However, today, it would not be wrong to categorize it as a basic need, just like food, clothing, and shelter. While we do not know if cryptocurrencies will ever reach the same level of ubiquity as the Internet, it is clear that they have emerged as a powerful force in the global economy. Cryptocurrencies have disrupted traditional financial systems and introduced new opportunities for individuals and corporate entities alike. Despite their recent arrival, cryptocurrencies have already gained widespread adoption and acceptance, and they are rapidly evolving and expanding their reach all around the world.[4]

India has emerged as one of the fastest-growing fintech hotspots in the world, with one of the world's fastest-growing economies and a strong focus on innovation and technological development.[5] The success of indigenously developed products such as the Unified Payment Interface ("**UPI**") has fueled this growth, as it has revolutionized digital payments in the country and made financial transactions more accessible and convenient for millions of people.[6] At the same time, the emergence of cryptocurrencies has added a new dimension to the fintech landscape in India.

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[4] Susannah Hammond and Todd Ehret, *Cryptos on the Rise 2022*, THOMSON REUTERS, (2022), https://www.thomsonreuters.com/en/reports/cryptos-on-the-rise-2022.html.
[5] *Why India is at the forefront of a fintech revolution*, THE ECONOMIC TIMES, (Oct. 11, 2021), https://economictimes.indiatimes.com/why-india-is-at-the-forefront-of-a-fintech-revolution/articleshow/86936413.cms.
[6] *From Local to Global: How India's Digital Payment Revolution is Inspiring the World,* PRESS INFORMATION BUREAU, (Mar. 19, 2023) https://pib.gov.in/FeaturesDeatils.aspx?NoteId=151350&ModuleId%20=%202.

While the Indian government has been cautious in its approach to cryptocurrencies,[7] Notwithstanding the legal ambiguity on whether cryptocurrency investment is permitted in India and huge volatility in prices, the unbelievable fact is that India has the highest number of crypto owners in the world at 10.07 crores.[8] The US came in a distant second in terms of crypto owners at 2.74 crores, followed by Russia (1.74 crores) and Nigeria (1.30 crores).[9]

However, with any new technology, there are also significant challenges and risks associated with cryptocurrencies, particularly in the areas of regulation and compliance. India's cryptocurrency market faces several legal, commercial, and specifically tax-related challenges due to the significant gaps and ambiguities in the current regulatory framework. While there are several concerns surrounding the legality of cryptocurrencies, including jurisdictional issues, data theft, financial fraud, privacy fraud, and intellectual property, the focus in this article will be on the corporate and commercial legal issues surrounding crypto, with a particular emphasis on the taxation regime.

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[7] *Cryptocurrency Regulations by Country*, THOMSON REUTERS, (2022), https://www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2022/04/Cryptos-Report-Compendium-2022.pdf.

[8] *India Has Highest Number of Crypto Owners in the World at 10.07 Crore: Report*, LIVE MINT, (Oct. 13, 2021), https://www.livemint.com/market/cryptocurrency/india-has-highest-number-of-crypto-owners-in-the-world-at-10-07-crore-report-11634110396397.html.

[9] Disha Sinha, *India: Hub of the World's Highest Number of Crypto-Owners, Much Remains to Be Done*, ANALYTICS INSIGHT (Oct. 13, 2021), https://www.analyticsinsight.net/india-hub-of-the-worlds-highest-number-of-crypto-owners-much-remains-to-be-done/.

III. UNVEILING THE DIGITAL FRONTIER: THE GENESIS AND EVOLUTION OF CRYPTOCURRENCY

In today's fast-paced world, customers demand faster, safer, and more practical payment methods and newer technologies. Blockchain, Distributed Ledger Technology ("**DLT**"), and New Umbrella Entities ("**NUE**") are meeting these needs. But the story of cryptocurrency dates back to the 1990s when David Chaum introduced the concept of untraceable transactions without intermediaries like Central Banks in his conference paper.[10] He also presented Digicash, a prototype cryptocurrency that required user software to withdraw money from a bank and certain encryption keys before transmitting the money to a receiver.[11]

However, it wasn't until Satoshi Nakamoto's Bitcoin went viral that the world began to take notice of cryptocurrency.[12] Before Bitcoin, there was Bit Gold, designed by Nick Szabo in 1998, which required participants to dedicate computer power to solving cryptographic puzzles for a reward. But it was Bitcoin's blockchain network, described in Nakamoto's 'Bitcoin - A Peer-to-Peer Electronic Currency System' white paper, that captured the world's imagination in 2008.[13]

Bitcoin's first monetary transaction occurred in 2012 when 10,000 bitcoins were exchanged for two pizzas, marking a milestone in the history of cryptocurrency. In today's terms, these 10000 BTC used for buying 2

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[10] Michael J. Christie, *David Chaum and Ecash: Privacy Technology's Negotiations of Political, Cultural, and Techno-Social Contingencies in the Mid-1990s*, THESIS DEPARTMENT OF HISTORY (2015), https://themilsource.com/content/files/historydept/wp-content/uploads/sites/20/2017/07/Michael-Christie.pdf.

[11] Adam Hayers, *The Socio-Technological Lives of Bitcoin*, 36(4) THEORY, CULTURE & SOCIETY (July 2019).

[12] Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, https://bitcoin.org/bitcoin.pdf.

[13] *Id.*

pizzas equals 19,10,23,00,327.53 INR or 19 Crores.[14] As Bitcoin gained popularity, several other cryptocurrencies such as Litecoin, Namecoin, and Swiftcoin began to emerge. Even Tesla CEO Elon Musk made a splash in the crypto market by tweeting "*Dogecoin is the people's crypto*" which caused the value of Dogecoin to spike.[15]

Ethereum, Bitcoin's rival based on the use of smart contracts, was founded in 2017,[16] adding to the growing popularity and diversity of the cryptocurrency market. Recently, in 2021, the market capitalization of crypto assets surpassed $3 trillion,[17] signalling the growing importance and potential of cryptocurrency in the global economy.

IV. FROM RESISTANCE TO REGULATION: INDIA'S CRYPTO STORY

The Indian population has become fascinated by cryptocurrency, and many are anxiously watching the changes in the financial industry. Despite the growing interest, India has not yet passed any particular cryptocurrency-related laws. In India, cryptocurrencies have existed since 2013, when the market was just getting started.[18] The number of exchanges has increased over time, with 13 major and 20 small exchanges debuting in

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[14] Rufas Kamau, *What Is Bitcoin Pizza Day, and Why Does the Community Celebrate on May 22?,* FORBES (Nov. 8, 2022), https://www.forbes.com/sites/rufaskamau/2022/05/09/what-is-bitcoin-pizza-day-and-why-does-the-community-celebrate-on-may-22/?sh=5ebebde1fd68.

[15] Swathi Kashettar, *Dogecoin Soars Followed After Elon Musk Tweet*, ANALYTICS INSIGHT (Feb. 16, 2023), https://www.analyticsinsight.net/dogecoin-soars-followed-after-elon-musk-tweet/.

[16] Ryan Derousseau, *Everything You Need to Know about Ethereum,* MONEY (Dec. 22, 2017), https://money.com/what-is-ethereum-everything-know-cryptocurrency/.

[17] Joanna Ossinger, *Crypto World Hits $3 Trillion Market Cap as Ether, Bitcoin Gain*, BLOOMBERG (Nov. 8, 2021), https://www.bloomberg.com/news/articles/2021-11-08/crypto-world-hits-3-trillion-market-cap-as-ether-bitcoin-gain.

[18] *The Journey of Cryptocurrencies in India*, MONEY CONTROL, https://www.moneycontrol.com/msite/wazirx-cryptocontrol-articles/the-journey-of-cryptocurrencies-in-india/.

2014. Nevertheless, despite the expansion, the RBI and the Ministry of Finance continued to oppose the concept of virtual currencies and repeatedly issued advisories about the risks they present.[19]

The resistance towards cryptocurrencies in India became even more evident when the RBI issued a circular prohibiting banks, NBFCs, and payment system providers from dealing with virtual currencies and offering services to virtual currency exchanges.[20] This move dealt a massive blow to the crypto user community in India. Adding to the woes, in 2018, the co-founder of Unicorn Technologies, Sathvik Vishwanath, was arrested by the Bangalore police for setting up the first cryptocurrency ATM in India.[21]

The resistance didn't end there, the government also came up with the Crypto Token and Crypto Asset (Banning, Control, and Regulation) Bill, 2018[22] and the Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019[23] to restrict any direct or indirect use of cryptocurrency as a medium of exchange. What was astounding about the government's resistance was that a penalty i.e. imprisonment of up to ten years was also imposed for violation of the provisions. However, neither of these laws was brought up for debate in Parliament.

The Apex Court struck down the circulars as unconstitutional when challenged in the case of *Internet and Mobile Association of India v. Reserve Bank*

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[19] Press Release*, RBI Cautions Users of Virtual Currencies against Risks*, RESERVE BANK OF INDIA, HTTPS://RBI.ORG.IN/SCRIPTS/BS_PRESSRELEASEDISPLAY.ASPX?PRID=30247.
[20] Notifications, *Prohibition on Dealing in Virtual Currencies (VCs)*, RESERVE BANK OF INDIA, HTTPS://WWW.RBI.ORG.IN/SCRIPTS/NOTIFICATIONUSER.ASPX?ID=11243.
[21] Sathvik Vishwanath, *CCB arrests CEO of Unocoin Technologies for setting up Bitcoin ATM*, THE HINDU, (Oct. 19, 2018), https://www.thehindu.com/news/cities/bangalore/ccb-arrests-ceo-of-unocoin-technologies/article25313768.ece.
[22] The Crypto Token and Crypto Asset (Banning, Control, and Regulation) Bill, 2018, Bills of Parliament, 2018.
[23] *Supra* note 1 at 4.

of India in 2020.[24] This breathed life into the crypto movement. Start-ups in the crypto ecosystem amped up efforts to increase the adoption of crypto through several means like Advertisements by tying up celebrities from social media, sports, and Bollywood to market cryptocurrency investments on the internet. Accordingly, cryptocurrency platforms spent close to 50 crores to flood TV screens with ads during the ICC T20 World Cup and the Indian Premier League.[25]

Parallel to this the Advertising Standards Council of India ("**ASCI**"), published rules to control the promotion and advertising of cryptocurrencies by celebrities.[26] According to ASCI, famous people or prominent figures who feature in such advertisements have to take extra care to make sure they have done their homework on the claims made in the advertisement to avoid misleading consumers. To establish a supportive environment for the development of digital currency issued by the RBI, the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021[27] was introduced in the Lok Sabha. New cryptocurrency rules were supposed to be unveiled by the Indian government during the Winter Session of Parliament. The cryptocurrency measure was delayed for the second time after being listed. The first time it occurred was in 2021, during the Parliamentary Budget Sitting.

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[24] *Supra* note 2 at 4.

[25] Gaurav Laghate and Sachin Dave, *'Crypto exchanges' Ad spend at Rs 50 crore in World Cup*, THE ECONOMIC TIMES (Nov. 16, 2021), https://economictimes.indiatimes.com/markets/cryptocurrency/crypto-exchanges-ad-spend-at-rs-50-crore-in-world-cup/articleshow/87727829.cms?from=mdr.

[26] *Celebrities must do their homework before endorsing crypto, says ad body*, THE ECONOMIC TIMES, (May 17, 2022), https://economictimes.indiatimes.com/tech/technology/celebrities-must-do-their-homework-before-endorsing-crypto-says-ad-body/articleshow/91618937.cms.

[27] The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021 Bills of Parliament, 2021.

Further clarity on Cryptocurrency and specifically its tax regime came out in Budget 2022; Even though the government did not include the eagerly anticipated cryptocurrency bill in the Union Budget 2022–2023, Nirmala Sitharaman, the union finance minister, declared that any revenue from the transfer of VDAs will be subject to a 30% tax.[28] Tax will be deducted at the source at 1% for payments made in virtual assets.[29] Experts have called it a bold move that might discourage transactions, which is explored in more detail later in this article.

There is some reflection of the government's intent to regulate cryptocurrencies following the Finance Ministry's recent notification on the formal induction of virtual assets under the PMLA framework which is a welcome step.[30] As a result, crypto exchanges will be considered "*reporting entities*" for purposes of Section 2(wa) of the PMLA.[31] This also means that VDA entities are now covered as a "*reporting entity*", meaning thereby that exchanges, custodians, or administrators of VDAs handling customer funds will have to take care of PMLA laws as much as banks do and report suspicious transactions.

Even though India has started to control the cryptocurrency market, there are still a lot of legal gaps that need to be filled. This has caused ambiguity and a lack of clarity, especially in the field of taxation. The next part will look at the legal and regulatory issues that the Indian cryptocurrency market is facing and how they relate to corporate and

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[28] The Income Tax Act, 1961, § 115BH, No. 43, Acts of Parliament, 1949.
[29] The Income Tax Act, 1961, § 194S, No. 43, Acts of Parliament, 1949.
[30] Ministry of Finance, Gazette Notification dated Mar. 7, 2023, https://egazette.nic.in/WriteReadData/2023/244184.pdf.
[31] Prohibition of Money Laundering Act, 2002, § 2(wa), Act No. 15, Acts of Parliament, 2002.

commercial law. The main section of this article will then explore potential ambiguities in the current tax system.

V. THE RIPPLE EFFECT: CORPORATE AND COMMERCIAL DIMENSIONS IN CRYPTOCURRENCY TRANSACTIONS

The adoption of newer technologies like Blockchain and Cryptocurrencies does indeed require better regulations at national and international levels. As cryptocurrencies gain popularity, countries such as India are faced with a growing number of legal and Commercial challenges.[32] Due to the absence of regulatory clarity, several corporate and commercial problems have emerged which are listed below:

A. OVERCOMING THE JURISDICTIONAL HURDLES IN BORDER MANAGEMENT AND REPORTING

Regulating cryptocurrencies across the world poses a critical challenge due to their decentralized nature, which presents complex jurisdictional issues. The determination and applicability of laws and regulations to transactions in public blockchain systems, where there is no central owner or regulator, are difficult to establish. On the other hand, private systems can create a legal framework and internal governance structure to specify governing legislation for transactions.[33]

In India, the classification of cryptocurrencies as "*capital assets*" or "*goods*" determines their regulation under the Foreign Exchange

[32]*Blockchain: The Indian Strategy Part 1*, NITI AAYOG (2020), https://www.niti.gov.in/sites/default/files/2020- 01/Blockchain_The_India_Strategy_Part_I.pdf.

[33] Evrim Tan, Stanislav Mahula & Joep Crompvoets, *Blockchain Governance in the Public Sector: A Conceptual Framework for Public Management*, 39(1) GOVERNMENT INFORMATION QUARTERLY (Jan. 2022), https://www.sciencedirect.com/science/article/pii/S0740624X21000617.

Management Regulations. The Reserve Bank of India ("**RBI**") is governed by two regulations, namely the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000[34] and the Foreign Exchange Management (Exports of Products and Services), 2015 Regulations[35]. However, the challenge remains the determination of the nodal agency and governing law for cross-border transactions and any breaches thereof.

Providing clarity on regulations is crucial as it enables investors and traders to engage in basic risk management and facilitates risk-free growth. A mutually agreed-upon conflict resolution procedure for private systems could be advantageous. It is imperative to address the legal and regulatory challenges surrounding cryptocurrencies to prevent financial risks and ensure their safe and secure use in the global economy. Failure to do so could result in the emergence of unregulated financial markets and increased risks to financial stability.[36]

B. MONEY LAUNDERING THREAT, OWNERSHIP AND LICENSING

Cryptocurrencies have been attracting users who engage in criminal activities due to their pseudonymous nature and perceived lack of limitations. Criminal organizations traded $2.8 billion in Bitcoin in 2019, up from $1 billion in 2018.[37] Recently, the Ministry of Finance in India has brought transactions involving cryptocurrency assets under the PMLA for

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[34] The Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, Acts of Parliament, 2000.

[35] The Foreign Exchange Management (Exports of Products and Services) Regulations, 2015, Acts of Parliament, 2015.

[36] *Financial Stability Board, Regulation, Supervision and Oversight of Crypto-Asset Activities and Markets*, (October 2022), https://www.fsb.org/wp-content/uploads/P111022-3.pdf.

[37] *Legal Issues Surrounding Cryptocurrency*, FREEMAN LAW (Oct. 4, 2022), https://freemanlaw.com/legal-issues-surrounding-cryptocurrency/.

anti-money laundering compliance.[38] Cryptocurrency exchanges are now considered "*reporting entities*" and "*persons carrying on designated businesses or professions*" for the purposes of the PMLA.

This decision has been welcomed by the crypto sector as it allows for communication with the Financial Intelligence Unit of India ("**FIU-IND**") and sharing of information to assist enforcement agencies. However, effective implementation of these requirements requires a nodal regulatory agency like the RBI for Banks. Without regulators, crypto companies would end up dealing with enforcement agencies directly. Concerns have also been raised about the lack of a transition period for companies to follow the new standards.[39]

The Securities and Exchange Board of India ("**SEBI**") can be the regulatory body to effectively govern KYC and AML compliances and ownership and licensing requirements. SEBI can use existing regulations like The SEBI (Investment Advisors) Regulation 2013[40] and SEBI (Portfolio Managers) Regulation 2019[41] to govern the activities of investment advisors and fund managers. However, categorization becomes crucial as cryptocurrency has not been included in the list of commodities under SEBI's purview.

In the recent case of *Hitesh Bhatia v. Mr. Kumar Vivekanand*,[42] involving alleged fraud in the sale and purchase of bitcoins in India, the Tis Hazari Court in Delhi issued noteworthy observations on cryptocurrency transactions. The Court emphasized that such transactions must conform to prevailing Indian laws, including the PMLA, Indian Penal Code, Foreign

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[38] *Supra* note 30 at 11.
[39] *Supra* note 2 at 4.
[40] The SEBI (Investment Advisors) Regulation, 2013, Regulations of SEBI, 2013.
[41] The SEBI (Portfolio Managers) Regulation, 2019, Regulations of SEBI, 2019.
[42] Hitesh Bhatia v. Kumar Vivekanand, Case No. 3207 of (2020).

Exchange Management Act, and tax regulations. It underscored the crucial role of intermediary platforms, stating that they bear the responsibility of conducting thorough Know Your Customer ("**KYC**") checks to verify the legitimacy of transactions and the actual identities of the parties involved. The Court further noted that, despite the absence of specific regulations, legitimate cryptocurrency trade through authorized intermediaries may be entitled to constitutional protection under Article 19(1)(g) of the Indian Constitution, ensuring the freedom to engage in any profession, occupation, trade, or business.

In conclusion, the inclusion of cryptocurrency transactions under the PMLA is a step towards a safer market for crypto exchanges. However, effective implementation requires a nodal regulatory agency like SEBI to govern KYC and AML compliances, ownership, and licensing requirements. Categorization of cryptocurrency becomes crucial for SEBI to effectively govern the sector.

C. RBI'S EXCLUSION OF CRYPTO FROM REGULATORY SANDBOX

The RBI's regulatory sandbox framework has the potential to establish India as a global fintech hub. However, the exclusion of cryptocurrency and crypto assets, as well as trading, investing, and settling in crypto assets, and initial coin offerings from the framework is a cause for concern.[43]

The primary objective of implementing a sandbox framework is to safeguard consumer interests, keep pace with industry advancements, and assist regulators in developing regulations for emerging technologies. Excluding fintech firms that deal with cryptocurrencies could be

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[43] *Enabling Framework for Regulatory Sandbox*, RESERVE BANK OF INDIA (Aug. 13, 2019), https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=938.

problematic for Indian cryptocurrency investors, as there is currently no regulatory framework to protect them in the event of disputes or issues.[44] Furthermore, virtual currencies held in e-wallets are vulnerable to cyber-attacks, posing a significant risk to users.

It is critical to subject these assets to testing to better comprehend and define them. The use of a sandbox satisfies this need, as it will allow regulatory bodies to fully grasp the nature of these assets and assist in the development of necessary laws.[45]

Therefore, it is imperative for the RBI to reconsider its exclusion of cryptocurrency and crypto assets from its regulatory sandbox framework. Doing so will not only provide a conducive environment for fintech companies to experiment with innovative solutions but also help safeguard the interests of Indian cryptocurrency investors. Ultimately, this will aid in establishing India as a global fintech hub, paving the way for increased investment, innovation, and growth in the industry.

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[44] K J Shashidhar, *Regulatory Sandboxes: Decoding India's attempt to Regulate Fintech Disruption*, OBSERVER RESEARCH FOUNDATION (May 24, 2023), http://20.244.136.131/research/regulatory-sandboxes-decoding-indias-attempt-to-regulate-fintech-disruption-66427.

[45] Parma Bains & Caroline Wu, *Institutional Arrangements for Fintech Regulation: Supervisory Monitoring*, IMF E LIBRARY (Jun. 26, 2023), https://www.elibrary.imf.org/view/journals/063/2023/004/article-A001-en.xml.

VI. CRYPTOCURRENCY TAX MAZE: THE LOOPHOLES AND AMBIGUITIES

The gains from the transfer of cryptocurrencies are subject to tax under the head of income, depending on the nature of holding the same, the Minister of State for Finance, Mr. Anurag Singh Thakur, had stated in response to a question in the Rajya Sabha back in 2021.[46]

The Ministry of Finance adopted a completely different and classification-neutral approach to taxing cryptocurrencies a year after making the aforementioned statement. The finance minister made four significant changes to the Income-tax Act, 1961 in the Budget for the Financial Year 2022–2023. The Union Budget 2022–2023 made an effort to address the taxation of cryptocurrencies in India, but the rules that came out of it have many gaps and are unclear in terms of corporate and commercial compliance.[47] Although the government has designated digital assets as *"Virtual Digital Assets"*[48] under Section 2(47A) of the Finance Act 2022,[49] there is still a lot of uncertainty surrounding the distinction between cryptocurrencies and central bank-backed currencies.

Cryptocurrency trades are subject to a high tax rate of 30%, which is equal to the top income tax bracket in India. According to Section 194S of the Finance Act of 2022,[50] the 1% withholding tax that is imposed on

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[46] Tanu Priya, *Digital Virtual Assets and Its Tax Implications*, DIGEST OF CASE LAWS (Dec. 29, 2022), https://itatonline.org/digest/articles/digital-virtual-assets-and-its-tax-implications/.
[47] *India Budget: Ministry of Finance: Government of India*, MINISTRY OF FINANCE, https://www.indiabudget.gov.in/.
[48] *FAQ on Taxation of Cryptocurrencies, Virtual Digital Assets in Works*, BUSINESS STANDARD NEWS (Apr. 10, 2022), https://www.business-standard.com/article/markets/faq-on-taxation-of-cryptocurrencies-virtual-digital-assets-in-works-122041000194_1.html.
[49] The Finance Act, 2022, § 2(47A), No. 6, Acts of Parliament, 2022.
[50] The Finance Act, 2022, §194S, No. 6, Acts of Parliament, 2022.

the buyer of a cryptocurrency for the consideration sum only makes compliance more difficult.[51] The crypto industry in India, which is still in its infancy, may be stunted by this high tax rate.

According to Section 115BH of the Finance Act of 2022,[52] taxable events include the conversion of digital assets into Indian rupees or any other fiat currency, the conversion of one type of VDA into another, and the payment of goods and services with a VDA. This, however, raises a lot of questions. The regulations don't give specific instructions on how to calculate the tax basis or determine the fair market value of VDAs/ cryptocurrencies.

Under Section 2(24) of the Income-tax Act,[53] the term "*income*" is defined in a way that aims to be inclusive rather than restrictive. The word "*income*" has the widest amplitude and must be given its natural and grammatical meaning, as the Supreme Court noted in *CIT v. G.R. Karthikeyan*[54]. Therefore, any cryptocurrency-related revenue, such as gains from trading or mining, would be governed by the IT Act.

It is significant to remember that just because a transaction is taxed doesn't automatically mean it complies with the Income Tax Act. In actuality, as has been established by the case of *CIT v. K. Thangamani, Madras,*[55] the Act taxes both legitimate and illegal transactions. Regardless of whether a transaction is legal or illegal, the Act is set up to tax it based on its nature. Because of this, it is unclear whether the Indian government's position on the legalization of cryptocurrencies has been formalized.

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[51] Ministry of Finance, *Guidelines for Removal of Difficulties under Sub-Section (6) of Section 194S of the Income-Tax Act, 1961* (Jun. 22, 2022), https://incometaxindia.gov.in/communications/circular/circular-no-13-2022.pdf.
[52] The Finance Act, 2022, § 115BH, No. 6, Acts of Parliament, 2022.
[53] The Income Tax Act, 1961, § 2(24), No. 43, Acts of Parliament, 1961.
[54] CIT v. G.R. Karthikeyan, (1993) 112 CTR (SC) 302.
[55] CIT v. K. Thangamani, Madras 309 ITR 15.

Additionally, there is still a great deal of uncertainty about how to tax cryptocurrency transactions. It's crucial to keep in mind the larger legal framework in which these transactions take place as we analyze the challenges the Indian cryptocurrency market faces in terms of taxation. Now one by one let us explore all the taxation loopholes that are present in the current cryptocurrency taxational regime.

A. CLASSIFICATION PROBLEM

First off, regardless of holding time, the flat income tax rate of 30% applies to all retail investors, traders, or anyone else transferring cryptocurrency assets in a particular financial year. This implies that there is no distinction between short-term and long-term gains and that business and investment income are taxed at the same rate.

Second, all cryptocurrency transactions, including those made by traders, miners, and investors, are subject to a uniform tax rate of 30%. In contrast, traders of other commodities are subject to regular slab rates of taxation. This lack of differentiation between various taxpayer types and the characteristics of their cryptocurrency holdings deviates from accepted tax law principles.

Therefore, regardless of the type of their transactions, people and companies involved in the cryptocurrency trade are subject to a fixed high tax rate of 30%.[56] On the other hand, regardless of how long they keep cryptocurrency units, investors are also subject to the same tax rate.[57] The distinctive characteristics of cryptocurrencies and the various levels of risk

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[56] JM Bharucha, *How Cryptocurrencies Are Taxed in India*, FORBES MAGAZINE (Nov. 23, 2022), https://www.forbes.com/advisor/in/investing/cryptocurrency/cryptocurrency-tax-in-india/.

[57] *Guide to Crypto Tax in India 2023*, COINDCX, (Jan. 13, 2023), https://coindcx.com/blog/cryptocurrency/crypto-tax-guide-india/.

attached to various types of transactions are not taken into account by this taxation regime.[58]

Let's use an example to better comprehend this:

If an investment of INR 1,00,000 was made in crypto at the beginning of FY 2022, and by the end of FY 2022, the crypto was sold for INR 1,50,000, a flat 30% crypto tax is applicable on an income gain of INR 50,000. As an investor, you will be liable to pay INR 15,000 (plus surcharge and cess) as a tax on crypto income in that financial year.

It should be noted that any income arising on transactions relating to crypto shall be taxed only at the time of transfer of such crypto i.e. if a person continues to hold the asset, the holding is not taxable on such unrealized gains.

B. AMBIGUITIES AROUND MINING

The Finance Act, 2022[59] has provided some clarity on the taxation of cryptocurrency transactions by stating that the term 'transfer' will be treated the same as that used for the transfer of capital assets. This means that activities such as selling, exchanging, or relinquishing cryptocurrency will give rise to capital gains, irrespective of whether the cryptocurrency is held as a capital asset or not. However, the Act has not provided clarity on whether the term 'transfer' would include the activity of mining and staking cryptocurrency.[60]

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[58] Aashima Sawhney, *Taxation of Cryptocurrency: Cryptic or Clear?*, VIDHI CENTRE FOR LEGAL POLICY (Feb. 14, 2022), https://vidhilegalpolicy.in/blog/taxation-of-cryptocurrency-cryptic-or-clear/.

[59] The Finance Act, 2022, Act No. 6, Acts of Parliament, 2022.

[60] Aashima Sawhney, *Why India Needs Clarity on Taxation of Cryptocurrency*, BAR AND BENCH (May 30, 2022), https://www.barandbench.com/columns/vidhispeaks-clarity-taxation-cryptocurrency.

It is difficult to calculate the price of purchasing a bitcoin because, in the case of mining or staking, the cryptocurrency is not paid by an entity but rather is won on the network. The Government has also verified that costs associated with mining cryptocurrencies are considered capital expenses and cannot be subtracted from earnings from the exchange of cryptocurrencies.[61] Taxpayers who participate in mining and staking activities face uncertainty due to the lack of clarity regarding their treatment.

Let us understand this better with the help of an example:

Suppose a taxpayer engages in mining activities and mines one bitcoin. The taxpayer incurs Rs. 1 lakh in expenses related to mining hardware and electricity costs. Later, the taxpayer sells the bitcoin for Rs. 1 lakh, resulting in a capital gain of Rs. 1 lakh.

Since the cost of acquisition of a bitcoin cannot be determined in the case of self-generated assets, the taxpayer cannot claim any deduction for the Rs. 1 lakh in expenses incurred for mining the bitcoin. As a result, the entire capital gain of Rs. 1 lakh will be taxable at a rate of 30%, resulting in a tax liability of Rs. 30,000.

After paying the taxes, the taxpayer's net profit will be Rs. 70,000 (Rs. 1,00,000 - Rs. 30,000). However, since the taxpayer incurred expenses of Rs. 1 lakh in mining the bitcoin, the taxpayer will have a loss of Rs. 30,000 (Rs. 70,000 - Rs. 1,00,000) overall.

This example highlights the importance of considering the costs incurred in mining or staking cryptocurrencies when calculating the net

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[61] Justin M Bharucha & Aashika Jain, *How Cryptocurrencies Are Taxed in India*, FORBES ADVISOR (May 4, 2023), https://www.forbes.com/advisor/in/investing/cryptocurrency/cryptocurrency-tax-in-india/#:~:text=The%20Government%20has%20also%20confirmed,from%20the%20transfer%20of%20cryptocurrency.

profit or loss from such activities. It also demonstrates the need for further clarification and guidance from authorities on the taxation of mining and staking activities.

C. NO EXCEPTIONS FOR MINIMIZING THE TAX LIABILITY

1) *No Set-Off*

As per the Budget 2022 proposal, the loss arising from the transfer of Crypto assets cannot be set off against any other income and also, it cannot be carried forward.[62] The Income Tax Act expressly prohibits the set-off of losses from transfers of Crypto against income or gains derived from other VDA.[63] Illustratively, if a person were to sell an NFT and incur a loss, the loss cannot be set off against a gain made on the transfer of another VDA. Illustratively, if A sells a Bitcoin for a loss of INR 10,000 and then sells units of Ethereum for a profit of INR 50,000, A would be liable to tax on the entire profit of INR 50,000 from the sale of Ethereum and would not be able to set-off the loss of INR 10,000 on the NFT.

Essentially, under the Income Tax Act, gains and income from VDAs are taxable but no relief is provided in the event losses are incurred, and, to that extent, VDAs are taxed differently than most other assets in India.

2) *No Carry Forward of the Losses*

Section 115BBH(2)(b) of the IT Act[64] provides no set off of loss from the transfer of the VDA computed under clause (a) of Sub-Section (1) shall be allowed against income computed under any other provision of

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[62] *Supra* note 47.

[63] *Understand the Taxation of Virtual Digital Asset,* TAXMAN PUBLICATIONS (Jun. 6, 2022), https://www.taxmann.com/post/blog/taxation-of-virtual-digital-asset/.

[64] The Income Tax Act, 1961, § 115BBH(2)(b), No. 43, Acts of Parliament, 1961.

this Act to the assessee and 'such loss shall not be allowed to be carried forward to succeeding assessment years'. Losses cannot be carried over to the following year or offset against any other income in the same year.

For example, if a user incurs a net loss of Rs 2 Lacs on the transfer of crypto during the year, his/her tax liability on crypto transfer will be zero for the current year but this loss of Rs 2 Lacs cannot be carried forward to the next financial year for adjusting against the future income in the following financial year. In effect, the loss of Rs 2 Lacs will not yield any benefit to the assessee in future tax periods when he/she generates taxable income from the crypto business.

3) *No Set-off From Other Sources of Income*

While presenting the budget, the Finance Minister said that loss from the transfer of VDAs cannot be set off against any other income. As per the Income Tax Act, 1961, when it comes to computing taxes on virtual assets, no deductions are allowed except for the cost of acquisition. Furthermore, the Income Tax Department has clarified that losses incurred through the transfer of virtual assets cannot be set off against any other income.[65]

For instance, as per Section 74 of the IT Act,[66] if an individual has a loss from the transfer of a capital asset (such as virtual assets), it cannot be set off against any other income. The government has clarified that if one incurs any loss from the transfer of virtual assets, it cannot be set off against any other income.

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[65] Babar Zaidi, *Crypto Losses Can't Be Set off, Clarifies Govt*, THE ECONOMIC TIMES (Mar. 22, 2022), https://economictimes.indiatimes.com/wealth/tax/crypto-losses-cant-be-set-off-clarifies-govt/articleshow/90358573.cms.

[66] The Income Tax Act, 1961, § 74, No. 43, Acts of Parliament, 1961.

Let's consider an example to understand the legal implications of losses from Cryptocurrency and other sources of income.

Suppose an individual, Mr. A, incurs a loss of Rs. 2 lakhs from crypto trading and earns Rs. 10 lakhs from other businesses. In such a scenario, the loss of Rs. 2 lakhs cannot be set off against the income earned from other businesses. As per the Income Tax Act, losses from speculative business (such as crypto trading) cannot be set off against income from any other business or profession.

Therefore, Mr. A will be liable to pay income tax on the full amount of Rs. 10 lakhs earned from other businesses, without any reduction for the loss incurred from crypto trading. Similarly, if Mr. A had incurred losses in his other businesses, those losses cannot be set off against the income earned from crypto trading.

4) *No Tax Exception*

Income from cryptocurrencies, NFTs, and other VDAs is taxed at a fixed rate of 30%, regardless of which tax bracket you fall into. This means that even if your total income is below the tax-exempt threshold, you will still need to pay taxes on your crypto earnings. For instance, if you are making a profit of Rs. 5 lacs from crypto trading, you'll have to pay 30% of taxes for it.

Unlike other income sources such as salary, house property, or capital gains from equity shares, mutual funds, and ETFs, the basic exemption limit rule doesn't apply to crypto income. Even if you earn only from crypto and have no other income, you'll still need to pay tax on it. This is different from other income sources where you can earn up to a certain limit tax-free.

D. <u>TDS: TAX DEDUCTED AT SOURCE</u>

Section 194S of the IT Act, 1961,[67] and the Income Tax Regulations, 1962[68] provide the legal framework for the TDS provisions related to Cryptocurrency. The Indian Income Tax Act mandates that when a resident transfers a VDA for consideration, the payer must deduct 1% of the consideration at source as income tax. This requirement applies regardless of whether the consideration is in cash, partly in cash, and partly in consideration for another Cryptocurrency This provision is included in Section 194S of the IT Act, which was introduced in the Finance Bill of 2022.

The revised Income Tax Regulations state that the 1% TDS is applicable on all sell transactions & It is important to note that TDS will be deducted on the final sale amount, irrespective of whether a profit or loss is booked on the trade.[69]

According to the Income Tax regulations, if the total transactions (both buy and sell) are less than ₹10,000, TDS may not be applicable. However, this limit appears to be pointless since exchanges may not be aware of the Crypto trades of a person across other exchanges, they are required to deduct TDS from the first applicable transaction, making the exception of ₹10,000 inapplicable.

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[67] The Income Tax Act, 1961, § 194S, No. 43, Acts of Parliament, 1961.

[68] The Income Tax Regulations, 1962.

[69] *1% TDS on Crypto in India: How It Works? & How Will It Impact Investors*?, COINDCX (Aug. 2, 2022), https://coindcx.com/blog/cryptocurrency/one-percent-tds-on-crypto/.

It would be necessary to have a TAN number in India and to collect the TDS if a non-resident were to buy a VDA from a resident. This again seems to be a very cumbersome process.[70]

E. GIFTING CRYPTOCURRENCY

The recent Budget announcement clarified that VDA like cryptocurrencies will be considered property and subject to taxation. However, gifts of property between specific relatives or on certain occasions, regardless of their value, remain exempt under the Income-tax Act[71]. Although the Finance Bill 2022 expanded the definition of property to include cryptocurrencies, there is still ambiguity around whether the existing exemptions apply to crypto gifting as well. The government needs to provide clear guidelines to ensure a fair and transparent taxation system for cryptocurrencies, including clarification on whether the specified exemptions for gifts between relatives apply to crypto gifting.[72]

F. ENTRY OF GST?

The taxation of cryptocurrencies in India presents a challenging issue due to the lack of clarity surrounding their classification under the Goods and Services Tax ("**GST**") regime. While income tax on cryptocurrencies is levied in India, the application of GST remains ambiguous, particularly concerning whether cryptocurrencies are classified as *"money."*

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[70] S. Nisar, *Digital Currency Taxation Proposals – Features and Way Forward - Fin Tech – India*, MONDAQ (Mar. 1, 2022), https://www.mondaq.com/india/fin-tech/1166768/digital-currency-taxation-proposals--features-and-way-forward.

[71] P. Mootani, *When Crypto Assets Received as Gift Are Tax Exempt in Your Hands*, THE ECONOMIC TIMES (Feb. 15, 2022), https://economictimes.indiatimes.com/wealth/tax/when-crypto-assets-received-as-gift-are-tax-exempt-in-your-hands/articleshow/89503000.cms.

[72] Ektha Surana, *Taxation on Cryptocurrency: Guide To Crypto Taxes in India 2023*, CLEARTAX (Jun, 08, 2023), https://cleartax.in/s/cryptocurrency-taxation-guide.

The existing laws pertaining to GST were formulated without considering technological advancements such as cryptocurrencies, leading to a lack of clarity on their treatment. The Indian Supreme Court's decision in the case of *Internet and Mobile Association of India v. Reserve Bank of India*[73] did not conclusively rule on whether cryptocurrencies fall under the ambit of "*money*." However, the Court did state that cryptocurrencies cannot be considered mere goods or commodities and may be regarded as real money.

Under the CGST Act, the definition of "*money*" appears to be broader than just legal tender and currency, leaving scope for the inclusion of other instruments. The European Court of Justice in the case of *Skatteverket v. David Hedqvist*[74] considered cryptocurrencies to be a "*means of payment*" and treated them at par with legal tender.

The uncertainty surrounding the classification of cryptocurrencies for GST purposes is substantial[75], and the lack of clarity may result in the exclusion or inclusion of GST on transactions such as the exchange of cryptocurrencies for fiat currency. Until the Central Board of Indirect Taxes provides clear guidance on the treatment of cryptocurrencies under the GST regime, the classification of cryptocurrencies for taxation purposes in India will remain ambiguous and uncertain.

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[73] *Supra* note 2 at 4.

[74] Case C-264/14, Skatteverket v. David Hedqvist, 2015 ECLI:EU:C:2015:718.

[75] *Govt Working on GST on Crypto Transactions, Defining Legal Framework*, BUSINESS STANDARD NEWS (Sep. 19, 2022), https://www.business-standard.com/article/economy-policy/govt-working-on-crypto-transactions-gst-finmin-to-define-legal-framework-122091900382_1.html.

VII. COMMERCIAL AND TAX FRAMEWORK RECOMMENDATIONS: A WAY FORWARD

To address the gaps and uncertainties in the regulatory landscape for cryptocurrencies in India, new measures could include developing clear taxation guidelines, creating a regulatory authority, and establishing a framework for reporting and monitoring transactions.

A. PROPOSING A TIERED TAX SYSTEM FOR CRYPTOCURRENCY TRANSACTIONS

The environment for cryptocurrencies is still developing. Adopting a standard rate over the long term could disrupt the cryptocurrency market because every move will be subject to a high tax rate, significantly raising the cost of taxes. As a result, the government should conduct a thorough risk and benefit analysis of various use cases. Where the goal is to reduce the number of certain types of transactions, the government might think about levying a specific tax rate for those transactions rather than imposing a high rate of tax on all transfers. For instance, long-term cryptocurrency purchases might be taxed at a lower rate. By doing this, the business will be supported while also being protected as investors.

B. IMPORTANCE OF CLARITY IN TAXATION FRAMEWORK FOR CRYPTOCURRENCIES

The environment for cryptocurrencies is still developing. Adopting a standard rate over the long term could cause disruption in the cryptocurrency market because every move will be subject to a high tax rate, significantly raising the cost of taxes. As a result, the government should conduct a thorough risk and benefit analysis of various use cases. Where the goal is to reduce the number of certain types of transactions, the government might think about levying a specific tax rate for those

transactions rather than imposing a high rate of tax on all transfers. For instance, long-term cryptocurrency purchases might be taxed at a lower rate. By doing this, the business will be supported while also being protected as investors. By adopting such an approach, it would be easier to identify taxable events and ensure compliance with tax laws.

C. THE NEED FOR MULTIPLE REGULATORS FOR EFFECTIVE REGULATION OF CRYPTO ASSETS

To create a more effective regulatory framework for crypto assets, it is suggested to involve multiple regulators such as RBI and SEBI. This approach can leverage the strengths and expertise of each regulator to address various risks related to crypto assets, including KYC/AML and CFT compliances and ownership and licensing requirements. Such collaboration can also ensure alignment with broader policy goals such as consumer safety and financial stability. By involving multiple regulators, it is possible to develop a comprehensive framework that addresses the unique challenges of this emerging asset class.[76]

D. MANDATORY KYC

To enhance the safety and security of crypto assets, holding them in accredited depositories' KYC-compliant vaults can ensure greater transparency and reduce fraud and money laundering risks. Investors may be forbidden from keeping cryptocurrency in personal possession except for a small amount in wallets. Recent updates under PMLA categorize crypto entities as "*reporting entities*" and require due diligence and risk

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[76] Erik Feyen, Jon Frost, Leonardo Gambacorta, Harish Natarajan & Matthew Saal, *Fintech and the digital transformation of financial services: implications for market structure and public policy*, BANK FOR INTERNATIONAL SETTLEMENTS PAPERS NO. 117 (Jul. 2021), https://www.bis.org/publ/bppdf/bispap117.pdf.

assessments to verify transactions. Bringing cryptocurrencies under the ambit of SEBI can effectively regulate KYC and AML compliances, fulfill ownership and licensing requirements, and improve the regulatory environment for crypto assets in India.

E. Implementation of Travel Rule

RBI has the authority to mandate that cryptocurrency exchanges comply with the "*travel regulation*," which calls for collecting, maintaining, and providing the necessary beneficiary and originator data for transfers of virtual assets. This will make it easier to spot suspicious transactions, report them, implement freezing measures, and forbid transactions with specific people and organizations.

F. Clear Regulations for Cross-Border Crypto Transactions

Due to the cross-border nature of these currencies and the transactions they underpin, it would be prudent and essential to establish a clear policy for regulating virtual and cryptocurrencies. This would also be in the market's best interests. Additionally, efforts must be made to develop, adopt, and execute global standards about crypto assets, working with other nations through multilateral or global conventions, taking into account the transnational nature of crypto assets.

G. Co-Existence of Cryptos and CBDCs

India has a significant chance to digitize its currency, streamline transactions, and reduce transaction costs through the adoption of Central Bank Digital Currencies ("**CBDCs**") supported by blockchain technology.

The government must understand that private and public blockchains, including those used by CBDCs and crypto assets, can cohabit and play complementary roles.

This fact has been recognized by multilateral organizations like the International Monetary Fund ("**IMF**"), which has also emphasized the advantages of regulating private digital tokens through micro and macro-prudential measures. Consumer security, systemic safety, market conduct, data privacy, and operational resilience should all be given top priority in such regulations.

Adopting a proportionate, proactive, participatory, and process-driven regulatory structure for cryptocurrencies is crucial to the success of Digital India. Private cryptocurrencies may be viable and aid the government and central bank in achieving important policy goals if they are properly regulated.

H. Assessing the Applicability of GST on Cryptocurrencies

It is crucial to ascertain cryptocurrencies' classification under the current GST structure to provide clarity on the GST taxation of cryptocurrencies. To determine whether cryptocurrencies should be treated as 'goods' or 'money' for GST reasons, a thorough analysis should be done. The GST law should be changed to include cryptocurrencies in the definition of goods, as done in Australia and presently under consideration in Canada if the classification of 'goods' is confirmed. Regardless of whether cryptocurrencies are considered 'goods' or 'money,' the GST impact on mining and staking activities should be assessed. This will encourage taxpayer compliance and assist in creating a clear tax structure for cryptocurrencies.[77]

[77] *Taxing Cryptocurrencies: The concept, the challenges, and the required changes*, VIDHI CENTRE FOR LEGAL POLICY (May 2022), https://vidhilegalpolicy.in/wp-content/uploads/2022/05/20220527_WP_Taxing-Cryptocurrencies_VCLP.pdf.

VIII. CONCLUSION & WAY FORWARD

In conclusion, the article has shed light on the grey areas surrounding the corporate and taxation regimes of cryptocurrencies in India. Despite the increasing popularity of cryptocurrencies among the Indian middle class, the government has taken a cautious approach to regulating this market, resulting in many ambiguities and loopholes in the regulatory framework.

While the Indian government has made some efforts towards regulating cryptocurrencies, it has not been able to provide a comprehensive legal and regulatory framework that can address the concerns of investors and traders. The lack of legal clarity has led to hesitancy among Indian middle-class investors to invest in cryptocurrencies.

However, it is important to acknowledge the potential benefits that cryptocurrencies offer, such as protection from inflation, cost-effective transactions, and easy fund transfer. Cryptocurrencies can be seen as a parallel to fiat currency, offering an alternative investment tool to the middle class. The recent introduction of central bank-backed digital currency is a welcome step, but it does not fulfill the needs and advantages offered by cryptocurrencies.[78]

The Indian government needs to be more flexible in allowing the use of cryptocurrencies and creating a robust regulatory framework that ensures the protection of investors while also encouraging innovation in the sector. While there are risks associated with cryptocurrencies such as

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[78] Anshu Siripurapu & Noah Berman, *Cryptocurrencies, Digital Dollars, and the Future of Money*, COUNCIL ON FOREIGN RELATIONS (Feb. 28, 2023), https://www.cfr.org/backgrounder/cryptocurrencies-digital-dollars-and-future-money.

volatility, security concerns, and lack of accountability, it does not mean that the government should ban its entirety. Instead, efforts should be made to improve the legal framework to regulate this market effectively. Recent developments, such as the Finance Ministry's notification about the formal induction of virtual assets under the PMLA framework,[79] do reflect the government's intent to regulate cryptocurrencies, which is seen as a welcome step. This is an important move towards bringing cryptocurrencies under a proper regulatory framework and addressing the concerns regarding their potential misuse for money laundering and other illegal activities.

However, it is important to note that legal gaps still need to be filled, especially in the field of taxation. The Indian government needs to provide clarity on the tax treatment of cryptocurrencies to ensure that investors and traders are not subjected to arbitrary taxation. A comprehensive legal framework that addresses the ambiguities and loopholes in the corporate and taxation regime of cryptocurrencies is necessary to provide legal clarity and protection to investors.

In conclusion, while recent developments such as the induction of virtual assets under the PMLA framework indicate the government's intent to regulate cryptocurrencies, there is still a long way to go in filling the legal gaps and creating a comprehensive regulatory framework for cryptocurrencies in India. The government needs to provide legal clarity and address the ambiguities and loopholes in the corporate and taxation regime of cryptocurrencies to encourage innovation in the sector and

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[79] Aanchal Magazine , Soumyarendra Barik, *Finance Ministry Brings Crypto Assets under Prevention of Money Laundering Act: What Are the Implications?*, THE INDIAN EXPRESS (Mar. 9, 2023), https://indianexpress.com/article/explained/explained-economics/crypto-assets-pmla-explained-8486629/.

protect investors. By doing so, India can become a leader in the global cryptocurrency market, benefiting the Indian middle class by providing them with a secure and profitable investment tool.

Mayank Gandhi, Decrypting Use of News Snippets by Google: A Potential Abusive Antitrust Concern, 10(1) NLUJ L. REV. 193 (2024).

DECRYPTING USE OF NEWS SNIPPETS BY GOOGLE: A POTENTIAL ABUSIVE ANTITRUST CONCERN

~ *Mayank Gandhi*[*]

ABSTRACT

News content has a significant place in a civilised-democratic society. Print media was the traditional form of presenting people's voice to the society at large. With the advent of the internet, a swift transition has been witnessed from print media to digital media. The pandemic has further accelerated this transition. With respect to the revenue of news outlets, advertisements account for 2/3rd of revenue of newspaper industry in India.[1] *Moreover, with the change in consumer behaviour and preference, emergence of digital media, and introduction of new advertisement models, a sharp decline has been noted in circulation and revenue generation of print media.*[2] *The KPMG India, A Year Off Script: Media and Entertainment Report 2020 asserted a constant increase in digital advertisements, subsequently increasing the dependence of the news publishers on digital advertising.*[3] *This financial dependence over online general search engines for digital advertisement has created a bargaining imbalance between news creators and online*

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[1] Digital News Publishers Association v. Alphabet Inc., (2022) SCC OnLine CCI 1.

[2] Competition and Market Authority, *Platforms and content providers, including news publishers: - Advice to DCMS on the application of a code of conduct*, Competition and Market Authority (2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073411/Platforms_publishers_advice._A.pdf.

[3] KPMG, *A year off-script: Time for resilience KPMG in India's Media and Entertainment Report 2020*, KPMG, (September 30, 2020), https://assets.kpmg/content/dam/kpmg/in/pdf/2020/09/year-off-script-kpmg-india-media-and-entertainment-2020.pdf.

general search engines. In this backdrop, this paper firstly seeks to explain the relationship between news publishers and online general search engines. Secondly, it determines the relevant market and establishes Google's dominance in that market. Thirdly, the author analyses the competition concerns arising from the abusive practices adopted by Google, taking into consideration the case of Digital News Publishers Association v. Alphabet Inc. and others.[4] *Lastly, the paper undertakes the task to suggest viable solutions to effectively regulate the conduct of online search engines vis-à-vis news publishers.*

[4] Digital News Publishers Association v. Alphabet Inc., (2022) SCC OnLine CCI 1.

TABLE OF CONTENTS

I. INTRODUCTION **196**
II. RELATIONSHIP BETWEEN NEWS PUBLISHERS AND ONLINE GENERAL SEARCH ENGINES **197**
III. DETERMINATION OF RELEVANT MARKET AND DOMINANCE OF GOOGLE IN THAT MARKET **199**
A. DETERMINATION OF RELEVANT MARKET **199**
B. DOMINANT POSITION OF GOOGLE IN THE MARKET FOR ONLINE GENERAL SEARCH SERVICES **201**
i. Market Share 201
ii. Entry Barriers 203
iii. Network Effect 203
IV. DECRYPTING ABUSIVE PRACTICES OF GOOGLE AND COMPETITIVE CONCERNS IN INDIAN MARKET **205**
A. NOT REMUNERATING NEWS PUBLISHERS FOR USE OF NEWS SNIPPETS **205**
B. BARGAINING IMBALANCE **211**
V. SUGGESTIVE MEASURES FOR THE INDIAN MARKET **217**
VI. CONCLUSION **222**

I. INTRODUCTION

The advent of the internet and digitalisation has changed the way in which news is monetised and consumed by the consumers. It reduced the cost of the news publishers and distributors and increased their global reach and accessibility.[5] Internet media has some shared features with traditional media and, at the same time, possesses some distinct features. The novelty can be understood from the advertiser side and from the user side. On the advertiser side, targeted advertisements can be made to an individual based on his characteristics, search history, and preferences.[6] On the user side, a user can avail of the facilities of multi-homing and active searching.[7] Digital media has increased the competition in the market by virtue of having a broader reach and enabling non-professional digital news platforms (such as blogs and short news videos) to enter the market of news publishing.[8] Digitalization has led traditional news publishers to shift to a hybrid mode (print and digital media) to sustain in this competitive market.

The situation in India is no different. The pandemic accelerated the transition of consumers of news from traditional channels to digital channels.[9] The financial dependency of the Indian news industry on digital advertising has risen over the last few years.[10] As per Statista, ad spending

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[5] Organisation for Economic Co-operation and Development, *Competition issues concerning news media and digital platforms,* OECD, (2021), https://www.oecd.org/daf/competition/competition-issues-concerning-news-media-and-digital-platforms-2021.pdf.

[6] GCF Global, *What is targeted advertising*, https://edu.gcfglobal.org/en/thenow/what-is-targeted-advertising/1/.

[7] S. Anderson, J. Waldfogel and D. Stromberg, *The Economics of Internet Media* 14-23 (University of Mannheim Working Paper, October 2014), https://doi.org/10.1016/B978-0-444-62721-6.00010-X.

[8] *Supra* note 5.

[9] Digital News Publishers Association v. Alphabet Inc., (2022) SCC OnLine CCI 1.

[10] S. Anderson, *supra* note 7.

in the Indian Digital Advertising market is projected to reach US$3.08bn in 2022.[11] Further, the global digital advertising market is expected to grow from $374.2 billion in 2020 to $763.6 billion in 2025 at a compound annual growth rate ("**CAGR**") of 15.3%.[12] Undoubtedly, the internet has transformed the manner of publication, distribution, and monetization of news. Nevertheless, it is pertinent to take into consideration the potential competitive concerns that may arise due to digitalization. In December 2021, the OECD Competition Committee comprehensively discussed the competitive dynamics between news publishers and digital platforms including online general search engines.[13] The identified potential competitive concerns are the imposition of unfair conditions, leveraging of market position by dominant online general search engines, and denial of market access. Therefore, there is a dire need to regulate the anti-competitive and abusive practices adopted by the online general search engines. A comprehensive policy framework that addresses the imbalance between news publishers and online general search engines is required to be formulated.[14]

II. RELATIONSHIP BETWEEN NEWS PUBLISHERS AND ONLINE

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[11] Statista, *Digital Advertising-Worldwide*, https://www.statista.com/outlook/dmo/digital-advertising/india.

[12] GlobeNewsWire, *Global Digital Advertising Market Analysis & Forecasts, 2015-2020, 2021-2025F & 2030F,* GlobeNewsWire (November 18, 2021), https://www.globenewswire.com/news release/2021/11/18/2337022/28124/en/Global-Digital-Advertising-Market-Analysis-Forecasts-2015-2020-2021-2025F-2030F.html.

[13] OECD, *supra* note 5.

[14] Daniel Mandrescu, *Tying and bundling by online platforms – Distinguishing between lawful expansion strategies and anti-competitive practices,* 40 COMPUTER L. & SECURITY REV. (April 2021), https://www.sciencedirect.com/science/article/pii/S0267364920301047.

GENERAL SEARCH ENGINES

In digital markets, platforms are generally denoted as gatekeepers because they establish an important link between the enterprise and the end user. Here, online search engines can be considered as gatekeepers as their core service of online general search connects the news publishers and the end-users.[15] In addition to this, a relation on the basis of revenue can also be traced. The sources of revenue for online platforms are either by charging commissions or through serving advertisements on websites. The relevant business model for the present paper is the sale of space/inventory by news publishers on a web page to advertisers.[16] Further, the source of revenue for the publishers publishing news on online search engines is through advertisement. The advertisements depend upon the number of visits a news publisher's website receives. In simple words, more traffic on a website leads to more advertisement and thereby to more revenue for a news publisher. Since online search engines is one of the major sources of generating traffic on a website, a corollary can be drawn that they have a prominent role in the revenue of the news publishers. Further, the relationship between news curators and online search engines can be divided into two categories, one is a vertical relationship and another is a horizontal relationship.[17] In the vertically integrated scenario, online search engines offer a broader reach and referral services to news publishers to distribute their content on the platform, and in exchange they earn revenue two-fold.[18] One is through advertisements displayed on news publisher's

[15] OECD Competition Committee Meeting, *News Media and Digital Platforms – Note by Germany,* OECD, (December 3, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)69/en/pdf.
[16] Competition and Market Authority, *supra* note 2, at 43.
[17] OECD, *supra* note 5, at 10.
[18] OECD, *supra* note 5, at 11.

websites and another is through the collection of user data to improve their targeted advertising services.[19] Moreover, there may exist a horizontal overlap between the two whereby online search engines (for example Google News) directly compete with news publishers by generating content.

III. DETERMINATION OF RELEVANT MARKET AND DOMINANCE OF GOOGLE IN THAT MARKET

As highlighted above, the news publishers are significantly dependent upon online search engines for high traffic. Thus, to analyses competitive dynamics in the said market, it is necessary to identify dominant players in the relevant market for online general web search service. Dominance is considered to be an integral part of a competition assessment. Across the globe, a uniform approach has been adopted with respect to establishing the dominance in the market.[20] Dominance implies an enterprise's ability to reduce competition in the market, increase price or lower the quality independently without being affected by other forces in the market.

A. DETERMINATION OF RELEVANT MARKET

Under the Competition Act, 2002 ("**the Act**"), prior to assessing abuse of dominance, it is required to determine the particular relevant market in which the entity operates.[21] The determination of the relevant market is necessary as it defines the boundary in which the assessment of

[19] OECD, *supra* note 5, at 12.
[20] Organisation for Economic Co-operation and Development, *Abuse of Dominance in Digital Markets – Contribution from India,* OECD, (3 November 2020), https://one.oecd.org/document/DAF/COMP/GF/WD(2020)8/en/pdf.
[21] GKB Hi Tech Lenses Pvt. Ltd. v. Transitions Optical India Pvt Ltd, 2012 SCC OnLine CCI 38.

dominance is going to take place. The delineation of the relevant market is instrumental in discerning entities that offer interchangeable or substitutable commodities or services, facilitating a comprehensive evaluation of competitive dynamics within the relevant market context. As per Section 2(r) of the Act, the relevant market is defined with reference to the relevant product market and relevant geographic market.[22] In the present issue, dominance is assessed only in the market for online general search. Specialised search market is excluded from the purview of assessment.[23] This was done because online general search engines and specialised search engines have different and distinct functions.[24] The manner of the results and extent of the results shown on online general web search services is generally not of the same extent as those produced on the specialized web search services for the same query.[25] The reach of specialized search engines is restricted to specific markets and products.[26] Even though sometimes search results produced by the online general search engine may overlap with the specialized search engine that does not make them substitutable. It is also claimed that generally, users reach a specialised web search service only after first querying at online general

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[22] Competition Act, 2002, § 2(r), No. 12, Acts of Parliament, 2002.

[23] Organisation for Economic Co-operation and Development, *Competition Law in Asia-Pacific - A Guide to Selected Jurisdictions,* OECD, (2018), https://www.oecd.org/daf/competition/Competition-Law-in-Asia-Pacific-Guide-2018.pdf.

[24] Statement of the Federal Trade Commission Regarding Google's Search Practices in the Matter of Google Inc, *FTC File Number 111-0163,* (January 3, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-Googles-search-practices/130103brillGooglesearchstmt.pdf.

[25] *See also* the German Monopolies Commission, *Competition policy: The challenge of digital markets,* Monopolkommission (2015), https://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf.

[26] Market study final report, *Online platforms and digital advertising*, Competition and Markets Authority, (July 1, 2020), https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf.

search engine.[27] Hence, the relevant market for assessment in this paper is the "*market for online general search services*". The Competition Commission of India ("**CCI**") in the case of *Matrimony.com Ltd. v. Google LLC & Ors.*, has held that online general web search service market and offline general web search service market constitute different relevant market altogether and held Google to be dominant in the market for "online general web search service market".[28] Further, this paper has incorporated the report of the Competition and Marketing Authority ("**CMA**") and of the Australian Competition and Consumer Commission ("**ACCC**") to establish the dominance and assess abusive practices in the said relevant market. The paper also included the dominance assessment in online general web search service market in Pan-India.

B. Dominant Position of Google in the Market for Online General Search Services

i. Market Share

In the United Kingdom ("**UK**"), Competition and Marketing Authority ("**CMA**") published a report on Online platforms and digital advertising wherein it held Google to be dominant in the online general search market. As per Statista, Google is enjoying a market share of more than 80% in the said market.[29] The commission's report noted that Bing is the only competitor present in the online general search market with a share

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[27] Case AT.39740-Google Search (Shopping), Comm'n Decision (Summary), 2017, O.J. (C 9) 11.

[28] Matrimony.com Ltd. v. Google LLC, 2018 SCC OnLine CCI 1; see also Priyadarsini T. P, *Big Data Analytics: A Cause of Concern for Competition?,* 9.1NLIU LR, 65 (2020).

[29] Statista, *Market share held by the leading search engines in the United Kingdom (UK) from September 2015 to September 2021*, Statista, https://www.statista.com/statistics/279548/market-share-held-by-search-engines-in-the-united-kingdom/.

ranging between 6% to 12%.[30] This reflects that there exists no effective competition in the market. In other words, no significant competitive concern is faced by Google in the market. Similarly, in Australia, a report was published by the Australian Competition and Consumer Commission ("**ACCC**") wherein it held Google to be dominant in the online general search market. Firstly, the ACCC considered that since 2009, Google has enjoyed a market share of more than 93%.[31] After Google, the second largest search engine in Australia is Bing with a market share ranging from 3% to 5%. Similarly, the European Union ("**EU**") in Google Search (Shopping) has held that Google is dominant in the general Internet search markets in all 31 European Economic Area countries. Since 2008, Google's search engine is holding a constant market share of more than 90% in the relevant market.[32] Through the above-shown data, it is evident that Google is dominant in major developed and developing countries. Likewise, the Competition Commission of India found Google to be in a dominant position in the online general search engine market.[33] In the case of *In Re: Mr. Umar Javeed and Others v. Google LLC and Anr.*, CCI held that "*Google enjoys an insurmountable position in the search engine market*".[34] Moreover, the remaining search engines have a negligible share in the market.[35] Thus, the

[30] Fiona M. Scott Morton and David C. Dinielli, *Roadmap for a Monopolization Case Against Google Regarding the Search Market,* Omidyar Network, (June 2020), https://omidyar.com/wp-content/uploads/2020/09/Roadmap-for-a-Monopolization-Case-Against-Google-Regarding-the-Search-Market.pdf.

[31] Statcounter, *Search Engine Market Share Australia,* Statcounter, https://gs.statcounter.com/search-engine-market-share/all/australia/2012.

[32] Case AT.39740-Google Search (Shopping), Comm'n Decision (Summary), 2017, O.J. (C 9) 11.

[33] Digital News Publishers Association v. Alphabet Inc., (2022) SCC OnLine CCI 1.

[34] *In Re:* Mr. Umar Javeed v. Google LLC, 2022 SCC OnLine CCI 61, *see also* Madhavi Singh, *Google's 'Search Bias' in India: What the Debate Is and How the CCI Got It Wrong,* SSRN (22 November 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289118.

[35] *Id.*

market share of Google highlights that it holds a significant market power in the online general web search service market.

ii. Entry Barriers

Moreover, while establishing the dominance of Google in the relevant market for online general search services, the CCI categorically noted that the online general search services market is characterised by number of entry barriers.[36] A significant amount is required to be invested in developing a search engine.[37] The European Commission in Google Search (Shopping) case has noted that in developing and improving an online general search service, significant investment is required to be made in R&D, personnel, and in obtaining large quantity of data.[38] Thus, author submits that for a small-entrant, the costs associated with developing a relevant search engine works as an entry barrier. This makes supply-side substitutability limited. Further, network effects also work as an entry barrier in this market for online general search services. The entry barriers present in the market for online general search services puts Google at an advantageous position against its competitors.

iii. Network Effect

In the Google Android case, the European Commission found that increase in number of Android users is proportional to the increase in a number of apps for Android and vice-versa. This is a direct network effect that led to high entry in the relevant market for "*licensable smart mobile*

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[36] *In Re:* Mr. Umar Javeed v. Google LLC, 2022 SCC OnLine CCI 61.
[37] Autorité de la concurrence, *Related rights: the Autorité has granted requests for urgent interim measures presented by press publishers and the news agency AFP*, Agence France Presse (April 9, 2020), https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/related-rights-autorite-has-granted-requests-urgent-interim-measures.
[38] Case AT.39740-Google Search (Shopping), Comm'n Decision (Summary), 2017, O.J. (C 9) 11.

operating systems".[39] Accordingly, the network effect has a huge role in Google being dominant in the said relevant market.[40] Similarly in the present issue, the Google search engine is operating on a "*trial and learn*" or "*trial-and-error*" model wherein Google's algorithm learns by every search a user conducts on the search engine and adapts its future results accordingly and provides more relevant, tailored and specific results in subsequent searches/queries.[41] Google by its free-of-cost web search services is able to attract more users (more data) and in turn, it uses that data to make its online general web search service more effective and relevant.[42] A search engine producing more relevant results is able to attract new users. Hence, it is a clear example of direct network effects. In this manner free-of-cost web search service gives a commercial advantage to Google over its competitors.[43] In reference to the above-cited Google Android case, it can be said that high entry barriers are derived partly in the relevant market for online general web search services through direct network effects. Additionally, there exists indirect network effect in the said relevant market. In indirect network effects, increase in number of users on one side of platform will make services of platform more valuable for users on the other side.[44] In the instant relevant market, increase in number of users on Google will make the platform more attractive for advertisers since they will be able to have broad reach and be able to connect with potential

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[39] Juan Montero and Matthias Finger, *The Rise of the New Network Industries: Regulating Digital Platforms,* Taylor & Francis (2021), https://ebin.pub/the-rise-of-the-new-network-industries-regulating-digital-platforms-1nbsped-0367693054-9780367693053.html.
[40] Case AT.40099-Google Android, Comm'n Decision (Summary), 2017, O.J. (C 402) 19.
[41] Maurice E Stucke, *Behavioural Antitrust and Monopolization,* 8(3) J. COMPETITION L. & ECON. 545 (2012).
[42] *Id.*
[43] The Competition Act, 2002, § 19(4)(d), No. 12, Acts of Parliament, 2003.
[44] E.G. Weyl, *A Price Theory of Multi-Sided Platforms*, 100(4) AM. ECON. REV. 1642-44, (2010).

customers.[45] Hence, direct as well as indirect network effects makes Google dominant in the said relevant market.

On the basis of market share, market power, entry barriers and network effect, it can be said that Google is enjoying a dominant position in India, UK, and EU etc.

IV. DECRYPTING ABUSIVE PRACTICES OF GOOGLE AND COMPETITIVE CONCERNS IN INDIAN MARKET

A. NOT REMUNERATING NEWS PUBLISHERS FOR USE OF NEWS SNIPPETS

News Snippets implies short excerpts displayed in conjunction with the hyperlinks to the news content. The purpose of snippets is allowing the user to identify whether a particular result is relevant to his search query.[46] Google uses various sources such as description in title, meta tags, and content in the main text to formulate snippets. It is having the sole control over the content and length of the snippets.[47] The media businesses do not possess any say in the substance of content which is to be displayed in snippets.[48] They only have the option of either choosing for snippets displayed in conjunction with hyperlinks on Google's search engine or

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[45] Inge Graef, *Business Models and Economic Characteristics of Online Platforms Data Protection and Online Platforms: Data as Essential Facility,* 68 INT'L COMPETITION L. SERIES 9-54.

[46] Michelle Ofiwe, *What Are the Different Types of Featured Snippets?*, Semrush Blog (April 15, 2023), https://www.semrush.com/blog/featured-snippets/.

[47] Australia Consumer and Competition Commission ("**ACCC**"), *Digital platforms inquiry - final report,* Australia Consumer and Competition Commission, (June 2019), https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf.

[48] *Id.*

disallow Google to display short extracts from online news content.[49] Further those snippets which are sufficiently lengthy and comprehensive enough to answer the queries of a person searching and the person is not required to click on any other link to get information are known as featured snippets.[50] Following is an example of featured snippet.

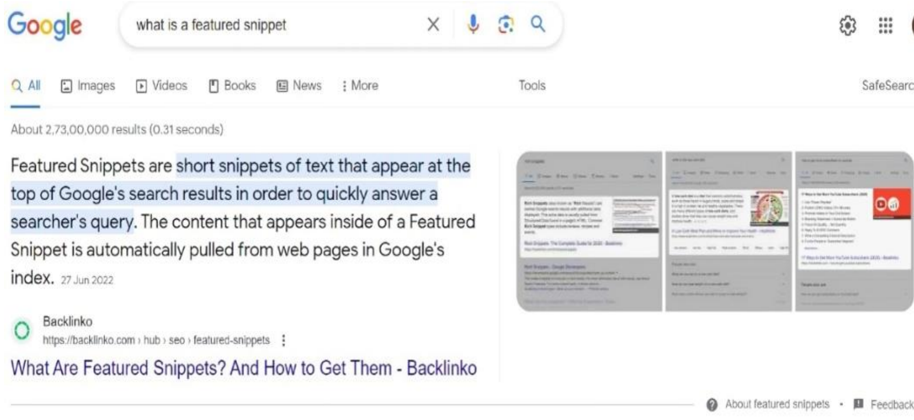

Figure 1: Shows the featured snippet

Studies have shown that featured snippets directly reduce the click-through rate of a website.[51] The same can be identified by the following result :-[52]

[49] Tone Knapstad, *Fighting the tech giants - news edition: competition law's unsuitability to safeguard the press publishers' right and the quest for a regulatory approach*, 16(12) J. INTELL. PROP. L. & PRAC. 1319 (2021).
[50] News Media Alliance, *How Google Abuses Its Position as a Market Dominant Platform to Strong-Arm News Publishers and Hurt Journalism,* News Media Alliance, (June 2020), http://www.newsmediaalliance.org/wp-content/uploads/2020/06/Final-Alliance-White-Paper-June-18-2020.pdf.
[51] Victoria Affleck, *Featured Snippets: Good or Bad?,* Reboot (September 2, 2019), https://www.rebootonline.com/blog/featured-snippets-good-or-bad/#featured-snippets-as-direct-answers.
[52] Barry Schwartz, *Another study shows how featured snippets steal significant traffic from the top organic result,* Search Engine Land (May 30, 2017), https://searchengineland.com/another-featured-snippet-study-shows-steal-significant-traffic-first-organic-result-275967.

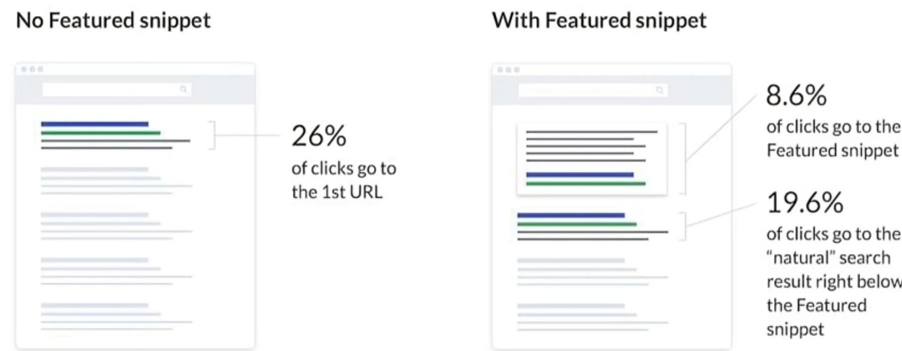

Figure 2: Shows the comparison of average CTR for Featured Snippets. (Based on click-stream data from 100k random search queries with monthly search volume of >100 searches per month)

Further, the study conducted by Stone Temple Consulting have shown that one of the every two-search query on Google has been answered with a featured snippet or a direct result.[53] Moreover, results shown under 'people also ask' section is also a part of rich or featured snippet as they provide additional information and seeks to directly answer their query.[54] In the year of 2020, a significant increase in zero-click searches has been witnessed with 65% of searches on Google search engine are

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[53] Barry Schwartz, *New study on featured snippets within Google reveals growth & optimization techniques*, Search Engine Land (May 24, 2017), https://searchengineland.com/new-study-featured-snippets-within-Google-reveal-growth-optimization-techniques-275714.
[54] BrightEdge, *What is People Also Ask?,* BrightEdge, https://www.brightedge.com/glossary/people-also-ask#:~:text=People%20Also%20Ask%20is%20a,that%20follow%20your%20original%20search.

answered or resolved without referring to another link.[55] Results in people also ask section is displayed in following manner.[56]

White Coffee is **coffee roasted half of the way through and to a lower temperature**. By roasting it to this much lower temperature, you get a whitish colored bean that is higher in caffeine because you roast out less caffeine. This results in a very nutty and sweet taste profile much different from traditional coffee. Feb 16, 2022

https://www.povertybay.com › coffee-blog › what-is-whit...

What is White Coffee? | Poverty Bay Coffee Company

People also ask

Is white coffee good for health?

Is a white coffee just coffee with milk?

In many English-speaking countries, "white coffee" is used to refer to regular black coffee that has had milk, cream or some other "whitener" added to it, though the term is almost entirely unheard of in the US, where the same beverage might be called "coffee light" in the New York City area, "light coffee", "coffee ...

https://en.wikipedia.org › wiki › White_coffee

White coffee - Wikipedia

Search for: Is a white coffee just coffee with milk?

Figure 3: Shows the 'People Also Ask' prompt

The European Commission in its report on internet users' preferences for accessing content online, has stated that when accessing news via news aggregators, social media, or search engines, 47% of the respondents have accessed the news without visiting the news website.[57] Outsell conducted a survey wherein 2787 consumers participated. The survey results reported that more than 40% of users accessed the news on

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[55] George Nguyen, *Zero-click Google searches rose to nearly 65% in 2020,* Search Engine Land (March 22, 2021), https://searchengineland.com/zero-click-Google-searches-rose-to-nearly-65-in-2020-347115.

[56] Ahrefs, *People Also Ask*, Ahrefs, https://ahrefs.com/seo/glossary/people-also-ask

[57] European Commission, *Internet users' preferences for accessing content online,* European Commission (September 2016), https://europa.eu/eurobarometer/surveys/detail/2123.

Googles' search page itself without clicking/visiting the newspapers' website.[58] Thus, in conjunction with the above studies and Google's full control over the formulation of feature snippets, it can easily be averted that Google can make long enough news snippets to answer a particular query on the search engine result page itself. This would then have a direct negative impact on referral traffic to other competitive news publisher websites. Consequently, less consumers will be viewing the ads on websites of the news publishers and subscribing to their paid news content.[59] Moreover, less traffic on the website will be an important factor in advertisers' decision to purchase inventory on webpages of news publishers. Since the query of the user is resolved at the search engine result page itself, therefore the user remains on Google's page itself and is thereby subjected to Google's advertising only.[60] Thus, Google without remunerating news publishers, is using snippets particularly featured snippets for its own purposes.

In the context of the Monopolies and Restrictive Trade Practices Act 1969, the Supreme Court in *H.M.M. Ltd. v. Director General, Monopolies and Restrictive Trade Practices Commission* has held that "f*or holding a trade practice to be an unfair trade practice, therefore, it must be found that it causes loss or injury to*

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[58] News Corp Australia, *Submission to the Australian Competition and Consumer Commission - Digital Platforms Inquiry Issues Paper,* Australian Competition and Consumer Commission, (April 20, 2018), https://www.accc.gov.au/system/files/News%20Corp%20Australia%20%28April%202018%29.pdf.

[59] Organisation for Economic Co-operation and Development, *Competition issues concerning news media and digital platforms,* OECD, (2021), https://www.oecd.org/daf/competition/competition-issues-concerning-news-media-and-digital-platforms-2021.pdf.

[60] Nine, *Nine Submission to ACCC Digital Platforms Inquiry*, Australian Competition and Consumer Commission, (April 2018), https://www.accc.gov.au/system/files/Nine%20%28April%202018%29.pdf.

the consumer. Insofar as prizes are concerned there has to be the intention of not providing them as offered…".[61]

As per Section 4(2)(a)(ii) of the of the Competition Act, 2002 unfair pricing includes imposition of unfairly high and unfairly low prices.[62] Drawing an analogy from the above judicial precedents and jurisprudence to the present issue, Google has unilaterally decided not to make any remuneration for use of news snippet (i.e. featured snippet). In other words, Google has indirectly forced the news publishers to allow it to use their content for its own benefit on its platform for free.[63] Hence, using news snippet for free-of-charge can amount to imposition of unfairly low prices under Section 4(2)(a)(ii) of the Act.

Further, news publishers are not paid for use of news snippets by Google as they intended. The arbitrary and uncontrolled use of news snippet is causing loss to news publishers in terms of advertisement and referral traffic. Non-payment for use of news snippets by Google may discourage innovation and technical services provided by news publishers in the relevant market and this will be detrimental for the end-users. Accordingly, the author finds that there appears to be a violation of Section 4(2)(b)(ii) of the Act. The CCI in the case of *Digital News Association v. Google*, has prima facie held that not compensating news publishers for using news snippets appears to an imposition of unfair pricing and amounts to a violation of Section 4(2)(a)(i) of the Competition Act and directed the DG

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[61] H.M.M. Ltd. v. Director General, Monopolies and Restrictive Trade Practices Commission, (1998) 6 SCC 485.

[62] S. M. Dugar, Guide to Competition Act, 2002 (Sudhanshu Kumar, 7th edition, Volume 1, 2017).

[63] Dhananjay Dhonchak, *News Publishers v. Google: an Indian investigation,* INDIAN J. L. & TECH. (August 14, 2022), https://www.ijlt.in/post/news-publishers-v-google-an-indian-investigation.

to conduct detail investigation.[64] Further, recently the CCI also extended the probe against Google on similar concerns raised by the Indian Newspaper Society.[65] Hence, the author believes that CCI has adopted the right approach in deciding the prima facie case against Google for its abusive practices.

B. BARGAINING IMBALANCE

Secondly, it is a well-established fact that users generally tend to click on results shown at a higher ranking.[66] Further, those who opt for snippets are ranked higher by Google on its search page. Thus, if the media businesses opt out of news snippets, then it will directly affect their ranking on the platform. Since Google is a key source of traffic for news websites and accordingly, opting out of snippets will lead to less traffic on the news website and consequently less advertisement and revenue for the news publishers.[67] The effect of snippets on referral traffic can be understood by studying the introduction of a licensing regime in Germany in 2013. The new copyright law required the search engine and other web aggregators to acquired license from news publishers for displaying snippets to their news content.[68] The law allowed newspapers to provide a free license to aggregators. Google acquired free license from majority media businesses.

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[64] Digital News Publishers Association v. Alphabet Inc., (2022) SCC OnLine CCI 1.

[65] Paurush Omar, *Competition Commission orders another probe against Google,* Live Mint (October 11, 2022), https://www.livemint.com/news/india/competition-commission-orders-another-probe-against-Google-details-here-11665428758417.html.

[66] Geoffrey A Manne and William Rinehart*, The Market Realities that Undermined the FTC's Antitrust Case against Google,* HARV. J. L. & TECH. OCCASIONAL PAPER SERIES 2, (July 2013), http://jolt.law.harvard.edu/antitrust/articles/ManneRinehart.pdf,.

[67] ACCC, *supra* note 47.

[68] Australia Consumer and Competition Commission (ACCC), *Digital Platforms Inquiry - Final Report,* Australia Consumer and Competition Commission, (June 2019), https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf, P. 236.

However, Germany's biggest news publisher Axel Springer refused to offer a free license to Google.[69] Subsequently Google removed snippets from the Axel's content. The result of this was a significant decline in referral traffic to Springer's website which ultimately forced it to sign a free license with Google.[70]

A similar legislation was enacted in Spain in 2014. The legislation did not provide a provision for free license. Thus, Google instead of paying the license fees opted to shut down Google news service in Spain.[71] This action resulted into a significant downfall in the referral traffic to small media businesses.[72] These natural experiments clearly reflect that opting out is not a viable solution for news publishers. According to Google, a news publisher can block all snippets (featured snippets and regular snippets) by using the non-snippet tag at page. Moreover, if news publishers want to retain snippets in regularly-formatted search results only, then they will have to tag the page with a max-snippet tag. However, as per Google, a low max-snippet tag will not guarantee that Google will not show a featured snippet for the page. Thus, the only option remaining with news publishers is to tag their pages with non-snippet tag so as to block featured and regular-formatted snippets on their pages.[73] Since, opting out of snippets will be detrimental for the ranking, reach, and monetization of the news page and

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[69] Archibald Preuschat, *Axel Springer, Losing Web Traffic, Bows to Google on Content,* The Wall Street Journal (November 5, 2014), https://www.wsj.com/articles/BL-DGB-38706.

[70] Harro Ten Wolde and Eric Auchard, *Germany's top publisher bows to Google in news licensing row,* Reuters (November 5, 2014), https://www.reuters.com/article/us-Google-axel-sprngr/germanys-top-publisher-bows-to-Google-in-news-licensing-row-idUSKBN0IP1YT20141105.

[71] Susan Athey, Jeno Pal and Markus Mobius, *The Impact of Aggregators on Internet News Consumption,* STAN. U. GRADUATE SCH. BUS. RES. PAPER No. 17-8 (January 11, 2017), https://ssrn.com/abstract=2897960.

[72] News Media Alliance, *supra* note 50.

[73] Miriam Ellis, *Title Tag*, MOZ (July 21, 2023), https://moz.com/learn/seo/title-tag.

accordingly, the news publishers are forced to opt for featured snippets. Hence, it can be concluded that the binary choice for publishers to opt in or out of featured snippets is not a real choice. The CCI in the case of *Digital News Publishers Association v. Google*, has prima facie held that scrapping and displaying the short extracts of news content without effective consent of a news publisher amounts to an imposition of unfair conditions violating the provisions of Section 4(2)(a)(i) of the Competition Act.[74]

Similarly, at the international juncture, the Bundeskartellamt has held that not obtaining voluntary consent and taking unfair advantage of such consent amounts to abuse of dominance under antitrust laws. The Bundeskartellamt in a case against Facebook, has observed that the user's choice to either allow for the combination and processing of their data by Facebook or to stop using the social media services of Facebook does not amount to effective choice.[75] Consent obtained through such practice cannot be considered voluntary consent. The Court considered such practice as abusive and held that Facebook can continue this practice only in a case where it has obtained proper voluntary consent from users.[76]

Furthermore, Google has sole control to determine whether a featured snippet should be shown for a news page or not. There is no minimum length specified by Google to appear as a featured snippet.[77] Google has not provided exhaustive list of factors which affects a page

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[74] Digital News Publishers Association v. Alphabet Inc., (2022) SCC OnLine CCI 1.
[75] The Bundeskartellamt, *Bundeskartellamt prohibits Facebook from combining user data from different sources* (February 07, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.
[76] *Id.*
[77] Google Search Central, *Featured snippets and your website,* Google Search Central, https://developers.Google.com/search/docs/appearance/featured-snippets.

appearing as featured snippet. This has left the room for Google to unilaterally determine the length of the featured snippet and to decide whether to display the featured snippet for a news page or not.

Hence, such exploitation of contractual clauses by Google puts news publishers at a disadvantageous position. It implies a bargaining imbalance between Google and news publishers wherein Google enjoys a superior bargaining position. Bargaining power or countervailing buying position is the ability of the buyer to influence the terms and conditions on which it purchases goods or avail the services.[78]

The CCI in the case of *Sunil Bansal v. M/s Jaiprakash Associates Ltd. and Others*, has held that imposition of unfair conditions implies forcing a party with low bargaining power to follow commitments dictated by the dominant party having high bargaining power. Further, the dominant entity imposes disadvantageous conditions on the counterparty due to a lack of adequate alternatives/substitutes.[79] Thus, to establish abuse of a superior bargaining position, it must be reasonably established that there is a lack of effective choice available to a party to the contract. In the case of *Shri Deepak Kapoor v. M. S. Jaiprakash Associates Ltd. and Others*, the CCI held that the interpretation of the term "*unfair condition*" would mean forcing or dictating terms on the weak party to the contract which is not based on principles of equality and justice.[80] Furthermore, in the case of *Faridabad Industries Association v. Adani Gas Limited*, the CCI has held that since the opposite party ("**Adani Ltd.**") had the sole discretion to either accept or reject the force majeure clause invoked by customers, such discretionary

[78] Coal India Ltd v. CCI and Bijay Poddar, Appeal No. 81/2014 [COMPAT].
[79] Sunil Bansal v. M/S Jaiprakash Associates Ltd., (2015) SCC OnLine CCI 178.
[80] Shri Deepak Kapoor v. M/S Jaiprakash Associates Ltd., Case No. 16 of 2012 (Competition Commission of India).

powers which occur due to bargaining imbalance, leads to the imposition of unfair conditions under Section 4(2)(a)(i) of the Act, and abuse of dominance in relevant market.[81]

Further reliance can be placed upon the case of *Central Inland Water Transport* case and *LIC of India and Others. v. Consumer Education & Research Center and Others*, wherein Supreme Court observed *that* "*if such a weaker party has no meaningful choice but to give his assent to a contract (or to accept a set of rules as part of the contract), however unfair, unreasonable and unconscionable they may be, the courts will strike down such unfair and unreasonable contract*".[82]

Drawing analogy from the above-mentioned judicial pronouncements, it is established that since Google has a market share of more than 90% in the online general web search service market and more than 50% of referral traffic on websites' is routed through Google, news publishers are not left with any meaningful choice but to rely solely on Google. The network effects as mentioned above have locked in the users to Google's eco-system.[83] Since the users are locked-into Google's eco-system, they generally do not use multiple platforms (Bing, Yahoo) for resolving their queries. Also, Google offers its search engine services for free and users usually do not multi-home for their search queries.[84] Hence, artificial restrictions on multi-homing by Google have increased the switching cost for users.[85] The author believes that the lack of effective

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[81] Faridabad Industries Association v. Adani Gas Limited, Case No. 71 of 2012 (Competition Commission of India).
[82] Central Inland Water Transport v. Brojo Nath Ganguly, (1986) 3 SCC 156; LIC of India v. Consumer Education & Research Center, (1995) 5 SCC 482.
[83] BEATA MAIHANIEMI (ed), COMPETITION LAW AND BIG DATA, (Edward Elgar Publishing 2020) (Chapter IX - Is Google dominant?) [2020] ELECD 331.
[84] News Corp Australia, *supra* note 58.
[85] Jonathan B. Baker, *Protecting and Fostering Online Platform Competition: The Role of Antitrust* Law, 17(2) J. COMPETITION L. & ECON. 493–501, (2021).

choice locked-in effects, and high-switching cost for users allowed Google to enjoy a superior bargaining position in the relevant market. Google by virtue of having a superior bargaining position is compelling news publishers to accept terms and conditions stipulated by it including the use of news snippets (including featured snippets) by Google without remuneration. It is exploiting the contractual clauses for its benefit. In other words, news publishers are forced to accept the terms and conditions of the contract which are unilaterally decided by Google.

The Court in *BRT v. SV SABAM* has propounded the test to determine the imposition of unfair trading conditions within the meaning of Article 102(a) of the Treaty on the Functioning of the European Union.[86] The court laid down two conditions: - *firstly,* conditions imposed are not absolutely necessary for attainment of object and *secondly*, conditions imposed infringes an entity's freedom to exercise his rights. In the present case, unilaterally creating and using snippets and not remunerating for the same are not necessary for the attainment of Google's objective of accruing benefits to consumers. Moreover, such conditions also infringe publishers right to freely exercise their right over use of their protected content. Hence, both the conditions as laid down in the *BRT* case are fulfilled and therefore, the conditions imposed by Google would be termed as unfair and thereby would constitute an abuse of dominant position.

Accordingly, on the basis of above reasoning and judicial pronouncements and international jurisprudence, it can be said that the contract between news publishers and Google amounts to imposition of

[86] Case C-127/73, Belgische Radio en Televisie et Sociétébelge des auteurs, compositeurs et éditeurs (BRT) v. SV SABAM, (1974) E.C.R. 51 ¶15.

unfair conditions and thereby violates the provisions of Section 4(2)(a)(i) of the Act and lead to abuse of dominance.

V. SUGGESTIVE MEASURES FOR THE INDIAN MARKET

The European Union has also accepted the argument that web aggregators and search engines' abusive practices are violating the creator's rights. Thus, to protect and ensure the enforceability of rights of European creators including but not limited to news publishers, the European Union has approved the EU copyright rules. One of the major provisions of the said directive is the requirement of obtaining a license from Google and other online search engines from news publishers for displaying news snippets. The new directives on the one hand will allow search engines to legally publish news snippets and on the other hand, will remunerate news publishers and authors for their content. In this manner, a balance is sought to be established between news publishers vis-à-vis online search engines.[87]

A similar issue was before the French Competition Authority ("**FCA**").[88] The FCA held that Google's unilateral decision of not displaying snippets in case news publishers do not license their content free of cost amounts to abuse of dominance. It directed Google to fairly negotiate with news agencies and publishers over the amount owed to them for the use of their protected content. The decision was upheld by the Paris

[87] Martin Senftleben, Maximilian Kerk, Miriam Buiten, and Klaus Heine, *New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era,* 48 INT'L REV. INTELL. PROP. & COMPETITION L. (2017), https://link.springer.com/article/10.1007/s40319-017-0605-y.

[88] Theo Wayt, *Google fined $593 million in France amid battle over news publishing,* The New York Post (July 13, 2021), https://nypost.com/2021/07/13/Google-fined-593m-in-france-amid-battle-over-news-publishing/.

Court of Appeal.[89] Further, the FCA imposed a fine of €500 million against Google as it failed to comply with the FCA's order of fairly negotiating with news publishers over remuneration for use of their news content.[90] It was found in contravention of the French Laws and EU Copyright Rules. Further, Google withdrew its plan of making an appeal against this decision and proposed the following behavioural remedies which are duly accepted by the Competition Authority – 1) Fairly negotiate with news publishers for use of their content and, 2) Share the information pertaining to validation of fair amount.[91] Likewise, Canadian legislation has introduced the Online News Act.[92] The Act mandates the digital platforms to negotiate agreements in good faith with news publishers for fair revenue sharing over use of news content.[93] The bill is on the similar lines with the News Media Bargaining Code.[94] Major news publishers in Australia have reached to a settlement with Google over remuneration. Similarly, in the USA, the Journalism Competition and Preservation Act, 2021[95] was introduced. In

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[89] David Tayar and Jalil El Khanchouf, *The Neighbouring Rights Saga (France): Google Fined €500 million for Breaching Interim Order to Negotiate in Good Faith with News Agencies and Publishers*, 13(5) J. EUR. COMPETITION L. & PRAC., (2022).

[90] Laura Kayali, *Google slapped with €500M fine in French press publishers case,* PoliticoPro (July 13, 2021), https://www.politico.eu/article/french-competition-authority-fines-Google-500m-euros-press-publishers-case/.

[91] Dominique Vidalon, *Google resolves French copyright dispute over online content,* The Reuters (June 22, 2022), https://www.reuters.com/technology/french-anti-trust-body-accepts-Google-pledges-over-remunerating-news-publishers-2022-06-21.

[92] The Online News Act, S.C 2023 c. 23 (Parliament of Canada, 22 November 2021), https://www.parl.ca/legisinfo/en/bill/44-1/c-18.

[93] Canada, Parliament, House of Commons Debates, 44th Parl, 1st Sess, Vol 151, No 071 (13 May 2022).

[94] TNN, *Canada's new law to boost desi publishers' anti-Google, FB case,* The Times of India (May 11, 2022), https://timesofindia.indiatimes.com/business/india-business/canadas-new-law-to-boost-desi-publishers-anti-Google-fb-case/articleshow/91477975.cms; Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Austl.) (February 25, 2021), https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code.

[95] Journalism Competition and Preservation Act, S. 673, 117th Cong. (2022).

New Zealand, the government has also been in accord of allowing news publisher associations to collectively bargain for remuneration for content displayed on digital platforms.[96] The aim of these legislations is to recognize news publishers' right to remuneration and allow them to negotiate with digital platforms regarding the terms on which their content may be distributed on digital platforms.[97]

Thus, while referring to the international legislation, one of the possible solutions for the Indian Antitrust Authority can be laying down the legal requirement of compulsory remuneration by the online search engines to news publishers for the display of short text previews of their content. Moreover, the legislation should allow negotiation over price and licensing of legal use of snippets. Further, news publishers and online search engines should be allowed to mutually negotiate over the terms and conditions for the display of snippets of the news content.[98] Furthermore, the legislation should prescribe a time limit for deciding price and other matters incidental thereto, so as to avoid any unnecessary delay by the parties. Moreover, the author proposes that if bargaining parties come to the conclusion in good faith over remuneration and other issues pertaining to the use of news content by digital platforms (bargaining issues), then in

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[96] Commerce Commission, New Zealand, *Commerce Commission issues draft determination on News Publishers' Association's collective bargaining application,* Commerce Commission (August 08, 2022), https://comcom.govt.nz/news-and-media/media-releases/2022/commerce-commission-issues-draft-determination-on-news-publishers-associations-collective-bargaining-application.

[97] Journalism Competition and Preservation Act, H.R.2054, (2019) (United States of America).

[98] Organisation for Economic Co-operation and Development, *Competition issues concerning news media and digital platforms,* OECD, (2021), https://www.oecd.org/daf/competition/competition-issues-concerning-news-media-and-digital-platforms-2021.pdf.

such a case, the legislation should mandate the such resolution must be communicated to the commission at the earliest.

Secondly, the Author argues that if digital platforms failed to negotiate fairly with news publishers, then the matter should be referred for Arbitration because the issue involves private rights which originates from the contract between digital platforms and news publishers. The author has drawn reference from the Supreme Court decision in the case of *Booz Allen and Hamilton Inc v. SBI Home Finance Ltd. & Others,* wherein the Court observed that a dispute involves a right *in personam,* i.e., rights against specific individuals can be arbitrated before an arbitral tribunal.[99] Later on, the Apex Court in *A. Ayyasamy v. A. Paramasivam & Others*, has observed that a dispute that does not affect public policy can be referred to an arbitral tribunal.[100]

Thirdly, the author suggests that CCI should direct Google to ensure news publishers that their visibility or ranking on the search general platform will not be subject to their consent. Thereafter it should ask news publishers to what extent they permit the use of news snippets for their news content. The ball should be in the hands of news publishers to allow them to decide the length of news snippets for their content. In this manner, Google can obtain the voluntary consent of news publishers to display news snippets attached to their websites. In this manner, the use of news snippets will be in consonance with the competition regime of India and will give news publishers effective control and choice over their content and news snippets.

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[99] Booz Allen and Hamilton Inc v. SBI Home Finance Ltd., (2011) 5 SCC 532.
[100] A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386.

Lastly, the competitive concerns in the news industry are arising due to the bargaining imbalance between Google and news publishers. Google is abusing its superior bargaining powers against its trading parties. In South Korea and Japan, specific provisions have been enacted to restrict the abuse of superior bargaining power by conglomerates.[101] Germany, France, and Italy also have comparable provisions.[102] In India, there are myriad cases in which the commission as well as the Courts have prohibited agreements created between parties due to the reason that the dominant party has unfairly restricted or prevented the rights of the other trading parties by abusing its superior bargaining power. Nonetheless, despite several decisions, the number of instances have been witnessed wherein digital platforms have imposed unfair conditions on the other trading party by virtue of it enjoying superior bargaining position/power. Hence, the author suggests that to tackle this bargaining imbalance, there is a dire need to introduce specific legal provisions prohibiting abuse of superior bargaining imbalance under Section 4 of the Competition Act, 2002. The author believes that such introduction will prima facie reflect the intent of legislature that one-sided agreement created by abuse of superior bargaining power are expressly prohibited and accordingly it will create special

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101 MS Gal and T Cheng, *Aggregate Concentration: An Empirical Study of Competition Law Solutions,* 4(2) J. ANTITRUST ENFORCEMENT 282, (2016); Y Kim and JK Ma, *A Statistical Study of the Cases of Unfairly Taking Advantage of a Position in the Business Area Clause of Korean Fair-Trade Act,* 13 J. REG. STUD. 67, 74–5, (2004).

102 International Competition Network, *Report on Abuse of Superior Bargaining Position,* International Competition Network, (2008), http://www.internationalcompetitionnetwork.org/uploads/library/doc 386.pdf.

responsibility over dominant entities to not abuse their superior bargaining power.[103]

VI. CONCLUSION

The Commission seems to be correct in prima facie holding Google liable for abusing its dominant position in the relevant market for online general web search services. Based on the international and national jurisprudence, it can be concluded that lack of control over optimisation of news snippets by media businesses and not compensating news publishers for news snippets raises a serious competitive concern in the relevant market. The same has also been advocated by the ACCC in its report on digital platforms and by the Competition Commission of India and EU as well. To tackle the same, the current competition law regime of India has provided sufficient provisions so as to enable CCI to exercise its jurisdiction to examine the practice of Google. while referring to the provisions related to market share, entry barrier, market structure, and market power of the competitors, competitive constraint in market and network effects, it will be difficult for the Google to contend its dominance in the market for online general web search services. Further, the bargaining imbalance between news publishers and Google and the use of a higher bargaining position by Google by dictating terms to the weaker party can adequately attract the provisions of Section 4(2)(a)(i) of the Act. Not remunerating news publishers can also be considered as an imposition of unfair pricing under the above-stated Section. Lastly, to tackle these competitive challenges, CCI is required to first direct Google to enter into negotiations

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[103] Thomas K. Cheng and Michal Gal, *Superior Bargaining Power: Dealing with Aggregate Concentration Concerns,* U. H.K. FAC. L. LEGAL STUD. RES. PAPER No. 2019/116 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3508336.

with news publishers over the licensing and remuneration of news snippets. Also, it can. The author believes that the arbitrary use of news snippets by Google has provided a golden opportunity for CCI to set a path for other international antitrust authorities to deal with such competitive challenges. Till today an approach in the right direction has been made by CCI by prima facie holding that Google has abused its dominant position. Nevertheless, a long distance is yet to be covered. The author believes that while referring to the international jurisprudence and Indian precedents, CCI can effectively examine the abusive practices adopted by Google.

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