VOL. VIII 2020-21

DELHI LAW REVIEW

STUDENT EDITION

ISSN 0973-00IX

FACULTY OF LAW
UNIVERSITY OF DELHI

DELHI LAW REVIEW
STUDENT EDITION

Volume VIII 2020-21

Mode of Citation : Vol. VIII SDLR <page number> (2021)

ISSN : 0973-00IX

Published by

Faculty of Law
Chhatra Marg
University of Delhi
Delhi – 110007

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INTRODUCTORY NOTE

PROF. (DR) MAHENDRA PAL SINGH*

It is very heartening to note that the Faculty of Law, University of Delhi, is bringing out the eighth volume of the Delhi Law Review (Student Edition), which I believe is a significant value addition to academic literature. For me, the publication of this journal is a personal achievement. In my capacity as the Dean of the Faculty of Law from 1994 to 1997, I encouraged the students to publish one periodical annually. However, the mission could not be accomplished due to some reasons. Now, the Faculty of Law, University of Delhi is publishing the *Delhi Law Review* and the *Delhi Law Review (Student Edition)* in addition to the other law journals from different Law Centres. These journals have not only gained footing among legal journals but also emerged as a space for discussions on varied legal issues.

I congratulate the Dean, the Faculty Advisor and the dedicated team of students for bringing out the *Delhi Law Review (Student Edition)* in high quality. The impeccable diversity the *Review* represents in terms of articles selected is a real delight. The intellectually stimulating research pieces offer incisive analyses on almost every area of law, ranging from those that govern fundamental relationships within society, such as administrative law, constitutional law, and criminal law, to more technical branches, including competition law and securities law. I am confident that the objective assessment of legal concepts undertaken by the authors will serve as an essential aid in fostering critical thinking not only among scholars but also among practitioners. Substantiated with meticulous research, the essays attempt to resolve complex legal cruxes, thereby providing an invaluable educational experience.

I laud the determined efforts made by the editorial board in presenting a portfolio of well-reasoned articles. The board's commitment to advancing legal scholarship is beyond comparison. I learnt that every submission that passed muster went through a rigorous review process comprising of five rounds. The editors, having an eye for detail, focused both on the 'correctness' and 'relevance' of the content while making selection decisions. It is noteworthy that they ensured that each article was accurately substantiated by facts and references and not developed from bald assertions. From engaging in detailed correspondence with the authors to assisting them in identifying errors (if any) and enabling them to amend their articles accordingly, the editors left no stone unturned in publishing scholarly works. I particularly commend the Faculty Advisor, Prof. (Dr.) L.

* Prof. (Dr) M.P. Singh is the former Dean of the Faculty of Law, University of Delhi and Vice Chancellor of The West Bengal National University of Juridical Sciences Kolkata, Kolkata. At present, he is a Research Professor at O.P Jindal Global University, Sonipat and Professor Emeritus, University of Delhi.

Pushpa Kumar for showing the student editors the ropes and supporting them in their endeavours. Devoted to furthering research inculcation, he is the mind behind the continuous evolution of the journal.

I hope that the editorial team will continue to improve the quality of the *Delhi Law Review (Student Edition)* from issue to issue and allow alternative perspectives to flourish. I appreciate that the journal is available online free of charge and is within easy reach of all. However, I feel that the Faculty of Law must also concentrate on producing and circulating physical copies of the *Review*. Indisputably, the availability of the print edition in libraries will ensure that the *Review* is accessible to a wider audience.

I am proud that the editors did not permit an unprecedented challenge in the form of COVID-19 to shatter their confidence. They assiduously carried on with their task of evaluating research papers and facilitating legal discourse. I congratulate all the members on this accomplishment and wish them the very best.

Prof. (Dr) Mahendra Pal Singh

New Delhi

MESSAGE FROM THE DEAN

Despite the unprecedented challenges thrown by COVID 19 over the last two years, the students from the Faculty of Law, University of Delhi have worked so hard to put together this volume successfully. Nothing makes me happier than to see that legal scholarship and academic rigour have been given pride of place in this Eighth Volume of Delhi Law Review (Student Edition).

This Volume covers considerable expanses of law, from niche commercial law in the form of competition law to the more day-to-day practicalities of administrative law all the way to even theorising the futuristic landscape of the law on artificial intelligence. I have also been informed that the Journal's form and design underwent a major overhaul in 2020 and in the present issues, great care was given to smaller details such as font type and size, margins and spacing to allow for better readability. It is thrilling to see such forward-thinking, and future-focused students working to create a lasting legacy of legal scholarship at the University.

It is truly heartening to note that Professor M.P. Singh, Former Dean, Faculty of Law has very passionately written the Introductory Note to this Volume providing an impetus to the academic zeal of our students. I congratulate the Student Editorial Board and Professor L. Pushpa Kumar, the Faculty Advisor for this significant achievement.

Prof. (Dr) Usha Tandon
Dean, Faculty of Law
Head, Department of Law

FROM THE EDITOR'S DESK

I am overjoyed to present the eighth volume of the Delhi Law Review (Student Edition) to all our readers. Devoted to the continued progress of legal scholarship, the *Review* encourages a stimulating dialogue on law and its interaction with other disciplines. The purpose of the journal is twofold: to enhance legal education through the inculcation of research culture and to substantially contribute to the development of law by publishing articles that are readily accessible. Entirely student-operated, it serves as a repository of intellectual content.

The *Review* is a symbol of courage and self-trust as it displays the indomitable spirit of everyone involved in the exercise of putting together a compendium of articles of scholarly interest. In the tumultuous two years of the pandemic, we went beyond our call of duty and made every attempt to shape legal literature. Though surrounded by challenges and uncertainties posed by the novel coronavirus, the editorial team never downed its tools and always remained better prepared for every eventuality. In these perilous times, where shifting to the digital mode became a desideratum, the members of the Editorial Board quickly acclimatised to changed conditions and ensured continuity in the *Review's* operations by regularly holding virtual meetings and conferences. I take pride in sharing that despite the two devastating waves of COVID-19, the enthusiasm of both authors and editors remained intact and the editorial work continued unabated.

Dealing with a wide array of subjects, the *Review* focuses on occupying as much academic foreground as possible. From the laws that encompass substantive rules regulating legal relationships between government bodies, and an individual and the state, namely constitutional law and administrative law, to the areas governing market behaviour, including antitrust law and intellectual property law, to emerging dispute resolution law, the 'well-researched' and 'well-analysed' research pieces[1] offer a new slant on myriad knotty legal issues. Donning the hat of a legal constructionist, the authors have attempted to deconstruct the legal texts to unravel the unexplored intricacies of the topic they probed. More importantly, to reach a larger audience and make their works more reader-friendly, greater emphasis has been laid on employing plain and transparent language to express opinions on the concerned matter. Indubitably, the endeavour of the authors to unpack legal questions worth of enquiry demonstrates their commitment to engage in thoughtful discourse.

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[1] Well-researched means assertions and facts that are found elsewhere and that the references correctly represent their sources, and well-analyzed means that the article's argument is logical and valid. See Natalie C. Cotton, "The Competence of Students as Editors of Law Reviews: A Response to Judge Posner" 154 *University of Pennsylvania Law Review* 964 (2006).

While coming up with an ingenious analysis, the authors were ably assisted by the editors. The Board undertook the enormous task of reviewing over 285 submissions with fastidious care and supplying the authors of the shortlisted articles with constructive feedback and suggestions. The editors, particularly Ms Manvi Dikshit, Ms Tanisha Kohli, Ms Samridhi, and Ms Jayati Sinha, not only shouldered the responsibility of helping the authors cover the breadth and depth of their preferred fields of legal studies but also scrupulously emended the text for clarity and better readability. Above all, the 'fantastic four' acted as catalysts in establishing a system of effective knowledge transfer. Furthering our objective of nurturing independent thinking, we organised two informative sessions on 'academic writing' and 'article editing' for law students across the country. The fruitful interaction revolved around two aspects — ingredients of a well-written piece and the standard article selection criteria taken into account by the editorial boards.

The goal of producing a collection of quality articles could be achieved only under the tutelage of our faculty advisor, Prof. (Dr.) L. Pushpa Kumar. I thank him for his copious amount of guidance and unstinting support throughout the journey. As a functioning bridge between the Board and the Faculty's administration, he has ceaselessly represented the *Review's* interests and played an instrumental role in giving every edition a new life.

One of the highlights of the *Review* is the introductory note by Prof. (Dr) M.P. Singh, Professor Emeritus, University of Delhi and former Head and Dean of the Faculty of Law, University of Delhi. I am certain that his words of wisdom will continue to enlighten the present and future custodians of the *Review* and give an additional impetus to our cause of promoting 'legal writing literacy'. Staying true to its purpose, I hope this volume whets your appetite for more articles providing an objective assessment of legal affairs.

Daksh Aggarwal
Editor-in-Chief
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BIG TECH AND ANTITRUST LAW: A PROBE INTO GOOGLE'S ABUSE IN THE DIGITAL PAYMENT MARKET

Harshita Sukhija and Rishika Agarwal [*]

The rise of 'Big Tech' has transformed the antitrust landscape. Their sheer size, market power, and control over user data make them invincible, rendering the traditional methods of competition policy redundant. One such Big Tech is Google, which has faced indictments in several jurisdictions for its anti-competitive activities. In India, after two antitrust rulings against it in the past, Google is once more under the scrutiny of the Competition Commission for its alleged abusive conduct in the digital payments market. Google is accused of having leveraged its dominant position in the Android App Store to gain an advantage for its digital payment app, Google Pay. This article will present a layout of the probable investigation into the allegations made against Google, which will constitute a three-step analysis starting from stipulating the relevant market to assessing its position of dominance and looking into abuse of such dominant position. Thereafter, the authors have identified Google's key rebuttals in light of the dynamic nature of the technology market. Finally, owing to the conundrum faced by the antitrust authorities while applying the competition laws of the country to modern digital anti-competitive cases, the article provides a brief discussion on future steps that may be taken.

I. INTRODUCTION

India's Competition Act ('the Act'),[1] enacted in the year 2002, has indubitably marked a monumental shift from the old Monopolistic and Restrictive Trade Practices Act, 1969, but the rapid advent of the digital economy propelled by tech giants like Google, Apple, Microsoft, Amazon and so forth, is giving rise to major challenges in addressing new issues through traditional methods of antitrust bodies. Lately, the Competition Commission of India ('CCI') has been proactively intervening in the innovation and technology driven markets. This is evident from the fact that after the two major antitrust rulings against

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[1] The Competition Act, 2002 (Act 12 of 2003).

Google in the years 2018,[2] and 2019,[3] it is now anticipated that the CCI might take cognizance of a third complaint filed against the allegedly abusive and anti-competitive conduct of Google.

In the month of February 2020, a complaint was filed against the tech giant of the United States of America for abusing its dominant position in the market by unfairly promoting Google Pay, its digital payment app, that allows users to pay bills and perform inter-bank fund transfers. The identity of the complainant was kept confidential and a notice was served by the CCI to Alphabet Inc's Google.[4] The app competes with Walmart's PhonePe, Softbank-backed Paytm, and Meta's recently launched WhatsApp Payments. The allegations made by the informant are six-fold: first, that Google ensures the use of Google Play Store's payment system as the exclusive mode of payment for purchase of apps and in-app purchases; second, that Google unfairly promotes Google Pay by pre-installing and prominently placing it on Android smartphones; third, that Google engages in search manipulation and bias in favour of Google Pay; fourth, that Google gives unfair advantage to Google Pay through its prominent placement on the Play Store; fifth, that Google manipulates the search advertisements algorithm on the Play Store; and sixth, that Google imposes unfair terms on users.[5]

While it is not illegal to be dominant, it is prohibited to abuse this dominant position. What makes it difficult for antitrust bodies to take measures in such scenarios is the dynamic nature of the digital and online market as well as the uphill task of defining the relevant market and dominance, where it is believed that the competition is just a click away with virtually zero switching cost. In its Order dated 09.11.2020, the CCI decreed investigation on the first two of the above-mentioned allegations. On the first claim, it was of the opinion that by making it obligatory to use Google Play Store's payment system, Google puts a limit on the choice of app developers, especially taking into account that Google charges a huge commission. This could have an adverse effect on the competitors in the downstream market as well as on the users.[6] Regarding the second claim, it observed that the pre-installation of Google Pay can affect the level playing field, considering that Google already enjoys a significant advantage in the Unified Payment Interface ('UPI') based app market.[7] However, this article focuses on the fourth claim, that is, the prominent placement of Google Pay on the Google Play Store. Although the CCI has dismissed this claim because of insufficient evidence, this article argues that this is a legitimate allegation.

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[2] *Matrimony.com Limited* v. *Google LLC,* 2018 SCC OnLine CCI 1.
[3] *Umar Javeed* v. *Google LLC,* 2019 SCC OnLine CCI 42.
[4] Aditya Kalra and Aditi Shah, "Exclusive: Google faces antitrust case in India over payments app-sources" *Reuters,* May 27, 2020, *available at*: https://www.reuters.com/article/us-india-google-antitrust-exclusive/exclusive-google-faces-antitrust-case-in-india-over-payments-app-sources-idUKKBN2331G3 (last visited on Mar. 30, 2021).
[5] *XYZ* v. *Alphabet Inc and Others,* 2020 SCC OnLine CCI 41.
[6] *Ibid.*
[7] *Ibid.*

The article discusses the plausible scope of the investigation under the Act with respect to this complaint, defenses by Google as well as our opinion on the recourse that should be taken, considering the ever-growing market in India and the world.

II. SCOPE OF INVESTIGATION

Section 4 of the Act prohibits the abuse of dominant position by an enterprise and lays down the conduct which is said to be abusive, and hence prohibited.[8] To prove that Google's conduct is covered under Section 4, the following three issues need to be determined:

1) What is the relevant market in the context of Section 4 read with Section 2(r) and Section 19(5)?
2) Whether Google is dominant in the above relevant market in the context of Section 4 read with Section 19(4)?
3) If yes, then whether Google has abused its dominant position in the relevant market?

Monetisation in the digital market: Before analysing the above-mentioned issues, it would be apposite to consider the fact that Google provides its Play Store free of cost. In the case of *Matrimony.com Limited* v. *Google LLC* ('*Matrimony Case*')[9] a similar contention was raised by Google with respect to its search services. The CCI rejected the contention on the ground that Google had overlooked the role of big data in an ever-increasing digital economy. The CCI pointed out that the users of Google's search services offer: [10]

> Indirect consideration to Google by: (a) providing their attention or 'eyeballs' to SERP (Search Engine Results Page); and (b) allowing Google to collect and use their information, both of which facilitates generation of revenues by Google as it attracts more advertisers.

First and foremost, though most of the apps are free, some of them are paid as well, and Google charges 30% of the sum consumers pay for the apps or as an in-app payment.[11] Secondly, Google indirectly monetises by collecting data about the apps we install, which ultimately helps it improve its features.[12] Therefore, there is a commercial relationship or economic activity that can be examined under the Act. Even if it is accepted that there is provision of a free service, this would not make a difference and would simply be a factor

[8] *Supra* note 1, s. 4.
[9] *Supra* note 2.
[10] *Id.*, at para. 82.
[11] Kamil Franek, "How Google Makes Money from Android: Business Model Explained" *KamilFranek, available at*: https://www.kamilfranek.com/how-google-makes-money-from-android/ (last visited on Oct. 10, 2020).
[12] Google, *Google Privacy Policy*, *available at*: https://policies.google.com/privacy?hl=en (last visited on Oct. 10, 2020).

to be taken into account while assessing dominance, as was held by the European Commission in the *Google Search (Shopping)* case ('*Google Shopping Decision*').[13]

A. Defining the Relevant Market

As per Section 2(r) of the Act,[14] a determination of relevant market requires giving due regard to the relevant product market, defined under Section 2(t),[15] and relevant geographic market, as per Section 2(s).[16]

1. Relevant product market

While delineating the relevant product market, it is imperative to give due regard to the factors listed in Section 19(7) of the Act, which are physical characteristics or end-use of goods, price of goods or services, consumer preferences, exclusion of in-house production, existence of specialized producers, and classification of industrial products.[17]

To determine the market, the dual role played by Google has to be considered. Google provides a platform to distribute apps which can be termed as its upstream market. This platform is the app store which in the instant case is Google Play Store. In this platform, it allows third-party apps as well as its own apps to be distributed by way of display and the download option, and this second leg can be termed as the downstream market.

Thus, there are two distinct relevant markets in this case, which have to be analysed by taking into account both the upstream and the downstream roles played by Google.

(i) *App Stores for the Android Mobile Phone Operating System ('OS')*

It is essential to understand why it is appropriate to narrow down the market to only Android OS, leaving aside other OS like Apple's iOS or Windows. Unlike Apple's iOS, Android is a licensable OS, as noted in Re: Google Android case ('*Google Android case*').[18] This means that for a mobile phone manufacturer like Samsung or Vivo, iOS is not an option because it is non-licensable and cannot be used by mobile phone manufactures other than Apple as an OS for their mobile phone. Thus, these manufacturers have to resort to either Android licensing or developing their own OS. A relevant product market is essentially a matter of substitutability, that is, the products have to be interchangeable to be considered a part of the same market. Therefore, Android's market, to the exclusion of iOS or Windows should only be taken as the relevant market.

Corollary to this, as held in the case of *Umar Javeed* v. *Google LLC* ('*Umar Javeed Case*'),[19] the app store of Apple will also not form part of the relevant market as that is available

[13] [2018] 4 CMLR 748.
[14] *Supra* note 1, s. 2(r).
[15] *Id.,* s. 2(t).
[16] *Id.,* s. 2(s).
[17] *Id.,* s. 19(7).
[18] *Re: Google Android (Case COMP/AT.40099),* (2019) 5 CMLR 661.
[19] *Supra* note 3.

only on iOS devices.[20] Hence, the primary relevant product market in the present case will only be the upstream market app stores for the Android OS.

(ii) *Digital payment apps with UPI feature*

With regard to the downstream market, Google displays its own apps and also third-party apps in its app store. Here, it is important to understand that Google Pay provides payment services solely based on the UPI platform which is similar to apps like PhonePe. Other apps like Paytm, Mobikwik, and Freecharge started with e-wallet services and later went on to add UPI payment service considering the demand and competition in the market.[21] UPI is a payment system through which funds between two banks can be transferred instantly through Immediate Payment Services ('IMPS'). It is different from other modes of payment like an e-wallet, as UPI involves direct payment from one bank to another, whereas an e-wallet acts as a middleman in the sense that it first requires a transfer from a bank account to an e-wallet and then further to the beneficiary. Additionally, UPI is much simpler to use as compared to credit cards and debit cards, which require various details like card holder's name, card number, expiry date and so forth, and to net banking where a beneficiary has to be added beforehand, which is a time-consuming process. Since these modes comprise of such different characteristics, they cannot be said to form a part of the same market. Thus, the second relevant market in this case would be digital payment apps with UPI features.

2. Relevant geographic market

For the relevant geographic market, due regard has to be given to the factors provided under Section 19(6) of the Act, which are regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences, and/or need for secure or regular supplies or rapid after-sale services.[22]

Taking these factors into account, it can be concluded that while the conditions of competition for supply and demand of apps are distinctly homogeneous in India, the same are distinguishable from the conditions prevailing in other countries. This is mainly because there are geographic restrictions on the apps that can be accessed on an app store. In addition, a country's regulatory framework also influences the supply of apps as the government may restrict or prohibit access to certain apps. Similarly, in respect of digital payment apps, the conditions of competition for demand and supply are affected by legislative or regulatory framework, variations in applicable terms and conditions, local

[20] *Id.*, at para. 15.

[21] "Now, transfer money from one e-wallet to another" *The Hindu,* Oct. 16, 2018, *available at*: https://www.thehindu.com/business/Economy/upi-to-facilitate-interoperability-among-prepaid-payment-instruments/article25241630.ece (last visited on Mar. 30, 2021).

[22] *Supra* note 1, s. 19(6).

specification requirements, language and so forth. Hence, the relevant geographic market for both app stores for the Android OS market and digital payment apps with UPI features market will be India.

Therefore, the following are the two relevant markets for examining the alleged abusive conduct of Google:

i. Market for App Stores for the Android OS in India
ii. Market for Digital Payment Apps with UPI feature in India

B. Analysing the Position of Dominance

As per Explanation (a) to Section 4 of the Act, 'dominant position' means a position of strength enjoyed by an enterprise in the relevant market in India which enables it to: (i) operate independently of competitive forces prevailing in the relevant market; or (ii) to affect its competitors or consumers or the relevant market in its favor.[23] Further, while assessing an enterprise's dominance in the relevant market, due regard has to be given to the factors enumerated in Section 19(4) of the Act. On analysis, this article has concluded that Google enjoys a dominant position in the market for App Stores for the Android OS in India on the basis of the below-mentioned factors.

1. Market share of Google Play Store

In the *Google Shopping Decision,* the European Commission discussed the relevance of market share while determining Google's dominant position in the market for general search services.[24] It has been settled in various judgments that a very large market share is evidence of a dominant position, save in some exceptional circumstances.[25] The Commission continued that:[26]

> An undertaking which holds a very large market share for some time, without smaller competitors being able to meet rapidly the demand from those who would like to break away from that undertaking, is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position. That is the case where a company has a market share of 50% or above. Likewise, a share of between 70% and 80% is, in itself, a clear indication of the existence of a dominant position in a relevant market.

[23] *Id.*, s. 4, Explanation (a).
[24] *Supra* note 13.
[25] *Hoffman-La Roche & Co. AG* v. *Commission of the European Committees*, Case 85/76 ECR 1979 461*; AKZO Chemie BV* v. *Commission of the European Committees*, Case C-62/86 ECR 1991 I-03359.
[26] *Supra* note 2 at para. 266.

The download statistics for apps in 2018 show that 70% of the downloads were made through the Google Play Store in the year 2017 alone and it has remained over 50% since 2013.[27] Moreover, a recent report disclosed that the estimated number of downloads through the Google Play Store can reach 250 million in just a single day.[28] In India, Android dominates the market with an exorbitant share of 91%.[29] A 2019 Mobile Apps Usage Survey reports that 97.18% of the mobile users prefer the Google Play Store because it is a default app store that is pre-installed in Android devices.[30] Although there is no data with the exact percentage of market share of the Google Play Store in India, recent statistics show that India is the biggest Google Play Store download market in the world.[31] In *Umar Javeed Case*,[32] the CCI noted that:

> Google's app store, the Play Store, accounts for more than 90% of apps downloaded on Android devices. Google's app store dominance is not constrained by Apple's App Store, which is only available on iOS devices. As such, Google's dominance in this relevant market also becomes evident.[33]

While market share as a quantitative criterion to measure dominance is a more appropriate standard when testing a static market, a volatile market needs gauging of other indicators as well to come to a rational conclusion. Thus, the Google Play Store's position of dominance is further reinforced by the following factors:

2. Vertical integration

No other licensable OS poses a threat to the Android OS as alternatives available are very limited in this market. Additionally, being a part of Google Mobile Services ('GMS'), the Play Store has to be pre-installed by equipment manufacturers as they are not downloadable.[34] Thus, Google Play Store is the main pre-installed app store in any Android mobile phone as other stores like Samsung App Store or Amazon App Store have a very

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[27] Sarah Perez, "A look at the Android Market (aka Google Play) on its 10th Anniversary" *TechCrunch,* Oct. 22, 2018, *available at*: https://techcrunch.com/2018/10/22/a-look-at-the-android-market-aka-google-play-on-its-10th-anniversary/https (last visited on Oct. 15, 2020).

[28] Avinash Sharma, "Top Google Play Store Statistics 2019-2020 You Must Know" *Appinventiv,* Aug. 18, 2020, *available at*: https://appinventiv.com/blog/google-play-store-statistics/ (last visited on Oct. 10, 2020).

[29] Vaibhav Asher, "Market share of mobile operating systems in India from 2012 to 2019" *Statista* (June 22, 2020), *available at*: https://www.statista.com/statistics/262157/market-share-held-by-mobile-operating-systems-in-india/#:~:text=As%20of%202019%2C%20Android%20held,operating%20system%20market%20in%20India.&text=As%20of%20December%202016%2C%20Android,percent%20of%20the%20market (last visited on Oct. 12, 2020).

[30] "Mobile App Download & Usage Report: Stats You Must Know (2019)" *GoodFirms, available at*: https://www.goodfirms.co/resources/app-download-usage-statistics-to-know (last visited on Oct. 15, 2020).

[31] Sohini Mitter, "India leads the world in mobile app installs in 2019, TikTok most downloaded" *YourStory,* May 23, 2019, *available at*: https://yourstory.com/2019/05/india-mobile-app-installs-tiktok-hotstar-google-play-store (last visited on Oct. 10, 2020).

[32] *Supra* note 3.

[33] *Id.,* at para. 15.

[34] David Bassali, Adam Kinskley, et.al., "Google's Anticompetitive Practices in Mobile: Creating Monopolies to Sustain a Monopoly" *Digital Platform Theories of Harm Paper Series* (2020), *available at*: https://som.yale.edu/sites/default/files/2022-01/DTH-GoogleMobile.pdf (last visited on Mar. 30, 2021).

limited usage in our country.[35] As Google Play Store occupies such an indispensable position in Android handsets, Android app developers mainly distribute their apps through it. On the other hand, consumers rarely download another app store onto their handsets when they already have the Google Play Store pre-installed with inbuilt advantages.[36] Thus, such a practice of tying separate products has helped Google in strengthening its dominant position in the market of app stores.

3. Entry and expansion barriers

The dominant position of Google Play Store is also evident from the entry and expansion barriers that it imposes on its competitors. First and foremost, development of an app store requires significant investment.[37] In addition, apart from traditional barriers, the digital era has led to the emergence of new barriers to entry and expansion. For instance, the lack of operability between apps, app stores, and operating systems creates a barrier to switching and entry. Therefore, by bundling its Google Play Store with the operating system, Google makes both discovery and installation of an alternative app store extremely difficult, if not impossible. Moreover, network effects also reinforce barriers to switching and entry, especially in a multi-sided digital platform. So, by integrating Android OS, Google Play Store, and the apps, Google has been able to raise switching costs for users and barriers to entry for potential competitors.

In the *Google Android case,* the European Commission observed that developing a new Android app store involves not only development, education, and marketing costs, but it is also hard to distribute a new app store.[38] In addition, Google has gained first mover advantage which, coupled with the existence of indirect network effects, has created an additional barrier to entry. This can be further substantiated from the recent example of Microsoft launching its new smartphone, Surface Duo with Android OS rather than its own Windows due to the failure of its app store to attract customers from Android and iOS users.[39]

4. Countervailing buying power

Google Play Store's dominant position is further strengthened by the lack of countervailing buying power. A 2020 report showed that Google Play Store has the maximum number of apps. It allows Android users to choose between 2.56 million apps,[40] offering apps for more

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[35] *Ibid.*
[36] *Ibid.*
[37] *Id.,* at 17.
[38] *Supra* note 18.
[39] BarışYüksel, Nabi Can Acar, et.al., "Competition Authorities to Investigate Mobile Application Store Dominance" *Kluwer Competition Law Blog*, Oct. 15, 2019, *available at*: http://competitionlawblog.kluwercompetitionlaw.com/2019/10/15/competition-authorities-to-investigate-mobile-application-store-dominance/?doing_wp_cron=1593374985.1365690231323242187500#_ftnref6 (last visited Oct. 10, 2020).
[40] J. Clement, "Number of apps available in leading app stores as of 1st quarter 2020" *Statista*, Aug. 11, 2020, *available at*: https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-

or less every purpose. App developers rely on the Google Play Store not only because of its wide reach, but also because it allows automatic updating of apps. Though Android allows installation of an alternate app store such as Amazon App Store, its failure to provide automatic updating makes it unattractive. Another benefit for Google is that the Play Store is closely linked with Google Play Services, which integrates advanced functionalities of Google with other apps, making it more attractive to customers. Other alternatives, such as side-loading and pre-loading are limited to a few large app developers and are mostly unrealistic. Thus, app developers have negligible to no bargaining power over the Google Play Store. This was also elaborately examined in the *Google Android case*,[41] in which the European Commission concluded that there is no doubt that Original Equipment Manufacturers ('OEMs') have insufficient countervailing buyer power over the Google Play Store.

C. Ascertaining Abuse of Dominant Position

Adverting to the abusive conduct, it is argued that the abuse is two-fold: (a) Leveraging market power from app stores for the Android OS market to the digital payments app with UPI feature market; and (b) Denying market access to rival apps.

1. Does Google use its dominance in one relevant market to enter into or protect other relevant markets?

As established above, Google Play Store undoubtedly enjoys a dominant position in the market for app stores for the Android OS. What needs to be analysed now is whether Google has abused its market dominance in the app store market by giving an advantage to another Google product, namely, its digital payment app Google Pay.

By prominently placing Google Pay in the search result of its app store, it has demoted the apps of the competitors and denied these companies the chance to compete on merit. While analysing user behaviour in the *Google Shopping Decision*,[42] it was observed that users are far more likely to click on options that are more visible and appear higher up in the search results. Moreover, users are more likely to click on the first generic search result than on any other generic search result.[43] Thus, by giving prominence to its own product, Google has given a significant advantage to Google Pay in comparison to its rivals. Similar concerns were also raised in the *Matrimony Case,*[44] where the prominent placement of commercial units on SERP by Google was held to be abusive as it directed traffic to its own specialized search service.

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stores/#:~:text=As%20of%20the%20first%20quarter,million%20available%20apps%20for%20iOS (last visited on Oct. 10, 2020).
[41] *Supra* note 18.
[42] *Supra* note 13.
[43] *Supra* note 18 at para. 457.
[44] *Supra* note 2 at para. 248.

In the instant case as well, Google Pay being displayed as a top result[45] leads to greater online visibility, thereby attracting more user attention. Consequently, the competition in the market is stifled by preventing the competitors' visibility as well as depriving the consumers of the most relevant results.

As per the reports published by Razorpay, till 2017, debit and credit cards used to dominate the market in terms of payment modes, but by September 2019, UPI transactions gained considerable ground and took the largest piece of the pie with 45% of the total transaction while cards and net banking stood at 42.56% and 9.29% respectively.[46] Now, among UPI transaction apps, Google Pay has the major chunk with a 61.33% market share, while other apps like PhonePe, Paytm, and BHIM have a share of 24.2%, 5.94%, and 4.55% respectively,[47] making Google's dominance abundantly clear. This is further substantiated by the fact that Google Pay was the most downloaded fintech app in the year 2018 worldwide with over 327 million downloads, 6 times more than the second most downloaded app PhonePe.[48] A similar trend was visible in the following year as well, wherein 83.6% of the total downloads were from India.[49] Hence, it is evident that Google has leveraged its dominant position in one market as a gateway for the positioning of its other product.

2. Does the conduct of Google result in denial of market access to competitors?

While analysing the conduct of Google, there is a need to keep in mind the special responsibility of a dominant enterprise, which is to not impair competition, and in the digital world, network effects become an important factor to determine the same. In the *Matrimony Case*, the CCI held that:

> In multi-sided digital platforms, the network effects are more pronounced. New users tend to choose platforms or networks that already have a large user base which can ultimately even lead to a dominance by a firm in the market. No doubt, network effects can also facilitate introduction of innovative products, yet it cannot be disputed that network effects can raise switching costs for users and barriers to entry for potential competitors. As a consequence, market entries become less

[45] For example, on typing "pay" as the keyword in Google Play Store, the top result displayed is Google Pay.
[46] Harshit Mathur, "UPI Overhauls Cards as the Preferred Payment Mode at 45%" *Razorpay*, Oct. 3, 2019, *available at*: https://razorpay.com/blog/upi-preferred-payment-mode-september-2019-data/ (last visited on Oct. 15, 2020).
[47] *Ibid.*
[48] Jitendra Singh, "Google Pay most downloaded fintech app in 2018 globally, recorded 6X more install than PhonePe" *Entrackr*, May 7, 2019, *available at*: https://entrackr.com/2019/05/google-pay-most-downloaded-fintech-app/ (last visited on Oct. 10, 2020).
[49] Harsh Upadhyay, "Google Pay and PhonePe top global fintech download chart in February" *Entrackr*, Apr. 9, 2020, *available at*: https://entrackr.com/2020/04/google-pay-and-phonepe-top-global-fintech-download-chart-in-february/#:~:text=Google%20Pay%20was%20the%20most,and%206%20million%20installs%20respectively.&text=Google%20Pay%20and%20PhonePe%20lead,Paytm%20and%20other%20distant% (last visited on Oct. 18, 2020).

> likely and users switch less frequently to other suppliers, which have a market power enhancing effect.[50]

Google Pay is able to benefit from direct network effects through the Google Play Store's enormous user base as the data collected from the Google Play Store's users is leveraged to improve its payment app's functionality.[51] By making the app more attractive and increasing user interaction, it is able to trigger both direct and indirect network effects. Moreover, a major consequence of network effects[52] is that it discourages multi-homing[53] by users, thereby ensuring concentration of users on a single payment platform, that is, Google Pay and solidifying its position against competition. In addition, the preferential treatment by the Google Play Store of its payment app reduces the visibility of other apps as already explained. As a result, the ability of other apps to secure adequate volume of business to compete with Google's payment app is remarkably diminished, allowing Google to foreclose competition and drive out rival apps.

It is also to be noted that there need not be a complete and absolute denial of market access, as was enunciated in the case of *In Re Biocon Limited* v. *F. Hoffman-La Roche AG & Ors*.[54] The CCI adjudged: 'Even a partial denial of market access that takes away the freedom of a substitute to compete effectively and on merits in the relevant market, may amount to a contravention of Section 4(2)(c) of the Act.'[55] The presence of rival payment apps does not make a difference because the conduct of Google and the resultant network effects enjoyed by Google Pay deny the rival apps the opportunity to compete on equal terms.

III. GOOGLE'S DEFENSE

In the modern era of tech markets, where determination of relevant markets and dominant positions need wider perspective, so does the ascertainment of its abuse. Its importance can be understood from the case of *Reliance Jio Telecom,*[56] where the company with enormous resources made a disruptive entry, but CCI held the same to be not an abuse of dominant position and brushed off the matter, taking into account factors like its small market share in the initial stage of competition and similar financial resources as its

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[50] *Supra* note 2 at para. 199.

[51] *Supra* note 9*; Supra* note 12.

[52] Network effects refer to the phenomenon in which more the number of users, the greater is the value of goods and services. See Nirmala Reddy, "How To Harness The Power Of Network Effects" *Forbes*, Jan. 02, 2018, *available at:* https://www.forbes.com/sites/forbescoachescouncil/2018/01/02/how-to-harness-the-power-of-network-effects/?sh=405f43fa62e8 (last visited on Nov. 25 2021).

[53] Multihoming is the strategy whereby a developer develops apps for multiple platforms, for example, Google Play, Apple app store, Microsoft Windows etc. See Sami Hyrynsalmi, Arho Suominen, et.al., "The influence of developer multi-homing on competition between software ecosystems" 111 *Journal of Systems and Software* (2016).

[54] 2017 SCC OnLine CCI 21.

[55] *Id.,* at para. 77.

[56] *Bharti Airtel Limited* v. *Reliance Jio Industries Limited*, 2017 SCC OnLine CCI 25.

competitors. Similarly, Google, being one such company operating in the dynamic technology market, trying its hand in the new domain of payment apps might have the following defenses against the allegation of abuse.

A. Narrow Definition of Relevant Market

One assertion on behalf of Google can be that the definition of relevant market as only a UPI transaction app is very narrow and does not reflect a true picture of the competition. Instead, other methods of online payment like mobile e-wallet and net banking should also form a part of the market as all these modes of digital payment can be used as a substitute for each other. While Google Pay has garnered a larger share in UPI mode in the past two years, Paytm continues to grow and dominate the market in terms of digital payments with over 50% of the market share when other modes are taken into account.[57] Moreover, UPI consists of a smaller percentage of all digital payments in the country with e-wallets, net banking, and cards comprising the major share. Thus, limiting a product market to only UPI mode would amount to excluding those substitutable participants, which also serve the same end result and compete in the same market, albeit in a slightly different manner.

B. No Entry Barrier

The CCI in *Fast Track Call Cab* v. *ANI Technologies* ('*Fast Track Case*') explained the effect of multi-homing,[58] that is:

> The possibility and ease of multi-homing constrains the power of the platforms to act independently of the market forces. Absence of switching costs between different networks in the relevant market limits the constraints exerted by the established networks on newer entrants.[59]

In this case, the CCI found that there is no influence of network effects on the entry or expansion of players in the market for radio taxi services because the radio taxi apps can be easily downloaded for free and can co-exist on the same smartphone, allowing users to switch between different apps.[60] Similarly, the CCI in *Vinod Kumar* v. *WhatsApp,*[61] in which the informant alleged that WhatsApp had abused its dominant position by indulging in predatory pricing, held that there had been no abuse as the users could easily switch to competing consumer communication apps.

The above is also true for the digital payment apps within the UPI Feature market in India. Here, there are numerous players competing with Google Pay such as Paytm,

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[57] Shreya Ambre, "Google Pay Beats Paytm, Becomes #1 Payment App; Google Says No Law Being Broken" *Trak.in*, June 25, 2020, *available at*: https://trak.in/tags/business/2020/06/25/google-pay-beats-paytm-becomes-1-payment-app-google-says-no-law-being-broken (last visited on Oct. 18, 2020).
[58] 2017 SCC OnLine CCI 36.
[59] *Id.*, at para. 94.
[60] *Ibid.*
[61] 2017 SCC OnLine CCI 32.

PhonePe, BHIM and so forth, and all of them are available on the Google Play Store. These apps are easily downloadable without any charge and can exist simultaneously on a single smartphone. Google Play Store also ensures easy access to information about these apps. There is nothing preventing users from switching from one app to a competitor's app, or, in other words, the users can multi-home. Therefore, it is evident that Google cannot act independently of market forces since users have the option to switch to a competitor's app with just a click. Moreover, the expansion of Amazon Pay in UPI transactions, where it witnessed a growth rate of 200% in its monthly transaction volume and successfully occupied a market share of 5%, shows that there are no significant barriers to entry and expansion.[62]

C. Early Stage of Competition

The peculiar characteristics of a digital market as distinguished from a traditional market should be given due emphasis. Considering the volatile nature of the online space, market shares keep changing frequently in a shorter span of time. Here, an observation made by the CCI in the *Fast Track Case* is relevant, which stated that:

> Aggressive competition in the early stages of network creation takes place, until the market settles in favor of a few enterprises. In such markets, market leadership position can be fragile or transient during the initial stage of evolution of the market.[63]

Also, it was observed that in case of hi-tech markets, high market shares in the early years of introduction of a new technology may turn out to be ephemeral.[64] For instance, Google was the only company providing UPI through Tez, launched in 2017, but it lost its share soon when other players jumped in.[65] Similarly, by mid-2018, PhonePe claimed the leading position in the UPI market with 40% of the market share.[66] Thus, concentration of power should not be considered conclusive in a highly innovative and dynamic market where the competition is still unfolding and dominance cannot be presumed to be attributed to one participant.

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[62] Digbijay Mishra, "US majors dominate payments play on UPI" *The Times of India,* June 11, 2020, *available at*: https://timesofindia.indiatimes.com/business/india-business/google-pay-maintains-lead-amazon-pay-starts-to-show-scale-as-paytm-sees-volumes-fall/articleshow/76294038.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited on Oct. 10, 2020).
[63] *Supra* note 58 at para. 90.
[64] *Id.,* at para. 84.
[65] Sunny Sen and Jayadevan PK, "Google Pay zeroes in on India as transactions hit $30 bn run rate" *Factor Daily*, Aug. 29, 2018, *available at*: https://factordaily.com/google-pay-tez-india-transactions-30-bn-run-rate/#:~:text=Tez%20was%20launched%20in%20September,also%20has%20a%20payments%20business (last visited on Oct. 20, 2020).
[66] Alnoor Peermohamed, "With 94 mn transactions in July, PhonePe claims leadership in UPI payments" *Business Standard,* Aug. 1, 2018, *available at*: https://www.business-standard.com/article/companies/with-94-mn-transactions-in-july-phonepe-claims-leadership-in-upi-payments-118080101534_1.html (last visited on Oct. 20, 2020).

D. Effect-Based Approach

Intervention in digital markets needs to be balanced and proportionate, so that innovation is not stifled, and consumers are not deprived of the benefits of such innovation. Sometimes, the conduct of a dominant enterprise may have pro-competitive effects by bringing benefit to the end consumers in terms of efficiency gains. Therefore, there is a need to adopt an effects-based approach. The Competition Appellate Tribunal ('COMPAT') in *Kapoor Glass* v. *Schott Glass*[67] held that discriminatory pricing per se does not amount to abuse of dominance, but it must also be proved: 'harm to competition or likely harm to competition in the sense that the buyers suffer a competitive disadvantage against each other leading to competitive injury in the downstream market'.[68] Similarly, in *Tata Power Delhi Distribution Limited* v. *Competition Commission of India,*[69] the CCI held: 'In cases of abuse of dominant position, the seminal issue is what harm is caused to the end consumer due to the behavior of the dominant player.'[70] There is no evidence to prove that Google's conduct has caused any harm to competition or the consumers.

As discussed above, there are several alternatives in digital payment with the UPI platform market and the positioning of an app in the Google Play Store depends on factors such as app name and description, backlinks, page performance in terms of click-through rate, conversions, localisation, update cycle, reviews, and ratings. These factors or Google's ranking algorithm does not favour its app and is meant to ensure more relevant results to consumers.[71] There is no bias and Google Pay competes with other apps in terms of its technological capability. This has ultimately benefited consumers in the form of innovative features and better services. Besides, the Google Play Store provides easy access to information about rival apps including their features and reviews, and despite this information, if users choose Google Pay instead of other apps, it is because of its innovative and high-quality service.

IV. CONCLUSION

Tech giants' market dominance around the globe has been receiving special attention in several countries worldwide like United Kingdom, United States of America, Germany, and India. The CCI, which has mostly dealt in brick and mortar or the traditional economy, unlike its counterparts in other countries, is relatively new to the antitrust arena and has stepped into the digital market domain very recently. Since the digital market is

[67] 2014 SCC OnLine Comp AT 3.
[68] *Id.,* at para. 45.
[69] 2017 SCC OnLine CCI 55.
[70] *Id.,* at para. 34.
[71] Jonathan Fishman, "Ranking Factors for App Store and Google Play" *Storemaven*, July 14, 2020, *available at*: https://www.storemaven.com/academy/app-store-and-google-play-algorithms/ (last visited on Oct. 20, 2020).

data-driven and the scope of data determines the power and control that a player exerts in the market, it lies in contrast to the traditional practice where market share and price played the primary role. Most of Google's activities are in the zero-price market where the consumers pay implicitly in the form of personal data, thereby helping in imposition of entry barriers to competitors. Thus, what is required is a change of method and technique for analysing market dominance as well as its abuse.

With the enormous size, network effect, and mines of data, the fear of misuse by the tech giants has become legitimate. The way Facebook in the past few years has bought Instagram and WhatsApp shows that these big players could easily buy out any potential threat in the market. The task to keep these tech giants in check is full of thorns with no definite and easy solution. In the past, governments tried to control monopolies by dividing them into smaller companies such as Standard Oil or regulating them as a public utility through price or profit caps such as AT&T.[72] But the question remains whether these traditional tools are competent to maintain a level playing field in digital markets? More importantly, whether the existing competition law is sufficient to deal with new challenges? A plethora of solutions have been proposed. One remedy is to ensure strict scrutiny of acquisitions and mergers by these tech giants and prevent them from entering into vertically integrated markets. Another solution is to regulate enterprises like Google in the same manner as public utilities or follow the route taken in the case of Microsoft, in which Microsoft was obliged to disclose its APIs to rivals.[73] These measures can be combined with mandatory regular internal audits by the dominant enterprises. However, these measures may not be adequate and the competition law might need re-evaluation.

The need of the hour is to free ourselves from the old and narrow approach and consider the emerging factors such as neutrality of search results, data leveraging, and the growing trend to act both as an umpire and player while assessing the conduct of tech giants. The European Union adopted an interesting approach to keep a check on these tech giants. Recently, France relied on the General Data Protection Regulation to fine Google 50 million euros for failing to get authorisation for data collection for the purpose of ad personalisation. Combining antitrust law with privacy law could be a necessary way forward.[74] Lessons can be also be learnt from the recent questioning of four tech players, namely, Google, Facebook, Apple, and Amazon by the House Judiciary Subcommittee on

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[72] "Big Tech faces its Standard Oil moment" *Financial Times,* Dec. 11, 2020; Jonathan Taplin, "Time tech giants were treated as public utilities" *Gulf News*, May 5, 2017, *available at*: https://gulfnews.com/business/analysis/time-tech-giants-were-treated-as-public-utilities-1.2022131 (last visited on Mar. 31, 2021).

[73] William H. Page, Seldon J. Childers, "Software Development as an Antitrust Remedy: Lessons from the Enforcement of the Microsoft Communications Protocol Licensing Requirement" 14 *UF Law Faculty Publications* (2007), *available at*: https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1071&context=facultypub (last visited on Nov. 16, 2021).

[74] Chris Fox, "Google hit with £44m GDPR fine over ads" *BBC,* Jan. 21, 2019, *available at*: https://www.bbc.co.uk/news/technology-46944696 (last visited on Mar. 31, 2021).

Antitrust in the United States of America that depicts the serious threat that these monopolies could pose in the market if cautious steps to regulate them are not taken at an early stage.[75] The Subcommittee is expected to make some suggestions, which might be a valuable guide to make the antitrust laws work in this digital era.

[75] "Apple, Amazon, Facebook, Google face claims of 'harmful' power" *BBC,* July 30, 2020, *available at*: https://www.bbc.co.uk/news/business-53583941 (last visited on Mar. 31, 2021).

SOMETHING OLD AND SOMETHING NEW: THEORISING THE USE OF MACHINE LEARNING AND ARTIFICIAL INTELLIGENCE BASED EVIDENCE UNDER THE INDIAN LEGAL SYSTEM

Aditya Krishna [*]

Artificial Intelligence ('AI') and facial recognition software have long played a role in the fictional law enforcement in television soap operas. While once only constituting a work of fiction, with the development of technology over the last few decades, AI technology and systems can now be seen to slowly ingress into the law enforcement and legal field as well. Having entered this new era of hyper-digitalisation, where the gap between reality and fiction seems to be gradually dissipating, it becomes prudent to analyse and conceptualise the role such AI systems could play in the legal system, to ensure a smooth transition when the time comes. This article attempts to add to the discourse on this rarely explored issue and theorise the admissibility and weightage of the evidence produced by such AI systems under the current Indian legal system. In doing so, the paper highlights the possible hurdles to the current endeavour and posits how the same can be overcome. Through the article, the author also provides a road map for the future to ensure the Indian legal system keeps pace with the changing times while also preventing the opening of a floodgate to inaccurate and unreliable AI into the legal system.

I. INTRODUCTION

While most of us have been hung up on 'self-driving cars' and 'mind reading software',[1] we have remained oblivious to the extent to which AI has become integral to our lives in society. From Siri to Alexa, to the more industry-oriented solutions (such as IBM's Watson), over the last few decades, the significance of AI has grown manifold in both our personal and professional lives. A study conducted by Stanford University in 2016 reported that AI, over the coming years, is bound to drastically transform no lesser than eight broad

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[1] Mike Elgan, "Mind-reading tech is here" *Computerworld,* Apr. 7, 2018, *available at:* https://www.computerworld.com/article/3268132/mind-reading-tech-is-here-and-more-useful-than-you-think.html (last visited on Nov. 15, 2020).

industries including education, transportation, public safety, and healthcare.[2] But according to most other AI researchers, this view is in itself restricted as they believe that AI is simply bound to change everything.[3] According to them, it is more a question of 'when' than 'if', especially since the required technology already exists today but only its application is curtailed. One such field where AI is slowly beginning to gain traction is the legal field.

While the concept may seem a bit absurd at first, it is interesting to note that such technology, while once theoretical, has now already found application in a variety of processes such as research, contract review and verdict prediction.[4] Much like in a variety of other fields, AI technology in the legal field also suffers from the same issue, i.e., its application is restricted even though the required technology already exists. This is seen most notably in the context of AI in the evidentiary process. Take for example a hypothetical scenario where a crime is committed and is captured on a CCTV camera, but the law enforcement agency is unable to identify the suspect due to the bad quality of the audio and video. Owing to the impossibility of positively identifying the suspect in such a case, the crime usually goes unsolved even though the perpetrator was caught on camera. Such an issue is often faced by law enforcement in real life and can easily be remedied using AI and facial recognition solutions that can help in identifying the suspects. While the human eye or ear may not be able to prove beyond reasonable doubt that the pixelated form with a distorted voice is indeed the suspect, recognition algorithms can do so with ease.[5] In recent years, AI technologies have developed to the extent of being able to provide approximations of the offender's face from mere DNA samples.[6]

While many such technical solutions are not being used in our current legal system, legal professionals will eventually have to acquaint themselves with such technologies in the near future, much like what had to be done with the introduction of other scientific forensic methods in the past, (such as DNA analysis,[7] fingerprint identification,[8] hand-

[2] Stanford University, "Artificial Intelligence and Life in 2030: One Hundred Year Study on Artificial Intelligence" (2016), *available at:* http://ai100.stanford.edu/2016-report (last visited on Nov. 15, 2020).
[3] Andrew McAfee and Erik Brynjolfsson, "The Business of Artificial Intelligence" *Harvard Business Review* (July 18, 2017), *available at:* https://hbr.org/2017/07/the-business-of-artificial-intelligence (last visited on Nov. 15, 2020).
[4] Lauri Donahue, "A Primer on Using Artificial Intelligence in the Legal Profession" *Jolt Digest* (Jan. 3, 2018), *available at:* https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession (last visited on Oct. 2, 2021).
[5] Marcus Smith & Seumas Miller, "The ethical application of biometric facial recognition technology" *AI & Soc* (2021), available at: https://doi.org/10.1007/s00146-021-01199-9 (last visited on Oct. 2, 2021).
[6] Parabon Nanolabs, "How DNA Phenotyping works", *available at:* https://snapshot.parabon-nanolabs.com/#phenotyping-how (last visited on Nov. 15, 2020).
[7] DNA analysis is the process of using DNA from physical evidence (for example, hair, semen, blood etc.) and matching it with the DNA of a specific individual, to ascertain whether the said individual may have committed the criminal act in question. See Dr. Himanshu Pandey and Anhita Tiwari, "Evidential Value of DNA: A Judicial Approach" *Bharati Law Review* (Mar. 12, 2017) *available at:* http://docs.manupatra.in/newsline/articles/Upload/BF936E7D-4211-4AE4-9BD7-3D721A8E424C.pdf (last visited on Oct. 2, 2021).
[8] Fingerprint Identification is the process of matching fingerprint evidence found with the fingerprint of a specific individual, to ascertain whether the said individual may have committed the criminal act in question. See Sundaram Bharti, "Fingerprint and Footprint Identification: A Legal Analysis" 1 *HPNLU Law Journal*

writing analysis,[9] etc.). Whether we like it or not, change is coming and unless we foresee and cater for these changes, the transition is going to be arduous. This paper attempts to add to the discourse on the topic and theorise the possible application of the output of such AI technologies and machine learning ('ML') algorithms under the Indian Evidence Act, 1872.[10]

For the said purposes, this paper is divided into five sections. Section II introduces the concepts of AI and ML and explains how the same overcomes the Polanyi's paradox. Section III theorises the possible application of such AI technologies under the Indian Evidence Act, 1872 and the issues that may occur. Section IV portrays the Black Box dilemma and its effects on the current discourse, and Section V concludes to provide a road map for the introduction of such AI into the current legal system.

II. OVERCOMING POLANYI'S PARADOX

Before delving into the more substantial aspects of this paper, it is important to familiarise ourselves with the concepts of AI and ML. This section dwells upon the said concepts by explaining what they are and how they work. Through the process, this section will also address the Polanyi's Paradox,[11] which plagued the use of such technologies in the past, and how AI has overcome the same. Polyani's Paradox was devised by a Hungarian-British polymath named Michael Polanyi, who in his book *Tacit Dimension*, explored the concept of 'tacit knowing' in human knowledge.[12] In the book, he argues that our knowledge and capabilities are usually beyond our understanding and cognition. He bases his theory on the fact that we learn a lot of tasks through experience, which we cannot explain. He uses the example of us recognising people, but not knowing how we do it, to explain the concept, which forms the foundation of the paradox, which in essence states that 'we can know more than we can tell.'[13]

A. What is Artificial Intelligence and Machine Learning?

If you have had a hard time grasping exactly what the term artificial intelligence encompasses, you are not alone. AI theorists as well as legal scholars have faced the same conundrum and have failed to come up with a single universal definition for the term.[14]

182 (2020), *available at:* https://hpnlu.ac.in/PDF/ad54531a-b54b-46cf-b784-e1b2805ee183.pdf (last visited on Oct. 2, 2021).

[9] Handwriting analysis is the process used to identify whether the signature or handwriting in question is that of a specific individual. This is done through an analysis and comparison of the document in question with a sample of the individuals signature/handwriting. see generally: *Murari Lal v. State of Madhya Pradesh*, AIR 1980 SC 531.

[10] Indian Evidence Act, 1872 (Act 1 of 1872).

[11] David Autor, "Polanyi's Paradox and the Shape of Employment Growth" *National Bureau of Economic Research* (Sept. 2014), *available at*: https://economics.mit.edu/files/9835 (last visited on Nov. 15, 2020).

[12] Michael Polanyi, *The Tacit Dimension* (Doubleday, Garden City, New York, 1966)

[13] *Id.* at 4.

[14] Yavar Bathaee, "The artificial intelligence black box and the failure of intent and causation" 31 *Harvard Journal of Law & Technology* 889, 898 (2018).

The main difficulty in defining the term comes from the fact that the technology it encompasses is constantly changing and developing, making it almost impossible to accurately define. Hence, it is not surprising that there exists no single legal definition for the same under current laws. This lack of a statutory definition, however, does not impede one's analysis of AI. On the contrary, the author believes it helps, by allowing its ambit to be more wide-ranging and fluid. Since the purpose of this article is not to devise or postulate a specific legal definition for AI, a basic contextual definition, based on the types of AI analysed, will be sufficient for the same.[15] That being said, AI here refers to any system that can be trained to observe, identify, analyse, and provide an output that can serve as an evidentiary solution and aid the criminal justice system.[16]

Before moving forward, it becomes imperative to understand what ML is. Unlike the term AI, ML is capable of being defined. The term 'Machine Learning' is usually used to refer to a subfield of AI which deals with digital algorithms that have the ability to learn from experience and enhance their performance over time.[17] While the phrase 'ability to learn' is commonly used, it is meant in a more metaphorical sense than a literal one. In reality, the said algorithms merely 'detect patters in varied data to perform complex tasks and make predictions.[18] Hence, it gives the impression of mimicking the complex cognitive task of learning. One such subset of the same, that is of interest for the purposes of this paper, is that of 'deep learning' or DL. DL is a type of ML that optimises the algorithms' accuracy of results over time without the requirement of human intervention.[19] For the purposes of this paper AI systems refer to those ML and DL systems and algorithms that fall within the aforementioned definition of AI.

B. How Does it Work and What Can it Do?

As stated earlier, AI systems have the ability to 'learn', but that raises a question on how these systems actually work. AI algorithms work by extracting patterns from large assortments of data to perform tasks.[20] In order to do so, the system learns through examples and experience. 'Training data' (whose properties are already known) is fed into the algorithm and is used to teach it to create rules that would allow it to identify and analyse new data whose properties are not known.[21] The said process is usually referred to as 'supervised learning'.[22] For example, in the context of facial recognition, the

[15] Rex Martinez, "Artificial Intelligence: Distinguishing between Types & Definitions" 19 *Nevada Law Journal* 1015 (2019).
[16] This definition is derived from the author's conception of an AI which could possibly be used to aid the criminal justice system. The definition is purposely kept as wide as possible to allow more systems (which may not have existed at the time this article was written) to come under the ambit of the analysis of this paper.
[17] Stuart Russell and Peter Norvig, *Artificial Intelligence: A Modern Approach* 693 (Pearson, 3rd edn., 2010).
[18] Harry Surden, "*Machine Learning and Law"* 89 *Washington Law Review* 87 (2014).
[19] Ian Goodfellow, Yoshua Bengio, et.al., *Deep Learning* 2,3 (MIT Press, 2016).
[20] Jerry Kaplain, "AIs PR Problem" *MIT Technology Review* (2017).
[21] *Supra* note 19 at 119.
[22] *Id.* at 103.

programmer would train the system to identify a set of images of an individual, as that individual. At this stage, the system knows the pictures to be that of the individual, not by any form of analysis but because the programmer has said so. The system then analyses the data set to create rules, correlations, and associations, enabling it to identify the individual even in images it has not seen before. This could be done by establishing rules based on the distance between the eyes, skin tone, height, or width of the face, etc.[23] It is important to note here that this so-called learning serves more as a means to achieve a goal rather than as the main goal of the process itself.[24]

Once the system has established basic rules using the training data, it is then tested to refine its accuracy using a different pool of data known as the 'test set', properties of which are known to the programmer but not to the system.[25] This process helps gauge the accuracy of the system and make adjustments to improve the same. Building on the aforementioned example, the programmer at this phase would feed new images of the individual, which the system has not seen before, to gauge how well it can identify the individual. Once the accuracy is up to the required standard, it is then tested using real world data, where it should ideally be able to identify that individual or any other individual, in any number of scenarios.

At this juncture, a question on the range of tasks that such a system can actually perform and whether it is merely theoretical or actually in use today, may arise. On this point it would be interesting to note that such systems actually exist today and are, in fact, being used for a variety of tasks such as those involving identification (for example, facial recognition), reconstruction (for example, identifying faces or objects from corrupted or inadequate data), and abnormality detection (for example, credit card fraud discovery), to state a few.[26]

C. Doing What No Machine Could Do Before

The next question that may come to mind is what makes these systems any different from the computer systems of the past, and what prevented the earlier system from being used for the said purposes? This is where Polanyi's Paradox[27] comes in.

In the past, most computer systems functioned as per the rules created by human programmers through written codes. While the code methods of programming did create

[23] *Id.* at 6,8.
[24] *Id.* at 97.
[25] *Id.* at 106.
[26] Vegard Flovik, "How to use machine learning for anomaly detection and condition monitoring" *Towards Data Science,* Dec. 31, 2018, *available at:* https://towardsdatascience.com/how-to-use-machine-learning-for-anomaly-detection-and-condition-monitoring-6742f82900d7 (last visited on Nov. 15, 2020). Also, see MedImaging International Staff Writers, "AI-Based Image Reconstruction Solution Receives FDA Clearance" *MedImaging.net,* July 6, 2018, *available at*: https://www.medimaging.net/industry-news/articles/294778539/ai-based-image-reconstruction-solution-receives-fda-clearance.html (last visited on Nov. 15, 2020).
[27] *Supra* note 11.

a multitude of applications, the same could not computerise many human centric tasks (such as facial recognition), as the same could not be reduced to a specific set of guidelines. The main reason for this seems quite intuitive, in that we can recognise people, but we do not really know how or what set of rules allow us to recognise them. This lack of clarity in our own understanding forms the basis of Polanyi's Paradox, making it impossible to code specific rules for computer systems to perform such human tasks. It is with this in mind that Polanyi's Paradox has been stated to apply even to computer systems where it leads to a fundamental limit to the extent of knowledge humans can possibly impart to the same.[28]

While this was the situation in the past, AI systems have now drastically changed the playing field and allowed for the overcoming of the said Paradox when it comes to the computerisation of tasks.[29] This is possible since humans do not need to code such systems to perform tasks anymore, and the AI systems can learn on their own through experience. It is important to note here that while we have overcome the effect of the Paradox on the computerisation of tasks through the application of AI systems, we did so by removing the need to code the systems ourselves and not by actually overcoming the Paradox in itself. Humans are still bound by the limitations imposed by the Paradox and hence would not be able to understand exactly how the AI systems would or should come to the conclusions they arrive at. This, in essence, makes an AI system work, but the manner in which it does so remains incomprehensible to humans.

While this may seem complex at first, viewing it in the mould of an analogous example will make it easier to understand. Take the example of a tracking or sniffer dog. We may train a dog to track or sniff out people or objects, but we still have no idea how they actually sniff them out (with respect to the internal correlations created in the brain of the dog), or what they base their conclusions and findings on. This can be attributed to the fact that we ourselves cannot perceive or understand how it works but all we know is that it does. This aspect of AI will be addressed in greater detail in Section IV, which deals with the black box dilemma involving AI. Having now understood the basics of AI and ML, we now move on to the legal analysis of the admissibility of their outputs under Indian evidentiary law.

[28] *Supra* note 3.
[29] Abhishek Sharma, "Can artificial intelligence prove Polyani's paradox wrong?" *Analytics India Magazine*, Sept. 6, 2018, *available at*: https://analyticsindiamag.com/can-artificial-intelligence-prove-polanyis-paradox-wrong/ (last visited on Nov. 15, 2020).

III. USE AS EVIDENCE AND ADMISSIBILITY UNDER THE INDIAN EVIDENCE ACT, 1872

The author believes that the output of such AI systems would most likely be admissible as expert testimony on scientific evidence in India. Such AI evidence would be made admissible via an expert's opinion on the said AI evidence (scientific evidence).[30] The said expert could be an expert on the functioning of such AI systems or the creator of the said system and would perform the task of informing the court on the reliability of the AI system and the evidentiary outputs it produces. In line with the duties of an expert witness as laid down in the case of *State of Himachal Pradesh* v. *Jai Lal*,[31] they will provide the necessary information and scientific criteria to enable the judge to form their own independent opinion on the said evidence. This could entail information on the training data set (such as the size of the data set, its composition, quality of the data, likelihood of biasness, etc., all to prove the reliability of the systems training), correctness of the source code, accuracy of the system's findings during the testing phase, etc., so as to prove that the said system and its evidentiary output are reliable. This section begins with an analysis of the ML outputs under (A) the current Indian standard of admissibility of scientific evidence, and then under (B) the stricter Daubert standard to ascertain the admissibility of such evidence in case either approach is adopted by the judiciary in the future.

A. Admissibility Under the Current Indian Standard

Currently in India, no real standard exists to determine the admissibility of expert evidence on scientific evidence under the Indian Evidence Act, 1872.[32] The Act merely states that the opinion of an expert would constitute a relevant fact as per Section 45,[33] and that the grounds for the opinion would also be relevant under Section 51.[34] Apart from this, there are no rules that direct the judge to ascertain the reliability and admissibility of

[30] The author premises the fact that AI evidence would constitute scientific evidence based on the manner in which AI evidence works. Unlike 'electronic evidence', AI evidence is an inference created or a conclusion reached by an AI system after processing and interpreting electronic evidence (such as videos, documents, audio files etc.). The nature of the said evidence is more akin to a scientific process which is used to yield a conclusion (like in a fingerprint or DNA test) rather than electronic evidence. The example of the fingerprint and DNA test would be useful here to further explain the conceptual basis. In fingerprint and DNA tests (which are done now using computers in modern times), even though the outputs are created using a computer (by analysing the data and creating conclusion), the conclusions created by the systems are not electronic evidence under Section 45A of The Indian Evidence Act, 1872, but are scientific evidence under Section 45 of the Act. In a similar manner, while AI evidentiary outputs are created by an AI system, since they are inferences/conclusions created after processing other data, they come under the ambit of scientific evidence and not electronic evidence as contemplated under the Act.

[31] AIR 1999 SC 3318.

[32] *Supra* note 10.

[33] *Id.,* s. 45.

[34] *Id.,* s. 51.

such evidence.[35] In the absence of any specific provision, the courts earlier resorted to using the aspects of relevancy of facts,[36] and expert opinions to admit scientific evidence in India.[37] To fill this void, the courts through precedence created their own *sine qua non* standard of admissibility for scientific evidence. As per the said rule, scientific evidence could only be admissible if the requirement of corroboration was satisfied.[38] This test merely served as a rule of caution to ensure that the scientific method used was reliable,[39] and was also affirmed in a variety of cases,[40] such as in the much-cited case of *Magan Bhiarilal* v. *State of Punjab,*[41] where the Supreme Court set aside the conviction of the accused based on the uncorroborated testimony of the handwriting expert. In this case, while laying down the said rule, the Court went on to observe that:

> It is well settled that expert opinion must always be received with great caution... There is a profusion of precedential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This rule has been universally acted upon and it has almost become a rule of law.

Subsequently, this test, too was watered down by the Supreme Court in the case of *Murari Lal* v. *State of Madhya Pradesh*,[42] where the Supreme Court while interpreting past precedents and commenting on the role of corroboration in accepting expert testimony stated that:

> We are firmly of the opinion that there is no rule of law, nor any rule of prudence which has crystalized into a rule of law, that opinion evidence of a handwriting expert must never be acted upon, unless substantially corroborated. But, having due regard to the imperfect nature of the science of identification of handwriting, the approach, as we indicated earlier,[43] should be one of caution. Reasons for the opinion must be carefully probed and examined. All other relevant evidence must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence

[35] C.E. Pratap, "Reliability of Forensic Scientific Evidence in Criminal Trials: An Indian Perspective" 3 *The International Manager* 182-193 (2016).
[36] Pratyusha Das, *Forensic Evidence Admissibility in Criminal Justice System* 42 (Eastern Law House, Kolkata, 2019).
[37] Veena Nair, "Review of the Evidentiary Value of DNA Evidence" 7 *Nirma University Law Journal* 29 (2018).
[38] *S. Gopal* v. *State of Andhra Pradhesh.,* AIR 1996 SC 2148.
[39] *State of Maharashtra* v. *Sukhdeo Singh*, AIR 1992 SC 2100.
[40] *Padum Kumar* v. *The State of Uttar Pradesh,* Cr. App. No. 87/2020; *S. Gopal Reddy* v. *State of A.P.*, (1996) 4 SCC 596; *In Murari Lal* v. *State of Madhya Pradesh,* (1980) 1 SCC 704; *Ram Chandra* v. *State of U.P.*, AIR 1957 SC 381.
[41] AIR 1977 SC 1091.
[42] AIR 1980 SC 531.
[43] *Id.* at para. 4: "His (experts) opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides. His duty 'is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the judge to form his own independent judgment by the application of these criteria to the facts proved in evidence'."

> throwing a doubt, the uncorroborated testimony of a handwriting expert may be accepted.[44]

While the excerpt of the judgment quoted is in the context of a handwriting expert, it is important to note that the rationale for the judgment also extends to all other categories of experts as enunciated in Section 45 of the Indian Evidence Act, 1872 (subject to the possibility of error and nature of the science) and hence the *ratio* or principle is equally applicable to all forms of expert witnesses under Section 45.[45] What is important to note here is that while the rule of corroboration was watered down, it was not in itself done away with. As per the Court, corroboration could be sought in specific cases, most likely where the science is less developed, leading to a lack of comprehensive reasoning for the said conclusions, or where there exists contradictory evidence.[46]

Interestingly, even prior to the watering down of the said standard, it is seen that the assessment of scientific evidence in India was in a deplorable state.[47] The standard of corroboration had been severely criticised for allowing the use of unreliable and questionable scientific evidence by the courts in many cases.[48]

In the present situation, it can be inferred that even if AI evidence (such as facial recognition software outputs) are required by the courts to be corroborated, it would still *prima-facie* be admissible in India. This can be inferred from the fact that such AI systems or facial recognition evidence would almost always be supported either by direct or circumstantial evidence. The author bases this conclusion on the fact that such AI systems are usually used on other forms of digital, documentary, or direct evidence, such as CCTV footage, audio files, images, etc. and hence, necessarily are accompanied by some other form of evidence (at least circumstantial evidence, if not direct evidence).[49] This tends to satisfy the requirement of corroboration.[50] While the issue of admissibility may seem resolved, since the standard for admissibility of such scientific evidence is subject to

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[44] *Supra* note 42 at para. 11.
[45] *Supra* note 42 at para. 4 read with para. 11. The Court draws the rational basis of its judgment on the fact that handwriting experts, much like other experts are susceptible to error and can reach incorrect conclusions/inferences. The Court also allows for probing into the rationale behind the opinion, analysing the relevant evidence, and in appropriate cases, insisting on corroboration, subject to and based on the imperfect nature of the science which they believe could lead to more chances of errors. The underlying rationale for this judgment can hence be attributed to two main aspects: the possibility of error and the nature of the science (in terms of how developed and perfect it is). Hence, this principle is easily extendible beyond the situation of a handwriting expert and to other experts as well, where the science may be considered less developed and perfect. The author is of the opinion that because of the Black Box issue as well as due to other aspects of AI (as will be explained in this paper) which prevent error-less outputs/conclusions, it too would be considered an imperfect science with possibility of errors and may necessitate corroboration (in appropriate cases).
[46] *Supra* note 42 at para. 11.
[47] Lyn Gaudet, "Brain Fingerprinting, Scientific Evidence, and Daubert: A Cautionary Lesson from India" 51 *Jurimetrics* 293 (2011).
[48] *Ibid.*
[49] The reader is recommended to recall the author's earlier statements on how such AI systems would function (i.e., the AI system would be used on other forms of evidence to create inferences and conclusions based on them). Hence, the AI evidence (being mainly inferences based on the analysis of data and other evidence) would by necessary implication always be accompanied by other evidence.
[50] This is so because corroboration requires at least circumstantial evidence, if not direct evidence.

judicial discretion, it also becomes important to analyse the same from the perspective of the more stringent and widely accepted Daubert's standard to ensure the admissibility of such evidence, if the judiciary does adopt the said standard in the future.

B. Admissibility Under the Daubert's Standard

Daubert's test is a test derived from the US Supreme Court case of *Daubert* v. *Merrell Dow Pharmaceuticals*,[51] which attempts to gauge the reliability of scientific techniques.[52] The four requirements of the test are: (i) the theory/technique has been/can be tested; (ii) the theory/technique has been subject to peer-review; (iii) the theory/technique is generally accepted in the scientific community/said field; and (iii) the theory/technique has a determinable error rate.[53]

AI systems such as facial recognition systems can be inferred to easily satisfy three out of the four requirements of the test. Since AI systems have already been created and tested, they are generally accepted in the scientific community, given that they already have a plethora of widely accepted applications.[54] Such applications also have a considerable amount of peer reviewed literature written on them.[55] On the other hand, the fourth factor on determinable error rate is where there exists a possibility for issues to arise. While these algorithms do have calculable error rates on paper, the relevance of the same to specific situations tends to complicate the matter.

Two types of error rates exist for such AI systems and algorithms. The first is that of the error rate observed in the test set while using the training data, and the second is the error rate observed while using the system in the real world.[56] The issue arises in the fact that the two error rates are usually combined to provide the error rate of the system. This tends to overlook a variety of factors which makes ascertaining the real error rate almost impossible.[57] The issue is further aggravated when the machine is used in real-life on subjects which do not share any similarities with the AI's training data. For example, if an AI was trained mainly using a test set of white men and portrayed an error rate of 2%, the error rate would tend to substantially increase when tested in real life, on members of

[51] 509 U.S. 579 (1993).
[52] *Id.* at 592.
[53] *Id.* at 593 -94. A determinable error rate is an error rate which is possible to calculate and ascertain.
[54] *Supra* note 19 at 98, 101.
[55] *Ibid.* at 20.
[56] *Ibid.* at 102.
[57] These factors are practical factors such as gender, race, ethnicity, lighting, etc., which can cause the AI systems error rates to vary. When the overall error rate of the system is provided, it tends to mask the rate of error of the system when it encounters specific scenarios/individuals which were not in the training set. This aspect has been further explained in this section where the author argues that it is important for the error rate to be broken down based on these practical factors to ensure that such error rates are truly determinable.

other races[58] and genders,[59] as has also been established through a variety of studies.[60] Such systems hence need the breaking down of the error rates according to gender, race, and a variety of other factors, for the error rates to be determinable.[61] Without doing so, even if a system has a very low general error rate, the accuracy and reliability of the conclusions could be considerably low.

But doing so is not as easy as it sounds. This requirement of needing to break down the error rate based on different factors tends to make the picture look a lot more complicated than if a single error rate would have sufficed. Considering that it would be close to impossible to calculate the error rate for every possible factor that may play a role when the AI is functioning in the real world, there is a possibility that courts may rule that such systems fail to meet the fourth requirement of the Daubert's test. Again, it is not the author's intention here to show the same will not satisfy the requirements (since the author, in all fairness believes the same would satisfy the requirements under most circumstances), but to highlight the possible issues that may surface when gauging the reliability of such systems in court.

Assuming the courts do not directly rely on the accuracy rates of the system and base their decision on the mitigating factors explained above, the author still believes that there are ways to ensure that such evidence is made admissible. To do so, experts would have to go into an analysis of the source code, characteristics of the test data and methods used to train the AI system, to prove that the possible rate of error with respect to the specific characteristics of the said individual is low. Additionally, the use of multiple such AI systems in concert with each other, which come to the same conclusion, would also help establish the reliability of the method. This would be similar to DNA testing,[62] where several tests are used together to provide the result, hence, increasing the level of accuracy. Such a form of compiling the results of AI systems would compel the judge to allow for the admissibility of such tests, as the homogeneity would be probative of the reliability of the AI systems.

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[58] Steve Lohr, "Facial recognition is accurate if you're a white guy" *New York Times* (Feb. 9, 2018), *available at*: https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html (last visited on Nov. 15, 2020).

[59] Hu Han and Anil K. Jain, "Age, Gender and Race Estimation from Unconstrained Face Images" *Michigan State University Technical Report* 1, 2 (2014) *available at*: http://biometrics.cse.msu.edu/Publications/Face/HanJain_UnconstrainedAgeGenderRaceEstimation_MSUTechReport2014.pdf (last visited on Nov. 15, 2020).

[60] Joy Buolamwini and Timnit Gebru, "Gender Shades: Intersectional Accuracy Disparities in Commercial Gender classification" 81 *Proceedings of Machine Learning Research* 1, 3 (2018), *available at*: http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf (last visited on Nov. 15, 2020).

[61] Yaniv Taigman, Ming Yang, et.al., *Deepface: Closing the Gap to Human-level Performance in Face Verification*, Institute of Electrical and Electronics Engineers Conference on Computer Vision and Pattern Recognition, Held on (Ohio, USA, June 23-28, 2014), *available at:* https://ieeexplore.ieee.org/document/6909616.

[62] Jessica Gabel, "Probable Cause from Probable Bonds: A Genetic Tattle Tale Based on Familial DNA" 21 *Hastings Women's Law Journal* 20-25 (2010).

At this point, the issues of reliability and weightage of evidence yet remain unresolved. This is due to the Black Box dilemma which plays a role in such AI systems. Reconciling the effects of the said issue forms the main focus of the next section.

IV. THE BLACK BOX DILEMMA: MANKIND'S SECOND-BEST FRIEND?

As stated in the previous section, the issue still remains with respect to the weightage given to AI evidence.[63] There is a high likelihood that judges may not be willing to give much weight to such evidence due to the unexplainable nature of such evidence. For example, even if expert witnesses or perhaps the creator of the algorithm could get past the initial issues and prove that the data, code, and other variable factors do not pose any problems, an issue still lies in the fact that they cannot, in most circumstances, explain exactly how the algorithms come to the said conclusions despite the algorithm's demonstrable accuracy in performing the tasks. This issue arising from the inability of humans to completely comprehend an AI's decision-making process and the failure of humans to be able to forecast the AI's outputs is known as the Black Box problem associated with AI.[64] This may result in a dilemma in the minds of the judges as to whether they should decrease the weightage given to such evidence in light of its indeterminacy, or simply rely on its accuracy to justify its evidentiary value. In the author's opinion, this dilemma can be referred to as the 'black box dilemma', since it stems from the aforementioned Black Box problem associated with AI.

To understand how the indeterminacy is caused, let us consider the example used earlier of the programmer training, the algorithm to identify an individual. When identifying the individual, the AI could rely on aspects such as the height, shape, width of the face and head, and so on, but at times the system may also establish a rule or correlation which may not have been apparent to the programmers. For example, if the system has only been fed images where the individual was photographed with the flash on, it may correlate the brightness of the picture to identifying the individual instead of other factors we may expect it to give weightage to. In such instances, the system could either lead to a false negative or false positive depending on the factor it correlates the output to. As can be seen from this illustration, even if the system is fed with specific data sets and produces highly accurate results, humans are most likely not going to be able to understand exactly what factors were used by the system to come to the said conclusion. Such systems, hence,

[63] Edward Imwinkelried, "Computer Source Code: A Source of the Growing Controversy over the Reliability of Automated Forensic Techniques" 66 *DePaul Law Review* 80 (2016).

[64] *Supra* note 14.

remain often unexplainable, mainly due to the enormous number of data points and the incomprehensible statistical probabilities involved.[65]

Acting in response to this deficiency there has been a movement for the creation of 'xAI' or explainable AI.[66] This new subfield of machine learning attempts to create AI which can explain their decision-making process on their own. The said field is, nonetheless still in its early stages of development and is not likely to replace the current unexplainable AI systems, at least for the foreseeable future. Hence, it becomes important to find a way to address this so-called dilemma, to help allow the admissibility of such evidence in the intervening period.

The author believes that the black box dilemma could be potentially solved by alluding to another familiar example, which the courts are quite well versed with, i.e., tracker/sniffer dogs. In the case of evidence provided by tracker/sniffer dogs, even though a trainer may know how he trained the dog and there may be an overall measure of the dog's accuracy, no one can say for certain exactly how the dog actually came to its conclusion (what correlations it made to come to its findings). Hence, much like what was seen in the case of such AI systems, here too we are aware of the inputs and can perceive the output but have no idea how the internal process works.

Using such a comparison to resolve the black box dilemma, in the opinion of the author, would not affect the admissibility or weightage of AI evidence, mainly due to the distinguishing factors in the evidence produced by the two. In India, sniffer dog evidence is considered hearsay evidence,[67] mainly because dogs cannot go and give comprehensible evidence in court and need humans to interpret and report the same.[68] This is distinguishable from the case of AI evidence, where the AI system itself provides a direct intelligible output which is not open to the subjective interpretation of humans. Further, the expert only exists to inform the court on the reliability of the AI system. Hence, for the aforementioned reasons, the author believes that AI evidence would be distinguishable from sniffer dog evidence and would not lose its evidentiary weightage even while making the comparison to sniffer dogs. Nonetheless, assuming for the limited purposes of this paper that the court does treat the weightage of the two types of evidence alike, AI evidence could still be used for convictions. This can be inferred from the fact that sniffer dog evidence can be used for a conviction when corroborated by circumstantial or direct evidence.[69] Hence, as AI evidence would (as stated earlier) usually be

[65] Orin Kerr, "The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution" 102 *Michigan Law Review* 801 (2004). Also, see Michael L. Rich, *"Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment"* 164 *The University of Pennsylvania Law Review* 871 (2016).
[66] Mark G. Core, Chad Lane, et.al., "Building Explainable Artificial Intelligence Systems" *American Association for Artificial Intelligence* (2006).
[67] *Tarun Walia* v. *State of Punjab*, CWP No.13624/2013; *Dinesh Borthakur* v. *State of Assam*, (2008) 5 SCC 697.
[68] *Abdul Rajak Murtaja Dafedar* v. *State of Maharashtra*, (1969) (2) SCC 234; *Ramesh* v. *State of A.P.*, (2001) (6) SCC 205.
[69] *Lalit Kumar Yadav* v. *State of U.P.*, (2014) 3 SCC (Cri) 318.

accompanied by circumstantial if not direct evidence, its weightage would not be diminished even if the same standard was to be applied.

This being said, since it is all open to judicial discretion and interpretation, there is no exact way to foresee how the same would work out in an Indian context. The next section concludes by providing the author's perspective on a favourable road map ahead, to aid the introduction and use of such AI systems in the Indian legal system.

V. CONCLUSION AND ROAD MAP AHEAD

As technology continues to develop and its applications increase by the day, it becomes imperative for the discourse on the same to increase as well. AI is already being used in a host of applications and it is only a matter of time before its usage and application in the law enforcement and the legal field increases.[70] While there exists a threat of inaccuracy and lack of understanding when it comes to the said systems, the author nonetheless believes that such evidence would be admissible in India. This draws from the fact that nothing categorically bars such AI outputs from constituting evidence in India. Additionally, as has been highlighted through this paper, there exist a plethora of ways to address each issue that may arise in the minds of the judges at each step, so as to aid the admissibility of AI evidence. This could range from utilising multiple such AI systems in concert with each other and compiling the results to increase the accuracy of the results (as is done in the case of DNA testing),[71] corroborating evidence to overcome the black box problem (analogous to the case of sniffer dogs),[72] to having experts elaborate on the source code, characteristics of the test data, and methods used to train the AI system, to prove that the possible rate of error with respect to the specific characteristics of the individual in question is low.

Although through this article, the author has categorically argued in favour of the admissibility of such AI evidentiary outputs and has suggested measures to address concerns with respect to the same at every stage, the author is nonetheless cognisant that it would be more beneficial if, while introducing such evidence into the Indian system, the courts initially did not rely solely on the outputs of such systems, at least until such technology became more accurate or refined. The author is of the belief that it makes sense to slowly open the door to its admissibility, to both allow for the transition while also preventing the admissibility of unreliable AI outputs and facial recognition matches which may be prejudicial to the accused in cases. The author suggests that in the earlier stages, such technology should be considered admissible only in scenarios where the same

[70] Christian M. Halliburton, "Letting Kate Out of the Bag: Cognitive Freedom and Fourth Amendment Fidelity" 59 *Hastings Law Journal* 318, 319 (2007).
[71] *Supra* note 62.
[72] *Supra* note 70.

are least prejudicial to individuals, such as in situations where it is used as exculpatory evidence. Doing so would help allow for the entry of such forms of evidence into the Indian legal system without prejudicially affecting the rights of individuals. It would also allow for a smooth transition of the legal system into the future while also preventing the opening of a floodgate to inaccurate and unreliable AI into the legal system.

VIDEO CONFERENCING IN CRIMINAL PROCEEDINGS: ROADBLOCKS AND THE WAY FORWARD

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Technological advances have not only impacted our lives, work, business, professions, industries but also the judiciary. Courts have adopted various new technologies, video conferencing being one of them. Video conferencing is used for parties and witnesses in criminal and civil cases at various stages of non-trial and trial proceedings. As a consequence of the COVID-19 pandemic, courts have increasingly employed the use of video conferencing, and it is speculated that courts may increase the use of this technology in the future even after circumstances become normal. This article focuses on addressing the issues which arise due to video conferencing in criminal cases. The scope of this paper is limited to the standard video conferencing in which only the witness or/and the accused are remotely located and does not extend to virtual courts introduced during the COVID-19 pandemic, however, the issues addressed in this paper may arise in virtual courts as well. The paper evaluates the implication of using video conferencing in courtroom dynamics, the interaction between client and attorney, the capacity to ascertain demeanour, effective communication, and the effect on the due process of law. The authors argue that by employing this technology in criminal cases, the courts might have improved their efficiency, however, several critical issues that affect the cornerstone of justice are being ignored in the present arrangement of video conferencing of proceedings. The paper thus concludes that the use of video conferencing should be very limited in criminal trials.

I. INTRODUCTION

Courts in India are experimenting with new technologies for ease of administration as well as to increase the efficiency of the judicial system. Courts have increasingly been using video conferencing ('VC'), and it has proved to be very helpful during the present testing

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times when the country has been greatly affected by the COVID-19 pandemic.[1] VC is a technology through which people in different locations can interact with the help of audio-visual transmission via the internet, and the 'parties are in presence of each other' in this form of communication.[2] In the case of *State of Maharashtra* v. *Dr. Praful B. Desai* ('*Praful B. Desai* case'),[3] the Hon'ble Supreme Court held that recording of evidence is permitted through VC for a speedy trial and removes inconvenience to witnesses. Such recording of evidence would fulfil the object of Section 273 of the Code of Criminal Procedure, 1973 ('CrPC'),[4] regarding evidence to be taken in the presence of the accused during the trial or any other court proceeding and be as per 'procedure established by law'.[5] In criminal trials, VC is used at various stages such as in bail hearings, remand production, sentencing - as well as in civil court proceedings - where the accused remains in jail and the proceedings continue with judges and lawyers being present in the court. VC is also used to conduct a trial in its entirety, like in the *Abdul Karim Telgi* case,[6] in which the accused, Abdul, was even allowed to confess through VC.[7]

The use of VC in criminal cases leads to a reduction in litigation costs to the government. Along with cost-saving, VC has the ability 'to shrink the world'.[8] As a result, a witness can testify while located in a different country. In contrast, earlier, large geographical areas presented a significant hurdle, such as the time and money involved in travelling. Furthermore, depending upon the nature of the case, transporting prisoners from prison to courts could pose a threat to the public and to detention officers. Thus, the usage of VC also mitigates security risks. Due to these benefits, VC has proven to be a boon for the Indian judiciary in these troubling times when the country is going through the COVID-19 pandemic.[9] It has helped in controlling the spread of COVID-19 while ensuring access to justice at the same time. Even before the advent of COVID-19, VC proved helpful in cases when the witness could not be physically present because of being

[1] LiveLaw News Network, "'Higher Number of Cases Can Be Decided Via Video Conferencing': Over 200 Advocates Oppose Resumption Of Physical Hearings In SC" *LiveLaw,* Aug. 14, 2020, *available at:* https://www.livelaw.in/news-updates/higher-number-of-cases-can-be-decided-via-video-conferencing-over-200-advocates-oppose-resumption-of-physical-hearings-in-sc-161420 (last visited on Sept. 14, 2020).
[2] 2003 (4) SCC 601.
[3] *Ibid.*
[4] The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 273.
[5] *Supra* note 2.
[6] Crl. O.P. No. 25880 of 2007.
[7] PTI, "Court Allows Telgi to Make Confession" *Hindustan Times*, Jan. 31, 2006, *available at:* https://www.hindustantimes.com/india/court-allows-telgi-to-make-confession/story-W8K4utbKX8i8Qy63sMo4QL.html (last visited on Sept. 10, 2020).
[8] Daniel Devoe and Sarita Frattaroli, "Videoconferencing in the Courtroom: Benefits, Concerns, and How to Move Forward" *Massachusetts Social Law Library* 22, *available at:* https://drive.google.com/file/d/1iK1GXTvNfMi6jvWDfjXgQPpLodLYQqRC/view?usp=sharing (last visited on Sept. 5, 2020).
[9] "Videoconferencing is a boon for courts in this pandemic: Shivanshu Goswami" *Deccan Chronicle,* Apr. 20, 2020, *available at:* https://www.deccanchronicle.com/in-focus/200420/videoconferencing-is-a-boon-for-courts-in-this-pandemic-shivanshu-gos.html (last visited on Sept. 2, 2020).

located in another state or country and the accused was incarcerated.[10] The former Chief Justice of India, Justice S.A. Bobde, while hearing a *suo moto* case for guidelines on court functioning via VC, remarked that: 'This cannot be seen as a temporary issue. Technology is here to stay.'[11] Further, the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice has also suggested continuing the use of VC to further the cause of justice even after the pandemic.[12] However, there exist several negative aspects of VC, especially in criminal trials, which should be considered before continuing its usage in criminal cases. Rather, its ordinary use, which existed before the outbreak of COVID-19 should be decreased.

This paper discusses several issues that may arise in VC proceedings in criminal cases. The scope of this paper is limited only to the standard VC procedure/virtual proceeding in courts where the lawyers and judges are present in the court, and the accused or witness is in jail or testifying from some remote location. This paper does not delve into 'virtual courts' in which lawyers and judges are also virtually present from their home. However, these issues arise in virtual courts also. Virtual courts pose some additional problems, such as the digital divide, and the question of Section 159 of the Indian Evidence Act, 1872 ('Evidence Act'),[13] which provides that a witness under examination can refer to any writing made by himself at the time of the concerned transaction upon which he is being questioned or 'so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory'. In normal VC proceedings, the remote witness has to be in the presence of the authorities while deposing his statement, whereas the same is not the case with virtual courts.[14] Thus, in the case of virtual courts, Section 159 of the Evidence Act would be redundant because there will be no check on whether the witness complies with Section 159 to refresh his memory.[15] Further, in virtual courts, lawyers and judges are also remotely located and thus, lawyers have to rely on their personal internet connections and technical know-how to participate in court proceedings which leads to the issue of digital divide as they are not all equally technologically savvy. As per the Parliamentary Standing Committee Report, around fifty percent of advocates in the lower

[10] Dr. Setlur B. N. Prakash, "E Judiciary: a Step towards Modernization in Indian Legal System" 1 *Journal of Education & Social Policy* 118-119 (2014).
[11] Sanya Talwar, "COVID19: SC Passes Guidelines On Modalities Surrounding Videcon Hearings During Lockdown, Says 'Technology Is Here To Stay'" *LiveLaw*, Apr. 6, 2020, *available at:* https://www.livelaw.in/top-stories/covid19-sc-passes-guidelines-on-modalities-surrounding-videcon-hearings-during-lockdown-says-technology-is-here-to-stay-154842 (last visited on Sept. 25, 2020).
[12] Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice (Rajya Sabha), "103rd Report on Functioning of Virtual Courts/ Court Proceedings Through Video Conferencing (Interim Report)" (Sept. 11, 2020).
[13] The Indian Evidence Act, 1872 (Act 1 of 1872), s. 159.
[14] High Court of Delhi, "*Guidelines for the Conduct of Court Proceedings between Courts and Remote Sites*" *available at:* http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_CQ84SWB5.PDF (last visited on Mar. 21, 2021).
[15] Shambhu Sharan and Ambika, "The Viewpoint: Recording Evidence by Video Conferencing" *Bar and Bench*, July 2, 2020, *available at:* https://www.barandbench.com/view-point/recording-evidence-by-video-conferencing (last visited on Oct. 26, 2020).

courts are at a loss since they do not have the required access to digital infrastructure or digital knowledge.[16]

Part II of this paper discusses the various issues that arise in employing VC in criminal trials such as the negative impact of VC on the right to counsel, 'demeanour evidence', due process of law, and other related issues which might adversely affect criminal trials. Part III of the paper provides some recommendations to the Criminal Law Reforms Committee to ameliorate the issues emerging from the use of VC in criminal trials. Part IV of the paper sums up the concluding thoughts.

II. ISSUES IN VIDEO CONFERENCING

A. Right to Counsel Affected

It has been argued that the separation between a remote defendant and his counsel may result in a lack of effective communication between them.[17] Thus, this may affect the right to counsel adversely. This right is statutorily present under Sections 303, 304 and 41D of the CrPC. As per Section 303 a person has a right to counsel of their choice during the trial,[18] and Section 41D grants a right to counsel during interrogation.[19] When an indigent person is not able to afford counsel, the Court appoints a pleader for their defence under Section 304, and the expenses are borne by the State.[20] Hence, the right to counsel is extended to the stage of interrogation as well as during all stages of a trial. Further, the right to counsel has been held to be a part of Article 21 of the Constitution in *Md. Sukur Ali* v. *State of Assam*.[21]

Privileged communication between the lawyer and the client has been statutorily explained under Sections 126-129 of the Evidence Act. Privileged communication is any communication between the lawyer and the client made after professionally employing the lawyer.[22] It may be any document or any information given to him by the client, any communication regarding their case in between the court proceedings or even any advice given by him to the client.[23] This privileged communication should be protected subject to a few exceptions, like any information in furtherance of any illegal purpose,[24] or any fact in the course of employment which indicates that a crime is committed after the lawyer was employed.[25] Section 127 provides for the application of Section 126 to

[16] *Supra* note 12 at 5.
[17] Eric T Bellone, "Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom" 8 *Journal of International Commercial Law and Technology* 30-34 (2013).
[18] *Supra* note 4, s. 303.
[19] *Id.,* s. 41D.
[20] *Id.,* s. 304.
[21] MANU/SC/0155/2011.
[22] *Supra* note 13, s. 126.
[23] *Ibid.*
[24] *Id.*, s. 126(1).
[25] *Id.*, s. 126(2).

interpreters, servants, clerks, pleaders, attorneys and vakils as well.[26] Section 128 provides that if a party discloses information voluntarily, this act should not be construed as a waiver of the attorney-client privilege provided under Sections 126 and 127 or that the lawyer is at liberty to disclose the information in the court.[27] Section 129, on the other hand, protects the lawyer, where a party cannot be compelled to disclose any confidential communication that has taken place between him and his lawyer unless the party offers to act as a witness.[28] Rule 17 of Part VI, Chapter II of the Bar Council of India Rules further protects communication under attorney-client privilege by stating that an attorney should not violate obligations under Section 126 of the Evidence Act directly or indirectly.[29]

In India, no particular arrangements have been made for privileged communication between the accused and his counsel, like providing a telephone line. During in-person hearings, the accused and the counsel may interact with each other during breaks or during the proceedings, or the counsel may request the court to provide some time for discussion, but the same may not be the case with VC proceedings. It adversely affects the right to counsel of the accused as the accused may not be able to interact or consult their pleader or vice versa, and so may be unable to put up their defence before the court effectively. If either of them does interact in front of the court, it will affect their attorney-client privilege as the whole court would be able to listen to their communication. Even if they are allowed to talk through VC and are given some time to interact privately, then also the lawyer may have a few concerns, for instance, whether the VC is being recorded and what would be done of that recording, or whether the connection is a hundred percent secure, or whether anyone is monitoring the video.[30]

In 2004, researchers from The Legal Assistance Foundation of Metropolitan Chicago and The Chicago Appleseed Fund for Justice ('Chicago Study') observed over 110 VC proceedings in Chicago's immigration courtrooms, in which the judges were in downtown court whereas the detainees were located in a small detention facility in a Chicago suburb.[31] In this study, issues related to access to counsel were estimated to be 12.7% or one in six hearings of the sample data, and it was noted that this communication barrier also slowed the hearing process.[32] Moreover, the majority of the counsels in the study believed that any private communication was not possible via VC. In the same study, a particular case was also discussed in which an observer noted that a person decided to just

[26] *Id.*, s. 127.
[27] *Id.*, s. 128.
[28] *Id.*, s. 129.
[29] Bar Council of India Rules, Section II, Chapter II, Part VI, Rule 17.
[30] Aaron Haas, "Videoconferencing in Immigration Proceedings" 5 *The University of New Hampshire Law Review* 85 (2006).
[31] The Legal Assistance Foundation of Metropolitan Chicago and The Chicago Appleseed Fund for Justice, *Videoconferencing in Removal Proceedings: A Case Study of the Chicago Immigration Court* (Chicago, 2005) *available at:* http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf (last visited on Mar. 21, 2021).
[32] *Id.*, at 36.

accept the charges, reasoning that the outcome might have been different if the client and counsel had had an opportunity to discuss in private.[33]

In the American case *Seymour* v. *State,*[34] the accused pleaded guilty without being able to consult his lawyer in confidence during the VC proceeding. The statement of the Appellate Court deserves to be quoted in full:

> We can imagine no more fettered and ineffective consultation and communication between an accused and his lawyer than to do so by television in front of a crowded courtroom with the prosecutor and judge able to hear the exchange. Quite apart from that obvious inhibition is the added circumstance that the accused is deprived of the opportunity to look directly into the eyes of his counsel, to see facial movements, to perceive subtle changes in tone and inflection, — in short, to use all of the intangible methods by which human beings discern meaning and intent in oral communication. Not every technological advance fits within constitutional constraints or the realities of criminal proceedings.[35]

Thus, the Court invalidated the guilty plea on the grounds that if the defendant cannot ask questions to his counsel in confidence, it may affect the voluntariness of his plea.[36]

In *Govindraj Amutha* v. *Customs,*[37] the petitioner had filed an appeal against her conviction under Sections 22, 23, and 28 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') for rigorous imprisonment of 10 years and a fine of rupees one lakh for carrying narcotic drugs in a flight to Malaysia. Initially, the petitioner had pleaded not guilty; however, the legal aid counsel for the petitioner was absent from the court proceedings and the petitioner languished in jail for almost 20 months till the date of final conviction. The petitioner pleaded guilty later stating that being a mother, her motherly instincts and separation from her children had affected her mental health and she had lost her sleep, all her senses, and had been living like a lifeless person. The Delhi High Court noted that the petitioner was probably misled into believing that 'if she pleaded guilty, a lesser sentence would be imposed on her and may be that she would be allowed to let go for the period she had already undergone in custody' and there was an issue with interpretation while the petitioner was accepting the guilty plea as she only knew Tamil, whereas the Court was well-versed in Hindi and English.[38] Therefore, the Court allowed the appeal in the present case and set aside the conviction. Thus, in India, even in normal trials, an accused can plead guilty under circumstances such as 'lack of knowledge and understanding, desperation, poverty, lack of proper advice, unavailability

[33] *Id.*, at 40.
[34] 582 So. 2d 127, 128 (Fla. Dist. Ct. App. 1991).
[35] *Ibid.*
[36] *Ibid.*
[37] MANU/DE/2668/2015.
[38] *Id.*, at paras. 13-14.

of experienced counsel' as stated in *Govindraj Amutha* v. *Customs*.[39] The lack of access to counsel due to want of effective communication may also produce similar results in India, where the remote defendant accepts a guilty plea without being able to consult his counsel properly.

B. Issues in Ascertaining Demeanour and Examination of Witnesses

Demeanour has been defined as 'every visible or audible form of self-expression manifested by a witness whether fixed or variable, voluntary or involuntary, simple or complex'.[40] 'Demeanour evidence' includes attitude, character, manner of testifying, personality, behaviour, whether a witness is confused or clear, helpful or evasive, nervous or confident while answering questions.[41] Under the common law system of litigation, the demeanour of a witness is used to determine the truth of his testimony.[42] In *Valarshak Seth Apcar* v. *Standard Coal Co. Ltd. and Ors*,[43] the Bombay High Court stated that through the demeanour of the witness, the trial court judge could determine 'whether the questions were answered with honest candour or with doubtful plausibility, and whether after careful thought or with reckless glibness.'[44] In several cases, the Hon'ble Supreme Court has reiterated that the High Courts should keep in mind that the trial courts are better placed in determining credibility as they have the distinct advantage of noticing the demeanour.[45] Thus, demeanour evidence proves to be of immense significance in cases.

VC is certainly not as effective as human eyes in ascertaining the demeanour of the remote witness or that of a remote accused. In *United States* v. *Nippon Paper Indus Co. Ltd.*, Justice Gertner expressed his concern that video screens in VC 'necessarily present antiseptic, watered-down versions of reality' and 'much of interaction of courtroom is missed.'[46] Canadian philosopher Marshall McLuhan has also stated that the 'medium itself is the message', meaning that any medium intervening the communication may affect processing and judgement formation.[47] Moreover, VC can exaggerate some personal features like blemishes, shadows, and hair growth, which is used to evaluate credibility.[48] In a study it was found that children witnesses who testified in-person were rated more

[39] *Id*., at para. 24.
[40] *R.* v. *N.S.*, 2012 SCC 72, referring to Barry R. Morrison, Laura L. Porter, et.al., "The Role of Demeanour in Assessing the Credibility of Witnesses" 33 *Advocates* Q 170 (2007).
[41] Bobby Naude, "Face-Coverings, demeanour evidence and the right to a fair trial: lessons from the USA and Canada" 46 *The Comparative and International Law Journal of Southern Africa* 168 (2013).
[42] James P Timony, "Demeanour Credibility" 49 *Catholic University Law Review* 904 (2000).
[43] MANU/PR/0019/1943.
[44] *Id*., at para. 12.
[45] *Gulab Singh Prabhu Rathod* v. *State of Maharashtra*, MANU/MH/1350/2001; *Ghurey Lal* v. *State of Uttar Pradesh*, MANU/SC/3223/2008; *Dhanapal* v. *State,* MANU/SC/1594/2009.
[46] 17 F. Supp. 2d 38 (D. Mass. 1998).
[47] Marshall McLuhan, *Understanding Media: The Extensions of Man* (McGraw-Hill, New York, 1st edn., 1964).
[48] Patricia Rabum, "Videotapes in Criminal Courts: Prosecutors on Camera" 17 *Criminal Law Bulletin* 409 (1981). See Michael D. Roth, "Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth" 48 *UCLA Law Review* 198 (2000).

credible than those who testified via VC.[49] In the Chicago study involving VC immigration proceedings, lawyers were of the view that VC 'undermined the judge's ability to assess the immigrant's credibility' and another attorney stated that 'split-second delays in the video transmission made the image 'choppier' subtly and made the immigrant appear less truthful.'[50] Similarly, the statement of the remote accused and witnesses may also be perceived as less credible.

Furthermore, it has also been noticed that even the shot size may affect the perception of the viewer, as different shots have attention on different details. A closeup shot concentrates on facial expressions which might be overlooked, a medium shot on both face and physical gestures, and long shot on primarily gestures, due to which, facial expressions may be lost and a true impact of shot size may be apparent only when seen in the context of the entire trial or other shots.[51] Similarly, the camera location may affect the perception of the viewer;[52] for instance, witness credibility can be increased when the camera angle and the shooting style resembles that of a talk show.[53] The shot size and camera angle may further negatively affect the remote witness and defendant, for instance, as the head shot focuses on the facial expression of the person, it can exaggerate them, which may increase the negative impact of unattractive expression or harsh facial features.[54] Additionally, when the accused or witness is communicating via VC, there may be a change in his behaviour, as he may become camera conscious and become nervous about filming the court proceeding, and thus act awkwardly.[55] In this situation, VC may make the accused appear less confident, and the nervous behaviour of the accused such as a decrease in gaze, smile as well as speech rate, and an increase in frequency of voice pitch, speech errors, speech hesitation may also affect him as cues to apprehension often signal deception,[56] thus making him seem less credible.[57]

Sigmund Freud states that: 'If his lips are silent, he chatters with his fingertips; betrayal oozes out of him at every pore' meaning that a person trying to lie will be sweating excessively or shaking his legs, and his gestures will also give away his intention.[58] Thus,

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[49] Gail S. Goodman, Anne E. Tobey, et.al., "Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony" 22 *Law and Human Behavior* 165-203 (1998). See also, Molly Treadway Johnson and Elizabeth C. Wiggins, "Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research" 28 *Law & Policy* 221 (2006).
[50] *Supra* note 30 at 45.
[51] Michael D. Roth, "Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth" 48 *UCLA Law Review* 203 (2000).
[52] *Id.,* at 204.
[53] *Ibid*., referring to Susan J. Drucker and Janice Platt Hunold, "Videotaped Depositions: The Media Perspective" 60 *N.Y. ST. B.J.* 38, 45 (1988).
[54] Anne Bowen Poulin, "Criminal Justice and Videoconferencing Technology: The Remote Defendant" 78 *Tulane Law Review* 1109 (2004).
[55] *Id.,* at 1125.
[56] Robert S. Feldman and Richard B. Chesley, "Who is lying, who is not: An attributional analysis of the effects of nonverbal behavior on judgements of defendant believability" 2 *Behavioral Sciences & the Law* 452 (1984).
[57] David M. Doret, "Trial by Videotape-Can Justice Be Seen to Be Done?" 47 *Temple Law Quarterly* 245-246 (1974).
[58] Sigmund Freud, *Dora: An Analysis of a Case of Hysteria* 69 (Simon & Schushter, New York, 1997).

according to Freud, body language and nonverbal cues ('NVCs') are keys to people's true feelings, which they are trying to hide. Further, Albert Mehrabian, in his book 'Non-Verbal Communication' has stated that for effective communication, body language, along with other two elements - words and tone of voice - are required.[59] The words account for 7%, the tone of voice accounts for 38%, and the body language accounts for 55%.[60] If these appear to be in conflict with each other, then reliance may be placed on the one which accounts for the highest percentage.[61] Thus, in such a case of conflict, body language accounting for the most, that is, 55% becomes vital. Unfortunately, body language and NVCs can be significantly lost, misinterpreted or distorted when the proceedings of the trial take place through VC. It is because only the upper body appears in the VC, and as discussed in the preceding paragraphs, VC can affect the credibility of the accused or the witness by a misinterpretation of demeanour.

In a study by Gwyneth Doherty-Sneddon, Anne Anderson, and others, the researchers drew a comparison of group communication to finish a task via three different media, that is, only audio, face to face, and both video and audio.[62] The subjects, seventy-two students (thirty-six pairs) from the University of Nottingham, were asked to perform the task in each different context.[63] It was found that verbal dialogue usage required to perform the task was more significant in the video than in-person, indicating the inefficiency of VC to convey NVCs and difficulty in effective communication.[64] In another study, people rated a defendant lowest when he showed nonverbal deception cues,[65] indicating the importance of NVCs in determining credibility. Thus, the lack of effectiveness in communication and transmission of NVCs may adversely affect the remote witness and defendant in determining his credibility in VC trials.

While going through the rigour of trial, it is possible that the accused may be unable to maintain his demeanour. In these situations, it may be difficult for the counsel to advise, prompt, calm or control the accused as there is a lack of effective communication between the counsel and the remote accused. It may create a wrong impression of the accused in the eyes of the judge, and the accused may be evaluated negatively and subsequently suffer the consequences.[66] Additionally, even if a mechanism like a secure telephone line is provided for communication, it may turn out to be ineffective, as the nonverbal cues would

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[59] Nagesh Belludi, "Albert Mehrabian's 7-38-55 Rule of Personal Communication" *Right Attitudes*, Oct. 5, 2008, *available at:* https://www.RightAttitudes.com/2008/10/04/7-38-55-rule-personal-communication/ (last visited on Sept. 24, 2020).
[60] *Ibid.*
[61] *Ibid.*
[62] Gwyneth Doherty-Sneddon, Anne Anderson, et.al., "Face-to-face and video-mediated communication: A comparison of dialogue structure and task performance" 3 *Journal of Experimental Psychology: Applied* 105 (1997).
[63] *Id.*, at 115.
[64] *Id.,* at 122.
[65] *Supra* note 54, at 1125.
[66] *Id.,* at 1129-1130.

still be missing, and the level of communication may be less than what it could have been in an in-person hearing.[67]

Examination-in-chief and cross-examination are regarded as the foundation of a trial. A significant number of lawyers rely on cross-examination to catch inconsistencies in the witnesses' stories through verbal and non-verbal cues.[68] However, when conducted on VC, the quality of examinations may be affected due to the aforementioned issues such as the loss of NVCs.

Another problem with VC is its reliance on the internet, with the possibility of network fluctuations at any time. For instance, recently, the Madhya Pradesh State Bar Council raised concerns regarding poor connectivity and inferior audio-visual quality in virtual proceedings.[69] Accordingly, the Supreme Court's e-committee requested the Chief Justice of the Madhya Pradesh High Court to take corrective actions.[70] These network fluctuations during examinations may also lead to the loss of NVCs, further affecting the quality of the trial. Moreover, VC does not allow the lawyers to read the body language of the accused or remote witness as a whole. If the lawyers cannot read the body language of the accused, then the quality of the examinations may be affected.

Likewise, network fluctuations can lead to miscommunications too. The audio and video quality may not be proper every time for every case. If the connection of even one party faces technical glitches, then issues may arise. For instance, if the witness is asked a question but due to a technical glitch, there is no audio and video clarity, it may result in hearing incomplete sentences with the witness's voice breaking down. This may further lead to miscommunication if the witness was misunderstood due to this error in the audio transmission.

Thus, VC may profoundly impact demeanour evidence in proceedings and the quality of examinations of witnesses or the accused. The loss of NVCs may lead to difficulty in ascertaining demeanour, with an increased possibility of misinterpreting it, which could diminish the credibility of the remote defendant as well as the witness who is appearing through VC.

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[67] *Ibid.*
[68] Shambhu Sharan and Ambika, "Recording Evidence by Video Conferencing" *Singhania & Partners LLP*, June 24, 2020, *available at:* https://singhania.in/recording-evidence-by-video-conferencing/ (last visited on Sept. 6, 2020).
[69] Sparsh Upadhyay, "VC Hearings- Address Issues Including Poor Connectivity, Inferior Audio-Video Quality: Justice DY Chandrachud Writes To MP High Court Chief Justice" *LiveLaw*, June 6, 2021, *available at*: https://www.livelaw.in/top-stories/justice-dy-chandrachud-mp-high-court-chief-justice-vc-hearings-poor-connectivity-inferior-audio-video-quality-175294 (last visited on June 8, 2021).
[70] *Ibid.*

C. Due Process of Law Affected

Due process of law evolved in the landmark case of *Maneka Gandhi* v. *Union of India,*[71] which postulates the right to a just and fair trial.[72] In VC, there exists a possibility that remote defendants or witnesses would have been or are being tutored. Moreover, an accused may not feel comfortable appearing before a judge or a magistrate from jail. The accused is permitted to give confessions only to a magistrate to enable the accused to feel comfortable and deflect any form of pressure.[73] However, in the case of VC, the accused appearing from prison may not be free from some unwanted stress. In prison, the accused is under the control of the jail authorities and in contact with other prisoners. Premised on Section 26 of the Evidence Act, the term 'custody' has been extensively debated in courts. The Supreme Court has held that 'custody' means that a person has to be under some control of the police, and it need not necessarily be physical custody.[74] Hence, this custody can amount to surveillance too. For instance, if a policeman arrests an accused and on his way to the police station, he leaves the accused with some villagers and goes somewhere else, then too the accused would be considered to be under the custody of the police.[75] Similarly, in prison, the accused is still under the custody of the police officers while appearing in a VC proceeding as per the definition of 'custody' defined by the courts. Hence, the accused may not feel completely comfortable. However, in an open court, the accused is physically standing before a judge who can relieve the accused of any reservations they may have. It may help the accused in speaking freely.

Hence, there is a difference between confessing in an open court and confessing in prison where one may be at the mercy of the jail authorities. Therefore, the credibility of such a confession given through VC may be in question. The apex court, in the case of *Indra Dalal* v. *State of Haryana,*[76] recognised that the confessions are given to the magistrate because the police may practice oppression or torture for the same.[77] In the case of VC, the accused would be giving the confession or any other evidence to a magistrate but would be under the instant control of jail authorities. Hence, the possibility of oppression cannot be ignored. Similar may be the case with the witnesses who may have been tutored prior to giving the testimony and appearing through VC while being in fear.

Researchers have noted that the atmosphere of a court may induce a witness to tell the truth,[78] and the judge, acting as a symbol of authority and a 'neutral convenor', may

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[71] AIR 1978 SC 597.
[72] A.H. Hawaldar, "Evolution of Due Process in India" 111 *Bharati Law Review* 107-118 (Oct.-Dec. 2014).
[73] *Supra* note 13, s.26.
[74] *State of Andhra Pradesh* v. *Gangula Satya Murthy* (1997) 1 SCC 272.
[75] *Harbans Singh* v. *State*, AIR 1970 Bom 79; *Abdulla* v. *Emperor*, AIR 1937 Lah 620.
[76] (2015) 11 SCC 31.
[77] *Ibid.*
[78] David M. Doret, "Trial by Videotape-Can Justice Be Seen to Be Done?" 47 *Temple Law Quarterly* 256-257 (1974).

cause a disconnection between the accused and prison authorities.[79] Thus, it may help the accused and witness to express himself without fear. However, due to the change in courtroom dynamics by VC, they may not experience the actual atmosphere of the court, and may feel like they are talking to machines. Therefore, the witnesses might not freely express themselves, without fear, in the VC proceedings.

Furthermore, in a study conducted by the researchers from the Northwestern University on the bail hearings in felony cases in Cook County, USA, decided in the period of June 1991 to June 2007, the researchers concluded that the average bail set by judges rose by 51% after the court started using VC in cases of the bail hearings.[80] In India, the Supreme Court has time and again reiterated the principle that bail is the rule, jail is the exception. Yet, it seems to have had little effect in practice, with 67.7% of 4.33 lakh prisoners in the country waiting for their trial, some for years.[81] Around 65% of these are Dalit, Adivasi, and marginalised people, who are usually illiterate or barely literate and unable to afford the bail fee.[82] Thus, the situation regarding grant of bail in India does not seem to be encouraging, which begs the question whether the use of VC in bail hearings increases the possibility of rise in average bail set by judges in India, similar to what was seen in the United States of America ('USA'). Further in the Chicago study, it was also found that a non-English speaker's probability of winning removal proceedings decreased in VC proceedings.[83] Similarly, another study concluded that VC doubles the chances of an asylum seeker being deprived of asylum in asylum removal hearings.[84] These studies show how there already exist less favourable outcomes for the accused in these specific proceedings. Therefore, it is clear from these that there already exists unfairness in VC proceedings though its degree may differ in different types of proceedings.

The right to a fair trial enshrined in Article 21 of the Constitution includes the right to counsel.[85] As already discussed in the previous sections of this paper, the right to counsel is adversely affected in VC proceedings. Furthermore, a study on prison conditions in Andhra Pradesh by the Commonwealth Human Rights Initiative in 2004 revealed the denial of legal assistance in remand production hearings to prisoners, which was developed as a habit by the arrival of VC technology.[86] The study noted that due to

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[79] Molly Treadway Johnson and Elizabeth C. Wiggins, "Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research" 28 *Law & Policy* 215 (2006).
[80] Shari Seidman Diamond, Locke E. Bowman, et.al., "Efficiency and Cost: The Impact of Video Conferenced Hearings on Bail Decisions" 100 *The Journal of Criminal Law & Criminology* 897 (2010).
[81] The Editorial Board, "High price: growing numbers in jails during Covid" *The Telegraph online*, Jan. 01, 2021, *available at:* https://www.telegraphindia.com/opinion/high-price-growing-numbers-in-jails-during-covid/cid/1802266 (last visited on Oct 29, 2021).
[82] *Ibid.*
[83] *Supra* note 31 at 8.
[84] Frank M. Walsh and Edward M. Walsh, "Effective Processing or Assembly-Line Justice - The Use of Teleconferencing in Asylum Removal Hearings" 22 *Georgetown Immigration Law Journal* 271-272 (2008).
[85] *Ramchandra Nivrutti Mulak* v. *The State of Maharashtra*, Criminal Appeal No. 487 of 2008.
[86] K. Murali, "Institutional Apathy towards Undertrial Prisoners" 41 *Economic and Political Weekly* 3937 (2006).

the absence of a strong monitoring system to gauge the performance of the legal counsel, the lack of information to the accused and his/her family member who is the assigned legal aid counsel, and no attendance register in VC rooms to ensure attendance of legal aid counsel, it had become a habit for the defence counsels or legal aid counsels to not be present in court if the remand production hearing was through VC, further affecting legal representation. Thus, it is clear from the above discussion that VC adversely affects the right to a fair trial, which also includes the right to counsel and as a result, the due process of law.

D. Other Issues

1. Reduced working hours

The Chicago study on immigration proceedings concluded that they found little evidence to support the claim that VC improves efficiency, as there existed issues that remote immigrants faced with regard to the right to counsel and language interpretation.[87] One of the major issues which may affect the proceedings done through VC is the reduction in the working hours of the courts. The virtual proceedings depend upon the strength of the internet connection. If the court's network is experiencing fluctuation or any other technical snag, then the working hours may reduce.[88] Hence, it directly affects the number of cases being adjudicated upon. Considering such technical snags may not occur daily, nevertheless even occasional snags may lead to considerable loss of hours.

2. Discomfort to people with disabilities

Another grave issue is that VC proceedings fails to provide a comfortable environment for persons with disabilities. The virtual proceedings may seem alien to an accused or a witness. For instance, a person with a speech disability may not be able to communicate properly if the network fluctuates, or a person with a hearing disability may not read the lips properly if the network fluctuates. A visually impaired person may not be comfortable due to the lack of physical interaction. Such inhibitions may perturb the persons with disabilities, which could have a severe effect on their case. Further, an accused gets only limited chances of seeing his family. One such opportunity is in the courtroom. Due to VC, the accused appears from jail and loses an additional opportunity to see his family and friends.[89] This issue does not seem too grave to an outsider, but an accused looks forward to this chance to meet his family.

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[87] *Supra* note 31 at 60.
[88] *Supra* note 12 at 7.
[89] Peeyush Pandey, "Trial by camera — Why India's inmates deserve justice, not technophobia of courts" *The Print*, Sept. 3, 2020, *available at:* https://theprint.in/opinion/trial-by-camera-why-indias-inmates-deserve-justice-not-technophobia-of-courts/475860/ (last visited on Sept. 8, 2020).

3. Lack of uniform rules

Furthermore, there is an issue of lack of uniform rules across all the courts in India since the concept of VC is still not comprehensive. In a criminal case, several courts may have the jurisdiction to try a case as per Section 178 of the CrPC.[90] In such cases, the case can be filed anywhere among the options available. Hence, the courts should seek to lay down a uniform set of rules for VC. A uniform set of rules for VC would also facilitate in standardising the procedure in different courts across the country. However, currently there is a lack of uniform rules across courts in the country. For instance, a perusal of the rules of VC of the Madras High Court[91] and the Delhi High Court[92] would highlight that the latter has a more detailed set of guidelines. It includes a dedicated provision for judicial remand which says the judicial remand in the first instance may not be granted through VC except in exceptional circumstances.[93] However, no such rule regarding not granting judicial remand in the first instance exists in the Madras High Court rules.[94] Similarly, the Delhi High Court provides for the framing of charges,[95] whereas, the Madras High Court rules are silent on the same. Lastly, the Delhi High Court rules have a dedicated provision which talks about access to Lok Adalats and Legal Aid Clinics.[96] However, no such rule is present in the Madras High Court rules. Thus, having a uniform rule across India would resolve the inconsistencies and also eliminate the need of referring to multiple rules.

4. Privacy

Lastly, the problem of privacy will also persist. Since VC proceedings will happen online, the data will be in cyberspace. A person with adequate skills and potential may hack into these proceedings and access confidential information. Once the data reaches cyberspace, it is challenging to get rid of it. Recently, a court proceeding in Hillsborough, Florida highlighted that virtual proceedings may be prone to interference.[97] The virtual court proceedings were hacked, and some songs and pornography were played.[98] If such sensitive information is accessed and released online, then it may disrupt the proceedings of the court. Moreover, if a sensitive case is being heard in-camera through VC, then the hacker

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[90] *Supra* note 4, s. 178.
[91] Tamil Nadu Government Gazette, "The Madras High Court Video-Conferencing in Courts Rules, 2020" July 15, 2020, *available at:* http://www.hcmadras.tn.nic.in/VCCourtRules2020.pdf (last visited on Sept. 12, 2020).
[92] Delhi High Court, "Video Conferencing Rules", June 1, 2020, *available at:* http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_ULDC4UVQWZ9.PDF (last visited on Sept. 12, 2020).
[93] *Id.*, rule 11.1.
[94] *Supra* note 91, rule 6(1).
[95] *Supra* note 92, rule 11.1.
[96] *Id.*, rule 15.
[97] "Twitter hack teen's court date 'Zoombombed' with porn" *BBC News,* Aug. 5, 2020, *available at:* https://www.bbc.com/news/technology-53667664 (last visited on Sept. 8, 2020).
[98] *Ibid.*

may have access to confidential information regarding the witnesses and the case. Hence, it may compromise privacy on multiple facets.

To sum up, VC proceedings may lead to ineffective communication and reduced credibility. The loss of human touch can entail several losses, as discussed above. After integrating all such losses, it is inferred that the overall communication may lose credibility and effectiveness. This loss in communication directly impacts the interests of the parties.

III. RECOMMENDATIONS

The following recommendations are advanced for the consideration of the Criminal Law Reforms Committee. These recommendations will help in filling the gaps existing in VC proceedings in courts. VC proceedings are not a new thing; they have been employed at various stages in criminal as well as civil cases since 2003 after getting recognition in the judgement of *Praful B. Desai* case.[96] However, there exists no systematic data and study on the usage of VC in court proceedings in the context of India. Therefore, a pilot project in some districts courts needs to be instituted for research and evaluation, where the various negative impacts of VC may be monitored and noted. These data may be subsequently utilised to decide whether to continue VC in criminal proceedings or not. If the court is determined to continue them, then the question arises whether it should be used in every criminal case at every stage of pre-trial or trial or in limited case proceedings and some stages of the trial. Till then, VC proceedings in criminal cases should be employed only when they are necessarily required, like in cases in which there is a very high degree of risk to the lives of witnesses or defendants.

Furthermore, Poulin has suggested that judges should be trained and informed about the potential negative impact of VC by providing them with special education programs.[97] In the *Praful B. Desai* case,[98] the Supreme Court took the view that 'no prejudice, of whatsoever nature, is caused to the accused' in VC. As demeanour evidence of the accused and witnesses get recorded by VC, it will give a benefit of playback. The Court was of the view that this playback facility would enable better observation of demeanour, rehearing the deposition of the witness and better cross-examination.[99]

However, the discussion in the previous part of this paper clearly suggests that there exist grave issues concerning the interpretation of demeanour and cross-examination of witnesses as well as the remote accused. Thus, judges may be trained to understand the various issues that VC in criminal proceedings poses to enable them to understand the potential negative impact of VC in criminal trials. In addition to this, a standard set of

[96] *Supra* note 2.
[97] *Supra* note 54 at 1161-1162.
[98] *Supra* note 2.
[99] *Ibid.*

guidelines across all the courts should be drafted for VC, which will tackle the issue of lack of uniformity in rules for VC.

The infrastructural costs and technical snags need to be reduced. As mentioned earlier, it may lead to a loss of time of the court, which is a delay in justice. Hence, it can be reduced with the help of additional funding from the government. New VC guidelines, which will be standard for all the courts, should address the concerns of persons with disabilities, and try to solve them in the best possible manner. Persons with disabilities may be given an option to write and testify, or whatever is said to them should be shown in writing on a disability-friendly platform.

Lastly, during the examination of witnesses, the courts may ensure end-to-end encryption of the virtual proceedings. This may prevent unwanted interference by third parties. If it is not possible, then as a temporary measure, the courts should try to examine witnesses in the courtroom, rather than VC proceedings.

IV. CONCLUSION

In holding business meetings or taking interviews, an in-person meeting is preferred over VC even though it saves money, time, and effort as face-to-face meetings are more effective and also allow a better evaluation of a candidate appearing for a job as cameras are certainly not better than our eyes. However, in something as important as a criminal trial, in which a person's fate is to be decided, the courts have started employing VC in the name of efficiency, without considering the various issues that emerge from its use.

However, like most things, VC has both pros and cons. The primary benefit of VC is that it facilitates easier access to courts in cases where the accused is in jail or the witness is in a different city, state, or country. It is hassle-free since the additional requirement of going to court for each and every date is dispensed with because of VC. These benefits may motivate more people to come forward to access justice through courts. In light of these benefits, some of the issues may be tolerated. Nevertheless, it should be determined to what extent the usage of VC may impact a criminal trial.

VC may lead to an increase in the number of cases decided. However, we may possibly be losing the quality of justice, which is far more valuable than the quantity. VC affects the right to counsel, due process of law, the process of observing demeanour and overall a chance to get a fair trial. Thus, what needs to be determined is the cost of this efficiency and convenience, and if it is justified. Do the costs of VC outweigh its benefits?

The impediments addressed in this paper certainly need to be cured for an effective VC experience. Therefore, the recommendations of this paper are pertinent for ameliorating these impediments. As suggested, proper empirical research should be carried out to assess the impact of VC technology in criminal proceedings in India by

instituting a pilot project in some districts. In the meantime, the usage of VC in criminal cases should be limited, and the various aforementioned recommendations should be considered to alleviate the mixed negative impacts of VC in a criminal trial. These recommendations pave the way for the future. At the dawn of the technological era, VC can acquire a prominent position, with the implementation of the recommendations suggested in this paper.

DECODING THE CONVOLUTED NATURE OF RESTRAINTS UPON ALIENATION: A CHALLENGE TO THE CURRENT JURISPRUDENCE

Eeshan Krishnatria [*]

Recent developments have called into question the contemporary viability of the 13th century doctrine of 'restraint against alienation', especially due to its apparently anachronistic nature. The extent to which a person transferring property is permitted to restrict its subsequent disposal has presented a longstanding legal dilemma. Although this problem dates back to the Court of Chancery, it remains a grey area because of differing viewpoints adopted by courts across the world. Attempts to modify the doctrine have also been largely unsuccessful. In this article, the author has examined this doctrine and suggested changes to renovate it with a view towards the future. In Part I, the author introduces the doctrine of restraint and related scholarly contributions. In Part II, the author explains the incidental nature of the right to transfer, which is followed by an analysis of why restraining alienation is necessary in Part III. In Parts IV and V, the author presents arguments from opposing factions of the restraint debate and outlines the reasons for rejecting the doctrine. In Parts VI and VII, the author juxtaposes it with personal laws and discusses lease as an exception. The author concludes the article with recommendations and closing remarks in Parts VIII and IX.

I. INTRODUCTION

Since John Locke's 'social contract', there appear to be three universal rights - that of 'life, liberty and property'[1] - which are largely considered to be inalienable. This is the sole reason, says Locke, that people agreed to the idea of being governed. Thomas Jefferson tailored the three inalienable rights into the famous 'life, liberty and the pursuit of happiness'[2] in the American Declaration of Independence. In this article, the author addresses only the inalienable right of property, or more specifically, the wide spectrum of perspectives that either endorse the current jurisprudence of restraint against alienation or oppose this view. Now, Locke defined property in a very distinct sense. He said that

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[1] John Locke, *Two Treatises on Civil Government* (Prometheus Books, Amherst, N.Y., 1986).

[2] Carli N. Conklin, "The Origins of the Pursuit of Happiness" 7 *Wash. U. Jur. Rev.* 195 (2015).

whatsoever man 'removes out of the State that Nature [has] provided, and left it in, he [has] mixed his labour with, and joined to it something that is his own' thereby becomes his property.[3] However, the author, in his analysis, does not use Locke's definition of property, instead the analysis is restricted to the traditional notion of the term. Before a person claims that their rights have been violated, especially the right to acquire, hold, and dispose of property, owing to the operation of the law, the primary issue to be established is that the claimed rights pertain to the rights of property. Although Indian law does not categorically define property, the General Clauses Act can be referred to for the same.[4]

Prior to the enactment of the Transfer of Property Act, 1882, Indian courts relied mostly on English law and the principles of equity in determining cases related to the transfer of immovable property. Resultantly, there was a dissonance in the legal framework which was then remedied by the introduction of the Transfer of Property Act, 1882.[5] It can be inferred that the primary objective was to streamline the process of transfer of immovable property. Therefore, the concept of 'restraint on alienation' is in itself a contradiction to the original purpose of enacting this Act.

Alienation refers to the transfer of property — through gifts, sales and/or mortgages, tenements or other things — to another person.[6] An absolute right to dispose of the property indicates that the owner can sell it for a consideration or can donate it for charitable purposes. The extent to which a person transferring real property may limit its subsequent disposition by the transferee has been a contentious issue for the courts for a long time. 'Restraint on alienation is a restriction in a deed or will conveying real property on future conveyance of that real property'.[7]

'The concept of restraints against alienation seems to appear in the legal discussions among scholars of the English common law, which possibly even occurred before the Magna Carta itself.'[8] The current jurisprudence regarding restraint on alienation is based on the principle that property must not be left hanging. At common law, alienation refers to the voluntary transfer of the title of property by the current owner to a prospective purchaser.[9] However, the extent to which the property is transferred may put a cap on its subsequent dispositions by the transferee. Although, neither has this been conclusively answered nor have any tests been devised by courts to determine it. Also, there have been divergent outlooks regarding the logical integrity of the extent to which the provision of Section 10 of the Transfer of Property Act, 1882 ('TP Act'),[10] is to be applied in practice.

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[3] *Supra* note 1.
[4] The General Clauses Act, 1897 (Act 10 of 1897), s. 3(26).
[5] V.P Sarathi, *Law of Transfer of Property* (Eastern Book Company, 6th ed., 2020).
[6] Black's Law Dictionary (11th edn., 2019, Thomas Reuters).
[7] "Restraint on alienation" *Wex, Cornell Law School*, Apr. 2021, *available at:* https://www.law.cornell.edu/wex/restraint_on_alienation (last visited on Oct. 22, 2021).
[8] Theodore Plucknett, *A Concise History of the Common Law* 483 (Little Brown & Co., Boston, 5th edn., 1956).
[9] *Rathbun* v. *Allen*, 63 R.I. 109 (1939).
[10] The Transfer of Property Act, 1882 (Act 4 of 1882), s. 10.

Professor John Chipman Gray spearheaded this view of 'restraining against alienation', and published his volumes on the restraint on alienation of property primarily as an attack on the incremental gains of judicial allowances of the trust device, for which he presented cogent reasons.[11]

Paton has established and circumscribed the rights of an owner extensively in his works.[12] He clearly lists the rights of the owner, namely:

i. 'Power of enjoyment.
ii. Right of possession.
iii. Power to alienate, *inter vivos.*'[13]

It is in Section 10 of the TP Act that one is introduced to the concept of restriction against alienation.[14] This Section states:

> Where property is transferred subject to a condition or limitation which goes on to absolutely restraint the transferee, or any other person claiming under him, from parting with or disposing off his interest in the property, the said condition or limitation is void, except in case of a lease where the condition is for the benefit of the lessor or those claiming under him.[15]

There is also a proviso to this particular Section, which reads:

> Provided that, property may be transferred to, or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist) so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.[16]

Through various decisions of the courts, it has been firmly established that restraint against alienation can be void, inoperable, and unenforceable, particularly where the legal interest that is sought to be restrained is the fee simple interest in land.[17] The fundamental postulate is that all restraints on fees are inoperable. There are however, some restraints even in this case, but courts treat these as exceptions. This practice was upheld and justified owing to the doctrine of repugnancy in the United Kingdom in Coke upon Littleton, which is the first part of a series of legal treatises written by Sir Edward Coke, and by Chancellor Kent in the United States.[18] The test for the doctrine of repugnancy

[11] John Chipman Gray, *Restraints on the Alienation of Property* (Boston Book Company, Boston, 2nd edn., 1895).
[12] G.W Paton, *A Textbook of Jurisprudence* (Oxford University Press, London, 4th edn., 2007).
[13] V.D Mahajan, *Jurisprudence & Legal Theory* 288 (Eastern Book Company, 5th edn., 1987).
[14] *Supra* note 10.
[15] *Ibid.*
[16] *Ibid.*
[17] M. Dennistone, "Direct Restraints Upon Alienation of Fee Simple Estates – Covenant Against Occupancy by Negroes – Mead v. Dennistone Et Al." 2 *Md. L. Rev.* 374, 401 (1938); *K. Permanayakam Pillai* v. *S.T Sivaraman*, AIR 1952 Mad 419.
[18] Richard E. Manning, "The Development of Restraints on Alienation Since Gray" 48 *Harv. L. Rev.* 373 (1935).

was laid down in the landmark case of *M. Karunanidhi* v. *Union of India*,[19] where the factors determining repugnancy were held as follows:

a) There must be no ambiguity and the presence of a clear inconsistency, between the Central Act and the State Act is necessary.

b) Such inconsistency must not be rectifiable, except by way of rendering it repugnant.

c) The nature of the inconsistency must be such that both the acts are in complete dissonance, and the compliance of one will lead to the direct violation of the other.[20]

The doctrine of repugnancy is applicable here, as the estates in fee have the inherent quality of transferability. Ergo, seeking to grant the interest and at the same time, simultaneously deleting the essential quality of transferability is an exercise in futility, and it can be construed as an attempt to create a novel proprietary interest, which cannot exist in any way.[21]

However, *post hoc*, the doctrine of repugnancy, with its dependence on the existence of a fixed essence inherent on a proprietary interest,[22] seemed anachronistic as the model for free alienability of property, as it might have potentially created many hinderances. The restraints which are qualified by limiting them to a particular class are valid.[23] However, there is considerable diversity in the decisions as to how broad the excluded class may be.

II. CURRENT JURISPRUDENCE UNDERLYING RESTRAINTS UPON ALIENATION

The jurisprudence underlying Section 10 is that a right to transfer is incidental to and cannot be segregated from the *bona fide* ownership of property. As explained earlier, if there is an absolute restraint on that right, it is repugnant to the nature of the estate. The chief jurisprudence of Section 8 of the TP Act is that a grant, *prima facie*, transfers with it all the legal incidents thereof.[24] However, there is an option with the parties to modify the said grant according to their necessities and for the sake of pragmatism. This principle is resting on the maxim *modus et conventio vincunt legem*, which virtually translates to say that

[19] (1979) 3 SCC 431.
[20] *Ibid.*
[21] *Supra* note 9.
[22] Glanville L. Williams, "The Doctrine of Repugnancy of Gifts – I: Conditions in Gifts" 59 *Law Q. Rev.* 343 (1943).
[23] Sir Thomas E. Tomlins (ed.), *Lyttleton, His Treatise of Tenures* (S. Sweet, London, 1841).
[24] *Supra* note 10, s. 8.

the form of agreement and convention of parties to that extent overrides the law.[25] When a grant is modified by certain conditions or restrictions, primarily for the sake of equity, and the grant no longer carries with it all the legal incidents thereof, the transfer so exercised is a conditional transfer and the only distinguishing characteristic from an absolute transfer is that the latter carries all legal incidents with it at the time of transfer. While the authorities have provided divergent explanations of what 'direct restraint' actually entails,[26] it is commonly accepted that such devices are created when an attempt is made to impose positive restrictions on the essential right to alienate due to the acts of the parties.[27] In Coke upon Littleton, it has been eloquently deliberated:

> If a feoffment be made upon this condition, that the feofee shall not alien the land to any, this condition is void, because when a man is infeoffed of land or tenements, he hath power to alien the land to any man by power of law. For if such a condition should be good, then the condition should oust him of all the power, which the law gives him, which is against reason and therefore, such a condition is void.[28]

This small paragraph represents the entire jurisprudence of the school of thought which believes that restraints against alienation are, in many cases, unreasonable, and in other cases, a direct violation of the equity principle. Owing to its inherent impracticality, it is not sufficient that a piece of land is restricted from alienation solely for the purpose of not leaving a property without an owner. The High Court of Karnataka[29] has held that a grant made by the government cannot be considered a 'transfer' within the meaning of Section 5 of the TP Act.[30] Ergo, neither Section 10,[31] nor the rule against perpetuity will be applicable in this case. This is also true as Section 2 of the Government Grants Act states that no provision of the TP Act will apply to government grants.[32] The solution here, as has been worked out, is that a permanent restraint on the alienation of the grant, if applicable to the said grant, will be valid.[33]

The voiding of an attempted restraint lends to its nature as an action in direct dissonance with a grantor's intentions. Furthermore, the Court has developed a policy that works to validate the underlying conveyance, wherein an attempted restraint has the effect of being void.[34] Ergo, it may not be wise to presume that the intention of the grantor was to transfer, primarily because he would assume control in future conveyances, as this has the potential to render the conveyance of an interest vastly different from what was

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[25] Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press, 2011).
[26] L. Simes and A. Smith, *The Law of Future Interests* (2nd edn. 1956).
[27] Ralph S. Nelson, "Direct Restraints on Alienation in Iowa" 22 *Drake L. Rev.* 342 (1973).
[28] Charles Butler (ed.), *Commentary Upon Littleton* (J. & W.T. Clark, London, 1823), at s. 360 97b.
[29] *Chennappa* v. *The State of Karnataka*, AIR 1993 Kant 188.
[30] *Supra* note 10, s. 5.
[31] *Supra* note 10.
[32] The Government Grants Act, 1895 (Act 15 of 1895), s. 2.
[33] *Laxmamma* v. *State of Karnataka*, AIR 1983 Kant 237.
[34] *Laval* v. *Staffel* (1885) 64 Tex. 370.

originally intended. The courts, therefore shall define a restraint, what is not a restraint, and classify these categories as 'valid' and 'invalid'. In *In Re Parry and Daggs,*[35] L.J Fry said:

> It has been the practice that the courts take great caution and attempts to avoid any device which renders an estate inalienable. It is the policy of the laws to make an estate inalienable, and it is does not matter what the modus operandi is to prevent an owner from exercising their power of ownership.[36]

Underlying Section 10, that governs transfers to which the TP Act does not wholly apply, is the legislative intent of equity and good conscience.[37] This Section has no bearing on cases where, on transfer, a restriction is activated on the said property's alienation by the transferor himself. This is generally the case where the transfer of the said property is a partial interest, primarily in cases of mortgage. Here, it may constitute a clog on the equity of redemption. If the restraint is on the very mode of alienation, it will not be under the ambit, nor be subservient to this Section.[38]

However, free and seamless alienability is challenged in this article, chiefly due to economic reasons and the inability of the existing jurisprudence to accommodate progressive economic growth.

III. WHY RESTRAIN ALIENATION AT ALL?

There is a longstanding debate on why restraining alienation is necessary. In recent times, Susan Ackerman's Inalienability and the Theory of Property Rights provides invaluable insights into the subject of alienation and its gradual demise.[39] She raises anew the question of 'why must be there any restraint on alienation at all?'. However, this proposition is an extremely broad one. The right to alienate, as part of the bundle of property rights resting with the owner, is set in dissonance with the two other rights of possession and enjoyment. Also, it cannot be interpreted in a parochial manner, as the types of property that it circumscribes are potentially vast as it will subsume anything ranging from real property, personal property, tangible, and intangible property. Furthermore, each kind of property aforementioned could be alienated in a plethora of ways, some of which include alienation by sale, by mortgage, by bail, or even by hire; and these ways of alienation too may be restrained partially, or in some cases, wholly. This is possible as alienation may be subject to an absolute prohibition or it may be operable only on the payment of due sum of money. The validity of such a restraint must be checked against the touchstone of general

[35] (1886) 31 Ch. D. 130.
[36] *Id.*, at para. 134.
[37] *Ramchandraji Maharaj* v. *Lalji Singh*, AIR 1959 Pat 305, at para. 308.
[38] *Sridhar* v. *N. Revanna*, AIR 2020 SC 824.
[39] S. Rose Ackerman, "Inalienability and The Theory of Property Rights" 85 *Colum. Law Rev.* 931 (1985).

principles of law, and not by the underlying principles of the TP Act itself, except in cases where the principles underlying the Act, conforms to the general principles of law.[40]

A balancing of social interests may have resulted in the formation of the common law rule against perpetuity, admitting the engendering of subsequent interests, with adequate freedom, yet not allowing the use of these interests to affect non-transferability for an unreasonable period of time.[41] The rule against restraints on alienation was primarily directed against attempts to render the current or future vested interests inalienable. These attempts are generally seen in two forms. The first method is where the restraint is the insertion in the conveyance of a provision — that in the event of alienation, it shall result in forfeiture of the interests of the transferee. The second method of restraint is a provision which withholds the power to alienate from the transferee.

A restraint on alienation may be either partial or absolute. The latter form of restraint is decided in a plethora of cases to be void.[42] However, it is worth noting that in case of partial restraints, Section 10 of the TP Act is not attracted.[43] Regarding prohibition of alienation, the English cases are in dissonance with each other, as can be seen in the variation of judgments. It was observed that a condition to not alienate, save for some particular purchasers, is bad in law.[44] Conversely, it has also been held that a condition not to restraint, save from some particular persons, is a condition that is good in law, as was covered by Lord Ellenborough.[45] Even in India, there is a discrepancy, as the Court has held the condition to not restraint, outside of a particular class as valid.[46] Partial restraint is permitted in the current jurisprudence, predominantly in common law nations,[47] but there are certain caveats that this article seeks to explore and, possibly answer. The term 'condition' used in Section 10 of the TP Act,[48] refers specifically to a 'condition subsequent,' as defined in Section 31,[49] thereby working to divest an estate, which in practice has already been vested. 'This is construed by courts as a "condition subsequent" as here the effect of the said condition is to either enlarge or defeat an estate already created.'[50] 'It is not to be confused or juxtaposed with "limitation" wherein it delineates the nature of the estate created. Words signifying limitation, which point to an estate of inheritance, do not generally impose or imply a restraint on limitation.'[51] As to restrictions regarding a particular time, a condition restraining alienation during a lifetime, has been

[40] *Gummanna Shetty* v. *Nagaveniamma*, AIR 1967 SC 1595.
[41] Merrill I. Schenbly, "Restraints Upon Alienation of Legal Interests: I" 44 *The Yale L.J.* 6 (1935).
[42] Bhavani Amma Kanakadevi v. C.S.I. Dekshini Kerala Maha Idavaka, AIR 2008 Ker 38.
[43] *Jagar Nath* v. *Chhedi Dhobi*, AIR 1973 All 307.
[44] *Attwater* v. *Attwater,* (1853) 18 Beav 330.
[45] *Doe D. Gill* v. *Pearson,* (1805) 6 East 173.
[46] *Kannamal* v. *Rajeshwari*, MANU/TN/1438/2002.
[47] *Thomas* v. *Dr. A.A Henry*, (2008) 2 KLJ 316.
[48] *Supra* note 10.
[49] *Id.*, s. 31.
[50] Woodfall, *Law of Landlord and Tenant* 222, 223 (Sweet & Maxwell, London, 22nd edn., 1890).
[51] *Vinayak Moreshwar* v. *Baba,* (1889) ILR 13 Bom 373.

deemed to be invalid.[52] The test to determine the validity of the condition of alienation is whether the said condition substantially carries off the power to alienate. It must be construed as this 'test' having a determining factor of 'substance' and not of 'form'.

In working through this analysis, the author starts with the assumption that the fundamental function of all law relating to property is to protect the persons (especially, the transferee) and their property from fraud or illegal seizures of another. Yet, in the modern day, this system is under strict scrutiny from vigilantes with divergent opinions about the established law, primarily by those who believe that all individuals must exercise the right to some level of satisfaction for certain rudimentary wants, which may be achieved by some collective means.[53]

IV. AN ANALYSIS OF THE REASONS - 'FOR' AND 'AGAINST' THE RESTRAINT PARADIGM

In the process of forbidding restraints, both of the 'absolute nature' and the 'partial nature' on fee simple interest on land, the chief reason given by the courts goes back to what was expounded by Littleton and later adopted by Lord Coke and also could be found in the works of Chancellor Kent, but these reasons were ultimately found to be obsolete in the works of Professor Gray. Before Gray, the legal paradigm regarded perpetuities law as a significant part of the policy favouring free alienability of property.[54] The term 'perpetuity', at that time, was used to describe primarily only one form of restraint, i.e., the use of future interests, to regulate the devolution of wealth.[55] Gray systemises perpetuities law by depicting its reduction to a single rule and formalises perpetuities by treating it as a settled doctrine, which has its foundation stone in legal conceptions. He divorces perpetuities law from the purpose of promoting alienability, which was the accepted norm. Gray said, this was due to misconceptions, and it led to various practical problems.[56] Gray in his treatise also said that the true policy was to protect market value of present estates.[57] Therefore, after Gray's train of thought was considered in the legal sphere, the earlier conception of 'restraint' had started fading.

One of the main jurisprudential conflicts among scholars seems to be the one stemming from the fact that the restraint itself is repugnant to the nature of the fee, which is the current position in most of the common law nations. The argument that the law does delineate the nature of the estate in land, on which there are certain legal incidents

[52] *Rosher* v. *Rosher,* (1884) L.R. 26 Ch. D. 801.
[53] John Rawls, *A Theory of Justice* 9 (Harvard University Press, Boston, 1971).
[54] *Supra* note 8.
[55] Sir William S. Holdsworth, *A History of English Law* 215 (Methuen, London, 1926).
[56] *Supra* note 11.
[57] *Ibid.*

are attached, and cannot be altered by the individual grantor or testator, and an essential incident of a fee, of most estates *in genere*, happens to be alienability.[58]

Ergo, the estates which signify to be a fee, must not be in any situation be deprived of the said legal incident. Also, if in any case, the transferor seeks to restrict alienation, a complication is likely to arise, as new estates, except by way of legislative action cannot be possibly created,[59] and thus, what the transferor originally sought cannot be realised.

This is an intersection in the jurisprudence where there is a divergent view, which is primarily promoted by Professor Gray. He posited that that the aforementioned doctrine of repugnancy, as was justified earlier, is exclusively a brainchild of the common law system. It could be construed prima facie, that if repugnancy is the sole basis of the forbiddance of the restraint, it would not be sufficient to justify this, in the modern legal system.[60]

This perspective is a contrast to what was posited in Coke upon Littleton, where it was said that restraints against alienation with respect to a particular class are valid. However, it was conceded that it was a long-standing exception to the general principle. But Gray posited that the most effective method is that the conditions not to alienate the property for a particular class is good in law, whereas the conditions disallowing alienation, except to a selected class are void.[61]

In the analysis, the author does not find a compelling dissent to this view, as has been posited beforehand. Even several judicial decisions support the view that the concept of restraint against alienation should be tested on the touchstone of sound public policies and pay careful consideration at the genesis of such policies. A prohibition against alienation to members of a certain class may be exceedingly broad, and the scope of implementation will be lost. There is also an inverse possibility that since the class is very broad, the actual effect of the restraint is very meagre. Therefore, a sensible test to be applied here is one of reasonableness. The criterion for determination was laid down by Sir George Jessel, in deciding the case of *In Re MacLeay*.[62] He remarked that the test for determination is, 'whether the whole power of alienation had been substantially suspended'.[63]

[58] *Camp* v. *Cleary,* (1882) 76 Va. 140, at 143.
[59] *In Re: McNaul's Estate* (1902) 1 L.R. R 114.
[60] Raleigh C. Minor, I *The Law of Real Property* (University of Virginia, Charlottesville, 1908).
[61] *Supra* note 11.
[62] (1875) L.R. 20 Eq. 186.
[63] *Ibid.*

V. SCHOOL OF THOUGHT FOR OPPOSING THE COMMON LAW JURISPRUDENCE ON RESTRAINTS UPON ALIENATION

In this analysis, the author will make a bold claim and posit my opinion as being opposed to the current jurisprudence on restraint against free alienation of property. There is an exigent need to overhaul this system which promulgates the ability to alienate freely. This may be a shift in the current paradigm. However, it comes as a necessity. The justifications that I provide for this are manifold and have been enumerated below:

1. This system may hinder the commercial process and productivity by working against the most efficient use of the property possible by multiple manners, such as transferring to a new owner or improvements by the current owner.[64]
2. This system also has the propensity to concentrate economic prowess in the hand of the people already on top of the economic chain.[65]
3. This process also encourages a vicious circle, as a so-called 'side-effect,' as it permits for abuse by creditors by not allowing them to take a borrower's restrained property where it was the ownership of the said property which triggered the credit.[66]
4. There is also a threat in the current jurisprudence as it may allow for the will of the former owners to take precedence over the free autonomy of the current owners.[67]

As one can construe, the reasons that the author posits here are almost purely economical, but that is exactly what makes it that much more pragmatic to bring a change in our current jurisprudence with respect to Section 10 of the TP Act. Indian courts, in particular, need to keep these points in consideration. Many critics may term this analysis as being of a 'Marxist character',[68] but this is precisely where the author's assumption made before will serve its purpose, that is, the core function of the law is to protect the persons and their property. This protection is not only meant to be a passive protection, but the law plays an active role here, especially in countries like India, where the spirit of the law is best characterised as being a polar opposite to Robert Nozick's minimalist state.[69]

The rule against unreasonable restraints on alienation is primarily and solely laid upon public policy, and not on rights of the party upon whose property the restraint had been

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[64] Herbert A. Bernhard, "The Minority Doctrine Concerning Direct Restraints on Alienation" 57 *Mich. L. Rev.* 1173 (1959), at 1179-80.
[65] *Id.*, at 1180.
[66] Scott Grattan, "Revisiting Restraints on Alienation: Public and Private Dimensions" 41 (1) *Mon. L. Rev.* 69 (2015).
[67] *Ibid.*
[68] Leszek Kolakowski, *Main Currents of Marxism: The Founders, The Golden Age, The Breakdown* (W.W. Norton & Co., New York, 2005).
[69] Robert Nozick, *Anarchy, State and Utopia* (Basic Books, New York, 1974).

imposed. Behind this rule is the belief that there must be progress. In this respect, the property in question must be put to its highest and best use.[70] If it is actually put to its highest and best use, and the present owner of the property is allowed to sell the said property, it will be sold to others who may use the property more effectively and productively. Also, on the contrary, the law must, and does take consideration of the need for some restraints, that may arise from time to time. 'Ergo, the rule that must be adopted is not that all restraints are prohibited, but the most intelligible approach, is to strike a balance, between 'reasonable' and 'unreasonable restraints,' and only the latter must be censured and prohibited.'[71]

It is reasonably viable to justify a higher degree of liberality in upholding the restraints on free alienability, in lieu of certain equitable interests, which are primarily two.

Firstly, a restraint on an asset, and consequently on its equitable interest, does not render the said property unmarketable, since the trustee may possess the ability to transfer said asset free of trust, especially wherein the subject matter is an interest in land, in which case, it is not necessarily from the stream of commerce. *Secondly*, persons dealing with the owner of an equitable interest may not place reliance upon the ownership, as such interest may not be legal, as a result of which there might be some reluctance.[72]

When property is transferred to several devisees as tenants in common, and partition is forbidden for a definite and particular part of time, the courts have, in the past, held these restrictions as valid.[73] There have been arguments that since there was never any right to partition at common law, therefore, this is apparently akin to the restraints on the separate estates of married women, which are valid in law.[74]

The countries which have retained the partial restraints generally take the path of repudiating the idea of repugnancy and only lie in support of the policy of their jurisdictions, declared either legislatively or judicially, to abandon the feudal property law, in the paradigm of a brand-new infrastructure. There are other diverse arguments that since property belonged to the grantor and the grantor himself is not under any real obligation to part with his asset to any particular devisee, this provides a very compelling reason for the grantor to impose such restrictions on the asset.[75]

In the modern day however, there are a few justifications that are painted on the canvas as policy reasons for striking down restraints on alienation. This economic or efficiency justification for opposing the unreasonable restraints on alienation acts as a bridge

[70] Kerry M. Jorgensen and Stephen F. Fanning, "One Step Further- Implementing the Recommendations of Guide Note 12" *The Appraisal Journal* (2013), at 218.
[71] *Libeau* v. *Fox,* (2006) 892 A.2d 1068.
[72] W. Barton Leach, "Powers of Sale in Trustees and the Rule Against Perpetuities" 47 *Harv. L. Rev.* 948, at 953, 955 (1934).
[73] *Porter* v. *Tracey,* (1917) 197 Iowa 1295.
[74] *Cahill* v. *Cahill,* (1901) 62 N.J. Eq. 157 Atl, at paras. 809, 810.
[75] *Nichols* v. *Eaton* (1875) 91 U.S 716, at 726.

connecting traditionally divergent concepts of 'public' and 'private'.[76] The latter is usually used to signify that which is in the realm of individual preferences. Where the owner can freely alienate their property through the exercise of mutually beneficial exchange, there can be an efficient acquisition of the said property by the subsequent owner through payment. In this manner, there is satisfaction of the buyer's selective individual preferences. Such a consensual transaction of the freely alienable property has a public benefit to it as well. Applying resources to their most productive use has a wide setting benefit to the society *in genere*.[77]

Of course, satisfying the selective preferences of the current owner and the prospective subsequent owner, by allowing the free transfer of an asset without any kind of restriction on the said asset's alienation amounts to defeating the purpose of the party, who would in a parallel circumstance, have had the utility of the restraint. However, the economic efficiency achieved by the free transfer of the asset justifies such outcome.[78]

A few courts oppose the validity of the said restraints *in toto*, which is also supported by leading jurists around the world, one of whom is Chancellor Kent. The primary case here is *Jenne* v. *Jenne*,[79] wherein the Court invalidated a limitation upon alienation. This was principally supported in *Morse* v. *Blood*,[80] where the Court held a restraint of transfer to members of the testator's family as void.

Although courts do strike down unreasonable restraints as inoperable in law, there is a recent propensity to find such restraints as valid, especially in the Indian courts. 'The primary mechanism for so holding is by way of the principle, which purports that a restraint which gives effect to a legitimate collateral purpose is valid.'[81]

In my analysis, I have found Gregory Alexander's perspective to be the most viable, both economically, logically, and also from a jurisprudential standpoint of 'future-proofing' the concept of restraint against alienation. As an alternative to the general characteristic of property, that is, 'wealth-maximization', he uses the term 'property as propriety',[82] and not 'property as commodity'.[83] His conception of property has as its core the idea that a proper society is more than what emerges solely from market relations. He says that the market-based conception of society is essentially empty, and on the other hand, the proprietorial concept has a mapped-out view of how the society should be ordered.[84]

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[76] *Supra* note 64.
[77] Richard A. Posner, *The Economics of Justice* (Harvard University Press, Boston, 1981), at 60, 61.
[78] Richard A. Epstein, "Past and Future: The Temporal Dimension in the Law of Property" 64 *Wash. U. L.Q.* 667 (1986), at 704-05; Richard A. Epstein, "Why Restraint Alienation" 85 *Colum. L. R.* 970 (1985), at 973-83.
[79] (1961) 271 Ill. 526.
[80] *Morse* v. *Blood*, (1897) 62 Minn. 442.
[81] *Supra* note 62.
[82] Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought* (University of Chicago Press, Chicago, 1997).
[83] *Ibid.*
[84] *Id.*, at 3.

The economic expression of this preference-based conception of property is 'commodity'. Property satisfies individual preferences primarily through market exchange or alienation. This is inferred from observing common practices. Therefore, this led to property being synonymously viewed as 'commodity'. However, Gregory Alexander says that this was not the primary way of understanding property. Property as propriety was the understanding that preceded it. This flowed from the basis that property is the material foundation for creating and maintaining proper social order. Proprietaries are not to be understood as anti-market, but they seek to reconcile propriety with the existence of the market.

VI. THE LANDSCAPE OF HINDU AND MOHAMEDAN LAW JUXTAPOSING THE EVOLUTION OF THE 'RESTRAINT AGAINST ALIENATION DOCTRINE'

The condition of restraining alienation in its absolute form is forbidden as has been laid down in Section 10, this is in consonance with both Hindu and Mohammedan law. Under Hindu law the restraint is void even in the form of a will[85] or a gift.[86]

Many of the earlier cases were decided on the touchstone of this very Section, even prior to the amending Act, which rendered this Section automatically applicable to the Hindus.[87] This is also true in the paradigm of Mohammedan law,[88] wherein this condition in restraint to alienation, specifically if the asset is attached to a gift, is void. However, like in other legal conundrums, there are several discrepancies regarding certain decisions of the courts.

Although it is well understood that the courts have to apply their mind and discretion and inspect into the nuances of the facts and circumstances of each unique case, a complete departure from the established jurisprudence is generally avoided. Perhaps the most used form of restraint on alienation is a restraint on use, placed within a conveyance. 'Use restrictions' are fairly common in residential leases and basically provide for a condition such as, 'The premises is not to be used for commercial purposes, and must only be used for residential purposes.'[89] There is a clear dissonance in the case of *Mohhamad Raza* v. *Abbas Bandi Bibi,*[90] where a Muslim widow was restrained from alienating the asset to a person outside her family resulting from a compromise and the Court established firmly that a 'compromise' does not amount to alienation, and ergo, the said restraint on

[85] *Lalit Mohun Singh Roy* v. *Chukkan Lal Roy*, (1897) 24 Cal 834.
[86] *Rukhminibai K. Tambvekar* v. *Laxmibai N. Tambvekar*, (1920) 22 Bom L.R. 254.
[87] *Ambalal Shankarlal* v. *Baldeodas Chhaganlal*, AIR 1947 Bom 191.
[88] *Babu Lal* v. *Ghansham Das*, AIR 1922 All 205.
[89] F. Elliot and A. Leopold, *West's Texas Forms* 15 (1981), ss. 12.27, 12.38.
[90] (1932) 34 Bom L.R. 1048.

the alienation is valid in law. One can clearly see that courts swing back and forth regarding the stance on the jurisprudence regarding alienation. There has been an evolution of the concept of restraint in a holistic manner, however, it is elusive as to what that evolution actually is, primarily due to the divergent logical postulates provided by the courts.

The common law practice that a woman's property upon marriage is passed on to the husband in the capacity of him being the owner, was abrogated in 1886, in lieu of the Indian Succession Act.[91] Later, in settlements designed to build a more equitable machinery, *ipso facto,* this clause was given statutory recognition and was retained in the Indian Trusts Act.[92] The High Court of Calcutta has held that these provisions have enabled a creditor to enforce his/her claims, specifically against an asset which a married woman is restrained against alienating.[93] This logical derivation can also be seen in a Bombay High Court decision given by Justice Farran.[94]

VII. LEASE AS AN EXCEPTION TO THE GENERAL RULE

A lease has been seen by the courts as an exception to the general rule of restraint, specifically of the absolute form of restraint, and it has been clearly delineated in Section 10 of the TP Act. Since a lease is for a particular time frame, even though it could extend up to perpetuity with the lessor retaining interest, ergo, the very nature of 'lease' demands that an exception to the general rule is created. This exception will apply even if the lease is of a permanent nature.[95]

The wording and nomenclature used in the Section, 'when the condition is for the benefit of the lessor or those claiming under him' seem to intimate the reason or justification for the said exception. In India, it has been held that such a restraint is bad in law, unless the party in question holds a right of re-entry.[96] However, a discrepancy does elude the Indian jurisprudence, even in this aspect, as there is a lack of consistency in the ratio of certain judgments. The aforementioned ratio was not followed as a precedent in a Madras High Court case on the ill-founded ground that all restrictions act for the benefit of the lessor and therefore the assignment was not held to be invalid.[97] The earlier cases, regarding this aspect of law has almost become obsolete and anachronistic in the author's opinion, as some of these cases were not correctly decided and consideration to equity was missing. The Bombay High Court opined that a condition, in case of alienation by the

[91] The Indian Sucession Act, 1865 (Act 10 of 1865), s. 4.
[92] The Indian Trusts Act, 1882 (Act 2 of 1882), ss. 56, 58.
[93] *J. Hippolite* v. *C. Stuart,* (1886) ILR 12 Cal 522.
[94] *Manekji Rustomji Bharucha* v. *Nanabhai Cursetji Bharucha*,(1929) 31 Bom L.R. 969.
[95] *Raja Jagat Ranvir Mahesh Prasad Singh* v. *Baqriden,* AIR 1973 All 11.
[96] *Udipi Seshagiri* v. *Seshamma Shettati*, (1920) 61 Ind. Cas. 658.
[97] *Parameshri* v. *Vittappa Shanbhaga*, (1903) ILR 26 Mad 157.

lessee, will render the lease void.[98] The author believes that this decision is not very scholastic as there is a requirement of a right of re-entry to be reserved, otherwise on the breach of such a condition, the only viable option with the lessor is to apply for an injunction.

However, an alienation that was involuntary, will not constitute a violation of the said condition in a lease agreement. An assignment, within the operation of law, such as the likes of sale in execution, or a sale of the official assignee, or even a sale of the property of a company by an official liquidator,[99] will not be considered as a violation of such a condition in the lease agreement.

This was made clear by the subsequent amendments in Section 111(g) of the TP Act, by Act 20 of 1929, which provided that a breach of a condition against alienation will not operate a forfeiture, unless the condition provided in the lease agreement reserves a right of re-entry.[100]

Ergo, one can construe that there is an ambiguity, which is rather nebulous in this particular aspect of law. There is a sound and cogent justification to allow for this exception, as otherwise, the interests of the lessor would be disregarded, and to allow such a condition in a lease agreement was the only pragmatic manner of defending the lessor's interests.

There is another exception in the case of married woman, by the name of 'doctrine of coverture'. Under coverture, a married woman had no legal persona, to the effect that she could not sue or be sued, nor she could buy or sell property, separately from her husband.[101]

However, now there has been a shift in the institution of marriage, towards a more equitable paradigm, and as a result, the doctrine of coverture has been losing relevance. Justice Indu Malhotra, in *Joseph Shine* v. *Union of India* stated that the doctrine of coverture is not recognised by the Constitution, as the woman is deprived of her rights and her own individual identity, and that it is also violative of a woman's fundamental rights.[102] Therefore, this doctrine has effectively become void.

VIII. RECOMMENDATIONS FOR THE FUTURE

The doctrine of 'restraint upon alienation' is a 13th century doctrine, which is still in force and practiced by courts. At this juncture, it seems appropriate to explore and re-examine

[98] *Vyankataraya bin Ramkrishnapa* v. *Shivrambhat bin Nagabhat*, (1883) ILR 7 Bom 256.
[99] *Subbaraya Kamti* v. *Krishna Kamti*, (1883) ILR 6 Mad 159; *Tamaya Bin Anaya* v. *Timapa Ganpaya*, (1883) ILR 7 Bom 262.
[100] *Sakunthalammal* v. *Chandrasekar Reddiar*, AIR 1968 Mad 195.
[101] Allison Anna Tait, "The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate" 26 *Yale J. Law. Fem.* 165, 167 (2014).
[102] (2019) 3 SCC 39.

the public policy, which led to the voiding of restraints and lent its continuous support to the doctrine. Presently there is a need to modify and evolve the requirements of this doctrine to be compatible with the 21st century.

According to Powell, the voiding of restraints is an efficient and effective tool and has a firm control upon 'a common human frailty which causes each person to believe that he knows what will be desirable in the future better than those who will then be living'.[103] But as a collateral of this liberalisation process of trust laws, the 'dead hand control' has been made rather ubiquitous.[104] This is being cropped out as a new breed of control, chiefly in the United States, that is rather undesirable. While it is conceded that the doctrine of restraints came into existence to ensure that property would not fall off from the stream of commerce, it must be considered that such a policy, in an environment of complex business transactions may no longer be adequately justified.[105]

There is a lack in the interpretation of this particular doctrine by the courts, as they have failed to put to consideration the cardinal principle of 'freedom of contract' and the relationship it holds to promissory restraints.[106] The Chancery Court had opined that there exists no public policy against partial restraints on alienation and have firmly established that there are certain policy considerations which validate their use.[107] The validity and the reasonableness of a particular agreement between two parties, even in the absence of this doctrine, would not be compromised.

> These standards are now maintained globally, with the use of anti-trust laws and fair trade standards, where specific rules have been codified and is used to govern such agreements, rather than using a plethora a nebulous common law principles and doctrines.[108]

Ergo, it facilitates a segue to abandon the existing common law principle of restraints against alienation and evolve seamlessly to the more cogent and equitable paradigm, where such agreements are subject to modern laws. This perspective renders the continuity of the current doctrine of restraint upon alienation futile and does not justify its continuing existence.

Keeping all things in consideration, there is a need for new devices which will function as either indirect or even direct restraints on alienation and it is absolutely cardinal that the courts keep an open mind when examining these new devices and are not intertwined by the restrictions of the current doctrine of restraint on alienation.

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[103] Richard Powell, *The Law of Real Property* 839 (S. Fetters rev. ed., 1987).
[104] Vernon, Texas Statutes and Codes Annotated (Vernon, 1984), s. 112.035.
[105] Michael D. Kirby, "Restraints on Alienation: Placing a 13th Century Doctrine in a 21st Century Perspective, 40 *Baylor L. Rev.* 413 (1988).
[106] Ibid.
[107] *Hinshaw* v. *Wright,* (1928) 124 Kan 792.
[108] *Supra* note 104 at s. 15.05.

IX. CONCLUSION

If public interest is being served by exercising free alienation of property; restraint of alienation, due to the whims and caprice of the owner of the said property, will function against the said interest.[109] If however, there is a presence of a desirable and viable interest, certain equitable and commercially friendly safeguards shall be permissible and the Courts shall not adjudge such restraints to be void.[110]

In application of the test of 'reasonableness', there is to an extent, an intention of the courts to make distinctions of policy. However, at this juncture it cannot be definitively concluded and this intention might later prove to be ostensible, as recently, there is a propensity of the courts to place reliance upon 'general rules of thumb' and to avoid an effective and real analysis of the underlying interests which are largely dissonant with each other.[111] It is neither helpful nor progressive, when the court cites that there is no violation of existing policy, or even that some other policy supports this restraint.

Since there are commercial and economic interests involved within the ulterior skeleton of the law of restraints, it becomes increasingly imperative for the legal community, inclusive of, and especially by the judges to examine and juxtapose the benefits with the losses and to objectively assess the merits of the gradual metamorphosis. There must be greater focus on these issues and the jurisprudence shall evolve to resolve the underlying challenges such as doing away with fictional virtues of qualifications, rather than always addressing the *prima facie* issues.

Finally, the only cardinal aspect of judicial interpretation of the nebulous concept of restraints upon alienation are the characteristics of consistency and predictability. Since this sphere of law directly affects the conveyability and eventual marketability of an asset, the planning of commercial and personal features is directly based upon the laws regarding such conveyance and distribution of property. Since the society in general strives to be dynamic, the legislature must adopt more favourable laws and interpretations of those laws, to be compatible today, in the interests of continuity and to provide a stable milieu for progress, both in an equitable and economic sense.

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[109] *Supra* note 8.
[110] *Ibid.*
[111] *Ibid.*

LIABILITY OF E-COMMERCE PLATFORMS FOR INTELLECTUAL PROPERTY INFRINGEMENT VIS-A-VIS INTERMEDIARY LIABILITY: NEED FOR A RECTIFIED APPROACH

Ashish Mishra and Siddhant Lokhande [*]

In recent decades, intermediaries have become a crucial element in facilitating various online services. Among these service facilitators, e-commerce intermediaries have become an active part of our daily commerce. Hitherto these intermediaries have been envisaged to passively facilitate exchange of various services and accordingly, considering their passive role, intermediaries have been vested with several safeguards to preclude them from any liability arising out of third-party acts due to which these entities often become a haven for intellectual property infringements. But with the changing nature of the involvement of these intermediaries, a need for reassessing the standards of liability is inevitable in order to effectively curtail intellectual property infringements. This paper attempts to scrutinise the extent to which these safe harbour provisions could be claimed by the intermediaries in the context of emerging jurisprudence and judicial trends, and also evaluates the circumstances under which the immunity needs to be withdrawn. Further, this paper makes a case for imposition of liability in case of failure to exercise due process while performing their duties. Additionally, an attempt has been made to understand the provision for intermediary liability under various jurisdictions. The authors conclude by proposing that the harmonisation of international standards by elimination of major differences and formulation of an objective standard for asserting liability upon e-commerce intermediaries is the most efficacious solution to the problem.

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I. INTRODUCTION

Internet is the most dynamic tool of the 21st century with a myriad of applications to it, which has led to a drastic increase in the flow of information throughout the globe. As a result, it has become the epicentre of human existence and has been a catalyst in the process of development to a great extent. Due to its convenient nature, internet has increased global connectivity, but this has led to the genesis of modern-day quandary as well. It is important to understand that the modus operandi of internet is very complex, and this complex structure has given rise to the problem of liability of 'internet intermediaries'. Even though it may not seem like a predicament but in the context of the modern intellectual property ('IP') law, it has stirred up a hornets' nest and has been one of the most contentious issues for a long time.

In present times, the role of internet intermediaries is becoming irreplaceable as they provide services that facilitate the use of internet, due to which these intermediaries have been catapulted to an unprecedented level of prominence. These intermediaries include search engines, social networking platforms, and other essential service providers. They are defined in Section 2(w) of Information Technology Act ('IT Act') as:

> Any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, web housing service providers, search engines, online payment sites, online auction sites, online marketplaces and cyber cafes.[1]

The online IP rights infringement in the contemporary era takes place far out of the reach of the right holders. In most cases, violators responsible for many copyright infringements have been noticed to be beyond the jurisdiction of the right holder.[2] For instance, if a person in Haiti infringes the IP rights of a person living in India by uploading content on an intermediary platform, it becomes tedious for the Indian right holder to catch the actual infringer, apart from the jurisdictional dilemma. Here, the Haitian authorities will have to show the political will to prosecute the infringer. It has been observed that in such cases, the internet intermediaries have been the targets of the rights holders as it is quite obvious that chasing individual infringers is futile.[3] This has brought to the forefront the question of liability of these internet intermediaries.

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[1] The Information and Technology Act, 2000 (Act No. 21 of 2000), s. 2(w).
[2] Ruth L. Okediji., "The International Copyright System: Limitations, Exceptions And Public Interest Considerations For Developing Countries" 2 *International Centre for Trade and Sustainable Development* (2006).
[3] Tatiana Eleni Synodinou (ed.), *Codification of European Copyright Laws: Challenges and Perspectives* 203 (Kluwer Law International, The Netherlands, 2012).

A. The Stakeholders Involved

There are three major stakeholders with incompatible set of interests whose contentions have given rise to different narratives, thus shaping the larger debate with regard to the issue at hand. The first stakeholders are the copyright holders who have always wanted to hold the intermediaries liable as it has always been their argument that even if the intermediaries, and in this case e-commerce websites, may not directly solicit the infringement, they do facilitate the infringement to a certain extent, and they should be held liable to that extent. The intermediaries, who are the second stakeholders, have countered this line of argument based on the assertion that they are just providing a medium and if they are held liable, it would be akin to scapegoating the agent, since it is convenient to do so rather than identify the actual perpetrator. The final stakeholder is the end-user, that is in simple terms, the public at large. The arguments of the rights of the end users, a fair and equitable information society, and promotion of e-commerce are entangled within the larger debate.[4]

B. Understanding the Problem

The facilitator role of an intermediary is limited to creating a platform for interaction, but the question that needs to be evaluated is whether the liabilities arising from this interaction can be asserted on these platforms and if yes, then to what extent, considering the limited role that e-commerce sites play. In contemplation of this role, intermediaries are provided with safeguards under the legislation giving immunity against any liability that arises due to third-party generated content. This immunity from liability is referred to as 'safe harbour.'[5] The safe harbour provision in Indian context is envisaged under

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[4] European Commission, Commission Staff Working Paper, "Online Services, Including E-Commerce, in the Single Market" (Jan., 2012) *available at:* https://op.europa.eu/en/publication-detail/-/publication/2d17d3dd-4f00-4e3c-b75c-98c03b135047/language-en (last visited on Oct. 1, 2021). Also, see Tim Wu, "When Code Isn't Law" 89 *Virginia Law Review* 111 (2003).

[5] *Supra* note 1, s. 79 "Exemption from liability of intermediary in certain cases - (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him.
(2) The provisions of sub-section (1) shall apply if--
(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or
(b) the intermediary does not--
(i) initiate the transmission,
(ii) select the receiver of the transmission, and
(iii) select or modify the information contained in the transmission;
(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.
(3) The provisions of sub-section (1) shall not apply if--
(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;
(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.
Explanation. -- For the purposes of this section, the expression 'third party information' means any information dealt with by an intermediary in his capacity as an intermediary."

Section 79 of the IT Act.[6] Due to such safe harbour provision, e-commerce websites *per se* are not answerable for actions of buyers and sellers on their portal. Further, as Section 79[7] begins with a non-obstante clause, the said provision will prevail over any other legislation including the Copyright Act, 1957 ('Copyright Act'), the Trademark Act, 1999, etc. Thus, the intermediaries are in most cases totally exempted from liability and tracing the real violators is a tedious process, due to which no one is held liable for the infringement.[8] The safe harbour provision, however, does not give absolute immunity to these intermediaries. In order to ensure that this commercial freedom does not result in infringement of IP rights, the judiciary has time and again placed limitations on immunity for intermediaries. The limitations are necessary to ensure IP protection in online markets. However, due to the large amount of data and millions of users, protection of IP rights in the online market becomes very difficult. This calls for a need for reasonable construction of safe harbour provisions to make these intermediaries more responsible, considering the ardent need for streamlining the current IP regime with needs of the present times.[9]

1. Nature of the problem

The nature of IP law has evolved to become international, and the general lack of harmonisation of laws throughout the world has led to actual perpetrators evading liability, due to which there has been an outcry to hold the intermediaries liable. Evidently, there is overall legal uncertainty surrounding the issue because the standards for attribution of liability for IP infringement vary from country to country. Furthermore, within the framework of national laws, the tests relied upon by the courts are largely unreasoned and open-ended, due to which the resulting lack of objectivity overshadows the issue.[10] It is, therefore, apparent that the most cogent solution would be significant reforms and harmonisation of these laws across various jurisdictions. IP infringement being a tort in itself,[11] the genesis of the solution can be through a thorough analysis of the existing framework of the tort law which has evolved across centuries. By harmonisation, we do not mean unification but rather elimination of major differences and creation of a minimum objective standard.[12]

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[6] *Ibid.*
[7] *Ibid.*
[8] Pritika Rai Advani, "Intermediary Liability in India" 48 *Economic and Political Weekly* 120-128 (2013).
[9] Aakanksha Kumar, "Internet Intermediary (ISP) Liability for Contributory Copyright Infringement in USA and India: Lack of Uniformity as a Trade Barrier" 19 *Journal of Intellectual Property Rights* 272-281 (2014).
[10] Christina Angelopoulos, "Beyond the Safe Harbours: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe" 3 *Intellectual Property Quarterly* (2013).
[11] Steven Hetcher, "The Kids are Alright: Applying a Fault Liability Standard to Amateur Digital Remix" 62 *Florida Law Review* 1275 (2010); Also, see Assaf Jacob and Avihay Dorfman, "Copyright as Tort" 12 *Theoretical Inquiries in Law* 59 (2011).
[12] W. J. Kamba, "Comparative Law: A Theoretical Framework" 23 I*nternational and Comparative Law Quarterly* 501 (1974).

C. Scope and Structure of the Paper

Now that the subject matter of the research paper has been extensively explained, it is necessary to analyse the scope of this analysis. The paper shall analyse the extent of the liability of internet intermediaries, specifically of e-commerce websites, for online IP infringement. Intermediaries include various types of service providers and sites, but the paper shall focus on a certain category of intermediaries with a market of USD 38.5 billion in India alone, i.e., the e-commerce market.[13] In this burgeoning industry, especially in India, which has second highest internet users in the world,[14] there is an ever-proliferating probability of infringement, and the lack of clarity surrounding the regulation increases the problem. The recently notified E-Commerce Rules define an e-commerce platform as any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity.[15]

Currently in the e-commerce sphere, liability of companies arises from the idea that the nature of the acts can be classified under the head of secondary or contributory infringement. This is because e-commerce companies only act as intermediaries and actual infringement arises from the third-party – the primary infringer. But it is pertinent to reassess such a proposition in light of the arguments put forth by the copyright holders, and that will be the effort throughout the paper. The paper will also attempt to evaluate the concept of accessory liability in the context of action of intermediaries. Also, the principles which safeguard the intermediaries (Section II) and the standards of liability of an intermediary (Section III) will also be discussed. The primary focus of the paper will be in India, but the stance in other jurisdictions will also be examined (Section IV).

D. Understanding Certain Ancillary Concepts

Before we move ahead it is imperative to understand the meaning of 'accessory liability'. When a person does not commit the tort but contributes to the commission of the tort by someone else, it is known as accessory liability, in the broad sense of the term.[16] There have been many attempts to outline an objective test for imposing such a liability, but to no avail. This concept is not largely theorised and has not been directly applied by the courts, at least in India. But surely, borrowing the basic attributes of this liability seems imperative to reach a viable solution. Now, accessory liability which will be analysed in the paper will be limited to internet intermediaries as defined under Section 2(w) of IT Act.

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[13] India Brand Equity Foundation, "Indian E-Commerce Industry Report" (Mar. 2021), *available at*: https://www.ibef.org/industry/ecommerce.aspx (last visited on Mar. 14, 2021).
[14] Abhijit Ahaskar, "India has second-largest population of monthly active internet users: report" *Mint*, Sept. 26, 2019, *available at*: https://www.livemint.com/technology/tech-news/india-has-second-largest-population-of-monthly-active-internet-users-report-15695005915 81.html (last visited on Mar. 14, 2021).
[15] Consumer Protection (E-Commerce) Rules, 2020, Rule 3(b).
[16] N. McBride and R. Bagshaw, *Tort Law* 860 (Pearson, United Kingdom, 4th edn., 2012); Also, see Paul S. Davies, *Accessory Liability* (Hart Publishing, United Kingdom, 1st edn., 2015).

In cases of e-commerce, a defence that is often claimed apart from the 'safe harbour' provision is the application of the doctrine of 'first sale', which refers to the principle of 'exhaustion of trademark rights or copyright' once the goods have been lawfully procured/bought.[17] These dual safeguards act together to enable e-commerce platforms to avoid any IP infringement liability. Therefore, it is imperative to formulate a test for evaluation and ascertainment of reasonable knowledge of such infringement on part of the intermediary. This paper attempts to balance the contentions made by the right holders and the intermediaries to make a case for the need to extend scope of liability so as to include actions of e-commerce platforms.

II. PRINCIPLES SAFEGUARDING INTERMEDIARIES

The current regime, which safeguards intermediaries, is based on the six principles set in the Manila Conference, referred to as the Manila Principles.[18] These principles act as an outline for any legislation which attempts to regulate intermediary liability.

The very first principle in this regard is: 'Intermediaries should be shielded by law from liability for third-party content.'[19] This principle is envisaged to safeguard intermediaries, considering their role to be passive in nature and limited to providing a medium for interaction between third-party uploaders and recipients. Thus, it postulates for creating a safe harbour for the protection of the intermediary which, in the case of India, could be traced to Section 79 of the IT Act. Section 79(1) provides for non-liability of an intermediary for any third-party information, data, or communication link made available or hosted by it.[20] However, this immunity is not absolute but rather conditional on the nature of the intermediary. The courts in cases like *Christian Louboutin SAS* v. *Nakul Bajaj,*[21] where the defendant, an e-commerce intermediary, was accused of unauthorised selling of the plaintiff's products, have held that instances where intermediaries actively conspire, abet or aide, or induce commission of unlawful acts on their website, cannot go scot-free. The implications of this case will be discussed in detail in the next section of the article.

The second principle for the intermediary protection is: 'Content must not be required to be restricted without an order by a judicial authority.'[22] This principle is envisaged to provide the intermediary a free platform and exemption from proactive monitoring

[17] Lalitha Nandula, "Delhi High Court Excludes Safe Harbour Protection for E-Commerce Platform" 14 *Journal of Intellectual Property Law & Practice* 665–666 (2019).
[18] Electronic Frontier Foundation, "Manila Principles on Intermediary Liability" (Mar., 2015) *available at:* https://manilaprinciples.org/index.html (last visited on May 31, 2021).
[19] *Ibid.*
[20] *Supra* note 5, s. 79(1).
[21] 2018 (76) PTC 508 (Del).
[22] *Supra* note 18.

measures for content which might be unlawful and needs to be removed. In India, Section 79(3)(b) is based on this principle, and it creates a need for 'notice and take down' to an intermediary in a scenario where the content is unlawful and required to be taken down.[23] Thus, an intermediary is required to act on any unlawful content only upon receiving actual knowledge, through a court order or a notification from the appropriate government or its agency. Even individual IP right holders may provide such actual knowledge to the intermediary. Rules 3(d) and (g) of the Intermediary Guidelines of 2021 as well mandate actual knowledge on part of the intermediary.[24] Therefore, the intermediary can also act on actual knowledge provided by affected individuals and not only on court orders or a notification from the government or its agency, under Section 79(3)(b). Further, limited need of self-assessment and mandatory takedown only after receiving a notice from an appropriate authority or from the IP right holders, in case of infringing content, increases the scope for infringement as there is practically no oversight on the products being sold on the platform. Also, Section 81 provides for a limitation on the safe harbour provision by authorising an IP holder to assert his rights under the Copyright Act or the Patents Act, 1970.[25] This can be seen under the Proviso to Section 52(1)(c) of the Copyright Act which gives a copyright holder or exclusive licensee the authority to issue a takedown notice to the intermediary to remove the content infringing such copyright holder's right.[26]

The third principle provides that 'Requests for restrictions of content must be clear, be unambiguous, and follow due process.'[27] This principle is an extension of the second principle calling for compliance with due process before the 'take down'. Rule 75 of the Copyright Rules, 2013 ('Copyright Rules') sets out the essential procedure and measures that need to be complied with in order to takedown any infringing content.[28] In order to issue a takedown order, it must be clear, unambiguous, and in compliance with due process as set out in these rules, specifying the infringing content. Often these intermediaries have website rules or forms that need to be filed specifying the content and the Uniform Resource Locators ('URL') which is infringing or unlawful to affect the takedown.

Further**,** the fourth principle states that the 'laws and content restriction orders and practices must comply with the tests of necessity and proportionality.'[29] This principle has not been legislated explicitly, but rather the testing of necessity and proportionality for content restriction is left mostly on the courts. At various instances, the courts have adjudged the necessity of blocking infringing content on the request of the IP holder. But

[23] *Supra* note 5, s. 79(3)(b).
[24] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rules 3(d) and 3(g).
[25] *Supra* note 5, s. 81.
[26] Copyright Act, 1957 (Act No. 14 of 1957), s. 52(1)(c).
[27] *Supra* note 18.
[28] The Copyright Rules, 2013, Rule 75.
[29] *Supra* note 18.

the pertinent question which arises here is the extent to which such takedown or blocking has to be exercised. Often, only a specific URL within these websites is of an infringing nature, which does not require the complete blocking of the website but rather blocking those URLs suffices. Thus, this postulation of proportionate action acts as a guiding principle for courts while passing an order for takedown or blocking of infringing, or unlawful content.

The last two principles have not been well accommodated in the Indian structure with the fifth principle stating: 'Laws and content restriction policies and practices must respect due process',[30] while the sixth principle, being an extension of the former, states: 'Transparency and accountability must be built into laws and content restriction policies and practices.'[31] With regard to the fifth principle, as already stated above, various rules and guidelines make up for the need for due process. Further, Section 79(2)(c) calls for the need to observe due diligence by an intermediary while discharging its duties.[32] Additionally, it needs to abide by other guidelines as the Central Government may prescribe in this behalf. The sixth principle**,** in an attempt to propound the due process, calls for the need for transparency and accountability with regard to the content taken down.[33] This principle is far from being accepted in the current regime as it opts for maintaining a confidentiality approach, since complaints received for takedowns and reasons for the order against content in form of taking down or blocking URLs are unavailable in the public domain. Such an approach is based on Section 69A of the IT Act,[34] and the rules framed under it, which provide a procedure for the government to direct intermediaries to take down third-party content, failure of which makes the intermediary liable to a penalty.

Now that it is clear that there are extensive safeguards afforded to the intermediaries, it is also important to understand that these safeguards are not absolute as there are instances where liability is imposed upon the intermediaries for their actions.[35] New e-commerce rules aim to bring transparency in respect of information and disclosure by e-commerce platforms to right holders, and have reiterated the need to comply with sub-sections (2) and (3) of Section 79 for safe protection.[36] The circumstances and the extent to which such a liability can be asserted upon the intermediary will be analysed in the following section.

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[30] *Supra* note 18.
[31] *Ibid.*
[32] *Supra* note 5, s.79(2)(c).
[33] *Supra* note 18.
[34] *Supra* note 1, s. 69A.
[35] *Supra* note 18.
[36] *Supra* note 1, s.79(2) & (3). Also, see *Supra* note 24, Rule 5(1).

III. EXTENT OF IMMUNITY GRANTED TO E-COMMERCE WEBSITES AS INTERMEDIARIES

In an earlier part of the article, an attempt was made to elucidate various principles and contemporary Indian legislation which safeguard intermediaries. This part will emphasise the instances where such immunity provided to e-commerce platforms cannot be claimed. These include an active role of e-commerce websites in selling products on their domain. Further, this part analyses instances which are currently included within the scope of claiming immunity by e-commerce platforms and argues that the proliferation of the e-commerce market calls for exclusion from immunity under certain circumstances. These include cases where an e-commerce platform has exclusive knowledge regarding the infringer or infringing content, and there is a need for it to act in a responsible manner and follow due process to avoid infringement on its platform.

A. Active Role of E-Commerce Platforms in Selling Process

Having elaborated upon various principles that act as protecting mechanisms for safeguarding an intermediary, the primary question is whether all actions of e-commerce websites can be construed as that of an intermediary. Thus, emphasis has to be laid on the nature of the role performed by an e-commerce platform to be classified as an intermediary. As already put forth, the role of an intermediary is restricted to providing a platform for transmitting, storing and other activities. *Prima facie,* e-commerce platforms can be construed as an intermediary and be allowed to claim exemption from liability.[37] But this understanding is fallacious as this exemption to e-commerce platforms is limited as long as it acts within the prescribed definition under Section 2(w),[38] and any active participation by it in the selling process would lead to it being excluded as an intermediary. So, the assumption on the part of the legal system that all actions of the e-commerce platforms can be construed as that of an intermediary would be erroneous. This need for evaluation of active role of intermediary arises from changing recent trends on e-commerce platforms whereby these entities are actively involved in promoting the goods being sold. This is evident from the excessive advertisements of products on their platforms and brand tie-ups, i.e., selling certain products exclusively on specific e-commerce websites. Though such active participation seems innocuous at the moment, the pertinent question that arises here is whether in case of any IP infringement by these products or brands, e-commerce platforms could be made accountable. This needs to be

[37] *Supra* note 24, Rule 5.
[38] *Supra* note 1.

ascertained while considering their active role in the selling process, which is a deviation from their role as an intermediary which grants them immunity.

This stance can be traced from the judgment in the case of *Christian Louboutin SAS,*[39] wherein the Delhi High Court stated that in order to claim exemption under the safe harbour provision, an e-commerce company 'ought to ensure that it does not have an active participation in the selling process. The presence of any element which shows active participation could deprive intermediaries of the exemption.'[40]

In this case, the Court emphasised the need for the evaluation of the level of involvement of the e-commerce company in the selling process, since just being 'automated' does not mean it is acting passively. The High Court, in order to ascertain the active role of e-commerce platforms, laid down certain factors that include: (i) the terms of agreement entered into between the platforms and the seller, (ii) the manner in which the terms were enforced, (iii) whether adequate measures have been put in place to ensure that the trademark rights are protected, and (iv) whether the platforms have the knowledge of unlawful acts.[41]

Further, the High Court observed that e-commerce platforms which actively conspire, abet or aid, or induce commission of unlawful acts on their website cannot go scot-free.[42] This stance was taken to restrict the safe harbour from being claimed in acts which reflect active participation of e-commerce platforms. This stand strengthens the proposition that protection afforded to them is not absolute in nature and could only be availed of when acting as a passive transmitter of information on their platforms.

B. Due Process

The current regime proposes 'takedown mechanisms' when content on these intermediary platforms is infringing or unlawful in nature, specifically in cases of copyright infringements as Rule 75 of the Copyright Rules sets out essentials for takedown of infringing content.[43] As discussed, Section 52(1)(c) of the Copyright Act gives copyright holders authority to issue notice for takedown.[44] Furthermore, the non-obstante clause under Section 79 does not preclude any remedy by virtue of Section 81 of the IT Act.[45]

But the question that arises here is whether the 'takedown procedure' serves as a deterrent to prevent future infringement. The takedown mechanism acts as a post-infringement mechanism but there is no mandate to prevent infringement in the first place, and since the scope of immunity granted to the intermediaries is wide, effective

[39] *Supra* note 21.
[40] *Ibid.*
[41] *Id.* para. 59.
[42] *Ibid.*
[43] *Supra* note 28.
[44] *Supra* note 26, s. 52(1)(c).
[45] *Supra* note 21.

implementation of takedown mechanism becomes difficult. Thus, imposition of liability along with takedown procedure is an efficacious deterrent to curtail such infringements. Though the current legislation provides for setting liability on the infringer, what still needs to be emphasised is the imposition of liability on the intermediary. This need for fixing liability arises from increasing active participation and a lack of following due process on the part of these intermediaries. This could well be comprehended from evaluation of changing working patterns of e-commerce marketplaces, from being a platform for selling to taking an active part in the sale and advertising of the product. This points towards platforms going beyond the prescribed role of an intermediary and hence being deprived of the protection envisaged under the safe harbour provision. Thus, the amount of caution exercised by these service providers needs a re-evaluation and a provision for mandatory self-assessment mechanisms, prior to a notice being issued, is required.

This re-evaluation of caution arises from the due process approach which suggests that an intermediary should be aware of what it is promoting. An intermediary needs to accommodate due process to check that the products it is selling on its platform do not infringe certain IP rights, and in case of failure to exercise this due process, it must be made liable. This view results from rising instances where products advertised and sold on these e-commerce platforms are counterfeit and violate the trademark and other associated rights of the original product.[46] Indubitably, an e-commerce platform that plays an active role in promotion of such products cannot escape the liability. For instance, in the case where the e-commerce platform has actual knowledge of counterfeit products being sold on its platform and still tries to promote the product through intensive advertising, the defence taken by these intermediaries that they lack knowledge of counterfeit products needs scrutiny as they ought to be aware of what they are advertising. Thus, a need for exercising due process should be imposed on these e-commerce platforms to safeguard IP rights. This due process would impose a stringent duty upon the e-commerce platforms to check on what they are advertising or whatever passing through their platforms is not violating IP rights related to any product.

This due process approach could be construed from the case of *Christian Louboutin SAS,*[47] where the Court emphasised the need for e-commerce players to observe necessary due diligence in order to stall IP infringement. This could result in preventing the sale of counterfeit products which may otherwise lead to trademark infringement and

[46] United States Trade Representative, "2020 Review of Notorious Markets for Counterfeiting and Piracy" (2020) *available at:* https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf (last visited on Oct. 18, 2021).
[47] *Supra* note 21.

instances where genuine branded products are sold in impaired or altered conditions which has tortious and contractual implications.

Further, the Court emphasising upon Section 79(2)(c) which calls for observing due diligence by intermediary while discharging its duties,[48] outlined certain measures that e-commerce platforms need to undertake. These measures include: (i) the need to disclose details of the sellers hosted on its platform, and (ii) obtaining legally binding guarantees from them as to the authenticity of the products being sold by them on the platform.[49] These requisites seem necessary for an e-commerce entity to claim that they were not conspiring, aiding or abetting the sale of counterfeit products on their platforms in case any infringement happens.

Recently, in the case of *Amway India Enterprises* v. *1Mg Technology*,[50] the Supreme Court once again reiterated the need to adhere to the principle of due diligence. Generally, if an intermediary follows the procedures laid down in the Intermediary Guidelines, 2011,[51] and if as per its terms of agreement, the third-party seller is not allowed to infringe IP rights of other persons, then it can be said that the due diligence requirement has been fulfilled.

Though Indian laws ask e-commerce platforms to ensure due diligence, it has never asked such platforms to judge millions of products. Even the Supreme Court has said that it is not practical to ask intermediaries to evaluate the contents of their portal.[52] Under Rule 3(b)(iv) of the new Intermediary Guidelines, 2021,[53] there is a mandate upon these platforms to inform its users of the prohibition of using any IP infringing resource.

A more prudent approach could be to adopt a self-assessing mechanism like an Artificial Intelligence system being utilised by the intermediaries to restrict IP infringement but this recommendation can negatively affect the business of small service providers as they might not be able to meet these statutory requirements. Additionally, this might adversely affect the privacy of the end-users and might restrict their fundamental right to freedom of speech and expression. Therefore, such implications of the filtering mechanisms also need to be scrutinised.

Regulating e-commerce platforms is one of the most important aspects of ensuring IP protection in the virtual world. The government must adopt a balanced approach for it. This would imply a situation where the liability of e-commerce platforms is proportionate to the infringement, based on the actual involvement of the platform, yet is not too harsh so as to deter small e-commerce platforms from expanding. At the same time, the said liability should not be too lenient either, as this could hamper the interests of the

[48] *Supra* note 5, *Supra* note 21.
[49] *Supra* note 40.
[50] 2019 SCC OnLine Del 9061.
[51] Information Technology (Intermediaries guidelines) Rules, 2011.
[52] *Shreya Singhal* v. *Union of India*, AIR 2015 SC 1523.
[53] *Supra* note 24, rule 3(b)(iv).

copyright holders, making them lose their trust in the IP regime, thus making the latter ineffective.

C. Responsibility of E-Commerce Platforms Considering Exclusive Nature of Knowledge

Another aspect that needs scrutiny while deciding liability of e-commerce platforms is exclusive knowledge related to the infringer that is often held by these entities. It has been discussed that the e-commerce platforms need to block or take down infringing content upon receiving a 'takedown notice' from affected individuals or appropriate authorities. But it cannot be ignored that such a procedure puts a burden upon the right holder rather than the infringer. This mechanism requires mentioning of the Internet Protocol address ('IP address') and other details of the infringing content. Gathering this information is often a chaotic task resulting in the infringer escaping liability. Considering this position, a review must be made as to how certain information regarding the infringer is in the 'exclusive knowledge' of the intermediary and thus the burden of gathering such information needs to be shifted upon the intermediaries. The 'exclusive nature' of information calls for imposition of a duty on the intermediary in order to ensure that such scenarios of infringement are under its control.[54] The imposition of liability on intermediaries in such cases becomes pertinent to prevent the violation of IP rights. This stance of imposing the liability and duty upon an intermediary to avoid IP violations, considering the presence of 'exclusive knowledge', was taken in the case of *M/s Shree Krishna International & Ors.* v. *Google India Pvt. Ltd.*[55] In this case, liability was imposed on industry giants like Google and YouTube for copyright violation in light of 'exclusive knowledge'. This approach becomes more important in order to shift the burden of gathering information and exercising due diligence from the right holder to the intermediary which fails to undertake due measures even after having exclusive knowledge of the infringer.

This way of imposition of responsibility draws from the earlier elaborated due process approach which makes it mandatory for e-commerce entities to exercise due diligence in order to avoid any infringements. In the case of *MySpace Inc.* v. *Super Cassettes Industries Ltd.*,[56] it was decided that if the intermediary has actual knowledge of infringement of IP rights on its portal, then it can be held liable for the infringement. The Delhi High Court observed that if there is 'actual knowledge', or in other words sufficient knowledge as possessed by a reasonable person, only then would the intermediary be liable for actions

[54] J Riordan, *The Liability of Internet Intermediaries* 77 (Oxford University Press, United Kingdom, 1st edn., 2016).
[55] CA/1358/2014. Also, see Prabhjote Gill, "A Bollywood Filmmaker Wins Copyright Case Against Google, Youtube-But Gets Paid Only $700 in Damages" *Business Insider*, Dec. 9, 2019, *available at:* https://www.businessinsider.in/tech/news/youtube-and-google-lose-copyright-infringement-case-against-suneel-darsha-bollywood filmmaker/articleshow/72434795.cms (last visited on Oct. 30, 2020).
[56] 2016 SCC OnLine Del 6382.

of the third-party. Therefore, after receiving a notice containing the exact URL of the infringement, an intermediary must remove such products or content from the website. Thus, the courts have acknowledged availability of exclusive knowledge with these e-commerce domains, thereby requiring them to disclose details of the sellers hosted on their platforms.[57] The requirement to disclose the details of hosted seller could be helpful for IP rights holder while undertaking the 'takedown procedure' and asserting liability on the infringer.

While discussing exclusive knowledge, it becomes pertinent to note that the duty lies upon the e-commerce platform to disable infringing content upon receiving 'actual knowledge' or upon obtaining knowledge from the affected person under Section 79(3) of the IT Act,[58] read with Rule 3(4) of the Information Technology (Intermediaries Guidelines) Rules, 2011.[59] This actual knowledge could well be construed to include instances where an e-commerce platform has knowledge as to the infringing product or content on their domain even before receiving the 'takedown notice'.

This application could enable the curbing of IP related infringement of products on e-commerce platforms by imposing the duty upon them to monitor their platform.

D. Changing Paradigm Post-2021 Rules

The Ministry of Electronics and Information Technology, acknowledging the significant growth of intermediary platforms, notified The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.[60] With these rules an attempt has been made to consolidate the due diligence that needs to be undertaken by an intermediary platform in its day-to-day activities. Rule 3 provides for intermediaries to keep a check on contents on its platforms by publishing rules and regulation, privacy policy, user agreement for access by any person on its website and mobile app. These rules under Section 3(b)(iv) specifically cover against hosting, displaying of content which infringes patent, trademark, copyright, or other proprietary rights.[61]

This Rule tries to extend certain duties upon the platform to keep check on its users by informing them against use of these platform for certain activities. Further, these rules try to bring clarity to the idea of actual knowledge under Rule 3(d) by requiring intermediaries to remove the infringing content within 36 hours upon 'receiving actual knowledge in the form of an order by a court of competent jurisdiction or on being notified by the Appropriate Government or its agency under clause (b) of sub-section (3) of section 79 of the Act'.[62]

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[57] *Supra* note 19.
[58] *Supra* note 1, s. 79(3).
[59] *Supra* note 51, rule 3(4).
[60] *Supra* note 24.
[61] *Ibid.*
[62] *Supra* note 5.

These rules provide for further compliance by requiring intermediaries to periodically inform its user as to any act against prescribed usage might result in termination of the access or usage rights of the users to the computer resource immediately or remove non-compliant information or both. Rule 3(2) provides for a grievance redressal mechanism which requires intermediaries to publish contact details of the grievance officer as well as the mechanism by which a user may make any complaint against any violations.[63] Here, the grievance officer is required to provide acknowledgement of the complaint within 24 hours and dispose of the same in writing within 15 days of its receipt. Also, the officer has to receive and acknowledge any order, notice or direction issued by the appropriate government, any competent authority or a court of competent jurisdiction. Thus, there is a positive shift of burden on the intermediaries to monitor their platforms but the applicability of these guidelines on e-commerce platform is yet to be affirmed.

IV. THE STANCE ACROSS THE GLOBE

Now that the interpretation of the issue by the Indian courts is clear and various contours of the arguments raised have been analysed, it is imperative to undertake a global analysis of the same. The reason being that the only efficacious solution to the problem is harmonisation of the law. Before even a single step is taken towards the same with regard to the liability of e-commerce websites, we need to analyse the status quo, so as to gauge why harmonisation of laws seems a distant reality. The article will begin with an analysis of two major jurisdictions, the United States of America ('USA') and the European Union ('EU'), not only because of the economic relevance of both the regions but also because of the differences in the general interpretation of law.

A. United States of America

It is crucial to the debate that an analysis of the development of the interpretation of secondary liability in the USA be undertaken, as the courts have used the same to impose liability upon intermediaries. Evidently, when direct infringement cannot be established, the concept of secondary liability comes into picture. The same can be established under distinct heads of contributory or accessory liability, and vicarious liability in the USA.[64]

In the *Grokster* case,[65] the United States Supreme Court held the party supplying peer-to-peer software liable for contributory and vicarious infringement. In this case, the standard set by the Court to impose liability is when one takes affirmative steps to foster infringement. This was assessed on the basis of the nature of service provided; in this case, the platform provided users the feature to share peer-to-peer files without any supervision

[63] *Supra* note 24.
[64] Evan F. Fitts, "Inducement Liability for Copyright Infringement Is Born: The Supreme Court Attempts to Remedy the Law's Broken Leg with a Cast on the Arm" 71 *Missouri Law Review* 767, 779 (2006).
[65] *MGM Studios, Inc.* v. *Grokster, Ltd.*, 545 US 913 (2005).

which included the copyrighted works of the petitioner. Thus, Grokster was held liable and consequently shut down.

Initially, the standard for accruing accessory liability was based on the question whether a third-party had been engaged in supplying products to someone who he knew to be engaging in the infringement of an IP right. The standard set by the Supreme Court in the case of *Inwood*,[66] was that of 'knowledge'. The '*Inwood* test' was evolved to include 'degree of control' as well. These standards of supply and control have been used in accruing liability to online trademark infringers.[67]

The standards set under the principle of vicarious liability under tort law have been a general point of reference for the development of laws concerning intermediary liability for IP infringement.

In the case of *Louis Vuitton,*[68] the Court held that for contributory negligence to arise, it is sufficient that the third-party provided their service with actual or constructive knowledge that the users of their service were engaging in infringement.[69]

The landmark case on imposing liability upon e-commerce platforms is *Tiffany (NJ) Inc.* v. *Ebay, Inc.,*[70] whereby Tiffany's claimed that some users of eBay were selling counterfeit merchandise. The Court of Appeals dismissed all claims put forth by Tiffany's and did not accrue either direct or indirect liability upon eBay for the act of third-parties. The Court thwarted Tiffany's claim of direct liability of eBay on the basis of protection granted due to nominative fair use of the trademark of Tiffany's, as it was necessary to illustrate the product offered by eBay for sale on its main page as well as on purchased sponsored links. As for eBay's potential contributory liability for facilitating third parties' infringing sales, the Court determined that the relevant standard to assess eBay's liability was the *Inwood* test.[71] Under this test, the Court had to determine whether eBay continued to supply its services to sellers when it knew or had reason to know that they were engaging in trademark infringement, rather than whether it could have prevented it. Therefore, specific knowledge was held to be the key component and preventive filtering measures were not mandated by law. Based on Tiffany's inability to prove specific knowledge on the part of eBay of specific items infringing the former's rights, the Court ruled that eBay did not have any affirmative duty to remedy the situation. Thus, the stance in USA is to support intermediaries as the law does not mandate any preventive measures on the part of the intermediaries to thwart IP infringements.

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[66] *Inwood Labs. Inc.* v. *Ives Labs. Inc.*, 456 U.S. 844 (1982).
[67] *Gucci America, Inc.* v. *Frontline Processing Corp.,* 721 F. Supp. 2d 228. Also, see John T. Cross, "Contributory Infringement and Related Theories of Secondary Liability for Trademark Infringement" 80 *Iowa Law Rev.* 109-129 (1994). Also, see *Lockheed Martin Corp.* v. *Network Solutions, Inc.,* 194 F.3d 980, 984 (9th Cir. 1999).
[68] *Louis Vuitton Malletier, S.A.* v. *Akanoc Solutions, Inc.* No. 10-15909 (9th Cir. 2011).
[69] *Ibid.*
[70] 576 F.Supp.2d 463 (S.D.N.Y. 2008).
[71] *Supra* note 65 at 15. Also, see *Ibid.*

B. Europe

In Europe, although direct liability is largely harmonised by virtue of Article 2 of the InfoSoc Directive,[72] the secondary liability doctrines have largely been left to the member countries to formulate on their own. However, Article 8(3) obliges the member states to make a provision which ensures that the right holders are able to apply for injunction against the intermediaries.

The legal framework concerning intermediary liability is largely similar in the EU and the USA, and the safe harbour provision exists in European law as well.[73] But it has been interpreted differently, resulting in inadequate protection for right holders and a great deal of legal insecurity.

The EU has a multi-tier legal system which in the context of the EUs' objective of a single market has proven to be a predicament, due to which the Court of Justice of the European Union ('CJEU') in recent judgements, had no choice but to extend the realm of primary infringement in order to achieve reasonably effective harmonisation of intermediary liability in Europe so as to attain the objective of a single market. But the nuanced contradictions in interpretation in various jurisdictions still exists, so it is better to look at certain important jurisdictions within Europe and their stance on the issue in order to better gauge the overall interpretation, as the standard of accruing secondary liability of the intermediary has been left to the national statutes of the members.

1. Germany

There are two different legal stances in German law, one in trademark and copyright laws, where the concept of *Storerhaftung*[74] provides for action based on accessory/contributory liability of the third-party due to breach of duty of care but provides only injunctive relief, and the second in patents law, which provides for various curative measures including damages.[75] The standards under both types of contributory liability are similar which

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[72] Directive 2001/29/EC of the European Parliament and of the Council on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, May 22, 2001, art. 2 "Article 2: Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:
(a) for authors, of their works;
(b) for performers, of fixations of their performances;
(c) for phonogram producers, of their phonograms;
(d) for the producers of the first fixations of films, in respect of the original and copies of their films;
(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite."

[73] Beatrice Martinet Farano, "Internet Intermediaries' Liability for Copyright & Trademark Infringement: Reconciling EU & U.S. Approaches" *Stanford-Vienna Transatlantic Technology Law Forum* (2012).

[74] Matthias Leistner, "Structural aspects of secondary (provider) liability in Europe" 9 *Journal of Intellectual Property Law & Practice* 78 (2014); T Hoeren, "German Law on Internet Liability of Intermediaries", LIDC Congress, Oxford 2011.

[75] BGH GRUR 1999, 977, para. 16 – Ra¨umschild, *available at:* https://www.jurpc.de/jurpc/show?id=19990164; GRUR 2002, 599 – Funkuhr I, *available at:* https://lexetius.com/2002,246 ¶25 (last visited on Oct. 1, 2021); GRUR 2007, 313 – Funkuhr II; GRUR 2009, 1142 – MP3-Player-Import, para. 43 *available at:* https://lexetius.com/2009,2671 (last visited on Oct. 1, 2021).

include adequate and relevant causation of the direct infringement and a fluid conception of duty of care.[76] This implies that the latter is decided on a case-to-case basis depending on various pertinent characteristics like the role and function of the participant and the degree of risk of the direct acts of infringement created by the participant.[77] Recently, there has been much academic writing in Germany supporting harmonisation of the legal remedies and blurring the differences in both the stances under German law by providing not only for injunctive relief but also for damages.[78]

In fact, the most recent judgment of the First Civil Senate of the Federal Court of Justice on the contributory liability of an eBay account holder which included damages seemed to point cautiously in that direction as well.[79] On April 2, 2020, the CJEU handed down its judgment in the *Coty Germany GmbH* v. *Amazon Services Europe Sarl* case,[80] dated April 2, 2020 which relates to a referral from the *Bundesgerichtshof* (Federal Court of Justice, i.e., the apex court of Germany). The CJEU ruled in favour of Amazon, holding that the mere storage by Amazon, in the context of its online marketplace of goods which infringe trademark rights, does not constitute an infringement by the platform. This 'mere storage' alone cannot constitute infringement, and a further accompanying act is required to assert infringement liability on Amazon.

So, the general stance in German law is to slightly lean towards a more pro-right holder approach, since under recent case laws there is a duty imposed upon the intermediaries under the injunctions to implement preventive measures such as filtering, to avoid infringement in the future.[81]

2. France

The Paris Commercial Court in the case of *LVMH* v. *eBay*[82] held that eBay was not a mere passive host but rather an active broker, playing an essential role in the commercialisation of counterfeit products and profiting from their sales. As a broker, eBay was held ineligible under the hosting exemption,[83] and deemed liable for failing to control its own activity. Due to its nature, eBay could not claim lack of knowledge as the information was disseminated on the site itself, especially because the infringing nature of some of the goods sold on eBay's website was apparent, either because of the use of words such as

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[76] *Supra* note 63.
[77] *Ibid*.
[78] Timothy W. Blakely, "Beyond The International Harmonization Of Trademark Law: The Community Trade Mark As A Model Of Unitary Transnational Trademark Protection", 149 *University Of Pennsylvania Law Review* 309-354 (Nov., 2000).
[79] Bundesgerichtshof [BGH] [Federal Court of Justice] July 12, 2007, BGH GRUR 2007, 890 – Jugendgefa¨hrdendeMedien bei eBay, para. 31, *available at:* https://lexetius.com/2007,2021 (last visited on Oct. 5, 2021).
[80] C-567/18, EU:C:2020:267.
[81] BGH GRUR 2013, 370 – Alone in the Dark, *available at:* https://lexetius.com/2012,6364 (last visited on Oct. 5, 2021); BGH, 15.08.2013 - I ZR 80/12 – File-Hosting-Dienst, para. 68, *available at:* https://lexetius.com/2013,3114 (last visited on Oct. 5, 2021).
[82] Tribunal de Commerce [TC] [court of trade] Paris, June 30, 2008 (Fr.).
[83] Arts. 12-15, Directive 2000/31/Ec of The European Parliament And of The Council (June 8, 2000).

imitation or fake in connection with the defendant's trademarks, or because of other circumstances such as low prices and/or the high number of identical goods offered at the same time by the same user. Clearly, this is a divergence from the position of law in the USA, and many countries like Belgium have not adhered to such an opinion either.

In *L'Oreal* v. *eBay*,[84] the Paris trial court held that in conducting its activity as an auction website, eBay discharged two functions: (1) a neutral function, when merely acting as a broker and hosting offers of third-parties, for which it was eligible under the hosting exemption; and (2) an active role, when promoting its own activities (sending promotional emails, etc.), for which it was liable under a regular regime of liability.[85] The French Court held that in both cases, eBay had a best-efforts obligation to ensure that its activity did not harm any third-party and to cooperate with the right holders to curtail infringement. The Court concluded by encouraging the parties to settle the dispute through mediation.[86] Thus, it is clear that the French courts have not shied away from holding the intermediaries liable.

3. United Kingdom

In a proceeding brought by L'Oréal in the United Kingdom against eBay, the England and Wales High Court of Justice observed that L'Oréal suffered damages as a result of the massive sales of infringing perfumes on eBay's website despite various attempts by the latter to curtail infringement. The Court finally referred the case to the CJEU.[87]

The CJEU held that while service providers such as online marketplaces are normally entitled to the hosting provider exemption, this is only on the condition that they confine themselves to 'providing an intermediary service, neutrally, by a merely technical and automatic processing of data'.[88] Where, on the other hand, platforms 'play an active role of such a kind as to give them knowledge of, or control over, those data',[89] the CJEU held that they were not entitled to the exemption.[90] The Court further clarified that an operator could be deemed to have played an active role where, for instance, 'it has provided assistance to its customers, which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers.'[91] The Court further clarified that even though there are safe harbour exemptions, there still exists a duty of care as a diligent

[84] Tribunal Judiciaire de Paris [TGI] [Paris Judicial Court] Paris, May 13, 2009 (Fr.).
[85] *Ibid.* Also, see Béatrice Martinet and Reinhard J. Oertli, "Liability of E-Commerce Platforms for Copyright and Trademark Infringement: A World Tour" *American Bar Association,* June 2015, *available at*: https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2014-15/may-june/liability-e-commerce-platforms-copyright-trademark-infringement-world-tour/#12 (last visited on Oct. 5, 2021).
[86] *Supra* note 83.
[87] *L'Oréal S.A.* v. *eBay Int'l AG*, [2009] EWHC (Ch) 1094.
[88] *L'Oréal SA* v. *eBay Int'l AG*, 12 July 2011, *L'Oréal*, C-324/09, EU:C:2011:474.
[89] *Ibid.*
[90] Gabriele Accardo, Marie- Andrée Weiss, et.al., "Transatlantic Antitrust and IPR Developments" *Stanford-Vienna Transatlantic Technology Law Forum* (Sept. 16, 2011), *available at:* https://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/188471/doc/slspublic/2011_4_5.pdf (last visited on Oct. 5, 2021).
[91] *Id.,* 16.

operator on the part of eBay to ensure that the use of the platform is only for legal purposes. The Court finally clarified that regardless of its liability, an e-commerce platform could always be the subject of injunctive procedures available under the Copyright and Enforcement Directive to take any effective, proportionate, and dissuasive measures to prevent and/or put an end to an existing infringement.

By taking such an approach of introducing new subjective standards of neutrality and duty of care, the CJEU introduced more questions than certainty, and it would not come as a surprise if more diverging opinions arose in Europe in the wake of the *L'Oréal* decision.[92]

The CJEU has in its recent judgements favoured a very broad concept of infringement which on principle, encompasses both proximate as well as distant causation. Hence, cumulative infringement by a party acting directly and at the same time by an intermediary, is conceivable in European law which is quite opposite from the interpretation of courts in the USA.

V. CONCLUSION

The current regime creates immunity from liability for intermediary, due to which there is insecurity amongst right holders. Though the safe harbour provision has its limitations, in many cases it acts as a loophole for the intermediaries to forgo their liability, as discussed above. In the case of e-commerce platforms, where the classification of the act of the intermediaries becomes difficult, there is a blurry line between their active and passive roles. It has been asserted by the right holders, and rightly so, that the intermediaries of the contemporary world in most cases go beyond their envisaged role as an intermediary, due to which there needs to be a certain degree of accountability. The authors have analysed three circumstances under which immunity needs to be withdrawn from e-commerce platforms, which are in cases where due process is not adhered to, in a scenario where they actively conspire, abet or aid, or induce commission of unlawful acts on their website, and in cases where the intermediaries have exclusive knowledge. Currently, Indian courts have recognised liability of e-commerce platforms in case of its active participation and failure to exercise due process resulting in IP infringement. Additionally, there is a need for imposition of liability on e-commerce platforms, considering the exclusive knowledge and the need for it to follow due process to create safeguards against IP infringement.

The Consumer Protection (E-commerce) Rules, 2020 is a step in the right direction as it mandates information disclosure.[93] Earlier, e-commerce platforms acted as a bridge

[92] *Ibid.*
[93] Consumer Protection (E-Commerce) Rules, 2020.

between the vendors and the purchasers and these entities did not share information regarding the seller to the consumer. But with the introduction of the Rules, e-commerce entities are now bound, upon a request made by the consumer in this regard, to disclose the details of the seller for better dispute resolution mechanism. Yet the issue of enforcement poses a great impediment. Even though legislators are attempting to keep up with the constantly evolving online market, there is a need for better enforcement mechanisms. There is a need to revise the decades-old intermediary guidelines, as there have been several significant developments since that period. A more stringent approach in the form of asserting liability is still needed to curtail IP infringement, considering the exclusive knowledge possessed by these intermediaries. Further, if we juxtapose this stance with that in the USA and the EU, it appears to be closer to the European stance but to a limited extent, while the stance in USA diverges from the same.

Finally, this paper concludes by emphasising the need for an active imposition of liability, considering the increasing involvement of e-commerce platforms but at the same time, the extent of such liability should be limited to the role played by the intermediary. To avoid placing excessive burden on small e-commerce enterprises, the extent of liability should be based on certain categorization, on the lines of the 'Significant Social Media Intermediary' category under the Intermediary Guidelines, 2021.[94] This way, major e-commerce players like Amazon will have a proportional burden to implement preventive measures. The transnational aspect of this issue can be resolved only through harmonization of laws governing intermediary liability, the need for which has been elucidated in this article. Harmonization at a global level may be too distant an idea, but the first steps can be taken through regional harmonization. It does not imply unification but rather elimination of major differences and creation of a minimum objective standard.

[94] *Supra* note 24.

DISGORGEMENT IN THE SECURITIES MARKET: A COMPARATIVE STUDY OF INDIA AND THE UNITED STATES OF AMERICA

Pranshu Gupta and Roopam Dadhich [*]

Even after the formulation of numerous investor protection regulations by securities regulators across the globe, 'unjust enrichment' remains a common observation in global capital markets. As a consequence, regulators seek remediation by extracting the fraudulent gains through a 'disgorgement' order passed against the wrongdoers. This article primarily focuses on the recent United States Supreme Court ruling in Liu v. Securities and Exchange Commission and makes a comparative analysis of the jurisprudences in the United States of America and India on disgorgement based upon the observations in the aforementioned judgement. Part I of the article introduces the idea of disgorgement. Part II deals with the historical development of disgorgement in India and the United States of America. Part III makes a comparative assessment on four major aspects of disgorgement, which are, its nature (equitable versus penal), computation of the disgorgement amount, the debate regarding joint and several liability, and finally, restitution of the disgorged amount. Part IV concludes the article by establishing that an analysis of the jurisprudence in United States of America on various facets of disgorgement makes a case for the Indian securities regulator to tweak the legislative and judicial framework in congruence with that of the framework in the United States of America.

I. INTRODUCTION

Over the last few decades, several regulations pertaining to the protection of investors have been enacted in different capital and securities markets all over the globe. Still, instances of profits earned, or losses averted through illegal or unfair means are commonplace, which may happen through non-disclosure of vital information, using

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unpublished price sensitive information to carry on insider trading,[1] circular trading,[2] and so on. When unlawful or unfair profits are made at the expense of another, it is referred to as 'unjust enrichment'.[3] As a consequence, securities regulators seize amounts realised through such unjust enrichment by forcing the defendant to give up their ill-gotten profits by passing an order of 'disgorgement'.[4] Disgorgement is a remedial measure which intends to deprive a person of the profits made illegally; the underlying idea being that no one should be allowed to avail an opportunity to benefit oneself based on wrongdoing. Therefore, the primary goal is to strip such violators of the enrichment made unjustly or illegally, so that, at the very least, the *status quo* is attained.

However, its imposition has always been contentious, not only in India but also across other jurisdictions. There have been constant debates on matters pertaining to the authority of the securities regulators or courts to order disgorgement, its nature as a remedy (equitable versus punitive), computation of the disgorgement amount, imposition of joint and several liability, appropriate mechanisms for the recovery of the amount to be disgorged, compensation, and restitution of the disgorged amount, etc. This article shall attempt to address these issues by engaging in a comparative analysis of the legislative and judicial evolution of disgorgement in the securities market between the United States of America ('US') and India. Such a study becomes relevant as the Indian jurisprudence on disgorgement has become rather nebulous lately, and the recent US Supreme Court decision in *Liu* v. *Securities and Exchange Commission* ('*Liu*')[5] provides certain requisite clarifications in that regard. For the said purpose, the article shall first briefly discuss the historical evolution of the concept of disgorgement in the legislative and judicial framework in both countries. Thereafter, the abovementioned issues will be analysed especially in the context of the dictum in *Liu,* the observations of which can be taken into account by India and necessary changes be made to its legislative framework and judicial practices as Indian courts have historically relied upon the US securities law and judicial practices owing to its sophistication and maturity.[6] In essence, a case shall be made for India to follow the US securities jurisprudence on disgorgement, considering the inconsistencies in the Indian securities laws and judicial practices which shall be highlighted.

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[1] Insider trading refers to the trading of a company's stocks based on material non-public information. See Legal Information Institute, "Insider Trading: An Overview", *Cornell Law School*, *available at:* https://www.law.cornell.edu/wex/insider_trading (last visited on Sept. 29, 2021).
[2] Circular trading refers to a securities fraud causing price manipulation which occurs due to placing of identical sell orders entered at the same time, with the same number of shares and the same price. See Dr. G Ramesh Babu, *Portfolio Management: Including Security Analysis* 89 (Concept Publishing Co., 2007).
[3] Professor Charles Mitchell, Professor Paul Mitchell, et.al., *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th edn., 2016).
[4] Black's Law Dictionary 568 (10th edn., 2014, West Publishing Co.).
[5] 140 S. Ct. 1936 (2020).
[6] *Rakesh Agarwal* v. *Securities and Exchange Board of India*, (2004) 1 CompLJ 193 SAT.

II. HISTORICAL DEVELOPMENT OF DISGORGEMENT IN INDIA & THE US

A. Evolution of Disgorgement in the US

Post the 1929 stock market crash in the US, abuse and fraud in the securities market became prevalent and a significant concern.[7] As a result, Congress enacted the Securities Exchange Act, 1934, which thereby established the Securities and Exchange Commission ('SEC').[8] However, disgorgement did not have any statutory recognition for decades and the only remedy exercised by the SEC was injunction and civil penalties.[9] The SEC found that injunctive relief is an ineffective remedy as it rarely deters offenders from violating securities law and availing unjust benefits.[10] As a result, in *SEC* v. *Texas Gulf Sulphur Co.,*[11] the US Court of Appeals in the Second Circuit recognised that the district court has the authority to order disgorgement where injunctive relief enshrined in the statute includes disgorgement as an ancillary equitable remedy. Consequently, disgorgement orders became widespread and an often go-to remedy under securities enforcement actions to rid violators of their ill-gotten gains.[12] Hence, Congress authorised the SEC through the Securities Enforcement Remedies and Penny Stock Reform Act, 1990, to seek civil penalties in proceedings of the district court and disgorgement in administrative proceedings.[13] More recently, through the introduction of the Sarbanes-Oxley Act, 2002 ('the SOX Act'),[14] Congress authorised the courts to award 'equitable relief' in civil enforcement actions under Title 15, United States Code, Section 78u(d)(5).[15] The SEC has thus acted as a statutory regulator to protect the investors' interest that mandates the need for equitable relief.

B. Evolution of Disgorgement in India

The Securities and Exchange Board of India ('SEBI') was established in India in 1992 under the SEBI Act, 1992 ('SEBI Act').[16] Disgorgement was not given any statutory recognition under the SEBI Act at that time, and hence SEBI was not *per se* authorised to extract disgorgement from violators of the securities law. In 1998, SEBI attempted to direct

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[7] Daniel B. Listwa and Charles Seidellt, "Penalties in Equity: Disgorgement After Kokesh v. SEC" 35 *Yale Journal on Regulation* 673 (2018).
[8] Pub. L. 73-291, 48 Stat. 881 {codified at 15 U.S.C. 78a}.
[9] *Ibid.*
[10] Edmund B. Frost, "SEC Enforcement of the Rule 10b-5 Duty to Disclose Material Information-Remedies and the Texas Gulf Sulphur Case" 65 *Michigan Law Review* 962-65 (1967).
[11] 401 F.2d 833.
[12] Dixie L. Johnson, Carmen Lawrence, et.al., "King & Spalding Discusses Potential Effects of SEC Disgorgement as a Penalty" *CLS Sky Blog*, June 21, 2017, *available at:* https://clsbluesky.law.columbia.edu/2017/06/21/king-spalding-discusses-potential-effects-of-sec-disgorgement-as-penalty/ (last visited on Oct. 30, 2020).
[13] Pub. L. No. 101-429, 104 Stat. 931 {codified at 15 U.S.C. s. 77t (d) (2018)}.
[14] Pub. L. No. 107-204, 116 Stat. 745 (2002).
[15] 15 U.S.C s. 78u(d)(5).
[16] The Securities and Exchange Board of India Act, 1992 (Act 15 of 1992).

disgorgement in *Hindustan Lever Limited* v. *SEBI*,[17] but failed to do so, since the Securities Appellate Tribunal ('SAT') had quashed the SEBI order holding that SEBI does not have any power under Section 11B of the SEBI Act, to order disgorgement. For the second time, it attempted to order disgorgement in *Rakesh Agarwal* v. *SEBI*,[18] but the SAT held that disgorgement being punitive in nature, SEBI was not authorised to pass such an order as Section 11B of the SEBI Act encompasses only remedial measures.

However, in 2006, SEBI successfully ordered disgorgement in the Initial Public Offerings scam ('IPO scam'),[19] validating its power to order disgorgement, which was further affirmed by SAT in *Karvy Stock Broking Ltd.* v. *SEBI*.[20] The SAT held that:

> Disgorgement is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct. It is not a punishment nor is it concerned with the damages sustained by the victims of the unlawful conduct. Disgorgement of ill-gotten gains may be ordered against one who has violated the securities laws/regulations but it is not every violator who could be asked to disgorge. Only such wrongdoers who have made gains as a result of their illegal act(s) could be asked to do so. Since the chief purpose of ordering disgorgement is to make sure that the wrongdoers do not profit from their wrongdoing, it would follow that the disgorgement amount should not exceed the total profits realised as the result of the unlawful activity. In a disgorgement action, the burden of showing that the amount sought to be disgorged reasonably approximates the amount of unjust enrichment is on the Board.

In the subsequent years, several disgorgement orders were passed by SEBI and upheld by SAT.[21]

In 2014, Section 11B of the SEBI Act was amended to include disgorgement as an explicit direction that can be passed by SEBI.[22] Similar provisions under the Securities Contract (Regulation) Act, 1956 ('SCRA'),[23] and the Depositories Act, 1996,[24] were also amended accordingly. The remedy of disgorgement in India thus emanates from the above two statutory provisions along with Section 11B of the SEBI Act and has been directly invoked by SEBI in numerous cases since then.[25] An analysis of the legislative and judicial evolution of disgorgement in India depicts its nature, from being punitive to remedial and

[17] (1998) 18 SCL 311 MOF.
[18] *Supra* note 6.
[19] SEBI Order, "In the matter of investigation into initial Public Offerings" (Nov. 21, 2006), *available at*: https://www.sebi.gov.in/enforcement/orders/nov-2006/in-the-matter-of-investigation-into-initial-public-offerings_15056.html (last visited on Mar. 6, 2021).
[20] [2008] 84 SCL 208 (SAT).
[21] *Dushyant N. Dalal* v. *SEBI* (2017) 9 SCC 660; *SRSR Holdings Pvt. Ltd.* v. *SEBI*, 2017 SCC OnLine SAT 88; *Pratik Minerals Pvt. Ltd.* v. *SEBI*, 2018 SCC OnLine SAT 274.
[22] The Securities Laws (Amendment) Act, 2014 (No. 27 of 2014).
[23] The Securities Contract (Regulation) Act, 1956 (Act 42 of 1956), s. 12A, explanation.
[24] The Depositories Act, 1996 (Act 22 of 1996), s. 19, explanation.
[25] *Supra* note 21.

now being expanded to an equitable remedy. However, the notion has witnessed a shift which shall be elaborated upon in the next section.

III. CONCEPTUAL ANALYSIS AND COMPARATIVE ASSESSMENT

A. Nature of Remedy: Equitable versus Punitive

Generally, disgorgement has been seen as an equitable remedy and not a penal measure, both in India and the US. While the idea of penalty is concerned with punishing the wrongdoer and pertains to the notion of retributive justice, disgorgement is concerned with the limited power of extracting the unjust gains made by the wrongdoer.[26]

However, this nature of disgorgement has witnessed a transition from being an equitable remedy to a penal measure, owing to recent changes in the legislative framework and judicial decisions. In *Kokesh* v. *SEC* ('*Kokesh*'),[27] the question that arose before the US Supreme Court was whether the five-year limitation period applicable to 'civil penalties' would also apply to disgorgement in the regime of the securities market. The Court held that disgorgement would be classified as a 'penalty' as per the United States Code.[28] The reasoning of the Court was that firstly, disgorgement is a remedy *in rem* as the securities regulator would act in the public interest;[29] secondly, disgorgement by its nature aims to create deterrence of violations of securities law,[30] and thirdly, this remedy is not necessarily compensatory in nature, since in most cases identification of individual victims is not possible (for instance, insider trading, where the entire securities market suffers).[31]

Similarly, the securities regime in India has again witnessed the mystification of the boundaries between the nature of disgorgement as an equitable and a penal remedy. With the introduction of the Finance Act, 2018,[32] various sections of the SEBI Act were

[26] Zachary S. Brez, W. Neil Eggleston, et.al., "Supreme Court Upholds the SEC's Disgorgement Authority, With Limits" *Kirkland & Ellis,* June 25, 2020, *available at:* https://www.kirkland.com/-/media/publications/alert/2020/supreme-court-upholds-the-secs-disgorgement-author.pdf (last visited on Nov. 2, 2020).
[27] 137 S. Ct. 1635 (2017).
[28] *Id.,* at 7.
[29] *Ibid.*
[30] *Id.,* at 8.
[31] *Id.,* at 9.
[32] The Finance Act, 2018 (Act 13 of 2018).

amended, including Sections 11B,[33] 15J,[34] and 15HB.[35] Before the amendment, the marginal note to Section 11B provided for SEBI's 'Power to issue directions' if after making requisite enquiries SEBI deems it fit to do so. However, it was thereafter changed to 'Power to issue directions and penalty' pursuant to the said amendment, so as to include 'penalties' within its ambit.[36] This amendment is perplexing since Section 15HB already contains the power to impose penalties for violation of the Act or rules/regulations made thereunder, where such penalty is not provided for separately. Further, Section 15J now encapsulates the power to issue penalty, among other provisions, under Section 11B, which includes the power to order disgorgement. The remedies of disgorgement and penalties are largely similar in nature with respect to their characteristic of recovering money from a violator who unjustly enriched himself on account of a violation and may be used together for specific violations. Clubbing both the remedies under a single provision without distinguishing each appropriately, especially when Section 15HB exists (which provides for the imposition of penalties), would create complications since disgorgement can now be seen both as an equitable and a penal remedy under Section 11B, and penal orders that ought to be passed under Section 15HB can now be passed under Section 11B, thereby empowering SEBI to pass punitive orders in the name of disgorgement.

The SEBI Order in *Beejay Investment and Financial Consultants Private Limited* witnesses such convolution of disgorgement under Section 11B.[37] In this case, certain persons violated a SEBI prohibitory order by trading indirectly in the market, making substantial profits. As a consequence, SEBI ordered disgorgement of the said profits (amounting to Rs. 27.44 crores) on account of the violation of the prohibitory order invoking Section 11B of the SEBI Act. It should be emphasised again that Section 15HB of the SEBI Act specifically provides for the imposition of penalties in case of violation of the SEBI Act, rules or regulations made or directions issued by SEBI, for which no separate penalty has been provided. However, Section 11B of the SEBI Act only covers wrongful gains obtained by violation of the law and does not extend to a violation of prohibitory orders.

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[33] The Securities and Exchange Board of India Act, 1992 (Act 15 of 1992), s. 11B; "For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention."

[34] *Id.*, s. 15J; "While adjudging quantum of penalty under 15-I or section 11 or section 11B, the Board or the adjudicating officer shall have due regard to the following factors, namely :— (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; (b) the amount of loss caused to an investor or group of investors as a result of the default; (c) the repetitive nature of the default."

[35] *Id.*, s. 15HB; "Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be 104[liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees."

[36] *Supra* note 33.

[37] SEBI Order, "Confirmatory Order in the matter of Beejay Investment and Financial Consultants Pvt. Ltd & 17 others" (Mar. 27, 2017), *available at:* https://www.sebi.gov.in/enforcement/orders/mar-2017/confirmatory-order-in-the-matter-of-beejay-investments-and-17-others_34480.html (last visited on May 23, 2021).

Consequently, the SEBI Order in the present case is a clear misapplication of the law since the penalty ought to be imposed under Section 15HB of the SEBI Act as opposed to Section 11B.

The recent ruling of the US Supreme Court in *Liu* has further altered the notion of disgorgement in the US securities regime post *Kokesh*. The Court observed that disgorgement constitutes an equitable relief and not a punitive remedy since it aims to remedy the wrong rather than punish the violator.[38] It was held that an award of disgorgement which does not exceed the net profits earned by the violator and is apportioned to the victims (as far as practicable), shall be a permissible equitable relief.[39]

In India, as observed above, obscurity has been created with the recent legislative changes and judicial stance with respect to the nature of disgorgement as an equitable or punitive remedy. The judgement rendered in *Liu* has, therefore, resolved this perplexity through a much-needed clarification, in line with the foundational principles of equity which India should take a cue from, since the Indian securities regulations have historically replicated the US law (especially those dealing with manipulation of the market).[40]

B. Computation of Disgorgement

The US Supreme Court in *Liu* made another significant observation, regarding the quantum of the amount to be disgorged. The Court held that disgorgement which does not exceed the net profits earned by the wrongdoer is a permissible equitable relief under the US securities law, in terms of the foundational principles of equity.[41] For this purpose, net profit should not include legitimate expenses incurred by the wrongdoer.[42] Prior to *Liu,* disgorgement of net profits was hardly observed in the US, since courts in a number of cases declined to deduct legitimate business expenses from the total unjust profits earned by the wrongdoer. In *SEC* v. *Brown,*[43] the United States Court of Appeals for the Eighth Circuit refused to deduct expenses such as payments to vendors and third-party employees. In *SEC* v. *JT Wallenbrock Associates,*[44] the United States Court of Appeals for the Ninth Circuit held that 'it would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created

[38] *Supra* note 5.
[39] *Ibid.*
[40] Somasekhar Sundaresan, "US Ruling Must Inform Disgorgement Review in India" *Business Standard,* July 1, 2020, *available at:* https://www.business-standard.com/article/opinion/us-ruling-must-inform-disgorgement-review-in-india-120070101990_1.html (last visited on Nov. 3, 2020).
[41] *Supra* note 5.
[42] *Ibid.*
[43] 658 F. 3d 858.
[44] 440 F. 3d 1109 (9th Cir. 2006).

to defraud those investors into giving the defendants the money in the first place.'[45] In some cases, courts denied deducting even taxes and general business operation expenses.[46]

In India, the framework regarding quantification of disgorgement seems rather convoluted since there remain inconsistencies in judicial decisions and inadequacies in the legislative framework. In *Purshottam Budhwani* v. *SEBI*,[47] the argument for deducting business expenses and tax liability from the total disgorgement amount was rejected from the very threshold both by SEBI and SAT.

However, in *Somani Overseas Ltd.* v. *SEBI*,[48] the SAT, while quashing the disgorgement quantum of illegal gains calculated by SEBI, questioned the manner of such quantification and remanded the matter to SEBI to lay down the precise norms for determining such amount as it failed to take into account the acquisition price and closing price of the shares.

Again, in *B Ramalinga Raju* v. *SEBI*,[49] the SAT quashed the SEBI Order that directed the appellants to disgorge illegal gains without accounting for the cost of acquisition and taxes. The SAT remanded the matter to SEBI to review the sanctions afresh.

Taking the above cases into account, it is evident that much confusion exists regarding the quantification of disgorgement amount, since the SAT seems to have evolved its reasoning, in terms of deducting legitimate business expenses and taxes for quantification of the disgorgement amount, whereas SEBI continues to reject it from the very threshold in nearly all the cases. Section 15J of the SEBI Act,[50] Section 23J of SCRA[51] and Section 19I of the Depositories Act[52] provide limited guidance in terms of quantification of disgorgement amount. Hence, there is a need to formulate an extensive non-mandatory statutory guidance that could serve as a basis on which disgorgement orders and related penalties could be imposed. In this regard, emphasis should be laid on the U.S. Sentencing Guidelines,[53] which lays down alternative methods for the courts to quantify losses incurred by investors on account of fraud in the securities market. The foundation for non-mandatory public guidelines was enunciated by the US Sentencing Reform Act of 1984 for federal courts,[54] which introduced a framework for sentencing and simultaneously

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[45] *Id.,* at 1109- 1114.

[46] *USSEC* v. *Svoboda*, 409 F. Supp. 2d 331 (S.D.N.Y 2006); *SEC* v. *World Gambling Corp.*, 555 F. Supp. 930 (S.D.N.Y. 1983).

[47] 2015 SCC OnLine SAT 9. Also, see SEBI Order, "In the matter of IPO Irregularities: Dealings by Mr. Purshottam Budhwani" (May 23, 2011), *available at:* https://www.sebi.gov.in/enforcement/orders/may-2011/order-in-the-matter-of-purshottam-budhwani_19803.html (last visited on May 23, 2021).

[48] 2016 SCC OnLine SAT 85.

[49] 2017 SCC OnLine SAT 183.

[50] *Supra* note 34, s. 15J.

[51] *Supra* note 23, s. 23J.

[52] *Supra* note 24, s. 19I.

[53] United States Sentencing Commission, "Guidelines Manual", s. 2B1.1 and s. 2B1.4 (Nov. 2018) *available at:* https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf (last visited on Sept. 29, 2021).

[54] H.R. 5773 — 98th Congress (1983-1984), Sentencing Reform Act of 1984.

granted discretion to the judge to deviate while providing reasons for such deviation. Moreover, the Sanction Guidelines adopted by the Financial Industry Regulatory Authority ('FINRA') can also be taken into account.[55] Here, all the adjudicatory bodies can refer to these guidelines while adjudicating disputes, which are again, not mandatory in nature.

SEBI should, therefore, consider developing such guidelines so as to ensure consistency and certainty in terms of quantification of disgorgement amounts. As violations could involve cases of insider trading, fraudulent activities in the market and so on, these guidelines can extensively lay down statistical methods and other norms (for example, modified market capitalization method,[56] event study mechanism,[57] etc.) for the calculation of disgorgement and penalties, which could be applied taking into account facts and circumstances of each case. While no straitjacket fool-proof formulae can be devised, these guidelines can be extremely helpful for quasi-judicial authorities like SEBI for reference while calculating disgorgement amounts and penalties, which would also ensure a possibly true and accurate valuation of net profits post deduction of legitimate business expenses.

C. Joint and Several Liability

While passing disgorgement orders, one of the blunt measures that regulators often use is the imposition of monetary liability on all the persons associated with a wrongdoing regardless of their respective degrees of fault. The wronged party has the right to recover the amount from any or all of the parties who might be engaged in the wrongdoing.

The US Supreme Court in *Liu* makes significant observations with regard to the imposition of joint and several liability. The District Court, in this case, held the petitioners jointly and severally liable and ordered them to disgorge the entire amount of $27 million realised from the investors. Questioning the District Court's findings, the Supreme Court observed that traditionally, equity courts in profit-based remedies have not imposed joint and several liability against multiple wrongdoers.[58] Such an action requiring one party to disgorge profits realised by the other could transform an equitable relief into a penalty.[59] It runs against the rule to not impose joint and several liability on wrongdoers as they should be held accountable for the profits accrued to themselves and

[55] Financial Industry Regulatory Authority, "Sanctions Guidelines" (Oct. 2020), *available at:* https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf (last visited on Nov. 5, 2020).
[56] Modified Market Capitalisation method refers to the capitalization of each Index Security, using the Last Sale Price of the security at the close of trading on the last trading day in February, May, August and November and after applying quarterly changes to the total shares outstanding. See *United States* v. *Berger*, 587 F.3d 1038 (9th Cir. 2009).
[57] An event study is a statistical technique that estimates the stock price impact of occurrences such as mergers, earnings announcements, and so forth. See Mark L. Mitchell and Jeffry M. Netter, "The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Commission" 49 *The Business Lawyer* 545-590 (1994).
[58] *Supra* note 5.
[59] *Ibid.*

not for those accrued to others.[60] In *SEC* v. *Contorinis,*[61] it was held that an insider who trades on behalf of another may still be directed to disgorge the full amount even when he does not personally realise any money. *Liu* held that such cases are 'seemingly at odds with the common-law rule requiring individual liability for wrongful profits',[62] undercutting the reasoning in these cases. It makes yet another significant observation, in order to retain a balance holding that as per the 'historic profits' remedy, imposition of collective liability may be justified in some circumstances, where the partners are engaged in 'concerted wrongdoing'.[63]

The jurisprudence on joint and several liability regarding disgorgement orders in the Indian securities market is somewhat inconsistent and unclear. One of the landmark cases in the securities market was the IPO Scam,[64] wherein SEBI passed an Order imposing a joint and several liability on all market intermediaries (depositories and depository participants) connected to the transaction without apportioning individual liabilities. On appeal, the SAT quashed the SEBI Order observing that disgorgement orders can be passed against only those violators who have violated securities law/regulations and made unlawful gains.[65] Each and every violator cannot be asked to disgorge the ill-gotten profits, and the disgorgement amount should approximate the unjust enrichment, the burden to prove which is upon SEBI.[66]

Again, in *Mahavirsingh N. Chauhan* v. *SEBI,*[67] the SAT made a significant observation. The Tribunal observed that:

> It is clear that a person can be directed to disgorge amount equivalent to the wrongful gain made by him. By such contravention, the liability to disgorge the amount is individual and not collective. Thus, we are of the opinion that the direction of the Whole Time Member directing the appellants to pay the amount jointly or severally is against the provisions of Section 11B and to that extent, it cannot be sustained.

Hence, the SAT overturned the SEBI Order which imposed a joint and several liability upon the appellants and observed that the liability to be imposed should only be individual in nature.

Interestingly, despite the above ruling, the High-Level Committee chaired by Justice (Retd.) Anil R. Dave ('the Committee') in its recent report titled 'Measures for Strengthening the Enforcement Mechanism of the Board and Incidental Issues' noted

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[60] *Ibid.*
[61] 743 F. 3d 296, 304–306.
[62] *Supra* note 5.
[63] *Supra* note 3.
[64] *Supra* note 19.
[65] *Ibid.*
[66] *Ibid.*
[67] 2019 SCC OnLine SAT 218.

that the explanation to Section 11B of the SEBI Act neither uses the word 'only' nor expressly prohibits the imposition of joint and several liability, and hence, it is well within the powers of SEBI to impose such liability.[68] Ironically, notwithstanding this observation, the Committee recommended an amendment to the explanation to Section 11B substituting the wordings 'power to direct all or any of the persons, who made profit or averted loss by indulging in any transaction or activity' with 'power to direct jointly and severally, all or any of the persons, who indulged in any transaction or activity'. If accepted, this recommendation would be in direct contravention to the SAT Order and the equitable nature of disgorgement, as the 'exception' of joint and several liability would then become a rule and an express power of SEBI.

Therefore, it can be concluded that the Indian jurisprudence on joint and several liability for disgorgement orders is rather inconsistent, taking into account the constant loggerheads between SEBI and the SAT, and the debate regarding its interpretation under Section 11B. Hence, *Liu* can serve as a guiding light especially when neither SEBI nor the SAT has dealt with the jurisprudence on the notions and principles of equity with respect to joint and several liability in disgorgement.

D. Compensation and Restitution

Another noteworthy observation made by the US Supreme Court in *Liu* is with respect to the need to provide restitution to the victims with the disgorged amount, to protect their interests. Merely disgorging the amount does not bring justice to the victims.[69] The true essence of disgorgement under equitable principles lies in a corresponding intent and effort to distribute the money amongst the victims.[70] Merely collecting the disgorged amount and depositing it in the government treasury would amount to a penalty, and hence restitution is necessary.[71]

Recently, in *Ram Kishori Gupta* v. *SEBI,*[72] the SAT directed SEBI to either pay the disgorged amount to the appellants or pay from the SEBI Investor Protection and Education Fund ('IPE Fund'). It observed that 'disgorgement without restitution does not serve any purpose.' However, as per the latest available Annual Accounts for Financial Year 2018-2019, merely around 7% of the amount in the IPE Fund has been spent and the remaining 93% still lies unutilised.[73]

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[68] SEBI Committee Reports, "The Measures for Strengthening the Enforcement Mechanism of the Board and Incidental Issues" (June 16, 2020), *available at:* https://www.sebi.gov.in/reports-and-statistics/reports/jun-2020/report-of-high-level-committee-under-the-chairmanship-of-justice-retd-anil-r-dave-on-the-measures-for-strengthening-the-enforcement-mechanism-of-the-board-and-incidental-issues_46863.html (last visited on May 23, 2021).
[69] *Supra* note 5.
[70] *Ibid.*
[71] *Ibid.*
[72] 2019 SCC OnLine SAT 149.
[73] SEBI, "Annual Statement of Accounts 2018-19" (June 20, 2020), *available at:* https://www.sebi.gov.in/reports-and-statistics/annual-accounts/jun-2020/sebi-annual-accounts-financial-year-2018-19_46902.html (last visited on May 23, 2021).

It should be noted that as per the SEBI (Investor Protection and Education Fund) Regulations, 2009 ('IPEF Regulations'), the scope for distributing the disgorgement amounts is rather ambiguous and is left to the discretion of the Advisory Committee.[74] There is, therefore, a need to bring forth an enabling provision to compensate the harmed investors for a beneficial and purposeful interpretation with regard to the utilisation of the disgorged amounts under the said regulations. Furthermore, emphasis should be laid upon Section 308 (the Fair Fund provision) of the SOX Act which empowers the SEC to levy civil penalties, and the amount so collected shall then become a part of the disgorgement fund for the benefit of the victims of such violations, and be distributed to them.[75] Notably, unlike the SEBI provisions, these amounts collected by SEC constitute a part of Fair Funds rather than depositing it with the government treasury, and are in fact distributed to the harmed investors, as much as practicable. As per the Annual Report 2020, nearly $3.6 billion were collected from parties in disgorgement orders, and SEC returned nearly $602 million to harmed investors and spent considerable amounts on investors' education.[76] A significant portion of these funds came from the Fair Funds created under Section 308 of the SOX Act.[77]

It can, therefore, be argued that an enabling provision in the IPEF Regulations may be inserted so that the unutilised money lying in the IPE Fund can be used to provide restitution to the harmed investors. Identification of such investors may be challenging, but it is not an impossible task, since the contemporary regulatory and technological landscape in the Indian securities market has gradually developed and is far ahead of the period during which the Justice Wadhwa Committee was constituted to identify investors who suffered losses in the IPO scam in 2005.[78]

IV. CONCLUSION

No system of laws can be perfect; an expectation of fool-proof laws and regulations is not only impractical but unrealistic as well. The US jurisprudence on disgorgement in the securities market has developed amidst its own set of inconsistencies and uncertainties as observed in the article. Being considered one of the most developed markets in the world, the US securities regime serves as a guiding light for India, especially when India has

[74] SEBI (Investor Protection and Education Fund) Regulations, 2009, Regulations 5 and 8.
[75] *Supra* note 14, s. 308.
[76] U.S. Securities and Exchange Commission, Division of Enforcement, "2020 Annual Report" (Nov. 2020), *available at:* https://www.sec.gov/files/enforcement-annual-report-2020.pdf (last visited on Sept. 28, 2021).
[77] *Ibid.*
[78] During the IPO scams (2005), no in-house real-time information gathering facilities were present with SEBI. Moreover, monitoring and surveillance were done manually. As a result, mapping of each transaction and generating real time alerts was an impossibly difficult task. However, SEBI is now equipped with a real-time surveillance mechanism, AI to capture and analyze data etc. See Pavan Burugula, "SEBI Plans Platform for Real-time Surveillance" *The Economic Times,* Mar. 5, 2020, *available at:* https://economictimes.indiatimes.com/markets/stocks/news/sebi-plans-platform-for-real-timesurveillance/articleshow/74485211.cms (last visited on Nov. 8, 2020).

historically relied upon the US securities regime for formulating its own laws and regulations.

The ruling in *Liu* has definitely laid the foundations for establishing a structure to determine the amount of disgorgement sought from securities law violators. Even though the US Supreme Court remanded the matter back to the Ninth Circuit for further proceedings consistent with the opinions enunciated therein, the principles laid down in this case form the basic structure and the essence of disgorgement, in convergence with the notions of equity. Therefore, it becomes essential that the methods to compute disgorgement are relooked at, and conceptions related to other aspects are also revised accordingly, such as its nature as an equitable remedy, the rule against the imposition of joint and several liability, and the best efforts of the regulator to restitute the disgorged amount to the victims.

ANATOMISING INDIA'S EXPERIENCE WITH EXTRADITION AND THE RECENT DEVELOPMENT IN RECOGNISING FUGITIVES

Abhinav Srivastava [*]

A person commits an offence in his country and flees to a foreign country to avoid prosecution under municipal law. Extradition is the key to bring back that person. To understand the entire process and stance of the Indian Government with regard to extradition, the author has divided the paper into three parts. In the first part, the author will analyse the extradition law of India, the procedure of extradition, and the prerequisites for extradition. In the second part, the author with the help of case laws, will analyse hindrances like human rights contraventions, delays by government, and procedural errors in extradition, which are some stumbling blocks in the process of extradition. In the last section, the author will look into the step that has been taken by the Government in redressing the current situation of apprehending fugitives, and what the loopholes in the same are.

I. INTRODUCTION

Extradition is the form of legal assistance between states, granted on the basis of treaties or by formal agreements. It is an official process whereby one nation or state surrenders the criminal sought to another nation or state. The main object of extradition is to bring back criminals who have fled their country to evade prosecution. Extradition in India is regulated by the Extradition Act, 1962.[1] Over the years, the Indian Government has extradited several criminals but the rate of success in extraditing has not been overwhelming. In the past few years, many economic offenders have fled to foreign countries to escape the law. Vijay Mallya, Nirav Modi, Mehul Choksi, and Lalit Modi are some of the big names on the list of economic offenders. In view of combating this evasion of law, the Indian Government introduced the Fugitive Economic Offenders Act, 2018 ('FEO Act').[2]

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[1] The Extradition Act, 1962 (Act 34 of 1962).

[2] The Fugitive Economic Offenders Act, 2018 (Act 17 of 2018).

Would it be enough to introduce this act without ameliorating the existing obstacles? This paper tries to explore the experience of India with extradition, along with the hindrances faced by the Government and further scrutinises the FEO Act, 2018.

II. PROCEDURE OF EXTRADITION

Extradition is the delivery of a person who commits a crime, from one state to another state, which desires to deal with such crime and is justifiable in the courts of another state.[3] Extradition treaties play a vital role in delineating the pattern for the return of fugitives. In the Extradition Act, 1962, the term 'extradition treaty' means a treaty made between India and a foreign state regarding the extradition of fugitive criminal.[4]

India has bilateral extradition treaties with 50 countries and 11 extradition agreements.[5] Countries like New Zealand, China, Pakistan, and the Maldives do not have an extradition treaty with India. However, the legal basis for extradition with states with whom India does not have an extradition treaty (non-treaty states) is given in the Extradition Act, which states that if there is no extradition treaty between India and any foreign state, then any Convention made between India and the said foreign state will be considered as an extradition treaty by the notified order of Central Government.[6]

The nodal authority for extradition in India is the Ministry of External Affairs ('MEA'), and the Extradition Act of 1962 is administered by them.[7] MEA receives extradition requests from a court or an investigating authority, and then they forward it to the foreign state, either through India's diplomatic representative in that foreign state or at Delhi, to the diplomatic representative of that foreign state, and if neither approach works, then an arrangement settled by the Indian Government with that foreign state comes into play.[8] The International Criminal Police Organization ('Interpol') plays an important role in accelerating the procedure of extradition.[9] The information regarding fugitive criminals is given to Interpol in the form of a 'Red Notice',[10] and they circulate it to the concerned state police.[11] The fugitive could also challenge the extradition order before foreign courts

[3] "Extradition", *Central Bureau of Investigation*, *available at:* https://cbi.gov.in/Extradition (last visited on Sept. 10, 2020).
[4] *Supra* note 1, s. 2(d).
[5] Rajya Sabha Unstarred Question no.1164, Nov. 28, 2019, *Rajya Sabha*, *available at:* https://www.mea.gov.in/rajya-sabha.htm?dtl/32115/QUESTION+NO1164+EXTRADITION+OF+CRIMINALS (last visited on Sept. 10, 2020).
[6] *Supra* note 1, s. 3(4).
[7] "From India", *Ministry of External Affairs*, *available at*: https://www.mea.gov.in/from-india.htm (last visited on Sept. 10 2020).
[8] *Supra* note 1, s. 19.
[9] "What is INTERPOL?", *INTERPOL*, *available at:* https://www.interpol.int/en/Who-we-are/What-is-INTERPOL (last visited on Sept. 11, 2020).
[10] "View Red Notices", *INTERPOL*, *available at:* https://www.interpol.int/How-we-work/Notices/View-Red-Notices (last visited on Sept. 11, 2020).
[11] *Supra* note 3.

by filing a writ of habeas corpus, but this writ is limited because the court can merely determine the jurisdiction of the magistrate, whether the offence committed by the fugitive is an offence under the extradition treaty, and whether any evidence is sufficient to arrest the fugitive.[12]If a fugitive is found guilty, the foreign government passes the order for extradition and cooperates with the requested state to surrender the person.

III. PREREQUISITES FOR EXTRADITION

A. Principle of Specialty

This principle goes hand in hand with extradition. It states that an offender should not be prosecuted for any offence other than the offence for which his extradition is sought,[13] and the same has been mentioned in the Extradition Act.[14] In the case of *Daya Singh Lahoria* v. *Union of India,*[15] the petitioner Daya Singh Lahoria had contended that the Criminal Court had no jurisdiction to try him for the offence that was not a part of extradition; the Supreme Court of India held that the fugitive brought in this country would not be tried for any offence other than the offence mentioned in the extradition decree. He was extradited from the United States in 1997.[16] However, in the case of Abu Salem, when he was extradited from Portugal by the Indian Government, India instituted a fresh case against him, in violation of the principle of specialty, according to Portugal.[17]The Supreme Court of India held that, unlike the law in the United States, the United Kingdom, and Portugal, the extradited person in India could be tried for a lesser offence as permitted by law, apart from the said offence for which a person has been extradited, but the additional punishment should be lesser than the punishment of an offence for which extradition has been granted.[18]

B. Principle of Double Criminality

This is also one of the conditions of extradition that states that to extradite the offender the crime must be an offence in both states.[19] If the particular crime is an offence in one

[12]Michael P.Shea, "Expanding Judicial Scrutiny of Human Rights in Extradition Cases After Soering" 17:85 *Yale Journal of International Law* 90(1992), *available at:* https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1587&context=yjil (last visited on Sept. 12, 2020).
[13] Carolyn Forstein, "Challenging Extradition: The Doctrine of Specialty in Customary International Law" 53(2) *Columbia Journal of Transnational Law* 365 (2015).
[14]*Supra* note 1, s. 21.
[15] (2001) 4 SCC 516.
[16]Manish Sirhindi, "Sikh bodies, SAD set up efforts for terrorist's release" *The Tribune*, Apr. 11, 2016, *available at:* https://www.tribuneindia.com/news/archive/features/sikh-bodies-sad-step-up-efforts-for-terrorist-s-release-220630 (last visited on Sept. 12, 2020).
[17]"Portugal SC rejects CBI plea on Salem's extradition" *The Free Press Journal*, Jan. 17, 2012, *available at:* https://www.freepressjournal.in/ujjain/portugal-sc-rejects-cbi-plea-on-salems-extradition - bypass-sw (last visited on Sept. 13, 2020).
[18]*Abu Salem Abdul Qayoom Ansari* v. *State of Maharashtra,* (2011) 11 SCC 214.
[19] Fey-ConstanzeBlaas, *Double Criminality in International Extradition Law* (Stellenbosch University, 2003), *available at:* https://core.ac.uk/download/pdf/37376692.pdf (last visited on Sept. 13, 2020).

country and not in another country then the principle of double criminality will not apply. For example, Canada repealed its blasphemy law under the Canadian Criminal Code,[20] which stated that if anyone published blasphemous (considered offensive to God or religion)[21] libel, he would be held liable and imprisoned for a term not exceeding two years. The Indian Penal Code, on the other hand, says that whoever outrages religious feelings, whether by speaking or writing will be liable and will be punished with imprisonment either for three years or with a fine or both.[22] Now, suppose an individual is liable under the Indian Penal Code, and he flees to Canada; since there is no 'double criminality', extradition may fail.

C. Exemption

Extradition could be denied for political and military offences,[23] and the same are also mandatory grounds for refusal under the Model Treaty on Extradition.[24] In International Human Rights Law, there is no specific standard related to military offences.[25] Several treaties related to extradition talk about 'essentially military crimes' or 'purely military offences', and other treaties consider military offences as those offences which are not an offence under criminal law but an offence under military law.[26] When talking about political offences, there is no exhaustive definition for this term. However, in the case In *reCastioni,*[27] it was held that to constitute a political offence, it is necessary to show that the crime was incidental to and formed part of a 'political disturbance'. In general, political offences are divided into two categories (i) 'pure' political offences, and (ii) 'relative' political offences.[28] Pure political offences include sedition, treason, and espionage, for which exemption is granted, whereas relative political offences are nothing but ordinary violent crimes related to political uprisings.[29] The reason behind the denial of extradition of an individual who is accused of a political offence is the plausibility that the judicial system of the requesting state would not be capable of treating rightly those individuals

[20] "Repeal of Canada's Blasphemy Law Applauded by National Secularist Organization" *GlobeNewswire*, Dec. 13, 2018, *available at*: https://www.globenewswire.com/news-release/2018/12/14/1667079/0/en/Repeal-of-Canada-s-Blasphemy-Law-Applauded-by-National-Secularist-Organization.html (last visited on Sept. 11, 2020).
[21] Cambridge Dictionary, *available at:* https://dictionary.cambridge.org/dictionary/english/blasphemous (last visited on Sept. 11, 2020).
[22] Indian Penal Code, 1860 (Act 45 of 1860), s. 295A.
[23] *Supra* note 7.
[24] Model Treaty on Extradition, art. 3, *available at*: https://www.unodc.org/pdf/model_treaty_extradition.pdf (last visited on Aug. 10, 2021).
[25] Federico Andreu-Guzmán, I*Military jurisdiction and international law* 17 (International Commission of Jurists, Geneva, 2004), *available at:* https://www.icj.org/wp-content/uploads/2004/01/Military-jurisdiction-publication-2004.pdf (last visited on Sept. 16, 2020).
[26] *Ibid.*
[27] *In Re Castioni*, [1891] 1 QB 149.
[28] Antje C. Petersen, "Extradition and the Political Offence Exception in the Suppression of Terrorism" 67 *Indiana Law Journal* 775 (1992), *available at:* https://www.repository.law.indiana.edu/ilj/vol67/iss3/6?utm_source=www.repository.law.indiana.edu%2Filj%2Fvol67%2Fiss3%2F6&utm_medium=PDF&utm_campaign=PDFCoverPages (last visited on Sept. 16, 2020).
[29] *Ibid.*

who mistrusted their government, and the requested state may also fear that the offender would be subject to inhuman treatment in the requesting state.[30]

This exemption is incorporated in the Extradition Act, 1962 which states that a fugitive criminal will not be surrendered for an offence of political nature if he proves before the court that the particular offence is of a political character.[31]

IV. HOW PROFICIENT INDIA IS IN EXTRADITING FUGITIVES

72 Indians have fled to foreign countries since 2015, where some are facing charges of financial irregularities with banks, and some are under criminal investigation,[32] including 27 alleged economic offenders.[33] India's experience with extradition is not stirring. The success rate in extradition over the last 15 years is no more than 36%,[34] which is not laudable. Data shows that India extradited 23 fugitive criminals from foreign countries successfully, from September 2014 to August 2019.[35] Out of this, India extradited only two fugitives from the United Kingdom ('UK'), one Samirbhai Vinubhai Patel in October 2016,[36] who was an accused in the Gujarat riots and the other being Sanjeev Chawla in February 2020,[37] who was the prime accused in the match-fixing scandal of 2000.

A. Hindrances in Extradition

1. Contravention of Human Rights

After the *Soering* v. *The United Kingdom* case,[38] it has become a touchstone for the UK and European courts to deny extradition on the ground of 'torture, inhuman or degrading treatment or punishment'.[39] The implication of this ground could be seen recently when the extradition of aide of underworld don Dawood Ibrahim, Hanif Mohammed Umerji

[30] *Id.*, at 776.
[31] *Supra* note 1, s. 31(1)(a).
[32] Lok Sabha Unstarred Question no.653, Feb. 5, 2020, *Lok Sabha*, *available at:*https://mea.gov.in/lok-sabha.htm?dtl/32346/QUESTION_NO653_EXTRADITION_OF_FINANCIAL_FRAUDSTER(last visited on Sept. 13, 2020).
[33] "27 economic offenders fled India in last 25 years" *The Economic Times*, Jan. 1, 2020, *available at*:https://economictimes.indiatimes.com/news/politics-and-nation/27-economic-offenders-fled-india-in-last-5-yrs/articleshow/67381198.cms?from=mdr (last visited on Sept. 13, 2020).
[34] Rakesh Dubbudu, "India Wants Vijay Mallya Back, But Our Extradition Success Rate Shows This Might be Tough" *The Wire*, Apr. 25, 2017, *available at:*https://thewire.in/external-affairs/india-vijay-mallya-extradition (last visited on Sept. 15, 2020).
[35] *Supra* note 5.
[36] Lok Sabha Unstarred Question no.3119, Mar. 14, 2018, *Lok Sabha*, *available at:* https://mea.gov.in/lok-sabha.htm?dtl/29626/QUESTION_NO3119_EXTRADITION_FROM_UK (last visited on Sept. 13, 2020).
[37] "Wanted bookie Sanjeev Chawla extradited from UK" *The Economic Times*, Feb. 13, 2020, *available at:*https://economictimes.indiatimes.com/news/politics-and-nation/wanted-bookie-sanjeev-chawla-extradited-from-uk/articleshow/74112791.cms (last visited on Sept. 13, 2020).
[38] 1/1989/161/217, *available at:* https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57619%22]} (last visited on Sept. 12, 2020).
[39] European Convention on Human Rights, art. 3.

Patel, was refused from the UK to India on a claim that he would be tortured in India.[40] One of the reasons for the delay in the extradition of Vijay Mallya from the UK is the condition of prisons in India. Vijay Mallya's defence team contended that given the conditions of prisons in India, which are 'appalling' and 'deplorable', his extradition would violate Article 3 of the European Convention on Human Rights.[41] The paucity of staff and overcrowded prisons area are big concerns. Prisons in India are generally managed by five personnel – the Executive staff, Ministerial staff, Correctional staff, Medical staff, and other staff. According to the Prison Statistics India 2019, the actual strength of prison staff (including all the states and union territories) is 60,787 against the total sanctioned strength of 87,599, thus the vacancies being of the tune of 26,812.[42]The absence of adequate prison staff has led to unbridled violence and criminal activities inside the jail. The UK has thus denied most of India's extradition requests because of these transgressions of human rights.[43]

2. Delays by Government

In 2017, a couple, Arti Dhir and Kanwaljit Raijada, who were accused of double murder, fled to the UK and their extradition was cancelled because of a lack of assurance by the Indian Government that the couple would not get life imprisonment.[44]The Indian Government produced assurance, but this was neither satisfactory nor on time because of which the UK refused to extradite them.[45] If they had extradited the couple to India, then the couple would have been subjected to a double life term without parole, which would have violated the European Convention on Human Rights.[46] Jatinder Kumar Angurala's case was another instance of delay, where he and his wife, Asha Rani Angurala, after defrauding the Bank of India in Jalandhar, fled to the UK, and after a legal battle for extradition, the UK refused to extradite the couple because too much time had elapsed.[47] Judge Emma Arbuthnot, in reference to this case, had stated that Jatinder Angurala was a

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[40] Munish Chandra Pandey, "Pak-origin former UK home secretary blocked extradition of Dawood aide Tiger Hanif to India" *India Today*, May 18, 2020, *available at:*https://www.indiatoday.in/india/story/pak-origin-former-uk-home-secretary-blocked-extradition-of-dawood-aide-tiger-hanif-to-india-1679061-2020-05-18 (last visited on Sept. 12, 2020).

[41] Aftab Alam, "Why 'Deplorable' Prison Conditions in India Are Major Hurdle to Bringing Back Mallya" *The Wire*, Sept. 20, 2018, *available at:*https://thewire.in/rights/india-prisons-uk-vijay-mallya (last visited on Sept. 13, 2020).

[42] "Prison Statistics India 2019" *National Crime Records Bureau*, *available at:*https://ncrb.gov.in/sites/default/files/PSI-2019-27-08-2020.pdf (last visited on Sept. 13, 2020).

[43] *Supra* note 41.

[44] Ruhi Khan, "India Loses Extradition Case of UK-Based Couple Accused of Murdering Adopted Son" *The Wire*, Feb. 7, 2020, *available at:*https://thewire.in/world/india-loses-extradition-case-couple-double-murder (last visited on Sept. 13, 2020).

[45] *Ibid.*

[46] "UK court hears India's appeal in extradition case of couple facing murder charges of adopted son" *India Today*, Jan. 28, 2020, *available at:* https://www.indiatoday.in/world/story/uk-court-hears-india-s-appeal-in-extradition-case-of-couple-facing-murder-charges-of-adopted-son-1641056-2020-01-28 (last visited on Sept. 15, 2020).

[47] Rashmee Roshan Lall, "London: A haven for the Kings of bad times?" *Firstpost*, Mar. 22, 2019, *available at:*https://www.firstpost.com/india/london-a-haven-for-the-kings-of-bad-times-6308071.html (last visited on Sept. 15, 2020).

fugitive and his extradition was barred by reason of the passage of time and 'it would be unjust and oppressive to extradite him' because considerable time has elapsed since the alleged offence.[48] So, in both cases, the slow pace of the Indian Government led to a failure of extradition.

3. Procedural Errors

A lenient approach by the Indian Government resulted in the denial of Nadeem Akhtar Saifi's extradition by the UK. Nadeem was accused of conspiracy to murder music baron Gulshan Kumar.[49] It had been said that the key witness gave an oral statement in Hindi because he did not understand English, and later, that statement was translated and recorded in a document in English and signed by him.[50] The Mumbai Police said that Mohammad Ali Shaikh's (witness) deposition statement was written by him alone.[51] Later, an expert testified that the statement was written by an educated man because Shaikh was illiterate and only knew Hindi and Urdu.[52] The Judges considered that this rendered the statement tainted and unfair. Lord Justice Christopher Rose held that no legally admissible material was available with the Mumbai Police Commissioner to substantiate his allegation against Nadeem.[53] On top of that, the Court awarded him £920,080 as a cost for legal expenses.[54]

Extradition is an indispensable process to bring back fugitives. It is not a cakewalk, it is a lengthy and complex process, and apart from treaties, formal relations between countries play a crucial role. For example, a lack of formal agreement with Argentina has been the reason for the denial of the extradition of Italian businessman Ottavio Quattrochi, who was accused as a middleman in the Bofors corruption scandal in 1986.[55]

Regardless of these hindrances, a major step was taken by the Government recently to apprehend fugitives who commit socio-economic offences. Laws have been enacted to penalise economic offenders, like the Prevention of Money-laundering Act ('PMLA') of

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[48] Aditi Khanna, "UK rejects 2 Indian extradition requests" *Outlook*, Nov. 5, 2017, *available at:*https://www.outlookindia.com/newsscroll/uk-rejects-2-indian-extradition-requests/1182013 (last visited on Sept. 20, 2020).

[49]Rajarshi Bhattacharjee, "Six high-profile people who left the country to escape law" *The Economic Times*, Mar. 16, 2016, *available at:*https://economictimes.indiatimes.com/magazines/panache/six-high-profile-people-who-left-the-country-to-escape-law/articleshow/51422853.cms?from=mdr (last visited on Sept. 20, 2020).

[50]"Procedural error cited in Nadeem extradition case" *The Times of India*, Nov. 18, 2001, *available at:* https://timesofindia.indiatimes.com/india/Procedural-error-cited-in-Nadeem-extradition-case/articleshow/1917022531.cms (last visited on Sept. 21, 2020).

[51] Sheela Raval and IsharaBhasi, "Music director Nadeem Saifee extradition case: Big embarrassment for India in London trial" *India Today*, Nov. 12, 2001, *available at*: https://www.indiatoday.in/magazine/crime/story/20011112-music-director-nadeem-saifee-extradition-case-big-embarrassment-for-india-in-london-trial-774621-2001-11-12 (last visited on Sept. 21, 2020).

[52]*Ibid.*

[53] "UK court asks Govt to pay Rs6.5cr to Nadeem" *The Times of India*, Oct. 30, 2001, *available at:* https://timesofindia.indiatimes.com/india/UK-court-asks-Govt-to-pay-Rs-6-5-cr-to-Nadeem/articleshow/1331291036.cms (last visited on Sept. 21, 2020).

[54]*Supra* note 51.

[55] "India wants suspect extradited" *BBC News*, Mar. 2, 2007, *available at:* http://news.bbc.co.uk/2/hi/south_asia/6410533.stm (last visited on Sept. 25, 2020).

2002,[56] the Prohibition of Benami Properties Transaction Act of 1988,[57] the Companies Act of 2013,[58] the Insolvency and Bankruptcy Code of 2016,[59] the Criminal Procedure Code, 1973,[60] and the Indian Penal Code, 1860.[61] Apart from these, there are other laws that penalise economic offences, but there is no specific law to apprehend a person who has fled to another country after committing a high-value economic offence and evades the law by staying outside. Now, considering the present condition of India in extradition of fugitives, the fact is apparent that the number of economic offenders in the last few years has increased, and in order to redress this issue, the FEO Act was brought into force on 21 April 2018.

The FEO Act, 2018 is the amalgamation of all the above-mentioned Acts in any matter related to economic offences and provides measures to deter a 'Fugitive Economic Offender' ('FEO') from evading the law in India by staying outside the jurisdiction of Indian courts.[62]

V. SYNOPSIS OF THE ACT

According to the Act, a 'Fugitive Economic Offender' means any individual against whom an arrest warrant has been issued by any court in India, who has left India after committing an economic offence or refuses to return to India to avoid prosecution.[63]

Here, an economic offence does not include any minor offence, and under the FEO Act, only if the total value involved is 100 crores or more would it be considered a Schedule offence.[64]

To declare a person an FEO, the Director or any other person, not below the rank of the Deputy Director, who has reason to believe that an individual is an FEO, may file an application prescribed by a 'special court'.[65] As mentioned in the Act, the application shall contain:[66]

i.) Reasons for the belief that an individual is a fugitive economic offender;

ii.) Information about the location/place of the fugitive economic offender;

iii.) List of properties or *Benami* properties in India or outside India which believed to be proceeds of crime for which confiscation is sought; and

iv.) List of persons who have any interest in the listed properties.

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[56] The Prevention of Money-Laundering Act, 2002 (Act 15 of 2003).
[57] The Prohibition of Benami Property Transaction Act, 1988 (Act 45 of 1988).
[58] The Companies Act, 2013 (Act 18 of 2013).
[59] The Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016).
[60] The Code of Criminal Procedure, 1973 (Act 2 of 1974).
[61] The Indian Penal Code, 1860 (Act 45 of 1860).
[62] *Supra* note 2, Preamble.
[63] *Id.*, s. 2(1)(f).
[64] *Id.*, s. 2(m).
[65] *Id.*, s. 4(1).
[66] *Id.*, s. 4(2).

The Central Government will attach the property of an FEO and it will be in possession of the Government for 180 days or may be extended by the special court.[67] The special court will then issue the notice to the individual with an ultimatum that he has to appear in not less than six weeks from the date of issue of notice, at a specified place in a specified time and if he fails to do so, he will be declared as an FEO.[68]

Whether the property is in India or abroad, after declaring such an individual an FEO, his properties will stand confiscated by the Central Government, and any other property or *Benami* property in India or abroad will also be confiscated by the Government.[69]

VI. FLAWS IN THE ACT

The FEO Act may debar an individual from exercising his right from filing or defending any civil claims before any court or tribunal.[70] Now, this is one of the drawbacks of the Act, as so debarring an individual is an infringement of their right to access to justice. Under Section 14 of the FEO Act, it is mentioned that the court or tribunal may disallow an individual from filing or defending 'any civil proceeding', which includes family disputes, divorce proceedings, consumer complaints, succession suits, and many more, which have nothing to do with this Act. This Section could deny the right to access to justice. In the case of *Anita Kushwaha* v. *Pushap Sudan*,[71]the right to access to justice was included within the scope of Article 14[72] and Article 21[73] of the Constitution of India. The Supreme Court had emphasised that access to justice is a facet of the right to life guaranteed under Article 21 of the Constitution as well as the facet of the right guaranteed under Article 14.[74]Many legal luminaries also consider the right to access to justice as part and parcel of the Fundamental Rights. Former Chief Justice Dipak Misra has said in a lecture that: 'access to justice is a Fundamental Right and there is no doubt about it.'[75]

So, the question arises, what made the legislators add a provision that might violate a fundamental right?

The provisions of the FEO Act work on the notion of 'guilty until proven innocent'. This argument gets its strength from the fact that the authorities have the power to attach property before the trial even begins if there is reason to believe that the property is

[67] *Id.*, s. 5(3).
[68] *Id.*, s. 10.
[69] *Id.*, s. 12.
[70] *Id.*, s. 14.
[71] (2016) 8 SCC 509.
[72] The Constitution of India, art. 14.
[73] *Id.*, art. 21.
[74] *Supra* note 71.
[75] "Access to justice a fundamental right: CJI" *Business Standard*, Jul. 10, 2018, *available at*: https://www.business-standard.com/article/pti-stories/access-to-justice-a-fundamental-right-cji-118071001321_1.html (last visited on Sept. 30, 2020).

proceeds of crime as per Section 5(2).[76] It could be argued that the said provision creates deterrence among accused individuals but the same would not be in congruence with the fundamental principle of criminal jurisprudence which is 'innocent until proven guilty'.

VII. CONCLUSION

Looking at the present situation, India needs to ameliorate the condition of prisons to expunge it as one of the reasons for the denial of extradition, as the existing condition stands in contravention of the United Nations Standard Minimum Rules for the Treatment of Prisoners, 2015, which seeks to minimise the differences between prison life and life at liberty.[77]

New reforms are the need of the hour, for instance, the establishment of new agencies for the investigation to assist the Central Bureau of Investigation or the Directorate of Enforcement will fasten the procedure of investigation without any unnecessary delays. Apart from all these, bilateral treaties or multilateral treaties need to be concluded by India. Formal agreements between countries play a consequential role. Without tackling these problems, the introduction of the FEO Act is just like any other law in the bucket, and it would not be wrong to say, 'too many laws, too little justice'.

Nevertheless, the FEO Act is a significant step by the Government to strengthen domestic law in pursuance of the United Nations Convention against Corruption. This Act can be considered a panacea for all the shortcomings in the previous laws, but the Act is not impeccable because a major drawback therein is Section 14, which needs to be amended, as it violates fundamental rights, and arbitrary sections like Section 5(2) needs to be reweighed as the same might not pass judicial scrutiny.

[76]Vakasha Sachdev, "Is Govt's Fugitive Economic Offenders Bill Unconstitutional?" *The Quint*, Feb. 28, 2019, *available at:* https://www.thequint.com/voices/opinion/fugitive-economic-offenders-bill-nirav-modi-vijay-mallya-unconstitutional#read-more#read-more (last visited on Sept. 30, 2020).

[77] UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN Doc A/Res/70/175 (Dec. 17, 2015), *available at:* https://undocs.org/A/RES/70/175 (last visited on Sept. 30, 2020).

THE ARBITRABILITY OF TELECOM DISPUTES: SETTLING THE UNSETTLED

Aakash Laad and Kratika Indurkhya [*]

Arbitration has gained prominence as one of the most desirable methods of alternative dispute resolution, owing to its flexibility and celerity of procedure. However, there has been a lot of clamour over the arbitrability of telecom disputes. One of the primary reasons for this is the impact of the issue created upon the public. Disputes with larger public impact are deemed not arbitrable, as arbitration is the result of an agreement made between two private parties. Therefore, issues that concern the hoi polloi are not made subject to arbitration. In this article, the authors have analysed only the jurisdictional tussle between Telecom Dispute Settlement and Appellate Tribunal and arbitration as a form of alternate dispute mechanism in light of passive infrastructure providers, mainly through the prism of two important judgments in this regard. The issue becomes imperative as there is a sectoral statutory regulator for telecom disputes in India, that is, the Telecom Regulatory Authority of India and thus the tussle between the sectoral regulator and the arbitral tribunal is bound to happen. The authors have also discussed the conflicting issue of infrastructure and telecommunication service providers under the Telecom Regulatory Authority of India Act and the Indian Telegraph Act to better analyse the issue of arbitrability of the telecom disputes and the impact of their contracts on the consumer. The authors have analysed how arbitration and public policy are connected while concluding the article through some recommendations based on foreign practices and Indian jurisprudential experiences.

I. INTRODUCTION

Although the judicial tussle between arbitration and the Telecom Dispute Settlement and Appellate Tribunal ('TDSAT') established under the Telecom Regulatory Authority of India Act, 1997 ('TRAI Act')[1] is no more *res integra* after *Aircel Digilink India Ltd.* v. *Union*

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[1] The Telecom Regulatory Authority of India Act, 1997 (Act 24 of 1997).

of India and Anr ('*Aircel* case'),[2] the discourse selected for this article majorly deals with other aspects of this feud which came into light with subsequent case laws. While the *Aircel* case dealt with legal principles, making it right *in rem*, this article constringes and analyses only the jurisdictional tussle between TDSAT and arbitration as a form of alternate dispute mechanism in light of passive infrastructure providers.

In the *Aircel* case,[3] laying importance on public policy, it was held that a services dispute that affects a large body of consumers all over the country should be amenable to one expert body, but if two private parties are involved or there is no violation of the interests of the public, ultimately making them beyond Section 14 of the TRAI Act,[4] the parties have the freedom to resolve it through alternative dispute resolution. The Delhi High Court, in *HDFC Bank* v. *Satpal Singh Bakshi,* in a similar vein, held that all disputes pertaining to right *in personam* are arbitrable and parties have the option to choose arbitration as an alternative forum, while disputes relating to rights *in rem* having inherent public interest are not arbitrable and the parties' choice of the forum of arbitration is ousted.[5] The *Aircel* case further emphasised and reiterated the principle of *generalia specialibus non derogant* (in case of conflict between the two, the general statute must yield to the special one), which is very relevant to dealing with the scrimmage at hand. Further, to elucidate this principle, reliance was placed on the ratio laid down in *Punjab State Electricity Board* v. *Bassi Cold Storage, Kharar and Anr.*[6]

Although the law appeared to be settled, the verdicts of the TDSAT in *Reliance Infratel Ltd.* v. *Etisalat DB Telecom (P) Ltd* ('*Reliance Infratel*')[7] and the Delhi High Court in *Viom Networks* v. *S Tel Pvt Ltd* ('*Viom Networks*')[8] added to the existing jurisprudence. The issue involved in these two judgments has laid the premise of this article which henceforth will scrutinise whether passive infrastructure providers qualify as service providers under the TRAI Act and if the Infrastructure Provider Category-I ('IP-I') Registration Certificate can be called a license under the said Act.

Taking into consideration the legislative intent of the statute, the sections of this article are divided into the following parts. Part II will deal with the intricacies of *Reliance Infratel* and *Viom Networks*; Part III will deal with the analysis of pertinent points involved; Part IV will deal with public policy argument in arbitration; Part V will deal with the recommendations; and lastly, Part VI will state the conclusion of the article.

[2] 2005 (3) CLJ 461.
[3] *Id.,* at para. 18.
[4] *Supra* note 1, s. 14.
[5] 2012 SCC OnLine Del 4815.
[6] (1994) Supp 2 SCC 124.
[7] MANU/TD/0056/2012.
[8] 2013 SCC OnLine Del 4511.

With the proposition laid down, it will be pertinent to anatomise the definitions around which the whole debate revolves, that being, 'service provider', 'telecommunication services' and 'licenses'. But first, the authors will begin with the types of infrastructure sharing models. There are two types of such networks, the difference between which is relevant to the issue at hand.

Infrastructural sharing models are divided into two parts - passive and active. Passive infrastructure sharing means 'sharing of physical sites, buildings, shelter, etc. It is a type of sharing where non-electronic infrastructure at a cell site, such as power supply and management system, and physical elements such as backhaul transport networks are shared'.[9] On the other hand, active infrastructure sharing involves 'sharing the active electronic network elements; the intelligence in the network embodied in base stations and other equipment for mobile networks and access node switches and management systems for fiber networks'.[10]

II. DISCUSSION OF THE CASES: RELIANCE INFRATEL AND VIOM NETWORKS

Dealing with the precise question at hand, it is apposite to discuss the brief of both the cases, that is, *Reliance Infratel* and *Viom Networks* which are for all intents and purposes similar. In both cases, the petitioners were involved in providing passive infrastructure for the purpose of the grant on a lease/rent/sale basis to the licensees of Telecom Services licensed under Section 4 of the Telegraph Act, 1885 ('Telegraph Act').[11] They also held a registered certificate of IP-I, issued by the Union of India with some restrictions and conditions. Such restrictions had been placed by way of terms and conditions of license as envisaged under the proviso appended to Section 4 of the Telegraph Act, 1885.

In the *Reliance Infratel* case,[12] the TDSAT conferred a very wide jurisdiction on itself. While holding that even the infrastructure providers (passive) would be service providers under the TRAI Act, it went on to state that even a beforehand arbitration agreement shall be of no effect, as TDSAT shall exercise exclusive jurisdiction over the matter. It was further stated that even by passive infrastructure, it is the consumer that will be ultimately affected, and so the same must be included within the ambit of 'service provider'. The judgment, in this case, rendered the arbitration clauses in such agreements ineffective and otiose due to the following factors:

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[9] Telecom Regulatory Authority of India (TRAI), "Consultation Paper on Review of Scope of Infrastructure Providers Category-I (IP-I) Registration" (Aug. 16, 2019), *available at:* https://trai.gov.in/sites/default/files/CP_NSL_Infra_16082019.pdf (last visited on Sept. 16, 2020).
[10] *Ibid.*
[11] The Indian Telegraph Act, 1885 (Act 13 of 1885), s. 4.
[12] *Supra* note 7.

a. The expansive interpretation given by TDSAT to the meaning of the term 'service providers' and 'telecommunication services' under the TRAI Act; and
b. The extension of the range of powers conferred on the TDSAT for adjudication of disputes under Section 14 of the TRAI Act.

Not much time has elapsed before the ratio of *Reliance Infratel* was declared incorrect by the Delhi High Court in the *Viom Networks* case.[13] In almost a year, the tables turned 360°, and the judgement in *Reliance Infratel* was overruled *sub-silentio* while providing the reasons for doing so.

In the *Viom Networks* case, the Delhi High Court simply stated that TDSAT was made to regulate the telecom disputes related to discrepancies in telecommunication services, which affect consumers directly. Further, it was held that conferring a jurisdiction as wide as that conferred in the *Reliance Infratel* verdict would ultimately act in contravention to the text of the statute. It may potentially hinder the right of the parties to move to the intended forum for dispute adjudication and resolution. It clearly cut down on the jurisdiction of the TDSAT as provided in the *Reliance Infratel* judgment and restricted it to only such service providers which are licensed as per Section 2(1)(e) of the TRAI Act and who are engaged in providing public 'telecommunication services' to the 'users'.

A. Points of Concern and Specific Holdings of the Cases: Reliance Infratel and Viom Networks

There were oppugnant views given by the Tribunal and Delhi High Court on the following three major issues:

1. Difference between IP-I Registration Certificate and License

In the *Reliance Infratel* case,[14] the TDSAT held that the restrictions contained in the IP-I Registration Certificate can be imposed by way of a license only, given in the proviso of Section 4 of the Telegraph Act. Subsequently, the Tribunal did not distinguish between the licensees under the Telegraph Act and the TRAI Act and held them to be the same and therefore amenable to the TDSAT's jurisdiction.

TDSAT in *Reliance Infratel* presumed licensee as given in the TRAI Act and in the Telegraph Act to be the same without noticing the fact that the former is only restricted to those who provide public telecommunication services.

The Delhi High Court negated this contention in the *Viom Networks* case[15] by holding that the licensees under both the aforementioned Acts are different, and in the TRAI Act, the licensee can only be one if he provides public telecommunication services that too directly to the users and not any other person. Moreover, it was held that the

[13] *Supra* note 8.
[14] *Supra* note 7.
[15] *Supra* note 8.

restrictions in the registration certificate can be contractual and may not necessarily be imposed by the way of a license only. Therefore, it can be implied that the Delhi High Court, in the *Viom Networks* case, held that the scope of Section 2(1)(e) of the TRAI Act is lesser than that of Section 4(1) of the Telegraph Act.[16]

2. Consumers on receiving end—*sine qua non*?

Another set of reasoning provided by TDSAT in the *Reliance Infratel* case was that the service need not be provided only to the consumers, and a service provided to other providers would also fall within the definition of 'service providers' as given in the TRAI Act and thus, will be a subject matter of the TDSAT's jurisdiction.[17]

In *Reliance Infratel,* the TDSAT only considered 'service of any description' and disregarded the succeeding word 'user', whereas, in the *Viom Networks* judgment,[18] it was specifically defined as consumers of telecommunication service. In the latter case, the Delhi High Court concluded that since passive infrastructure providers do not do the same, they are not within the jurisdiction of TDSAT.

3. Interpretation of the term 'service provider'

In *Reliance Infratel,* emphasis was laid on the purposive interpretation of a statute when the literal interpretation leaves a doubt, and by applying the former, the word 'service provider' was given a wide connotation to include the word 'infrastructure provider' within it.[19]

The Delhi High Court, in *Viom Networks* case, cited *Nahar Industrial Enterprises* v. *Hong Kong & Shanghai Banking Corporation,*[20] which held that the purposive interpretation should not be made an instrument of the courts to rewrite a statute as per their caprices. Further, if once it is found that all the licensees under Section 4 of the Telegraph Act are not included in the TRAI Act and only those are included which provide public telecommunication services, using purposive interpretation to include all such licensees in the latter Act would amount to a violation of the statute. Even TRAI itself held through its recommendations and consultation papers that the IP-I registrants were to be out of the ambit of licensees under the TRAI Act.[21]

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[16] *Id.,* at para. 20.
[17] *Supra* note 7.
[18] *Supra* note 8.
[19] *Supra* note 7.
[20] (2009) 8 SCC 646.
[21] Telecom Regulatory of India (TRAI), "Recommendations on Infrastructure Sharing" (Apr. 11, 2007), *available at:* https://trai.gov.in/sites/default/files/recom11apr07.pdf (last visited on Sept. 11, 2020); Telecom Regulatory of India (TRAI), "Consultation Paper on Issues related to Telecommunication Infrastructure Policy" (Jan. 14, 2011), *available at:* https://trai.gov.in/sites/default/files/5-main.pdf (last visited on Sept. 14, 2020); Telecom Regulatory of India (TRAI), "Recommendations on Spectrum Management and Licensing Framework", (May 11, 2010) *available at:* https://trai.gov.in/sites/default/files/FINALRECOMENDATIONS952012.pdf (last visited on Sept. 11, 2020).

III. ANALYSIS OF THE CASES

A. Whether the Term 'Licensee' and 'Service Provider' are Correctly Construed?

Although the authors are in consensus with the emphasis and reiteration of the principle of *generalia specialibus non derogant* in the *Aircel* case[22] as per which TDSAT will supersede and have jurisdiction over arbitration proceedings, the authors would like to state that the same though true, is not applicable to the issue at hand. To substantiate the same, Section 14 of the TRAI Act is mentioned below, which specifies the jurisdiction of TDSAT. TDSAT, as per the TRAI Act, can adjudge any dispute:

a. between a licensor and a licensee
b. between two or more service providers
c. between a service provider and a group of consumers

The contention that will be substantiated through this article is that passive infrastructure can neither be a licensee, licensor, nor a service provider and hence opting for arbitration proceedings does not overstep or transgress the principle of special legislation overriding general legislation.

1. A passive infrastructure provider cannot be a licensee

It is an undisputed fact that passive infrastructure providers are given IP-I Registration Certificates.[23] Not only has the Authority, the TDSAT, recommended that the IP-I players should not be brought under the licensing regime,[24] but has also clearly admitted the infrastructure providers to be currently not covered under any license but holding only registration.[25]

Not only has the meaning of the term 'licensee' been expounded keeping in mind the context, which strictly deals with 'telecommunication services', but the latest notification of 2016 ('2016 Notification') by the Department of Telecommunications ('DoT'), also holds the expansive interpretation redundant.[26] Now, the discussion is not only based on the recommendations and consultations but a black and white government notification. The 2016 Notification states that the IP-I providers are not permitted to own and share active infrastructure. IP-I providers can only install the active elements on behalf of the

[22] *Supra* note 2.
[23] *Supra* note 9.
[24] Telecom Regulatory Authority of India, "Recommendations on Definition of Revenue Base (AGR) for the Reckoning of License Fee and Spectrum Usage Charges" (Jan. 06, 2015), *available at:* https://trai.gov.in/sites/default/files/Reco-AGR-Final-06.01.2015_0.pdf (last visited Sept. 16, 2020).
[25] Telecom Regulatory of India, "Recommendations on Spectrum Management and Licensing Framework" (May 11, 2010), *available at:* https://trai.gov.in/sites/default/files/FINALRECOMENDATIONS952012.pdf (last visited on Sept. 11, 2020).
[26] Government of India, "Ministry of Communications Letter vide 10-40/2007-CS-III" (Nov. 28, 2016), *available at:* https://dot.gov.in/sites/default/files/2016_11_28%20IP-I-CS-III.pdf?download=1 (last visited on Sept. 18, 2020).

Telecom Licensees, i.e. these elements should be owned by the companies who have been issued a license under Section 4 of the Telegraph Act.[27] It is important to mention that Section 2 of the TRAI Act begins with a truly relevant phrase, 'unless the context otherwise requires'.[28] Hence, after the 2016 Notification, it is clear that even the most expansive interpretation of the term 'licensee' cannot include passive providers.

2. A passive infrastructure provider cannot be a service provider

A service provider, as defined in Section 2(1)(j), means the government as a service provider and includes a licensee.[29] In *Bharat Coop. Bank (Mumbai) Ltd* v. *Coop. Bank Employees,* it was held that 'the use of the word "means" followed by the word "includes" in Section 2(bb) of the Industrial Disputes Act is clearly indicative of the legislative intent to make the definition exhaustive'.[30] Hence, applying the same in the present scenario, since passive infrastructure cannot be licensee, they cannot be service providers under the TRAI Act too.

The analysis of 'telecommunication services' is done in the next section, whereby it will also be established that the term 'service provider', when read contextually, will not mean the ordinary meaning as given in the *Reliance Infratel* case.[31]

Lastly, a passive infrastructure provider cannot be a licensor as Section 2(ea) of the TRAI Act defines a licensor as 'the Central Government or the Telegraph Authority who grants a license under Section 4 of the Indian Telegraph Act, 1885'.[32] Further, Section 4 of the Telegraph Act defines a 'Telegraph Authority' as 'the Director-General of [Posts and Telegraphs], and includes any officer empowered by him to perform all or any of the functions of the telegraph authority under this Act'.[33] Since the same is inapplicable to passive infrastructure providers, they cannot be a licensor.

B. The Correct Interpretation of the Term 'Telecommunication Services'

In both judgments, i.e. *Viom Networks* and *Reliance Infratel,* the definition of 'telecommunication service' has been considered and explored, albeit in a limited sense. As per the TRAI Act, the following is the definition of the term 'telecommunication services':

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[27] Telecom Regulatory Authority of India, "The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) (Seventh Amendment) Regulations" (Mar. 15, 2016), *available at:* https://trai.gov.in/sites/default/files/201603160344549732446Seventh_amendment_16mar2016_0.pdf (last visited on Sept. 15, 2020).
[28] *Supra* note 1, s. 2(1)(j).
[29] *Ibid.*
[30] (2007) 4 SCC 68.
[31] *Supra* note 7.
[32] *Supra* note 1, s. 2(1)(ea).
[33] *Supra* note 11.

> (k) 'telecommunication service' means service of any description (including electronic mail, voice mail, data services, audio text services, video text services, radio paging and cellular mobile telephone services) which is made available to *users* by means of any transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature, by wire, radio, visual or other electromagnetic means but shall not include broadcasting services.[34]

As per the rule of interpretation, even though the word 'includes' provides for an inclusive definition, the same in this case can still not give such an expansive definition as to include 'passive infrastructure' within its ambit. In the *Reliance Infratel* case, it was held that since it would be 'services to the customers, therefore, in our opinion, it would mean the service ultimately reaching the customer and all the intermediate processes involved therein.'[35] Now, if we again scrutinise the definition at hand, it calls for services which are provided to the users, which here are the consumers (the same being undisputed and not debated in either of the judgments) through the wire — only point where passive infrastructure is referred. If the judgment of *Reliance Infratel* is to be accepted, the definition which demarcates services (active infrastructure) from the medium (that is, passive infrastructure) would be taken to be one.

In various technologically advanced nations like the United States of America ('USA'),[36] the United Kingdom ('UK'),[37] and Germany,[38] there is a clear demarcation between telecommunication services and telecommunication network/apparatus. For example, a completely different clause talks about the 'telecommunication network' in the USA's legislation which states that 'the term "network element" means a facility or equipment used in the provision of a telecommunications service.'[39] Germany's legislation distinguishes between providers of telecommunications networks and providers of telecommunications services. These categories are then sub-divided into public and private providers. A 'telecommunications network' is defined in the Telecommunications Act as:

> Transmission systems and, where applicable, the switching and routing of equipment and other resources in their entirety which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed and mobile terrestrial networks, electricity cable systems (to the extent that they are used to transmit signals, networks used for radio and television

[34] *Supra* note 1, s. 2(1)(k).
[35] *Supra* note 7.
[36] US Code, Title 47 – Telegraphs, Telephones and Radio Telegraphs, 2006.
[37] Telecommunications Act 1984, s. 4, cl. 3.
[38] Telecommunications Act (Telekommunikationsgesetz TKG) 1996, s. 3.
[39] *Supra* note 36, s. 153.

> broadcasting, and cable television networks, irrespective of the type of information conveyed.[40]

Further, there are two more reasons why the term 'services' cannot take within its fold services provided by the passive infrastructure. Firstly, the term 'including' is preceded by a category of services. It is germane to our theme to note the meaning of the word 'including'. It is well settled that the word 'include' is generally used in interpretation clauses in order 'to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used, those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import but also those things which the interpretation clause declares that they shall include'.[41] Although the statute lacks an interpretation clause, the very fact that 'users' connotes 'consumers' and services have been clearly demarcated from the medium, i.e. the telecommunication network provides us with a conclusion and not an assumption that 'services' cannot take within its fold passive infrastructure.

Moreover, importing the rationale of *ejusdem generis*, which is about the meaning and interpretation of general words being followed by specific words, can be very well applied here. The Supreme Court, through a Constitution Bench, reiterated in the case of *Amar Chandra Chakraborty* v. *The Collector of Excise, Govt. of Tripura, Agartala and others*[42] that the basis of the principle of *ejusdem generis* is that if the legislature intended general words to be used in an unrestricted sense, it would not have bothered to use particular words at all unless there is a clear manifestation of contrary purpose.[43] Therefore, since the words and terms used to denote active infrastructure are different, the inclusion of passive infrastructure to the same would defeat the purpose of having such terms.

In conclusion, the authors would like to state that albeit the rule of purposive interpretation was used in both the judgments, the ways differ drastically, so much so that the results are oppugnant of each other. In the *Reliance Infratel* case, the rule was discussed and applied, but in the *Viom Networks* judgment, while interpreting the term 'service', although the rule applied was the same, it went unmentioned.

IV. PUBLICY POLICY AND ARBITRATION

As seen above, considering the 2016 Notification and other factors, TDSAT does not have the jurisdiction to decide the disputes of passive infrastructure providers. Hence, the discretion of parties to opt for arbitration is not brought into question on the ground of it being violative of the principle of public policy.

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[40] *Ibid*.
[41] *Associated Indem Mechanical (P) Ltd* v. *WB Small Industries Development Corpn Ltd.,* (2007) 3 SCC 607.
[42] AIR 1972 SC 1863.
[43] *Kochunni* v. *State of Madras,* AIR 1960 SC 1080.

Even in Turkey, apart from a few circumstances where the regulator steps in, both interconnection and roaming agreements are subject to private law.[44] Disputes of such nature are technical, such as network access, quality of services or access to infrastructure and thus well suited for arbitration.

Recently, the Apex Court of India has taken a pro-arbitration stance, and now landlord-tenant disputes, which are not covered in any specific statute, are arbitrable.[45] After a thorough examination by the Supreme Court in the case of *Vidya Drolia* v. *Durga Trading Corporation,*[46] a prolonged test for the arbitrability of disputes was laid down with the following being its components:

i. when the cause of action and subject matter of the dispute are related to a right *in rem;*

ii. when the cause of action and subject matter of the dispute affect third-party rights or where they operate against the world in general;

iii. when the cause of action and subject matter of the dispute relate to the inalienable sovereign and public interest functions of the State; and

iv. when the subject matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statutes since Section 2(3), which provides for the scope of the Arbitration & Conciliation Act, 1996, itself recognises that certain disputes may not be referred to arbitration.

While the fourth point is negated in the previous section and the 3rd point of the test is inapplicable, the 1st and the 2nd point will be discussed in this section. It is understandable that when a key policy issue is at stake, regulators may insist on conducting an official adjudication process.[47] Even in disputes between passive and active infrastructure providers, there is a slight probability of involvement of public law. For example, distortions in retail or wholesale pricing can be introduced or perpetuated, which would ultimately have an impact on the pricing of services to customers. It is their interests which might not be represented in a private dispute resolution process. Moreover, the Supreme Court in *M/s Emaar MGF Land Limited* v. *Aftab Singh* held that the arbitration clause cannot oust the jurisdiction of the Consumer Court as consumer disputes are public in nature.[48]

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[44] Stéphanie Beghe Sönmez, Can Yilmaz, et.al., "Turkey- Disputes in the telecom sector" *Lexology,* May 16, 2019, *available at:* https://www.lexology.com/library/detail.aspx?g=458acc8a-9b1a-4b9d-ba75-49e7cfed074c (last visited on Sept. 16, 2020).
[45] *Vidya Drolia* v. *Durga Trading Corporation*, 2020 SCC OnLine SC 1018.
[46] *Ibid.*
[47] International Telecommunication Union, "Dispute Resolution in the telecommunication sector" (oct. 2004), *available at:* https://www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf (last visited on Aug. 15, 2020).
[48] 2018 SCC OnLine SC 2771.

Even when the disputes are within the jurisdiction of the telecommunication regulators, countries have promoted arbitration in such disputes. The Australian Competition and Consumer Commission ('ACCC') places considerable reliance on arbitration as a way to resolve telecom access disputes.[49] Even in the USA, the Telecommunications Act of 1996 allows state regulatory commissions to use arbitration to resolve network or interconnection-related disputes.[50]

Although these are private commercial contracts, the possibility of consumer interest must be addressed. Henceforth, the next section of the article states some recommendations. Moreover, recently, it was held by the National Consumer Disputes Redressal Commission that telecom disputes could be decided by consumer forum as the same are not covered within the Telegraph Act.[51] Since the case did not involve the TRAI Act, under which Section 14(iii) states that the dispute between consumers and service providers is within the jurisdiction of TDSAT,[52] the recommendations have considered TDSAT to be the right alternate forum for dispute settlement in such cases.

V. RECOMMENDATIONS

A. Review or Approval of Arbitral Award

While there is a possibility of public interest in disputes involving passive infrastructure providers, not all cases fall in that category, and thereby, there must be minimal inroads into party autonomy. Further arbitrators can provide technical expertise in such matters. But considering consumer interest whenever such kind of arbitration proceeding commences, TDSAT must be informed of the same and the Chairperson, being a retired Supreme Court or High Court judge,[53] must determine whether the matter involves public interest. In case it does, the matter must be decided by TDSAT and not the arbitrator. In Spain[54] and France,[55] the matters of private law are resolved by private law courts, but the Telecommunications Market Commission, Spain's telecommunications regulator, may have jurisdiction in matters involving private and public law both.

Alternatively, like the UK[56] and Japan,[57] the arbitral award can be sent to TDSAT for approval. Lastly, regulators could also require that they be included as observers or parties

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[49] R.U.S. Prasad, "Working Paper No. 372 Dispute Resolution Mechanisms in the Telecom Sector: Relating International Practices to Indian Experience", Sept. 2008, *available at:* https://siepr.stanford.edu/sites/default/files/publications/372wp.pdf (last visited on Aug. 17, 2020).
[50] *Id.,* at 12.
[51] *Bharat Sanchar Nigam Limited* v. *D P Sharma,* RP No 2254/2012 (NCDRC).
[52] *Supra* note 1, s. 14(iii).
[53] Telecom Dispute Settlement and Appellate Tribunal, *available at:* https://tdsat.gov.in/writereaddata/Delhi/docs/organize_auth1.php (last visited on Sept. 1, 2020).
[54] *Supra* note 47.
[55] *Ibid.*
[56] *Id.,* at 16.
[57] *Id.,* at 87.

in proceedings addressing sensitive policy issues, or the parties/decision-makers consult them and seek their comments, as has been suggested by International Telecommunication Union ('ITU').[58] For example, in France, as the telecommunications regulator, the Authorité de Régulation de Télécommunications may submit its observations on the dispute to the appeals court.[59] Henceforth, the doctrine of competence in such cases will be done away with.

B. Arbitration Centre of TDSAT or Institutional Arbitration

Like the Mediation Centre of TDSAT,[60] an arbitration centre comprising acknowledged experts can be established as well. The regulator can oversee the process of appointing independent arbitrators. Detailed procedures and rules can be laid down for such disputes like the 4-month statutory limit of Ofcom.[61] Alternatively, one of the recommendations of ITU of endorsing some institutional arbitration can be taken into consideration as well. There is a bigger reason too for choosing institutional arbitration against commercial arbitration as India has been plagued by factors like the 'lack of a credible arbitral institution, excessive judicial intervention, absence of a dedicated arbitration bar and lack of clarity on the concept of public policy, making it an unfavourable place of arbitration.'[62] For example, the American Arbitration Association ('AAA') has developed an arbitration program in conjunction with the USA Cellular Telecommunications and Internet Association ('CTIA') for the wireless industry and its customers.[63]

C. Third Party Beneficiary

Besides the abovementioned alternatives, at times when there is a set of consumers or any other individual involved, the TDSAT may consider including them as third-party beneficiaries as well. The Indian judiciary has recognised the rights of the third-party beneficiaries as against the doctrine of privity. To quote Justice Lord-Williams, from a considered judgment in *Khirod Behari Dutt* v. *Man Gobinda,*[64] 'though ordinarily only a person who is a party to the contract can sue on it, where a contract is made for the benefit of a third person, there may be equity in the third person to sue upon the contract'. From

[58] *Id.,* at 82.
[59] *Id.,* at 61.
[60] Telecom Dispute Settlement and Appellate Authority, "Mediation Centre", *available at:* https://tdsat.gov.in/admin/introduction/uploads/Introduction%20to%20Mediation%20Centre%20TDSAT%202018.pdf (last visited on Sept. 16, 2020).
[61] Ofcom, "Dispute Resolution Guidelines Ofcom's guidelines for the handling of regulatory disputes" (Dec., 2010) *available at:* https://www.ofcom.org.uk/__data/assets/pdf_file/0019/68131/condoc.pdf (last visited on Sept. 16, 2020).
[62] Mridul Godha, Kartikey M., "The new found emphasis on institutional arbitration in India" *Kluwer Arbitration Blog*, Jan. 07, 2018 *available at:* http://arbitrationblog.kluwerarbitration.com/2018/01/07/uncitral-technical-notes-online-dispute-resolution-paper-tiger-game-changer/ (last visited on Sept. 17, 2020).
[63] American Arbitration Association, *available at:* https://adr.org/ (last visited on Sept. 17, 2020).
[64] AIR 1934 Cal 682.

a plethora of judgments,[65] it is clear that a body that is not the principal or direct party can benefit from its performance or will have enforceable rights.[66] This is called a third-party beneficiary. A third-party beneficiary is 'a party that the contracting parties intend to directly benefit'.[67]

Further, for example, Section 8 of the Australian Telecommunications (Arbitration) Rules, 2018 provides that the parties to the arbitration are the 'service seeker, the service provider, anyone that the ACCC considers will have to do something as a result of the determination of the dispute, and any other person who applies in writing to be made a party and is accepted by the ACCC as having a sufficient interest'. Even in the USA case of *Cargill P.V.* v. *M/T Pavel Dybenko & Novorossiysk Shipping Co,*[68] the Court of Appeals stated that if the third-party was found to be a third-party beneficiary under the contract, the District Court may then enforce the arbitration agreement against a party to the contract.

Along with this, the recommendation could be made non-binding on the consumers as a recent Supreme Court ruling held that although consumer disputes are not arbitrable, there is no bar against consumer disputes being submitted to arbitration in general, there is only a bar against arbitration when a consumer files a consumer complaint.[69] Hence, consumers or other individuals could approach the TDSAT in such instances.

D. A Structure Like the Mediation Centre of TDSAT

In addition to the abovementioned recommendations, the information in an arbitration proceeding must be kept confidential, as in the TDSAT's mediation process, which will not violate any principle of public policy due to the involvement of TDSAT, endorsed institutional arbitration and voluntary arbitration.

Lastly, like the Mediation Centre of TDSAT, only a nominal fee of Rs. 1,000 must be payable to the TDSAT Registry.[70] The fees of arbitrators and office expenses can be borne by the TDSAT. A similar setup exists in National Highways Authority of India ('NHAI') disputes wherein the NHAI has set up a Society for Affordable Redressal of Disputes ('SAROD') for settlement of disputes through arbitration in a cost-effective and time-bound manner.[71]

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[65] *MC Chacko* v. *The State Bank of Travancore,* AIR 1970 SC 504; *Klaus Mittelbachert* v. *East India Hotels,* AIR 1997 Del 201; *Bhujendra Nath* v. *Sushamoyee Basu,* AIR 1936 Cal 66; *Pandurang* v. *Vishwanath,* AIR 1939 Nag 20.
[66] Bryan A. Garner, *Black's Law Dictionary* (Thomson Reuters, 11th edn., 2019).
[67] *Helms Realty Inc* v. *Gibson-Wall Co,* 611 SE 2d 485, 488 (SC 2005) (US).
[68] 991 F 2d 1012 (2d Cir: 1993) (US).
[69] *Supra* note 45.
[70] *Supra* note 60.
[71] Society for Affordable Redressal of Disputes, *available at:* http://sarod.org.in/ (last visited on Sept. 8, 2020).

VI. CONCLUSION

Recently, the Delhi High Court followed *Viom Networks* in *Indus Tower Ltd.*[72] Contrary views of TDSAT and the Delhi High Court have led us to a puzzling position. With a few ifs and buts, as mentioned above, the authors have majorly concurred with the judgment of *Viom Networks*. Passive infrastructure cannot be licenced post the 2016 Notification and hence is not a service provider under the TRAI Act. Since the dispute does not relate to any category mentioned under Section 14 of the said Act, opting for arbitral proceedings does not violate the principle of *generalia specialibus non-derogant* or *publicum consilium*.

Further, it is to be considered that in the Consumer Court itself, there were 4.5 lakhs pending cases in the year 2017.[73] By way of the abovementioned recommendations, a balance has sought to be struck between party autonomy and various advantages of arbitration on the one hand and the possibility of public policy on the other. There must be a minimal violation of party autonomy when such contracts are mostly private in nature and the consumers' interests are also being taken care of as TDSAT will have a major role to play in the proceedings.

[72] 2016 SCC OnLine Del 5238.
[73] Sana Shakil, "Over 4.5 lakhs cases pending in the consumer court of the country" *The New Indian Express*, Aug. 08, 2017, *available at:* https://www.newindianexpress.com/nation/2017/aug/08/over-45-lakh-cases-pending-in-consumer-courts-of-the-country-1639896.html (last visited on Sept. 8, 2020).

STATE OF MAHARASHTRA V. LAXMICHAND NAGAJI JAIN: MANDATORY NATURE OF PUBLISHING OFFICIAL GAZETTE NOTIFICATIONS

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Delegation is essential for the smooth functioning of any authority which is layered at multiple levels. At the macro level of governance, subordinate legislations become necessary to effectively bring about desired results. However, unlike the legislature, the administration is not always available for public scrutiny. In such scenarios, it becomes necessary to limit the ancillary law-making powers in the untraceable hands. The paper attempts to analyse the object and purpose of certain subordinate legislations. The argument made through this paper is that conditional legislations are mandatory for bringing certain provisions into effect. This paper inspects one of the latest cases under this lens, State of Maharashtra v. *Laxmichand Nagaji Jain, where a Government Analyst was called upon to assess the quality of certain medicines. Though his report declares the drugs as substandard, his findings hold no significance because his appointment is brought into question due to a procedural violation. The resolution which contained the Analyst's appointment was not published in the Official Gazette. Due to the non-publication in the Official Gazette, there is no definite area of operation or area of products that may be open to test and analyse. The Bombay High Court found no warrant to overrule the trial court and hence dismissed the State's appeal. The author argues that the procedural provisions, such as the Official Gazette Notifications, are mandatory, and presents a method to identify and classify them.*

I. INTRODUCTION

For the longest time, it has been a custom to notify the masses about vacancies and appointments in government personnel through official channels for authenticity and reliability. The Official Gazette is not just symbolic documentation of all such decisions,

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it also acts as a source of information that is unbiased and readily available. Notifications via the Official Gazette have become customary, even in the absence of direct instructions regarding the same. This is due to the general nature of an order which affects a class of persons. Administrative orders need not be mandatorily published when they concern a specific individual. The idea is to convey orders from a superior chain of command to the affected persons, and the Official Gazette serves as a credible medium for a class of affected persons to be informed by an official unabridged source. New appointments, similar to orders of a general nature, concern a class of individuals, thus making their mandatory publication almost customary. However, such procedures are often ignored, resulting in a limbo where actions are authorised, but the source of their authority cannot be traced.

II. PROCEDURAL IMPROPRIETIES IN APPOINTMENT

On 17 October 1995, Pushpahas Mukand Balal visited Agarwal Medical Store in his capacity as a Drug Inspector. He drew samples of ESCOL suspension and sent one portion of the sample to Dr. Pilankar, the Government Analyst. Dr. Pilankar's report stated that the sample was not of standard quality. Esjeet Products along with four other respondents, including Mr. Laxmichand Jain, were booked for the contravention of Section 18(a)(i) of the Drugs and Cosmetics Act,[1] for the sale of a drug which was not of standard quality. The trial court acquitted the respondents as the prosecution had relied entirely on Dr. Pilankar's report and it was found that he 'was not appointed as Government Analyst validly and properly as per the provisions of Section 20'[2] of the Drugs and Cosmetics Act.[3] A closer examination must be made with regard to how the Court arrived at this conclusion.

A. Mandatory Publication for Lawful Appointment of Government Analysts

The trial court relied on the case of *R.A. Chandawarkar*,[4] where Section 20 of the Drugs and Cosmetics Act was discussed in great detail, and the facts were quite similar to the present dispute. The aforementioned judgement declared that 'the State can appoint the Government Analysts only by the publication of Government Gazette Notification as contemplated under Section 20 of the Drugs and Cosmetics Act, 1940, and not otherwise.'[5] Justice S. Radhakrishnan had 'no doubt that the provisions therein are

[1] The Drugs and Cosmetics Act, 1940 (Act 23 of 1940), s. 18(a)(i).
[2] *State of Maharashtra* v. *Laxmichand Nagaji Jain,* (2020) SCC OnLine Bom 64.
[3] *Supra* note 1, s. 20.
[4] *State of Maharashtra* v. *R.A. Chandawarkar,* (1999) (5) Bom.C.R. 519.
[5] *Ibid.*

mandatory'; hence, the Government Analyst could not have been appointed without the explicit Official Gazette Publication. Since the arguments made on behalf of the State were similar in both cases, this paper shall analyse this approach holistically and attempt to highlight the rationale behind the judgements.

The prosecution denies the mandatory obligation to issue any Official Gazette Notification for the appointment of a Government Analyst under the Drugs and Cosmetics Act. Section 20 of the Drugs and Cosmetics Act states that the government 'may', by notification in the Official Gazette, appoint persons to be Government Analysts.[6] This provides room for argument and evasion from duty since the government can now presume a burden and choose to notify in the Official Gazette or not. The absence of words such as 'compulsory', 'shall', or 'mandatory' might possibly lead to a presumption that such a notification is recommendatory in nature and the choice of compliance belongs to the State. However, an Official Gazette Publication is the only manner by which the appointment to such a post mentioned in the Drugs and Cosmetics Act can be confirmed. Additionally, the provisions under Section 20 of the Drugs and Cosmetics Act have been declared mandatory.[7] In light of *R. Chandawarkar*,[8] the term 'may' should be read as 'shall'.

It may be argued that non-compliance with such a procedural requirement should not affect the object of the statute and cause inconvenience to the masses. The Government Analyst had rightfully performed his duties, but his findings were discarded due to no fault of his own. In the present dispute, the performance of a public duty, such as sample testing, would be gravely affected due to the negligence of other persons. The risk from sub-standard medicines would result in general inconvenience, and the lack of compliance with the aforementioned provision would result in the continuance of the same in the market, thus, defeating the purpose of the statute. In such scenarios, these provisions have been held to be only directory, neglect of which should not affect the validity of the actions performed as a public duty.[9] This proposition, however, would not hold true for provisions with mandatory requirements. Two elements need to be considered to determine whether an Official Gazette Notification is mandatory, firstly, the nature of power and authority delegated, and secondly, the object and purpose of such notification.

B. Delegation of Authority and Nature of Power

Traditionally, there exists a distinction between conditional legislation and delegated legislation. Delegated legislation has been defined as a delegation of rule-making powers

[6] *Supra* note 1, s. 20.
[7] *Ibid.*
[8] *Supra* note 4.
[9] *Dattatraya Moreshwar* v. *State of Bombay,* (1952) S.C.R. 612.

which constitutionally can be exercised by the administrative authority[10] and conditional legislation refers to the delegate's power of determining the condition which would render an existing rule effective.[11] Here, the legislature delegates to administrators the conditional powers to determine the time, manner, and method of carrying into effect legislations. Legislations are often complete by themselves and the only remaining function is to apply the law in a systematised manner to either determine the time and manner of enforcement or ascertain a particular area for its application; conditional legislation fills this gap.[12] Such exercise of power is seen regularly when the legislature makes a law and the executive is expected to prescribe a date for its effective application.

The application of delegated legislation contains the potential for misuse by the legislators and acts as a shield for autocratic and oppressive administrators.[13] The administrator, limited in his/her powers as prescribed by the statute, is expected to complete the enforcement of legislation with additional details as required. Though these details are subject to policies and broad frameworks that have been pre-determined by the legislation, the possibility of arbitrary misuse cannot be overlooked. These risks are why the delegation of such power is not favourably looked upon by constitutional purists. For example, John Locke opposed the transfer of law-making powers from the hands of the legislature.[14] The people alone can decide the laws they wish to be bound by, and they do this by appointing their representatives to the legislature, who in turn make laws for them. From the purists' perspective, the administration's involvement in making laws is implicitly unconstitutional. Such involvement in the rulemaking powers in order that the objects of the legislation may be subserved is the purpose behind delegated legislation. Quite evidently, the discretion conferred on the administrators is wider in comparison to conditional legislation.

C. History of Delegated and Conditional Legislation in Independent India

In post-independence India, the first case of delegated legislation was brought about in 1949, wherein the Federal Court held that no power could be delegated beyond that of 'conditional legislation'.[15] It denied the legality of delegated legislation, in so many words; 'it is not and cannot be disputed that delegated legislation will be ultra vires.'[16] However, this position changed with the advent of the Constitution of India.[17] A dilemma arose

[10] Yashomati Ghosh, *Textbook on Administrative Law* 90-91 (LexisNexis, 2016).
[11] *Hampton & Co.* v. *United States,* (1927) 276 U.S. 394.
[12] *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi* v. *Union of India,* (1960) (2) S.C.R. 671.
[13] P. B. Mukharji, "Delegated Legislation" 1 *Journal of the Indian Law Institute* 465 (1959).
[14] John Locke, V *Two Treaties of Government* 167 (Dublin, 1823).
[15] *Jatindra Nath Gupta* v. *Province of Bihar,* (1949) AIR FC 175.
[16] *Ibid*.
[17] The Constitution of India, art. 312.

before the Supreme Court regarding which model to follow for recognition of the legislature's powers to delegate its law-making power.[18] The two most prominent options were the British model, which had no limitation on the powers that could be delegated, or that of the American Congress, where policies had to be determined with respect to the administrators.[19] While India shared Britain's model of a parliamentary form of government, they could not be congruent with respect to administration because, unlike Britain, India has a written constitution. Inversely, while the American presidential form of government was alien to India, a written constitution in both States meant similarity in administration.

Essentially, the courts were free to decide and did so in the landmark case of *In Re: Delhi Laws Act*.[20] The judiciary had single-handedly solved two problems. First, the Court legally acknowledged the power to delegate legislative power to the executive. Secondly, it managed to ensure a limitation on delegation of the legislative powers by emphasising its role as a conditional delegation and reiterating the denial of unlimited delegation of powers. In this regard, Kania, C.J. made the following observation:

> ...while a legislature, as a part of its legislative functions, can confer powers to make rules and regulations for carrying the enactment into operation and effect, and while a legislature has power to lay down the policy and principles providing the rule of conduct,...the operation of the Act can be extended to certain areas or may be brought into force on such determination which is described as conditional legislation, the power to delegate legislative functions generally is not warranted under the Constitution of India at any stage.[21]

In the same reference, Fazl Ali, J. noted that:

> ...conditional legislation simply amounts to entrusting a limited discretionary authority to others, and that to seek the aid of subordinate agencies in carrying out the object of the legislation is ancillary to legislation and properly lies within the scope of the powers which every legislature must possess to function effectively.[22]

D. Classification of Official Gazette Publication as Conditional Legislation

Before making a case for an Official Gazette Publication being conditional legislation, it is imperative to restate why this classification is relevant. A provision within legislation may take effect only upon some determination or after the application of a certain

[18] *D. S. Gerewal* v. *State of Punjab,* (1959) AIR 512.
[19] M.P. Jain and S.N. Jain, *Principle of Administrative Law* 45 (LexisNexis, 2013).
[20] *In Re: Delhi Laws Act,* (1951) 2 SCR 747.
[21] *Ibid.*
[22] *Ibid.*

condition by an extraneous authority.[23] As long as such legislation is made in all its completeness as regards the rights, affected persons, laws, powers, etc., and only requires a specific condition to be fulfilled for bringing the law into operation, then it is conditional legislation.[24] Notwithstanding the completeness of the law, the effect of such a provision is contingent on the authority's fulfilment of the said condition, making the law essentially powerless without said authority. Effectively, conditional legislation comprising certain details from the administrator is a mandatory requirement and it is essential for putting the provisions into effect.[25] If the administration fails to perform its duty through any conditional legislation, then those provisions would be rendered ineffective. It is argued that the requirement of an Official Gazette Publication is conditional legislation. Hence, if it is proven that an Official Gazette Publication is conditional legislation, then it becomes mandatory as an administrative task to invoke those provisions. Similar provisions across statutes have received the recognition of conditional legislation. Section 36 of the Payment of Bonus Act empowers the government to exempt certain establishments from the purview of the Act,[26] as was also held in the *Jalan Trading* case.[27] However, this has to be done by the Official Gazette Notification, as elaborated in the text of Section 36. The provision permits the government to exempt any establishment from the purview of the Payment of Bonus Act 'by notification in the Official Gazette.'[28] The majority opined that:

> Condition for exercise of that power is that the Government holds the opinion that it is not in the public interest to apply all or any of the provisions of the Act to an establishment or class of establishments, and that opinion is founded on a consideration of the financial position and other relevant circumstances. Section 36 amounts to conditional legislation, and is not void.[29]

The minority opinion went further to clarify that 'the Section cannot rightly be described as a piece of delegated legislation.'[30] In some cases, while judges are not as explicit in classifying the two, the Court has explained why certain provisions amount to conditional legislation;[31] and are, hence, mandatory. Section 3(1) of the Commission of Inquiry Act contains a similarly worded phrase requiring notification in the Official Gazette.[32] In the view of the Court, such publication is 'an imperative requirement and cannot be dispensed

[23] *Sardar Inder Singh* v. *State of Rajasthan,* (1957) SCR 605.
[24] *Ibid*.
[25] T.K. Viswanathan, *Legislative Drafting: Shaping the Law for the New Millennium* (Indian Law Institute, 2007).
[26] The Payment of Bonus Act, 1965 (Act 21 of 1965), s. 36.
[27] *Jalan Trading Co. (Pvt. Ltd.)* v. *Mill Mazdoor Union,* (1967) (1) SCR 15.
[28] *Supra* note 24.
[29] *Supra* note 25.
[30] *Ibid*.
[31] *King-Emperor* v. *Benoari Lal Sarma,* [1944] UKPC 40.
[32] Commissions of Inquiry Act, 1952 (Act 60 of 1952), s. 3(1).

with.'[33] Similarly, Section 20 of the Drugs and Cosmetics Act would fall under the category of delegated legislation as 'the power to bring an Act into force as well as the power to grant exemption are both treated, without a doubt, as belonging to the category of conditional legislation.'[34] In such a scenario, the scope of discretion does not exist.

E. Opposing Views on Conditional Legislation and Official Gazette Publication

There has been a long-standing academic discussion regarding the term 'conditional legislation'. Renowned academician M.P. Jain ridiculed the need to retain such a term, stating that 'it is unnecessary to keep alive a shibboleth, reminiscent of the colonial era, which serves no practical value.'[35] If the classification of such provisions as conditional legislation does not continue, then the object and purpose of a notification by the Official Gazette should determine its mandatory requirement or lack thereof.[36] The primary object of publication in an Official Gazette is twofold; wide publicity and public awareness, and authenticity of notification and its contents:[37]

1. The notification ensures wide publicity and public awareness – The Official Gazette is a public document that may be viewed freely by any person at any given time. Like all open-access sources, the Gazette is open for scrutiny to the public eye without any restrictions, thus serving the objective.
2. The contents of the notification receive authenticity – Being an official document and published under the authority of the State, the publication in the Official Gazette is an undisputed confirmation and its version is final. This authentic order may further be published elsewhere and notified through other mediums, but it provides irrefutable affirmation regarding the content. In case of any disputes, such a notification may be referred to for details regarding its date of enforcement and implementation.

Both the aforementioned points have been previously summarised in *I.T.C. Bhardrachalam*, where the Court elaborated that:

> The object of publication in the Gazette is not merely to give information to public. Official Gazette, as the very name indicates, is an official document. It is published under the authority of the government. Publication of an order or rule in the Gazette is the official confirmation of making of such an order or rule. The version as printed in the Gazette is final. The same order or rule may also be published in the newspaper or may be broadcast by radio or television. If a question

[33] *Sammbhu Nath Jha* v. *Kedar Prasad Sinha,* (1972) 1 SCC 573.
[34] *I.T.C. Bhadrachalam Paperboards* v. *Mandal Revenue Officer, Andhra Pradesh,* (1996) 6 SCC 634.
[35] *Supra* note 17.
[36] *Raza Buland Sugar Co. Ltd.* v. *Municipal Board, Rampur,* (1965) AIR SC 895.
[37] *Supra* note 31.

> arises when was a particular order or rule was made, it is the date of Gazette publication that is relevant and not the date of publication in a newspaper or in the media.[38]

Sri Soli Sorabjee had famously argued that a Government Order serves the same purpose and hence it may act as a valid substitute for an Official Gazette Publication. It provides wide publicity, and the authenticity is at a similar level.[39] Even if the two cannot be interchanged, the argument possesses some merit when it narrows down to conclude that mere non-publication in the Gazette is not fatal.[40]

F. Prescribed Mode of Publication Cannot be Dispensed With

In all cases where the parent statute enshrines a mode of publication, it has to be followed, and such a requirement is imperative.[41] As such, the notification through an Official Gazette Publication should be held as the only source of compliance with the statutory requirement.[42] The Court has found it 'unacceptable' to call such a requirement directory.[43] In addition to restricting the dispensability of a prescribed mode of publication, the Court has also laid down a test to determine whether a provision is mandatory or directory. The test established in *Atlas Cycles*[44] can be utilised to argue that in the absence of the word 'shall', a *de facto* mandatory requirement cannot be placed on Section 20 of the Drugs and Cosmetics Act. The Court in *Atlas Cycles* stated that:

> Two considerations for regarding a provision as directory are: (1) absence of any provision for the contingency of a particular provision not being complied with or followed and (2) serious general inconvenience and prejudice that would result to the general public if the act of the government or an instrumentality is declared invalid for non-compliance with the particular provision.[45]

Even if the aforementioned test is applied, Section 20 of the Drugs and Cosmetics Act would still remain mandatory. The *Atlas Cycle* test was not a formation of a new determination criterion, but rather an evolution of the common law statutory interpretation and past precedent. The test constitutes two conditions which can be referred to as the 'contingency test' and 'inconvenience to general public test.' Craies' on Statute Law elaborates that there is 'no general rule as to when enabling Acts are absolute and when directory'.[46] The contingency test operates by making provisions

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[38] *Supra* note 32.
[39] *Ibid*.
[40] *Municipal Board, Sitapur* v. *Prayag Narain Saigal & Firm Moosaram Bhagwandas,* (1969) SCR (3) 387.
[41] *Supra* note 32.
[42] *Supra* note 31.
[43] *Supra* note 32.
[44] *Atlas Cycle Industries Ltd.* v. *State of Haryana*, (1979) SCR (1) 1070.
[45] *Ibid*.
[46] Sir Charles E. Odgers (ed.), *Craies' on Statute Law* 242 (London, 1952).

directory if there is no contingency provision in the absence of compliance with the said provision. However, the contingency test cannot be applied to provisions that prescribe a mode of procedure or are explicit in their conditions for application. *Expressio unius est exclusion alterius*, express enactment shuts the door to further implication,[47] as a principle of statutory interpretation should outweigh the contingency test in the present case since Section 20 of the Drugs and Cosmetics Act clearly lays down the mode of appointment through a notification in the Official Gazette.

On the other hand, the 'inconvenience to general public test' would simply be inapplicable here due to the nature of an Official Gazette Notification being mandatory under Section 20 of the Drugs and Cosmetics Act. This test was first openly discussed by the Supreme Court in 1952, where it held that:

> Where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or in other words as directory only.[48]

Notwithstanding the absence of reference to the case above in *Atlas Cycle*, it is evident on a simple reading that the principle has been derived in a similar manner. Where the irregularity or procedural lapse may not necessarily be mandatory or may remain a question to be determined, then the 'inconvenience to general public test' can be applied. However, this principle cannot be employed to dispense with a mandatory provision, irrespective of the proposition's merit.[49] As argued above, the Official Gazette Notification was the prescribed mode of publication and it cannot be dispensed with. If it could, then any individual would have been appointed as the Government Analyst as per the whims and fancies of the authority in power. The magnitude of its requirement, its explicit mention as the mode of publication, and common law principles make the Official Gazette Notification imperative. The 'inconvenience to general public test' would be inapplicable since the provision is mandatory *ab initio*.

III. CONCLUSION

The *Atlas Cycle* test has evolved in a manner for provisions that do not demand any action for the effective implementation of the parent act. The case of laying rules before the Parliament does not warrant an active role for the provision coming into force. However,

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[47] *Id.* at 240.
[48] *Supra* note 7.
[49] *Supra* note 32.

in the present case, the notification of an Official Gazette Publication is essential for the appointment of a Government Analyst, and its non-publication would render such an appointment invalid. As long as the validity of any act remains dependent on the provision being effective, such provisions will remain mandatory.

While the express words 'conditional legislation' does not reflect in this judgement, in its reference to other decisions there is a resonance of this particular term. Section 20 of the Drugs and Cosmetics Act can be classified as conditional legislation, which means that the administration was responsible for determining a condition upon which the provision would be effective. Here, the notification through the Official Gazette was the condition for the valid appointment of the Government Analyst. As explained before, with regard to conditional legislation, the provision is ineffective until the delegated condition is not fulfilled. This makes all conditional legislations mandatory for the invocation of specific provisions. In different ways, the same principle resonates across various judgements and this case presents a similar scenario. Perhaps a change in the test for identifying mandatory provisions may be made whereby if a provision is assessed as conditional legislation, then it is declared to be mandatory.

ONG MING JOHNSON v. ATTORNEY GENERAL: CRITIQUING SINGAPORE HIGH COURT'S APPROACH TO CRIMINALISATION OF HOMOSEXUALITY

Akshita Tiwary [*]

On 30 March 2020, in the case of Ong Ming Johnson v. Attorney General, the High Court of Singapore upheld Section 377A of the Singapore Penal Code which criminalises homosexuality. This regressive judgement has come under severe flak for encouraging discrimination against the Lesbian, Gay, Bisexual, Transgender and Queer ('LGBTQ') community. A bare reading of the judgement shows how the High Court uses principles of traditional judicial review to advocate for the validity of the law. It reflects support for colonial standards and perspectives to discard egregious acts against the notion of 'public morality'. The paper provides comments and analysis on the seven issues that were decided by the High Court in the case. Most of these issues were covered in the 2014 case of Lim Meng Suang and another v. Attorney-General, as argued before the Singapore Court of Appeal. The present judgement portrays agreement with the Court of Appeal's reasoning, thereby using the law of vertical stare decisis to deliver a judgement once again in favour of Section 377A.

Additionally, an attempt is made to compare the case in question with Navtej Singh Johar v. Union of India, pronounced by the Supreme Court of India. By applying the legal principles espoused by the highest court in Navtej Singh Johar case, the author argues how the High Court's verdict in Ong Ming Johnson case is erroneous as Section 377A violates Articles 9(1), 12(1) and 14(1)(a) of the Singapore Constitution. It also contends that 'constitutional morality' takes precedence over 'public morality,' and the same should be protected by courts in the interest of justice. Such a law goes against the basic human dignity of the LGBTQ community, and is thus, liable to be rendered void on account of unconstitutionality.

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I. INTRODUCTION

> *"An individual has the sovereignty over his or her body and can surrender autonomy willfully to another individual. Their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature."*
>
> *Justice Dipak Misra*[1]

On 30 March 2020, the Singapore High Court ('the Court') upheld the law which criminalises sexual intercourse between adult males.[2] This paper attempts to critique the Court's rationale that was pronounced in the case of *Ong Ming Johnson* v. *Attorney-General*.[3] Firstly, a brief background is given on how Section 377A of the Singapore Penal Code is unconstitutional as it violates the LGBTQ community's right to equality, right to life and personal liberty and right to freedom of speech and expression. Secondly, a detailed overview of the Court's judgment is provided in which the Court tackles the plaintiffs' concerns on seven different grounds. Thirdly, the paper critically analyses how such a judgment is regressive by drawing inspiration from the legal interpretations arrived at by the Indian Supreme Court in the landmark judgement of *Navtej Singh Johar* v. *Union of India* ('*Navtej*').[4] Both India and Singapore are Asian nations that have been colonised in the past and follow the common law system. Singapore's Penal Code, 1872 is almost entirely based on the Indian Penal Code of 1860 with various similarities, including the replication of Section 377 which criminalises homosexuality. Thus, keeping in mind this shared colonial history, the *Navtej* judgment provides a suitable yardstick to compare recent rulings on Section 377. Finally, the paper concludes by shining light on the responsibility of courts to uphold the constitutional rights of citizens in the hopes that Singaporean courts too will realise the deprecating effect of this ruling on the LGBTQ community and modify their approach.

II. BACKGROUND OF THE CASE

The plaintiffs, in three originating summonses, challenged the constitutionality of Section 377A of the Singapore Penal Code.[5] Section 377A criminalises 'any act of gross indecency' between adult males. The plaintiffs submitted that this Section violated Articles 9(1), 12(1),

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[1] *Navtej Singh Johar* v. *Union of India*, (2018) 10 SCC 1, Chief Justice Dipak Misra (on behalf of himself and Justice Khanwilkar), para. 149.
[2] *Ong Ming Johnson* v. *Attorney General*, [2020] SGHC 63.
[3] *Ibid.*
[4] *Supra* note 1.
[5] The Singapore Penal Code, 1872, s. 377A states: 'Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.'

and 14(1)(a) of the Singapore Constitution ('Constitution')[6] and was liable to be struck down. They also pleaded for a reconsideration of the 2014 Court of Appeal's decision in the case of *Lim Meng Suang and another* v. *Attorney-General* ('*Lim Meng Suang CA*').[7]

In relation to the right to life and personal liberty under Article 9(1), the plaintiffs argued that Section 377A directly strikes at their personal liberty by criminalising homosexuals due to their identity. It violates the right to equality under Article 12(1) as it contains neither an intelligible differentia, nor any rational relation with the legislative object that it seeks to achieve. Such a law also contravenes Article 14(1)(a) by preventing homosexuals from freely expressing themselves in the public sphere. The Court proceeded to formulate its decision on seven different issues.[8]

III. THE JUDGEMENT: ARGUMENTS AND COURT'S VIEWS

The Court rendered a comprehensive, yet irrational, judgement on all the issues after examining the submissions of both sides.

First, while ascertaining the object of Section 377A,[9] the Court evaluated various legislative materials and other historical evidence to arrive at the conclusion that the legislative intent of Section 377A mirrored Section 11 of the Criminal Law Amendment Act, 1885, ('UK Act') which criminalised homosexuality.[10] Thus, if the law was promulgated to declare homosexuality entirely illegal, then the plaintiffs' two main arguments stood annulled, namely that: (i) Section 377A only targeted male prostitution and could not include private non-commercial sexual activity between males (the 'male prostitution' argument); and (ii) it included only commercial non-penetrative sexual activity short of sodomy, since other legal provisions already dealt with the latter conduct (the 'no overlap' argument). The Court erroneously upheld the reasoning given in *Lim Meng Suang CA* that the law broadly covered 'not only penetrative sex, but also other (less serious) acts of 'gross indecency' committed between males' in private as well.[11] It concluded by elaborating upon how the general purpose of Section 377A was to criminalise offences against public morality which included all forms of homosexual activity, be it commercial or non-commercial, penetrative or non-penetrative, consensual or non-consensual.[12]

[6] The Constitution of the Republic of Singapore, 1965, art. 9(1) states: 'No person shall be deprived of his life or personal liberty save in accordance with law'; art. 12(1) provides 'All persons are equal before the law and entitled to the equal protection of the law'; art. 14(1)(a) states 'every citizen of Singapore has the right to freedom of speech and expression.'
[7] [2015] 1 SLR 26.
[8] *Supra* note 2, para. 19.
[9] *Id.*, paras. 20-147.
[10] The United Kingdom Criminal Law Amendment Act, 1885, s. 11.
[11] *Supra* note 2, para. 98.
[12] *Id.*, para. 146.

Second, the plaintiffs challenged the constitutionality of Section 377A on the grounds that it was a legislation of the colonial era, passed long before the Constitution came into existence. The Court held that as per *Lim Meng Suang CA*, such laws are valid under Article 162 of the Constitution,[13] which allows for the continued existence of colonial laws after suitable modifications as may be necessary to bring them in conformity with the Constitution.[14] Additionally, it also accepted its constitutionality as the Parliament had retained Section 377A after extensive deliberation, thereby according due recognition to parliamentary power to frame laws for the benefit of the public.[15]

Third, the plaintiffs argued that presuming constitutionality of Section 377A did not guarantee constitutional adjudication. The Court was not required to uphold this law even if the legislature had done so, because of the principle of separation of powers. To this, the Court replied that the constitutional adjudication was arrived at by looking at the underlying intent of the legislature to frame laws in public interest. The presumption of constitutionality generally operates in favour of the Parliament, and the Court cannot interfere with this unless it can be shown that the law was either enacted or is being implemented arbitrarily.[16] In the Court's opinion, there was no arbitrariness associated with the enacting or implementation of Section 377A in the present case. Hence, the presumption of constitutionality was valid and applied in constitutional adjudication as well.[17]

Fourth, it was submitted by the plaintiffs that Section 377A violates the right to equality under Article 12(1) of the Constitution. They relied on the reasonable classification test to prove that the law is discriminatory, by having: (i) no intelligible differentia[18] and (ii) no rational relation to the object sought to be achieved.[19] On the contrary, the Court found that there is an intelligible differentia and rational relation[20] present, as Section 377A only criminalises male-male sexual conduct (even in private) to safeguard public morals. The exclusion of female-female sexual conduct is justified since male homosexual conduct has a worse impact on public morality than female homosexual conduct,[21] and such gender-based differential treatment is present within other areas of Singapore law as well.[22] Additionally, the Court stuck to its traditional approach of judicial

[13] The Constitution of the Republic of Singapore, 1965, art. 162 states 'Subject to this Article, all existing laws shall continue in force on and after the commencement of this Constitution and all laws which have not been brought into force by the date of the commencement of this Constitution may, subject as aforesaid, be brought into force on or after its commencement, but all such laws shall, subject to this Article, be construed as from the commencement of this Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.'
[14] *Supra* note 7, para. 106.
[15] *Supra* note 2, para. 154.
[16] *Public Prosecutor* v. *Taw Cheng Kong*, [1998] 2 SLR(R) 489, para. 39.
[17] *Supra* note 2, paras. 159-163.
[18] *Id.*, para. 169.
[19] *Id.*, para. 179.
[20] *Id.*, para. 189.
[21] *Id.*, para. 177.
[22] *Id.*, paras. 172- 173.

review by rejecting the reconsideration of proportionality in equality clauses for fear of usurping legislative functions while reviewing the object of Section 377A.[23]

Fifth, concerning the right to freedom of speech and expression under Article 14(1)(a), the plaintiffs submitted that they had the liberty to indulge in private intercourse with any other person they desired, given their freedom of expression. The Court, on the other hand, utilised the principle of *ejusdem generis* to interpret freedom of expression as intrinsically interlinked to freedom of verbal speech and communication.[24] Thus, it did not consider Section 377A to be in contravention of Article 14(1)(a) of the Constitution.

Sixth, the plaintiffs used scientific evidence to show that male homosexuality is biologically determined, and hence its criminalisation leads to a violation of right to life or personal liberty under Article 9(1). The Court, in the instant case, upheld the reasoning embraced in *Lim Meng Suang CA* which regarded such evidence as extra-legal arguments that could not be considered.[25] Additionally, the Court emphasised that a homosexual man is not punished merely on account of his sexual orientation; he is punished only when he violates the law under Section 377A and indulges in 'acts of gross indecency'. Likewise, a heterosexual man can also be punished on the same counts.[26] Moreover, the Court did not deem it appropriate to give absolute protection to the personal liberty of homosexual men, especially when it is not specified by the Constitution.[27] Further arguments pertaining to redundancy and arbitrariness of Section 377A were discarded because: (i) issues with how the law is enforced fall within the purview of administrative review of the Criminal Procedure Code and not constitutional review[28] and (ii) even if it is not enforced, it remains constitutional on grounds of public morality.[29]

Finally, the Court upheld that the rule of vertical *stare decisis* compelled it to be bound by the *ratio decidendi* as laid down in *Lim Meng Suang CA*. It disagreed with the plaintiffs' submission that the findings in that case constituted *obiter dicta*, and hence the Court was not bound by it. Furthermore, the Court countered the usage of a Canadian case,[30] in which a lower court had departed from a higher court's ruling to declare a law unconstitutional, by asserting that vertical *stare decisis* ought to be preserved in order to prevent uncertain effects on constitutional rights.[31]

[23] *Id.*, para. 216.
[24] *Id.*, para. 249.
[25] *Supra* note 7, paras. 53, 176.
[26] *Supra* note 2, para. 282.
[27] *Id.*, para. 283.
[28] *Id.*, paras. 286-287, 295.
[29] *Id.*, paras. 297-298.
[30] *Attorney General* v. *Bedford*, [2013] 3 SCR 1101, paras. 42-43.
[31] *Supra* note 2, paras. 313-314.

IV. A CRITICAL ANALYSIS

The judgement of the Court appears to be quite orthodox when compared to landmark judgements rendered by countries like India which decriminalised homosexuality,[32] and can be critiqued on several grounds.

First, most of the submissions of the plaintiffs were rejected on grounds of being 'antithetical to public morality'. While public morality may play an important role in the determination of constitutional rights, it is not the sole factor which courts ought to consider. As emphasised upon in *Navtej*, the idea of 'constitutional morality' takes precedence over public morality. The Constitution guarantees certain fundamental rights to individuals which must be protected, regardless of disapproval by the majoritarian public. In such cases, it becomes the duty of the court to act as the defender of constitutional rights and uphold these rights which are central to overall development of individuals.[33] At most, the court should balance constitutionally guaranteed individual rights with notions of social morality, without completely compromising one for the other. Given this argument, even if we are to assume that homosexuality is not approved by Singaporean society, it is illogical to prohibit consensual sexual intercourse between two males in private also. This, unnecessarily and completely, takes away the individual rights of homosexual males at the cost of public morality which is unacceptable.

Second, the Court incorrectly interpreted freedom of expression under Article 14(1)(a). Here, the rule of *ejusdem generis* cannot be applied as the basic meaning of expression itself includes not only verbal speech, but also communication through gestures or actions.[34] The sexual identity of an individual constitutes a facet of personal expression, which cannot be criminalised. It is paradoxical that the Court upheld that it is not criminalising homosexual males for their identity but is simply prohibiting them from indulging in sexual intercourse with other males. As a form of expression of his identity, a homosexual male would wish to enter into sexual relations with another; and if sexual intercourse is criminalised, then so is identity. This would also be in clear violation of Article 9(1), as 'sustenance of identity is the filament of life'.[35] Furthermore, homosexual males should be allowed to express their opinions on sexuality even in the public sphere and engage in discourse on romantic notions and desires. Thus, this mistaken decision of the Court contravenes their freedom of expression.

Third, the Court failed to perform its duty of being the 'highest protector' of constitutional rights for fear of interfering with legislative functions. The doctrine of separation of powers does streamline duties between the legislature, executive and

[32] *Supra* note 1.
[33] *Id.*, Chief Justice Dipak Misra (on behalf of himself and Justice Khanwilkar), paras. 119-124.
[34] Oxford Dictionary (3rd ed., 2010).
[35] *Supra* note 1, Chief Justice Dipak Misra (on behalf of himself and Justice Khanwilkar), para. 2.

judiciary. However, it has been accepted that complete differentiation of duties is not possible. Sometimes, when a court declares a legislation to be illegal, it analyses sufficiently why it is so and creates a new rule. This law-making power of courts supplements existing legislative functions of the Parliament and is not in contravention of the doctrine of separation of powers.[36] The Court presumed that the legislature framed Section 377A in public interest, and thus it could not be unconstitutional. Even if the law was framed in public interest many years ago, it did not prevent the Court from reviewing its object and relevancy in current, progressive times and declaring it unconstitutional. Thus, courts cannot shy away from declaring a law unconstitutional simply because judicial review might overlap with legislative functions. If courts start being overly cautious about this, then they will not be able to perform their own responsibility of ensuring that citizens' rights are protected, and justice is served.

Fourth, the Court rejected the plaintiffs' submission that homosexuality is a scientific phenomenon on the grounds that it falls within the ambit of extra-legal arguments. However, analysis of such extra-legal arguments is necessary while determining the impact on legal rights. In *Navtej*, it was adequately indicated that homosexuality may be considered a scientific phenomenon as a process of evolution over several years.[37] Hence, discarding such a fundamental argument merely due to the Singapore High Court's orthodox view of what arguments may be legally acceptable is definitely against the assurance of fundamental rights.

Finally, and most importantly, courts ought to have utmost respect for the human dignity of homosexual males. Given the 21st century, when active efforts are being taken to promote respect and equal rights for the LGBTQ community, the Court should have tried to preserve and promote the human dignity of such individuals.[38] While socially people may not approve of who a person falls in love with, such disapproval should have no bearing on legal rights. The underlying intent of Articles 9(1), 12(1) and 14(1)(a) is to safeguard human dignity of all individuals, and this safeguard should equally extend to gay men.

V. CONCLUSION

In light of its erroneous judgment, the Singapore High Court has further perpetuated the discrimination faced by the LGBTQ community. It is the responsibility of courts to ensure access to justice to all individuals, which cannot be denied merely because these institutions are still latching onto deteriorating perspectives. An appeal against this

[36] Albert Tate Jr., "The Law Making-Function of the Judge" 28(2) *Louisiana Law Review* 211-234 (1968).
[37] *Supra* note 1, Chief Justice Dipak Misra (on behalf of himself and Justice Khanwilkar), para. 148.
[38] *Id.,* Chief Justice Dipak Misra (on behalf of himself and Justice Khanwilkar), para. 229.

judgment has already been filed in the Singapore Court of Appeal.[39] Hopefully, Singaporean courts may modify their approach like their contemporaries in India which have taken an active step in furthering the cause of LGBTQ rights. Such a change is a prerequisite for a democratic society that seeks to promote unbiased equality and free expression of identity for homosexual individuals.

[39] Ashok Kini, "Homosexuality Is Not A Form Of 'Expression': Singapore SC Disagrees With 'Navtej Singh Johar' Judgment" *LiveLaw* (Apr. 1, 2020), *available at:* https://www.livelaw.in/top-stories/homosexuality-is-not-a-form-of-expression-154638 (last visited on Mar. 1, 2021).

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