NLUA LAW & POLICY REVIEW

Volume 7 Peer Reviewed Journal 2022 ISSN : 2455-8672

ARTICLES

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Price **Rs. 300/-** (Rupees three hundred) or US $50 (Fifty)

Mode of Citation: 7NLUALPR2022<Page No.>

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Editorial

Research is very important for the development of our society. It is a phenomenon which helps the society and humanity to move forward. With the present state of the art development, there has been constant rework and modification of our ways of doing research. Nonetheless, the basic objective of research is to analyse and have a look into anonymous and unperceived things and bring out new opportunities.

Research articles are a very important method to disseminate new ideas and findings in a consolidated manner. Writing a research article is a phenomenon and it has to be executed in an appropriate manner so that the basic idea of research is justified. They are a medium to showcase one's ability and expertise in a particular or various fields of knowledge and achievements and how it can be communicated to the whole world.

The NLUALPR is a peer reviewed journal with ISSN: 2455-8672. It is a compilation of selected articles contributed by eminent scholars and academicians in various fields of law and recent developments in the same. This journal is a platform to bring out discussions and to analyse various aspects of law and other multidisciplinary areas. This issue has been able to garner positive response in the path of research and development through its articles which reflects on the importance of research and its contribution to the development of the society.

In this issue of NLUALR,

Aman Amrit Cheema and Anushka Jain, in the article titled 'Child Incest: Is It Time to Relook at POCSO Act, 2012?' discusses on Child Incest mass epidemiological obstacle faced by all the nations of the world including India. It also focuses on the need to study the laws in the International arena as well as the stand-point of Indian Judiciary in this regard and bring out improvements in the legal system as suggested by the researcher.

Bhanu Pratap Singh, in the article titled, 'Bewildering Mandis: Insight Into Agricultural Produce Marketing Committees and the Law' discusses the interstate movement of agricultural produce in confluence with One Nation One Market and re-examine the distressed state's Agricultural Produce Marketing Committees (APMCs) pivot around the pertinence and inadequacies of the APMCs and diagnose hindrances. It critically examined the interconnections between APMCs and MSP, elements behind protests, and recommendations for eliminating the existing impairments in the legal, institutional and regulatory framework administering the structure.

Diptimoni Baruah and Kangkana Goswami, in the article titled, 'Efficacy of Legal Institutions in Protecting Assam's Ramsar Site: Assessing Waste Pollution in Deepor Beel through The Legal Lens' discusses on critical importance of wetlands for the ecosystem. It further focuses on the identification of the environmental threats pertaining to pollution the Ramsar site of Deepor Beel and scrutinizing the efficacy of laws, institutions and practices in adhering to Ramsar Convention norms.

K. Syamala and Kaustubh Kumar, in the article titled 'Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 & OTT Platforms: A Critical Evaluation from the Constitutional Perspective' discusses about the IT Rules, 2021 and regulation on OTT platforms from the constitutional view point. It also focuses on the possible tussle between the IT Rules 2021, OTT platforms and the fundamental rights in the light of Constitutional principles of our country.

Y. Papa Rao and V. Suryanarayana Raju, in the article titled 'Insider Trading an Unethical Practice: With Special Reference to Indian Securities Market' has discussed on the concept of Insider Trading and various laws regulating it. It also focuses on various dimensions of national and international perspective pertaining to the insider trading with special reference to the legal framework and enforcement of insider trading in U.K., U.S., and India.

Shibam Talukdar and Ashish Shukla, in the article titled 'Automatic Stay and Accreditation of Arbitrators: A Critical Analysis of The Arbitration And Conciliation (Amendment) Act, 2021' discusses on the multiplicity of amendments that the Arbitration and Conciliation Act, 1996 (referred in the article as Principal Act) with special focus on automatic stay on an arbitral award, and on the accreditation of arbitrators and its after effects. It further focuses the changes introduced by the Amendment Act of 2021 into the Principal Act.

Chintu Jain, in the article titled 'The Potential for Artificial Intelligence in Health Care' discusses on the importance of Artificial Intelligence (AI) in health care. It further focuses on various difficulties in implementation of Artificial Intelligence (AI) and the ethical issues while considering the potential of artificial intelligence in health care.

Subhash P., in the article titled, 'Pegagus Spyware-Manohar Lal Sharma V. Union of India: State Hegemony Or Misconception', discusses on importance of data as a commercial tool which is used for various purposes but there is a question mark on human dignity. It further focuses on the issues of human dignity and privacy vis-a vis constitutional values and rule of law in the light of the *Pegagus Spyware-Manohar Lal Sharma V. Union of India (2021 SCC Online SC 985).*

We extend our warm gratitude to the authors for their well-researched articles and duly acknowledge their contributions. It is expected that several aspects which have been covered in this issue would immensely contribute for further research and study related to contemporary issues in the society.

Editorial Board

CHILD INCEST: IS IT TIME TO RELOOK AT POCSO ACT, 2012?

*Aman Amrit Cheema**
*Anushka Jain***

Introduction

A home and family are boded to be a sanctuary for a child's physical, psychological, and emotional well-being but tragically, this is not always the case. Child incest is extensively acknowledged as a mass epidemiological obstacle, and pegging it away is a quandary faced by nations around the globe all alike. But in India, deficiencies in both state and community responses, add to the problem. Studies augur, that children victimized by a family member, often prolong the communication of the incident, sensing remorse and abashment, and fearing ramifications. Furthermore, POCSO Act, 2012, is inconsistent with rape law as provided under S. 375 of the IPC and the personal laws governing marriages. Thus, there is a need to study the laws governing child incest in light of international laws in this regard as well as the stand-point of Indian Judiciary in the present shifting paradigm. An endeavour, to carve up the paper into three sections, has been made, wherein, the first part brings home the infirmities in the legislative framework. The second part attempts to throw light upon the view-point adopted by the judicial mechanism and the third part concludes the research with certain improvements in the legal system as suggested by the researcher.

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PART – I

The Standpoint of Indian Judiciary with Respect to the Issue of Child Incest

The major controversy as regards the instances of Sexual Abuse of minors within the domestic set-up, is the double- standard slant assumed by the legislature, towards married girls falling within the age-bracket of 15-18 years. Whereas, a primal comprehension of the statutory provisions establishes the rule that sexual intercourse, even forcefully performed on a girl aged between 15 and 18 years, is NOT rape, if the perpetrator happens to be her husband, the judiciary apparently tends to take a different standpoint on the question of IFCSA from that of legislators, as is manifest from its discernment in the case – *Independent Thought* v. *Union of India and Another*[1] It was via this judgment that the Apex Court of the country demonstrates an opinion in stark contrast to the clear rule contained in the Exception to S. 375 of IPC, which absolves the criminal liability of a man for forcing carnal intercourse on an under-aged girl, for a simple reason, that he is her husband.

Facts and Submissions of the Case

A writ petition was filed u/A. 32 by an NGO- Independent Thought with a view to draw the attention of the Court on the violation of the rights of the girls who are married and are between 15 and 18 years of age.[2]

It was submitted by the petitioners that merely the fact that a girl in that age bracket has been given in marriage doesn't mean that the girl ceases to be a child or that she has become mentally and physically capable of indulging in sexual activity. The provision takes away the right of a married girl so aged to refuse

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[1] (2017) 10 SCC 800

[2] Independent Thought v. Union of India, (2017) 10 SCC 800, para. 3

to a sexual indulgence, as well as her right to object to a non-consensual sexual intercourse.[3]

The provision places females within this category at a great disadvantageous position and is in gross violation of the provision and spirit of Art.15 (3). It has a propensity to place the husband of such a woman in absolute charge of her and leaves him to treat her as he pleases.

The counter contentions of the opposite counsels centered around the idea that if sexual indulgence of a married couple were to be brought in contempt in court of law, for the reasons submitted by the supporters of the motion, it would result in disturbing the sanctity of the very institution of marriage. Since in India, child marriages are a very glaringly existing social phenomenon, a whole slew of criminal cases would be instituted and marriages and families broken, if the provision were amended to be given the argued effect.[4]

Court Judgment and the Reasons Thereof

1. The Court deliberated on all the issues raised and contentions and arguments forwarded by the counsels appearing both, for the motion and against the motion. On the question of incongruity between the provisions of the POCSO Act and the exception to s.375, IPC, the Court held that there is a need to cogitate ss. 5 and 41 of the IPC along with s.42A of the POCSO Act.[5] S.5[6] provides for a special law to have an over-riding effect over the provisions of IPC, while s.41[7] defines special law as a law applicable to a particular subject. S. 42A[8] of the

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[3] Supra note 1, para. 4 and 5

[4] Supra note 1, para. 8

[5] Supra note 1, para. 49

[6] *Id*

[7] *Id*

[8] S.42A of the Act is not in derogation of any other law. – the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions

POCSO Act provides for the Act to be in addition to and not in derogation of any other law and to have an over-riding effect in the event of inconsistency. (The provision was added by Criminal Law Amendment Act, 2013, based on the recommendations of Justice Verma Committee, which came into effect on Feb. 3, 2013.)

2. The Court also opined that it would be wise for that States to follow the example of Karnataka in so much as the State Government has inserted sub-section (1A) to section 3 of the PCMA, voiding child marriages altogether and thus ruling out the scope for contended confusion created by the apparently contradictory provisions.[9]
3. The Court in its words as under, rebuffed the demand of the illusory contrariety in the provisions of both the Acts:

   "An anomalous state of affairs exists on a combined reading of the IPC and the POCSO Act. An unmarried girl below 18 years of age could be a victim of rape under the IPC and a victim of penetrative sexual assault under the POCSO Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the POCSO Act, but she cannot be a victim of rape under the IPC if the rapist is her husband since the IPC does not recognize such penetrative sexual assault as rape. Therefore, such a girl child has no recourse to law under the provisions of the IPC notwithstanding that the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the POCSO Act. We see no rationale for such an artificial distinction."

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of this Act shall have over-riding effect on the provisions of any such law to the extent of the inconsistency.

[9] Supra note 2, para. 75

Thus, the Court taking a diverging route from the statute book held that sexual intercourse by a man with his own minor wife, whether consensual or non-consensual, is rape and settled the long-standing controversy for once and all.

PART – II

Lacunae in the Legal Provisions Pertaining to Child Incest

The majority of the problematic scenario pertaining to child incest that exists, owes to the legislative gaps. It is because of the infirmities in the laws that the judicial activism too, fails in the face of constitutional morality. There are patent gaps in the legislative framework as it is, and judiciary cannot be assigned the task of remedying the shortcomings of the legislature, banking on precedents. Nor can the executive be expected to act in a void of provisions to act upon. Thus, it is important to get an extensive understanding of the legislative shortcomings which have been discussed in three parts as under:

i) shortcomings in IPC
ii) shortcomings in POCSO Act
iii) the Frailties in IPC Provisions relating to Sexual Violation of a Minor

The provisions of IPC dealing with sexual offences against children, albeit, indirectly suffer from certain gaps, which are:

1. An incestuous relationship, in the absence of a distinct offence, could only be brought indirectly within the purview of IPC only if it amounted to 'child-rape' (when the victim of incest is below 18 years of age.)[10] IPC, 1860, thus, does not forbid sexual intercourse within consanguinity unless it amounts to 'incest-child- rape'. It, thereby, does not make any distinction between an

[10] Gajrajsingh v. State of M. P., 2000 CriLJ 3765; Pooran Ram v. State of Rajasthan, 2001 CriLJ 91 and Mangoo Khan v. State of Rajasthan, 2001 CriLJ 3001.

incestuous relative and a stranger who establishes sexual liaison with either an under-aged girl (with or without her consent). It is needless to mention that the 'child-rape' -'sexual abuse outside family' - is obviously different from the 'incest-child-rape' - 'sexual abuse within family'. The latter is not merely linked with exploitation of the (victim) child by a person because of his position of authority and trust but it also is the abuse of the relationship of trust and dependency. Such a peculiar relationship gives an ample opportunity to the person to 'persuade', by resorting to his familial exploitative and pressure tactics, his victim child for the sexual relationship and to perpetuate it. The 'incest-child-rape', compared to the 'child-rape', invariably, leads to a continuous sexual exploitation, wherein the child (even after the age of statutory consent) does not have any other alternative except to yield to a variety of pressures from the perpetrator and to suffer in silence.[11]

In fact, such an abuse of relationship of trust and dependency deserves to be treated as an 'aggravating factor' while quantifying punitive measures against the perpetrators. But provisions of sec. 375 r/w 376, IPC, do not mandate such judicial discretion.[12]

2. Next, the provisions relating to the offence of rape, as contained in s.375 of IPC are gender specific in nature and they do not encompass the situation where a male child has been violated and thus, in absence of any log with respect to male victims, section 377 of IPC had to be attracted.[13]

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[11]Sudesh Jhaku v. K.C.J., 1998 CriLJ (Delhi); K. I. Vibhute, Sexual Violence against Children and the Indian Penal Code: Proposals for Reform 22 DLR 21-43 (2000)

[12] K.I. Vibhute, Incest: A Blissful or Miserable Omission of the Indian Penal Code of 1860? 44 JILI 85(2002)

[13] The Indian Penal Code, 1860, s.377. Unnatural offences.— whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with

3. Lastly, the main provisions read with the explanations make it amply transparent that the case of domestic child sexual abuse would fall within the purview of sections 375 and 377 only if there were a violation of the child's body by the way of penetration whereas the concept of sexual offences includes within itself a wide range of offensive sexual activities. Thus, case falling short of "rape" and "unnatural offence", as defined under the respective sections, could be penalized under Section 354, IPC.[14] This provision suffers from its own set of defaults when it comes to tackling the problem of Child Sexual Abuse. The first being that this provision, taking exactly after section 375, is gender specific in respect of the victim and likewise doesn't account for the outrage of modesty committed against a male child and further, it doesn't clearly specify the meaning of the term 'modesty'.

Major Provisional Infirmities in the POCSO Act as regards to Child Incest are as follow:

1. A cursory glance at these provisions would reveal that the offence that is graver in nature is gender specific in respect of the offender. The word 'he' used in clauses (a) to (d) of section 3 while defining Penetrative Sexual Assault, depicts the idea of the legislation that while framing the provision they specifically sought to exclude women from being penalized as initiators of sexual assault.[15] (And by extension of this provision,

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imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.— Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

[14] The Indian Penal Code, 1860, s.354. Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[15] Section 3: Penetrative Sexual Assault- A person is said to commit "penetrative sexual assault" if-

Aggravated Penetrative Sexual Assault, as defined u/s. 5(n),[16] being built on the premise of s. 3 itself, happens to be gender specific in its scope and extent.) On the other hand, Section 7, defining Sexual Assault uses the word 'whoever'.[17] (Likewise, Aggravated Sexual Assault, as defined u/s. 9(n),[18] is an augmentation of s. 7 and is gender neutral.) Combating the panoramic impression, the survey conducted by the Government of India on Child Abuse, in the year 2007, revealed that the overall ratio of male children who'd been incestuously violated was much higher than that of female children.[19]

The provisions under scrutiny for the current purpose are seemingly quite removed from the ground reality as researchers and activists suggest that of cases relating

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(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

[16] Section 5(n): Aggravated Penetrative Sexual Assault- whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child is said to commit aggravated penetrative sexual assault.

[17] Section 7: Sexual Assault- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

[18] Section 9 (n): Aggravated Sexual Assault- whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child is said to commit aggravated sexual assault.

[19] Kritanjali Sarda, *Child Sexual Abuse Laws in India* 3 International Journal of Legal Developments and Allied Issues 46 (2007); Government of India, Study on Child Abuse: India, 2007 (Ministry of Women and Child Development)

to child incest, most happen to have been perpetrated against boys of tender years. And, what renders the situation more unbecoming is the fact that the stated inferences are drawn on the basis of cases which come to be reported somehow, as the agencies involved also endorse the idea that in cases where boys have been violated, the disclosure rate tends to be abysmally low for the fear of gender-oriented harassment and humiliation.[20]

2. Secondly, the provisions of the POCSO Act viewed in juxtaposition with the provisions of the IPC and those of customary marriage laws, bring to the foreground the major contradiction as regards the concept of marital rape where a marriage of girl under the age of 18 years has been solemnized.[21]
   i. According to Section 5(iii) read with Sections 11 and 12 of the Hindu Marriage Act, 1955, the marriage of Hindu girl aged less than 18 years is neither void u/s.11, nor voidable u/s. 12. The grounds listed under both ss. 11 and 12 are exhaustive. Therefore, in absence of a direct provision declaring the marriage void or voidable, it is a perfectly valid marriage (though, it is an offence punishable u/s. 18(a)[22] of HMA).
   ii. Under the Muslim personal laws, the age for contracting a valid marriage is age of discretion, which is admittedly taken to be the age of attaining puberty. Even in cases where the

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[20] Ajay Joshi, "1 in Five Children is Victim of Incest: Expert" *The Tribune*, Dec. 19, 2019; available at: https://www.tribuneindia.com/news/jalandhar/1-in-five-children-is-victim-of-incest-expert-13891 (Last visited on Feb. 24, 2020)

[21] Surbhi Garg, The Protection of Children from Sexual Offences: A Critical Analysis 4 JLSR 412 (2018); available at:

http://thelawbrigade.com/wp-content/uploads/2019/05/Surbhi-Garg.pdf (Last Visited on Feb. 6, 2020)

[22] Section 18(a) of Hindu Marriage Act, 1955 provides that a marriage in contravention of s. 5(iii) is punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees, or with both.

parties to marriage have not attained the age of discretion, their marriage can be contracted validly by their guardians.

iii. Even u/s. 3(1) of the Prevention of Child Marriages Act (PCMA) 2006, a child marriage is voidable at the option of any contracting party who was a child at the time of the marriage. The marriage can be declared a nullity in terms of the proviso to Section 3(1) of the PCMA through an appropriate petition filed by the child within two years of attaining majority and by approaching an appropriate court of law. That is, if the party who was a child at the time of marriage, chooses to go down that road, which, by practical experience, has a thin chance of happening. Because, a party would see the need to initiate a proceeding of nullity only if, either the marriage had been forced – in which case the marriage would be void ab-initio altogether as per s.12(b) of PCMA[23] –,or if they are dissatisfied with the familial relationship.

'Husband', clearly falls within the category of 'domestic relationship' as defined u/s. 2(1)(e) of the POCSO Act r/w s. 2(f) of the Protection of Women from Domestic Violence Act. Accordingly, sexual activity with an under-aged wife by her husband, even with her consent, falls within the purview of this Act (*consent of a person aged less than 18 years of age is not considered as a valid consent*)[24]. But, the exception to section 375 clearly states that sexual intercourse by a man with his wife, where the wife is not under 15 years of age is NOT rape. Even a base-level understanding of these provisions firmly instates the idea that the law chooses to adopt a differential

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[23] S. 12. Marriage of a minor child to be void in certain circumstances.—*Where a child, being a minor*—

(b) by force compelled, or by any deceitful means induced to go from any place; or

such marriage shall be null and void.

[24] The Indian Penal Code, s. 90

attitude towards a 'married' girl child and an 'unmarried' girl child. To this day and age, child marriage remains a fairly common practice in semi-urban, rural and remote societies of India; grace - the legally validated customary laws. And, by the virtue of the exception to s. 375, IPC, sexual activity, even forcefully committed against a 'married' girl child by her husband does not qualify as a 'wrong' by the standards of IPC. Therefore, it is unequivocal and conspicuous that both the major morsels of statute are in rebuttal.[25]

3. The reporting mechanism as provided under Chapter V of the Act is imposing in its form and content. S. 19[26] provides that if any person (including the victim-child), have knowledge of the offence having been committed, or even an apprehension that the offence might be committed, is bound to provide information to Special Juvenile Police Unit, or to the local police. The failure to mete out the obligation is dealt with punishment provided u/s. 21.[27] These provisions paint a fairly deceptive picture, passing an idea that the justice system has a very fierce approach towards the offenders and that there is no stone left unturned in ensuring a child's safety. But the ground reality is a far

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[25] Independent Thought v. Union of India, (2017) 10 SCC 800

[26] S.19. - Reporting of offences.-

(1.) "Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,-

a. the Special Juvenile Police Unit, or

b. the local police.

[27] S.21. Punishment for failure to report or record a case.-

(1.) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2.) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

cry from this imagery. In actual, as is seen invariably, there is hesitation on the part of the child in disclosing the commission of misdeed – because of a number of reasons ranging from a sense of shame to a fear of victim-blaming – more so on the part of child's parent(s) or immediate confidants, for the apprehension of family name being soiled and the child being tagged as a victim of a sexual more for the remainder of their life.

4. The Act does not create any provisions for the personnel dealing with the cases of IFCSA to be given any kind of specialized training. The situation of a child having been subjected to sexual abnormality by a person in position of trust and confidence is rather delicate. And the police have but a flimsy reputation for trying to bring about a compromise between the perpetrator and the victim, instead of taking a harsh action against the cold-blooded offenders. (Though, there is a whole chapter dedicated towards the directed behaviour of the police and the SJPU while handling the cases of sexual offences against children,[28] the provisions have a dead letter's equivalent value when the question of IFCSA arises, because of the reasons explicitly discussed earlier.)
5. The imposition of death penalty upon the offenders of IFCSA u/s. 6[29] of the Act, tends to create an exorbitant pressure upon the child and the family and is certain to induce them to never report instances of being abused by their caregivers, or to turn hostile at later

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[28] See parts 1.2.2. and 1.3.1 of Chapter 1, Section II of P.M. Nair, *A Handbook on the Legal Processes for the Police in respect of Crimes Against Children'* (The Centre for Police Studies and Public Security, Tata Institute of Social Sciences, Mumbai and Bureau of Police Research & Development Ministry of Home Affairs, Govt. of India, New Delhi, 2018); available at: https://bprd.nic.in/WriteReadData/News/A%20Hand%20book%20on%20the%20Legal%20Processes%20for%20the%20Police%20in%20respect%20of%20Crimes%20Against%20Children.pdf (Last visited on Feb. 7, 2020)

[29] S.6. Punishment for aggravated penetrative sexual assault.-

Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

stages of the proceedings (in cases where such matters have however been reported and prosecution case sufficiently established.)

6. After having fought its way through the above-mentioned mire of barricades, if a case is finally filed, the protracted process gives the accused plentiful time to goad the victims into taking back their complaints.[30] And, it has been observed that more often than not, the child-victim, who is considered a sterling witness in such cases, turns hostile[31] and thus resulting in the accused be given a carte blanche despite their otherwise obvious guilt. The fact that turns the whole prosecution situation all the more embroiled is that when the child-victims abjure from their statements as made to the police, they cannot be prosecuted for the offence of perjury as s. 22(2) of the POCSO Act sheathes them from such charges.[32]
7. Another problem which cranes up is that a number of cases of child incest happen to be romantically motivated (for an instance, in cases where the perpetrators are major and the victims happen to be young adults, who often mistake infatuation for the bases of a steady relationship) and in such cases, the statement of the victim would naturally tend to incline in the favour of the accused.
8. Topping it all, it is a matter of common knowledge in Court parlance that, defence counsels use all ways they can avail to manipulate the provisions of procedural laws, in order to orchestrate the evidence of

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[30] HAQ Centre for Child Rights, POCSO: Why Cases of Child Sexual Abuse Mostly End in Acquittal, 2019, available at:

https://www.haqcrc.org/news/pocso-cases-child-sexual-abuse-mostly-end-acquittal/ (Last visited on Feb. 4, 2020)

[31] HAQ Centre for Child Rights, POCSO: Why Cases of Child Sexual Abuse Mostly End in Acquittal, 2019, available at:

https://www.haqcrc.org/news/pocso-cases-child-sexual-abuse-mostly-end-acquittal/ (Last visited on Feb. 4, 2020)

[32] Section 22 - Punishment for false complaint or false information.

(2) Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed on such child.

prosecution in a self-serving fashion. It is pretty much customary for the defence counsels to either altogether omit cross examining the victim or omitting certain obviously important questions in due turn and then move under s. 311 of CrPC to re-examine the victim, usually after the accused has been released on bail and the family or other societal agents have had sufficient time to coerce and/or brainwash them, clearly mocking the limitation period for recording the evidence of the victim as provided under S.35(1).

A detailed study of the developing trends of the legislations with respect to Intra-Familial Child Sexual Abuse suggests sufficiently well that the central legislations in India are not, till date, apposite to uproot the evil entirely.

PART – III

Suggestions

Based on the deductions made after having indulged in discursive and itemized deliberation about the demerits in the legal framework, the researcher proposes the following recommendations and overtures, in view of the above-mentioned lacunae, in the following manner, to all the major stakeholders, where the problem of Child Incest is concerned:

- The Legislature
- The Judiciary
- The Executive
- The General Public

All the other participating agencies can only do so much when there is a lucid lack of provisions.

- The Legislature

  In a democratic set-up, where every governmental tier is supposed to function in congruence with each other,

without overpowering the other, it is an unequivocal onus upon the legislature to overcome the hurdles posed by gaps within the provisions as it is.

- Gender Oriented Provisions

  In the year 2017, the filmmaker Insia Dariwala, initiated a public petition addressed to the then Women and Child Development Minster, Maneka Gandhi through a petition website 'change.org', claiming that there is a need to 'Order an In-Depth Study on Male Child Sexual Abuse in India'.[33] Via her petition, the filmmaker, who herself is a survivor of child incest, brought to the foreground her concern about the gender-specific nature of the offences as listed out in the POCSO Act, sharing the first-hand experience of her husband, who too had been victimized by sexual abuse at the tender age of 5, at the hands of a trusted caretaker. She bore into the idea that the misery of a male victim is even more rueful for the reason that he'd feel obligated to keep the secret buried within for the fear of being subjected to ridicule, infamy, dejection and masculinity-targeting-attacks. They live with the pain and often end up unleashing it by victimizing others. She also submitted that having been subjected to molestation as children, and having been forced to live with it just fine all through their lives, is what tends to turn men insensitive and oppressive towards women, as it is, they are not born that way, and it is rather, an acquired behavior which they learn from people around them. She suggested that a detailed study into this issue would deliver insights into the reasons of violence men initiate by shedding light into their mindsets, pent up agonies and might actually end helping curb violence right at its onset. Another

[33] Editorial, "Govt. Proposes Amendment of the POCSO Act to Make it Gender-Neutral" *The Indian Express*, Jun. 10, 2020; Available at: https://indianexpress.com/article/gender/govt-proposes-amendment-of-pocso-act-to-make-it-gender-neutral-5154795/ (Last visited on Mar. 25, 2020)

question she arose, which does call to be thought upon, was "Why Have We Invested So Much in Cure but So Little in Prevention?"[34]

The petition generated a hash tag - #*EndTheIsloation* - to popularize the movement and garnered as many as 1.25 lakh supporters who actively signed the petition. Consequently, it came to the notice of the Women and Child Development Ministry and on April 25th, 2018, the WCD minister, Maneka Gandhi responded to the petition notifying the general public that after having been acquainted the matter in September 2017, she had instructed the National Commission for Protection of Child Rights (NCPCR) to look into the issues and following a few meetings, a core team was organized and conferences were commissioned. And, as per the recommendations emerging from the conference, the Ministry had reached a unanimous decision that there actually was a need to bring about amendments in the POCSO Act to the effect that all the categories of sexual assaults listed out in the Statute became gender neutral in their scope and purview.[35]

But, despite the proposals, the Amendment Act of 2019 lacked amendments to that effect.

- Contradiction with IPC and Personal Marriage Laws

There is a clear contradiction in the provisions of the POCSO Act when viewed with the provisions of IPC that deal with the offence of rape and those of the personal laws relating to marriage. Whilst the POCSO Act brings a husband committing sexual violation upon his minor

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[34] Available at: https://www.change.org/p/maneka-gandhi-minister-for-women-and-child-development-order-an-in-depth-study-on-male-child-sexual-abuse-in-india-endtheisolation (Last visited on Mar. 20, 2020)

[35] Available at: https://www.change.org/p/maneka-gandhi-minister-for-women-and-child-development-order-an-in-depth-study-on-male-child-sexual-abuse-in-india-endtheisolation/responses/40971 (Last visited on Mar. 23, 2020)

wife within the purview of criminal action, s. 375 of the Indian Penal Code referred together with the provisions relating to marriage governed by the personal laws, absolves his criminal liability altogether.[36]

And, as has been clearly laid down by the Supreme Court in *Independent Thought* v. *Union of India*[37], there is unequivocally, a need to bring about amendment in the rape laws in the IPC and personal laws governing marriage, so as to have the child incest provisions in POCSO Act apply fully well to the married minor girl.

- Dissonant Reporting Mechanism

Further, there is a need to understand the sense of stigma our society attaches with a sexual more and the consequent hesitation of the victim-child/ parents/ confidants when it comes to the disclosure of the offence. Hence, it necessitates that the penalty[38] imposed for non-disclosure of the offence be alleviated. The imposition of a penalty is an equivalent of jarring a double-edged sword through the already wounded sense of pride and safety of the victim and that of their

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[36] Refer Chapter III

[37] Independent Thought v. Union of India and Another, (2017) 10 SCC 800

[38] S.19. - Reporting of offences.-

(1.) "Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,-

a. the Special Juvenile Police Unit, or

b. the local police; and,

S.21. Punishment for failure to report or record a case.-

(1.) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2.) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

confidants. What rather needs be done is setting up a reporting mechanism that is sensitive towards the disturbed psychology of the victim and their associates.

Though, there have been commendable efforts made by certain State Governments for promoting a projection of their 'standing guard to the victims' interests' image, there needs to be done a lot more to implement the objects of the POCSO Act in its true sense and to its complete extent. More initiatives like that of the Punjab Govt. in regard to make the POCSO e-Box better conventional and rife, need to be simultaneously adopted so that the reporting mechanism becomes an aide of the victim, rather than being a deterrent.

- Unchartered Personnel

The personnel dealing with the IFCSA cases need to be much defter than the personnel dealing with sexual offences, even than that dealing with cases of Child Sexual Abuse. The reason being, as discussed earlier, that the psychological terrain of a child violated at the hands of a person per se entrusted with their safety and well-being, is extremely precarious, and the chances of a dilettante interviewer treading on deleterious territory are rather extortionate. Therefore, the personnel entrusted with the first – hand interaction with the victim children need to be extremely sensitive towards the misery of the victim, in both their approach and action. And, in tandem with masterfully schooled personnel, there must be strict prohibitions imposed against the authorized officers who try to bring about a 'settlement' amongst the parties by resorting to inducement or coercion.

- Provision for Death Penalty on Conviction

  It has been suggested by activists that the death penalty provide u/s. 6[39] of the Act needs to be stricken down for the obvious reason that there are inordinate chances of the victim and perpetrator's family would pressurize the victim and the confidante adult (if any,) to retort from their reports or complaints if, and when then matter does reach the court, as has already been enunciated in the previous chapters. What's more is that within a family set up as they're styled in our country, seldom would a family allow the family name be soiled by bringing out such a tabooed issue for the public scrutiny, let alone involving police and court procedures that as it is have a reputation to go on forever. Adding a death sentence to the equation is sure a recipe for disaster.

  Then, there are romantically endorsed cases, where there is experimentation, but no exploitation and in such cases, conviction is absolutely futile.[40]

- Absence of Punishments for Sham Accusations

  Another very drastic drawback of the procedure laid down in the Act is that there is no provision fixing a liability for false complaints. Rather, S. 22 of the Act, clearly states that in case of a false complaint made by a child, they cannot be tried for perjury and S. 19(7) provides protection the informant adult. It has been very commonly observed within the usual court

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[39] S.6. Punishment for aggravated penetrative sexual assault.-

Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

[40] A Principal Judge at the family court in Delhi who has dealt with cases u/ POCSO Act and has served at the DLSA opined so while explaining the reasons as to why most POCSO cases result in acquittals; HAQ Centre for Child Rights, POCSO: Why Cases of Child Sexual Abuse Mostly End in Acquittal, 2019, available at: https://www.haqcrc.org/news/pocso-cases-child-sexual-abuse-mostly-end-acquittal/ (Last visited on Feb. 4, 2020)

practices that people having ill will against somebody cloak behind the child and initiate fallacious proceedings against an otherwise innocent person. And the interminable nature of proceedings, coupled with the innate nature of the offence being of a kind that once a person accused of such an offence is permanently tagged with the title of paedophile.

What is required is that there needs to be a preliminary filtering out procedure included within the trial process so as to ensure the genuineness of the complaint, without delaying the justice providing procedure from being set into motion.

- The Judiciary

Mere enactment of provisions after provisions just cannot serve the purpose of the Legislative action until there is practical consonance of judicial mechanism right from the stage where they take over the justice administration process.

  - Prejudiced Position of the Victim

    Apart from passing more and more Judgments and setting precedents, the Courts need to adopt an attitude of utmost sympathy towards the victims and their confidants/supporters. Also, it is needed of the judicial officers to make sure that the victim and/or their confidants are stationed away from the accused and/or their supporters, or anybody in general who can pressurize the victim into retracting from their complaints for the entire duration of trial.

  - Guileful Approach of the Defence Counsels

    The manipulative ways defence counsels go about the examinations and re-examinations of the prosecution witnesses by scheming around the provisions of the procedural laws, over a masterfully elongated period of time tends to bring about certain discrepancies in their

statements they've made before the Court and then they use those discrepancies to cancel out the very story of the prosecution.

The Supreme Court, in regard to the badgering of the victim during the cross examination, held in the *Gurmit Singh case*[41] that the Court should not sit a silent spectator and must control the very recording of evidence so as to not let it turn into a means of harassment and humiliation of the victim.

- The Executive

In addition to the functions performed by the Legislative and the Judiciary, the Executive needs to perform its own part in sensitizing the general public in regard to the offence of Child Incest and in making sure that the provisions enacted, rules made and judgments passed do not remain as effective as a dead letter in the book of law.

  - Vigilance Pageantries

    Like the initiatives of the Punjab Government, there should be congruous endeavours by the State Executives in order to bring the offence and, as well as the preventive actions, as warranted by the Legislative and Judicial manoeuvers, into the mainstream. It solely is the calling of the State Executives to suffuse observance and perception amongst the masses.

- The General Public

Over and beyond the ventures of the government sector, certain duties fall in the general public's crook. Policy making, judicial deportment and awareness programmes have a limited print run in absence of a parallel action by the proletariat.

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[41] State of Punjab v. Gurmit Singh, (1996) 2 SCC 384

- Fight the Vice, Not the Victim

  The very phenomenon needs to be regarded independent of the anathema society attaches with incidences of the sexual violation. It is because of these proscriptions and interdictions that the incidences often go unreported and the victims are forced to live with a sense of shame, even where there is no fault of theirs.

- Keeping a Close Monitor on the Child's Association and Changes in the Behaviour Pattern

  It is quintessential to pay close attention to any unexplained changes in the usual behavioural pattern of the child. Owing to the uber-busy lifestyle of millennial parents, children are left under the custody and supervision of nursemaids or day-care centres/ nurseries and children often do not get the parental attention that the problem at hand warrants. But, having regard to the fact that problem of IFCSA is all pervasive, persistent and none-sparing, the need for close parental attention cannot be pressed enough.

Concluding Note

The issue of Intra-Familial Child Sexual Abuse is still a taboo in India. Majority of the people remain numb about this issue. This silence is due to the fear of indignity, denial from the community,[42] social stigma,[43] not being able to trust

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[42] World Health Organization, *World Report on Violence and Health* (United Nations Organization, 2002);

D. Collin-Vezina, I. Daigneault, M. Hebert, *Lessons Learnt from Child Sexual Abuse Research: Prevalence, Outcomes and Preventive Strategies* 7 Child and Adolescent Psychiatry and Mental Health 22 (2013).

[43] R.T. Haile, N.D. Kebata, G.M. Kassie, *Prevalence of Sexual Abuse of Male High School Students in Addis Ababa, Ethiopia* 13 BMC International Health Human Rights 24 (2013);

government bodies,[44] and gap in communication between parents and children about this issue.[45] Majority of the healthcare professionals do not have the abilities and are not trained to examine and manage cases of Child Sexual Abuse. A chief concern in India is the dearth of good monitoring of various juvenile residential institutes and there is no punishment for institutes that do not follow the laws. Institutions fear they will lose their dignity if incorrect information is disclosed. Hence cases are not reported and are settled within the institution. Same is the situation in cases where the accused and the victim hail from the same family, for the absolutely similar set of reasons as discussed above. A number of factors confound the identification a Child Sexual Abuse victim. Some of them do not reveal characteristic signs and symptoms. Many instances of Child Sexual Abuse don't include penetrative sex, victims usually clean themselves following attack, and hence the medical investigation does not provide any evidence of sexual indulgence.[46] Child Sexual Abuse victims and their families experience the panorama of legal proceedings that can continue for several years.[47] Adding to the problem, the execution of laws and initiatives in India is a challenge and there is lack of funding for programs for child safety.[48]

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A. Verelst, M. Schryver, E. Broekaert, I. Derluyn, Mental Health of Victims of Sexual Violence in Eastern Congo: Associations with Daily Stressors, Stigma and Labeling 14 BMC Women's Health 106 (2014);

M.O. Folan, N. Odetoyinbo, A. Harrison, B. Brown, Rape in Nigeria: A Silent Epidemic Among Adolescents with Implications for HIV Infection 7 Global Health Action 25583 (2014)

[44] Human Rights Watch, Breaking the Silence: Child Sexual Abuse in India (USA, 2013)

[45] Ministry of Women and Child, *Development Study on Child Abuse: India* (Government of India, 2007)

[46] Supra note 44.

[47] Supra note 12; *P.B. Behere, A.N. Mulmule, Sexual Abuse in 8 Year Old Child: Where Do We Stand Legally?* 35 IJPM 203-205 (2013), Available at: http://www.ijpm.info/text.asp?2013/35/2/203/116256 (Last visited on Jan. 30, 2020).

[48] Supra note 44; UNICEF: India, The Legislative and Institutional Framework for Protection of Children in India (United Nations Organisation, 2010).

BEWILDERING *MANDIS*: INSIGHTS INTO AGRICULTURAL PRODUCE MARKETING COMMITTEES AND THE LAW.

Bhanu Pratap Singh[*]

Abstract

Last November, a historic farmer's agitation was enduring at the capital's borders, which received enormous recognition worldwide. The preliminary ultimatum was the annulment of the three farming legislation, and prolonged outstanding statutory backed Minimum Support Price (MSP) founded on the Swaminathan Commission. The Union with the Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act of 2000 coveted to liberalise the market for private players, facilitate the interstate movement of agricultural produce in confluence with One Nation One Market and reexamine the distressed state's Agricultural Produce Marketing Committees (APMCs). These laws received vehement protests, and finally, the government admitted to repealing them. However, this protest successfully attracted the focal point of discussion toward those who practice agriculture as a livelihood. The National Commission on Farmers and multiple committees continually accentuated the importance of the agricultural marketing system in strengthening the agricultural system.

The present article will pivot around the pertinence and inadequacies of the APMCs and diagnose hindrances. Further, the investigation would concentrate on interconnections between APMCs and MSP, elements behind protests, and recommendations for eliminating the existing impairments in the

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legal, institutional and regulatory framework administering the structure.

Introduction

India is unfailingly a motherland of revolutionists, and carrying a perspective against iniquities is a natural trait; earlier, after decades, an agrarian protest transpired. It activated under the pennant of Samyukta Kisan Morcha –(an umbrella body of the farmer union) on November 2020; thousands of farmers trudged toward the peripheries of Delhi and sustained their dissatisfaction in adverse weather and pandemic,[1] against the antagonistic legislations,[2] which resulted that over 600 farmers lost their lives.[3]An in-depth exploration divulges that the complaints are not precipitous but outbreaks of earlier grievances.[4] Unbendable defiance from stakeholders that these convivial market enactments based on laissez-faire approaches [5] would wipe out regulatory support of agricultural produce marketing committees (APMCs), and corporations would employ

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[1] Neel Kamal , Farmers,protest: 333 days & 600 deaths later, stir still strong, The Times of India ,Oct 26, 2021,

http://timesofindia.indiatimes.com/articleshow/87269191.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst(last visited Nov. 2, 2022)

[2] PRS legislative research, *The Farm Laws Repeal Bill, 2021*, available at https://prsindia.org/billtrack/the-farm-laws-repeal-bill-2021 (last visited Oct.15, 2022).

[3] Ishaan Gera , *Over 600 deaths, at least Rs 5,000-cr loss: The cost of farm protests*, Business Standard, Nov. 20, 2021,https://www.business-standard.com/article/economy-policy/over-600-lives-lost-daily-loss-of-rs-777-cr-the-cost-of-farm-protests-121111900891_1.html(last visited Nov. 3, 2022).

[4] Sudhir Kumar Suthar , *Contemporary Farmers, Protests and the New Rural–Agrarian in India*, Vol. 53, No. 26-27, Jun. 30, 2018, Economic and Political Weekly , https://epw-nlul.refread.com/journal/ 2018/26-27/review-rural-affairs/contemporary-farmers-protests-new-rural-agrarian.html(last visited Oct.16, 2022)

[5] Sukhpal Singh & Shruti Bhogal, *MSP in a Changing Agricultural Policy Environment*, Vol. 56, I No. 3, 12 ,Jan. 16, 2021, Economic and Political Weekly, https://epw-nlul.refread.com/journal/2021/3/ commentary/msp-changing-agricultural-policy-environment.html (last visited Oct.6, 2022).

ruthless market persuasion in apprehending agriculture.[6] Also, perceived as an endeavour to encroach upon the states domain, which contributed to a disruption of the federal arrangement,[7] and disassembling the Minimum support prices (MSP) and public procurement.[8] Further cited that by installing private markets without acknowledging statutory endorsed MSP, the state is seeking to escape the accountability and attention[9] from agriculture inefficiencies and debt-ridden farmers towards agricultural marketing.[10] This maneuver is to build an electronic National Agricultural Market (e-NAM),[11] and simultaneously make the agricultural system more World Trade Organisation (WTO) compliant. Although, it will modify the previous philosophy of preparing India's agricultural policy towards an agricultural export hub and unfurl the indigenous markets for advanced nations.[12]

In disagreement, experts speculate that the farmers, income can advance if assigned a considerable share of the supply chain. It obliges stocking, export promotion, legal and institutional adjustments, and expenditures in agri- market infrastructure.[13]

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[6] MUJIB MASHAL & EMILY SCHMALL, ET AL., "*WHAT PROMPTED THE FARM PROTESTS IN INDIA?* THE NEW YORK TIMES, JAN. 28, 2021, HTTPS://WWW.NYTIMES.COM/2021/01/27/WORLD/ASIA/INDIA-FARMER-PROTEST.HTML (LAST VISITED OCT.8, 2022).

[7] PRITAM SINGH, *BJP'S FARMING POLICIES, DEEPENING AGRO BUSINESS CAPITALISM AND CENTRALISATION*, VOL. 55, NO. 41, OCT.10, 2020, ECONOMIC AND POLITICAL WEEKLY, (LAST VISITED OCT.6, 2022).

[8] *Supra* note 5.

[9] Bills of Contention, Vol. IV, No. 39, 7,Sep. 26, 2020, Economic & Political Weekly, (last visited Oct.6, 2022).

[10] Biswajit Dhar & Roshan Kishore, *Indian Agriculture Needs a Holistic Policy Framework Not Pro-market Reforms*, Vol. lVI No.16 ,27, Economic & Political Weekly, (last visited Oct.10, 2022).

[11] Barbara Harriss-White & Mekhala Krishnamurthy , *Agro-food Systems and Public Policy for Food and agricultural Markets A Discussion* Vol. lV No.51 ,70, December 18, 2021, Economic & Political Weekly, (last visited Oct.6, 2022).

[12] *Supra* note 10 at 28.

[13] Ashok Gulati & Devesh Kapur et al., *Reforming Indian Agriculture,*

Vol. lV No. 11, 40, Mar. 14, 2020, Economic & Political Weekly (last visited Oct.8, 2022). .

Further, guarantee of disengagement of regulatory restrictions and intermediation, authorising marketing outside the APMCs, fostering barrier-free, direct sales to processing conglomerates via contract farming,[14] and intra-state trade in the spirit of one nation, one market,[15] so that producers and traders can entertain buyers with their preferences can deliver positive results.[16] Integrated with digital technology and online platforms, agri-markets would uplift traders and farmers in accessing multiple markets throughout the season, simultaneously expanding farmers, bargaining power, diminishing commissions, and faster payment.[17] Even majority of marketable surplus commences outside the APMCs, this intervention access direct purchase, and farmers would become "price dictators".[18]

Concerning MSP, procurement, and APMCs, interdependence, experts surmised that implementing MSP is an administrative decision; therefore, it does not mandate any legislation. The Union has previously ensured a 50% or higher margin on cost A2+ imputed cost of family labour, sustenance of buffer stock of pulses. Further, strategies like PM- ASHA extend to indemnify any damage to states on MSP. Another rationale is that the MSP coverage is below 7%, including socially purchased crop output, reaches 11 %, constituting only 7 % of total agricultural output. The intent was to uphold the MSP intact for crops already encircled and conceive an environment for enhancing the price actualisation of the other produce. Also, the existence of APMC does not guarantee MSP, citing Bihar and Kerala, where 20 lakh

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[14] Rajib Sutradhar , *The FPTC Act, 2020 A Blinkered Vision*, Vol. IV, No. 31,19, Jul. 31, 2021,Economic & Political Weekly (last visited Oct.9, 2022).

[15] Ramesh Chand, *New farms act understanding the implications*, Nov. 2020, 5, Niti Aayog, available at https://www.niti.gov.in/sites/default/files/2020-11/NewFarmActs2020.pdf (last visited Nov. 8, 2022).

[16] Lok Sabha, *One India, One Agriculture Market*, unstarred question no: 2471, Mar.9, 2021, https://loksabhaph.nic.in/Questions/15.aspx?qref=21146&lsno=17 (last visited on Oct. 30, 2022).

[17] *Supra* note 13.

[18] *Supra* note 15 at 8.

tons (LT) and 7 (LT) has solicited.[19]Removing all charges protects consumers and improves trader's to farmers, settlement. Likewise, forewarning that any move against and legalising MSP without withdrawing the impediments will be detrimental to trade and push purchase prices expensive.[20] *In the intervening period, t*he issue reached the Apex Court in *Rakesh Vaishnav and Ors v Union of India and Ors*[21], which further deferred three farm laws until they resolved their legitimacy. Regardless, because of large-scale protests and bitterness across the country, on Nov 19 2021 Prime Minister announced the rollback of the farm legislation citing that, ***"****I apologise to the country's people... we could not convince farmers*" and assured to incorporate a committee to address farmers, grievances concerning those legislations and make recommendations.[22] Recently, after the elapsing of nine months, a committee on MSP and four sub-groups formed under the chairmanship of a former agricultural secretary to promote crop diversification, zero-budget farming, micro-irrigation, and ensuring MSP.[23] However, all disagreements have been interrupted, and considerable time has elapsed; the farmers, necessities and requests are still pending. Though, these oppositions jolted the conscience, conveyed distress, and brought into prominence non-remunerative returns to farmers at international fora and called for profound policy and academic concentration towards the viability of agriculture as a

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[19] Gopi Sankar & Gopal Naik, *Markets for Farmers Revisiting the Role of Mandis in the Context of Farm Law's Repeal* , Vol. VII No. 8 , 33, Feb. 19, 2022 , Economic & Political Weekly page(last visited Oct.29, 2022).

[20] *Supra* note 15 at 19.

[21](2021) 1 SCC 590

[22] India today, *Three farm laws to be rolled back, says PM Modi, urges farmers to leave protest sites*, Nov.19, 2021. https://www.indiatoday.in/india/story/govt-will-repeal-three-farm-laws-farmers-pm-modi-1878436-2021-11-19 (last visited Oct.25, 2022).

[23] Outlook India, *As Farmers Protest In Delhi, MSP Panel Forms Four Sub-Groups For Key Farming Issues*, Aug.22, 2022, https://www.outlookindia.com/national/as-farmers-protest-in-delhi-msp-panel-forms-four-sub-groups-for-key-farming-issues (last visited Oct.26, 2022).

livelihood.[24] Again, it introduces a question about why there is an initiation of disassembling the existing APMC structure, despite deep historical underpinnings. Second, whether APMCs and MSPs can exert remunerative prices, along with APMCs, readiness to regulate transactions between the farmer and trader.

However, via preamble and committee recommendations, the government conceded that the arrangement is enduring severe malfunctions. The existence of state instrumentalities like the Food Corporation of India, the Public Distribution System, the Essential Commodities Act, the Commission for Agricultural Costs and Prices, and MSP ratified these assumptions, and the existence of both illustrates the quandary of Agri-markets.[25] Therefore, the present study will pivot around the pertinence, inadequacies of the APMCs, and recognise the existing impediments. The assessments would be motivated towards interconnection between the APMCs and MSP, factors for the farmers, agitation, and findings that bestow statutory mandated MSP to straighten out all disturbances coupled with suitable measures for redressing the same.

Agricultural Sector at a Glance

Agriculture endures as a potent sector, as it is the foundation of raw materials and revenue generation, contributing to the requirement for industrialised products. Its consequence is overwhelming that an upsurge of 1% in agricultural output will raise 0.5% of industrial production and national income by 0.7%. [26] The pertinence ascertains from the assignment of a

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[24] The Swaminathan committee reports , *National Commission on Farmers serving farmers and saving farming from crisis to confidence second report*, XXVII,Aug.11,2005, https://ruralindiaonline.org/en/library/resource/serving-farmers-and-saving-farming-towards-faster-and-more-inclusive-growth-of-farmers-welfare---fifth-report-volume-ii/(last visited Oct.29, 2022).

[25] *Supra* note 11 at 66.

[26] The Hindustan Times, *25 years of change: Why India's farm sector needs a new deal*, Jul. 26, 2016, https://www.hindustantimes.com/business-news/25-years-of-change-why-farms-in-india-need-a-new-deal/story-9LXMbxV7BIDX54f9JvQabP.html(last visited Nov.5, 2022).

colossal budget of around Rs 1,51,521/- crores in 2022-23.[27] The Economic Survey 2019-20 showcases the total GVA depressing trend from the period of 2009-10 to 2013-14, which is 18.3%, 2014-15 to 2018-19 is 17.4%, and 2018-19 is 16.3%, against the industry proportion, which remains at 29.6%.[28] Nevertheless, a recovery in the 2021-22 economic survey was registered, which stayed at 18.8% and 20.2% in 2020-21, owing to the pandemic.[29] The growth in GVA of agriculture and allied sectors for 2021-22 is hovering at merely 3.9 %.[30] Even the portion of Gross Value Added (GVA) of crop production in the agricultural sector is hardly 10.7% against the livestock, which is 5.2%, and forestry and fishing stayed at 1.3% and 1.2%.[31] Another explanation is the multiplying gap between agricultural and non-agricultural income; at the same time, the latter ascended over time; the former remained unprotected owing to inflation, input costs, and living costs, which swelled to 3.15 times.[32] The significant decadal growth (compound annual growth rate) for agriculture was merely 3.5% in the 1980s against the non-agriculture, attaining 8.5% in 2000-2010.[33] In divergence, the industry and services sectors, which comprise

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[27]Ministry of Finance, *Budget at a Glance 2022-2023*, 2022, https://www.indiabudget.gov.in/doc/Budget_at_Glance/budget_at_a_glance.pdf (last visitedNov.5, 2022).

[28] Ministry of Finance, *Economic Survey 2019-20 Agriculture & Food Management*, Vol.2, 15, https://www.indiabudget.gov.in/budget202021/economicsurvey/doc/vol2chapter/echap07_vol2.pdf (last visited Nov.5, 2022).

[29]Ministry of Finance, *Economic Survey 2021-22 Agriculture & Food Management*, 234,https://www.indiabudget.gov.in/economicsurvey/doc/eschapter/echap07.pdf(last visited Nov.3, 2022).

[30] Ministry of Agriculture, *Annual Report: 2021-22*, 3, https://agricoop.nic.in/sites/default/files/Web%20copy_eng.pdf (last visited Nov.3, 2022).

[31] *Supra* note 29 at 237.

[32] Ramesh Chand & Raka Saxena et al., *Estimates and analysis of farm income in India, 1983–84 to 2011–12,* Vol.50,No.22,139,145,May 30, 2015, Economic and Political Weekly https://www.jstor.org/stable/24482496?seq=5#metadata_info_tab_contents (last visited Nov.6, 2022).

[33] *Supra* note 19 at 35.

above 80% of GVA, commit 54.4% of the workforce, the agriculture reports for 18.29%, containing 45.6% workforce in 2019-20.[34] This downtrend reaffirms in the 2011 census estimates, with the engagement of 54.6% workforce, which dwindled to 46.1% in 2015-16.[35] Besides, the complication lies with the unequal workforce *deterioration contrasted* with the agricultural contribution to the GDP, as there stood disappointment by the state to supply purposeful employment.[36] This diminishing workforce and speeding income gaps pushed Indian agriculture towards the 'farmer excluding path';[37] elucidating that most farmers will quit farming as an occupation. Although, this transition is sluggish, as a disappointment of non-agriculture sectors to induce engagement,[38] compelling the rural workforce to rehearse this loss-making exercise. In supplement, a record 140.57 million tonnes (MT) of food grain is produced in 2020; the central pool previously encompassed 73.45 (MT), above 300% of the reserve norm of 21.4 MT correlated with FCI procurement of over 92 MT above stocking norms.[39] The entire subsidy of approximately 132407.87 crores in 2019-20 is adequate to underscore the

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[34] Ramesh Chand & Jaspal Singh, *Workforce Changes and Employment Some Findings from PLFS Data Series*, Niti Aayog 1, (2022) ,https://www.niti.gov.in/sites/default/files/202204/Discussion_Paper_on_Workforce_(last visited Nov.4, 2022)

[35] K J S Satyasai, & Ashutosh Kumar et.al., *Farmers welfare in India: A state-wise analysis*, July 2021, 8, NABARD, https://www.nabard.org/auth/writereaddata/tender/1710224557farmers-welfare-in-india-a-state-wise-analysis.pdf (last visited Nov.7, 2022).

[36] *Supra* note 4.

[37] Neelam Patel & Bruno Dorin, et al., A new paradigm for Indian agriculture from Agroindustry to Agroecology, India Headed for a World without Agriculture?, https://www.niti.gov.in/sites/default/files/2022-(last visited Nov.7, 2022).

[38] Ramesh Chand, *Presidential Address Transforming Agriculture for Challenges of 21st Century*, Dec.27-29, 2019, 102, Annual Conference Indian Economic Association, https://www.niti.gov.in/sites/default/files/2020-01/Presidential_Address.pdf (last visited Nov. 9, 2022).

[39] *Supra* note 9 at 7.

sector.[40] This abundant produce is problematic to distract owing to depressed global costs and crises like war and pandemics.[41] The statistics presented unquestionably indicate the dismal state of the agricultural sector and the motivations for launching reforms.

Evaluating the Agricultural Marketing System in India

The appearance of a dynamic marketing system in stimulating agri-sector development is tremendous, which stood highlighted by the National Commission on farmers, specifying that: "An efficient marketing system is essential for the development of the agricultural sector, providing incentives to the farmers for commercialisation, increasing production, and giving appropriate signals for production planning and research activities."[42] Agricultural markets are a crucial link between producers and consumer. It comprises capital formation via trading agricultural produces, storing, transporting, processing and commissions; it generally commences where production ends and concludes where consumption begins.[43] The current APMCs are not unfamiliar or contemporary to the Indian agricultural system but rather consequent to the continuing contemplations of about a century-old system. The chronological reinforcements were founded with the onset of the first regulated market under the Hyderabad Residency Order

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[40]Food corporation of India, *Annual Report: 2020-21*, 10, https://fci.gov.in/app/webroot/upload/Finance/ANNUAL%20REPORT%202020-2021_2.pdf (last visited Nov. 7, 2022).

[41] Kristalina Georgieva & *Sebastian Sosa et.al., IMF Blog, Global Food Crisis Demands Support for People, Open Trade, Bigger Local Harvest, Sep. 30, 2022https://www.imf.org/en/Blogs/Articles/2022/09/30 /(last visited Oct.29, 2022).*

[42] The Swaminathan committee reports, Serving Farmers And Saving Farming Fifth and Final Report- Towards Faster and More Inclusive Growth of Farmers Welfare , Oct. 4, 2006,

https://ruralindiaonline.org/en/library/resource/serving-farmers-and-saving-farming-towards-faster-and-more-inclusive-growth-of-farmers-welfare---fifth-report-volume-ii/(last visited Oct.29, 2022).

[43] *Supra* note 11 at 64.

1886. Later, the promulgation of the Berar Cotton and Grain Market Act of 1887 entrusted the British residents to acknowledge any place in the district as a market for selling and purchasing agricultural produce and equipped a committee to supervise the regulated markets. Finally, a considerable impulse through the Royal Commission on Agriculture 1928 established regulating marketing practices and specifying regulated markets/yards. Afterward, a Model Bill of 1938 circulated, as agriculture was a provincial subject.[44] After Independence, India started dangling on foreign food compensation from the United States-PL480 wheat and accomplished its necessities.[45] With the changeover in public policy to achieve self-sufficiency, constrain inflation, safeguard farmers from traders, mischief, and expedite agricultural advancement, regulated markets were indispensable.[46] Recognising this emptiness, as agriculture marketing is a state subject, [47] majority states from 1960 to 70s legislated their APMC Act, and rules aided them, e.g., the Uttar Pradesh Krishi Uttapadan Mandi Adhiniyam, 1964, and the Punjab Agricultural Produce Markets Act, 1961. These legislations established a network of physical markets comprises of wholesale assembling markets or market yards/sub-yards, which further paved the way for a conducive environment of remunerative prices through the legitimate interplay of market forces, administrative market operations, and transparent transactions.[48] In supplementing the coveted aspirations and eliminating the supply side constraints, various incidentals or ancillary, product-specific enactments like the Essential

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[44] Directorate of marketing and Inspection, *APMC and reforms, Brief History of agricultural marketing regulation, its constraints and reforms in the sector*,https://dmi.gov.in/Documents/Brief%20History%20of%20Marketing%20Regulation.pdf (last visited Nov. 10, 2022).

[45] Biswajit Dhar & Roshan Kishore, *Indian Agriculture Needs a Holistic Policy Framework, Not Pro-market Reforms,* Vol.VI, No. 16 ,28, Apr.17, 2021, Economic & Political Weekly (last visited Nov. 11, 2022).

[46] *Supra* note 42.

[47] INDIA CONST. Entry 28. List II .

[48] Ministry of Agriculture, *Marketing Infrastructure & Agricultural Marketing Reforms*, 5, https://agricoop.nic.in/sites/default/files/apmc.pdf, (last visited Nov. 11, 2022).

Commodities Act of 1955 and Sugarcane (Control) Order of 1966 were enacted.[49] These regulated markets undoubtedly influenced transactional methods, marketing practices, basic amenities, and services conducive to an efficient marketing system. Therefore, comprehensive advances in marketed surplus-output ratio, standardisation of market charges, shifting of burden towards buyers, availability of market information, market sales, commission squeezing up to 50%, endorsement of correct weighting, and swift transactions.[50] Recognising the positive impact, state governments increased the strength from 286 markets in 1950,[51] to 6920 regulated Mandis, combining 2591 principal Market yards and 4329 sub-market yards. Regardless, with duration, the agri-markets encountered assorted iniquities and were necessitated to strengthen the design.[52] The evolution commenced with the arrangement of an Expert Committee in 2000, which recommended a reorientation of policies through amendments in the State Agricultural Produce Marketing Regulations Act and the Essential Commodities Act and acceptance of warehousing receipt in facilitating institutional credit to the marketing sector. Further submitting to the Ministry of Agriculture, a task force was constituted, and recommendations were tabled in the national conference of state ministers in 2002. Again, a committee under the chairmanship of K M Sahni introduced the Model APMC Act of 2003,[53]which incorporates requirements for liberalisation, contract farming, direct purchase outside APMC, single point of levy, single registration, and trading outside notified area[54]. In comparison, states are reluctant to incorporate them; only 18 modified their APMC acts, and 10

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[49] *Supra* note 24.

[50] *Id.*

[51] *Id.* at 2.

[52] Rajya Sabha, *Operational agricultural mandis in the country*, unstarred question no. 1465, Jul.29, 2022 https://pqars.nic.in/annex/257/au1465.pdf (last visited Nov. 7, 2022).

[53]Ramesh Chand, *e-Platform for National Agricultural Market*, vol. lI No. 28 , 16, Jul. 9, 2016, , Economic & Political Weekly, (last visited Nov. 1, 2022).

[54]*Supra* note 44.

enforced them.[55] Even states included provisions that thwarted reforms and renewed the original position.[56]In 2004 exertions were erected to retrieve fruit and vegetables from the APMC domain, and in 2017, the State/UT Agricultural Produce and Livestock Marketing (Promotion and Facilitation) Act (APLM Act) was drafted and disseminated. This Act encompasses arrangements for eliminating constraints inside and outside APMC markets, prerequisites of shops for trading, fresh produce marketing exceeding the APMC domain, and proclamation of the entire state as a single market area. However, APMCs will endure the actual jurisdiction in issuing licenses and imposing taxation on the independent wholesale market and direct purchase.[57] This model Act was exhaustively discussed with states, and Arunachal Pradesh alone embraced the Model Act; reforms in other states lasted as a document.[58] The structure brings decisive impact though concluded in a regulated framework, enables self-sufficiency, and is a marketing platform for farmers. Besides, it sorrowed from severe distortions constraining remunerative returns, dis-incentivising private sector participation, and commission agents developed into essential characteristics; therefore, the price discovery procedure in the country remained ineffective, and the effectiveness of the regulatory framework downgraded to a significant measure.[59]Last 18 years, agri-markets have become disillusioned or diverted from their purposes and goals, and unanimity is advancing toward transformation; restoring this, the Union exercised a statutory route to execute market reforms.[60] These laws receive mixed reactions; however, experts acknowledge that legislation neglected to appreciate the

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[55] *Supra* note 14 at 20.

[56] *Supra* note 53 at 16.

[57] *Supra* note 44.

[58] *Supra* note 15 at 7.

[59] *Supra* note 19 at 33.

[60] Ramesh Chand, *Agricultural Challenges and Policies for the 21st Century*, No.6/2022, NABARD Research and Policy Series, file:///C:/Users/Administrator/Desktop/Niti%20aayog%20on%20agriculture/Paper_Agri-Challenges-and-Policies_NABARD.pdf (last visited Nov. 5, 2022).

perpetuating issues of un-remunerative MSP and dysfunctional public procurement and would assemble an exploitative free market, which destroys the existing APMCs with parallel markets. Besides, it aggravates tax-free purchases and simultaneously downgrades state revenue or fiscal federalism; mass welfare, rural developmental activities, and agricultural viability would holdup.[61] The prime obsession is eliminating intermediaries with no registration provisions, as they act as market distortions. In comparison, they recreate a meaningful role in high-volume business and have satisfactorily imbibed in regional conditions.[62] Nevertheless, formulating legislation without addressing local/state variations, commodity specificity, institutional preconditions, addressing structural asymmetries, organisations, and structure of agri-markets will hamper the public-oriented markets. Also, reliance on overburdened non-specialist administrators in the dispute resolution mechanism possessing no experience and knowledge of price information is a short-sighted measure.[63] Similarly, the Union refuses to acknowledge that the marketing system is already private, with the state operating as a regulator, excluding government procurement. Experts believe that there remained regulatory barriers despite needing to be more sufficient to prevent private players from entering; as a result, large businesses would not command these laws would accomplish those pursuits.[64] The admittance of private players is no panacea; there are associated eliminations like consolidation of the supply chain in resource-endowed areas adjoining municipalities; they mediate via local agents and shop for the best suitable products without developing any competence. Likewise, big farmers endowed with resources were able to appropriate higher returns; as a result, the land rentals will downgrade, and the absence of auction in the private purchase is another exclusion.[65] Even if the intermediaries are

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[61] *Supra* note 5.

[62] *Supra* note 11 at 70.

[63] *Id.*

[64] *Id.*at 71

[65] *Supra* note 14 at 20.

eliminated, as their presence in production, credit, and input markets is detrimental; guidance can be elicited from the Madhya Pradesh APMCs model, where domination is bestowed to Farmer producer companies (FPCs), primary agricultural credit societies (PACS), and cooperatives.[66] As a result, corporations buy high-quality varieties via their single-license procurement centres and choupals without government acquisition.[67] Again, the agents have assembled their space through full-time, licensed traders for FCI or local agents for corporations. Though their performance has been maintained nominal, with the installation of Primary Agricultural Credit Societies (PACS) and the aggressive performance of the cooperative banks and State Warehousing Corporation.[68] Since India is a welfare state catering to numerous producers and consumers, maintaining economic justice and federal character is also an aspiration.

Liberalization, Privatization and Globalization

After 1991, it brought 17 years to duplicate per capita income, and agriculture and allied sectors (GVA) doubled in 23 years and will retain the same duration to renew.[69] The average annual growth rate of agriculture continues at 3%, whereas the non-agriculture sector showed 6% in the 1990s, 10% in 2004-09, and 7.5% in 2010-15.[70] The rationalization, being agriculture, remained aloof from the 1991 policy, apprehending that these reforms were detrimental and in reaction to the World Bank and IMF commitments; however, it proceeded with

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[66] Sukhpal Singh, *Arthiyas in Punjabs APMC Mandis Inadequate Analysis and Solutions*, vol II No. 15, Apr. 9, 2016, 69, Economic & Political Weekly (last visited Nov. 7, 2022).

[67] Mekhala Krishnamurthy , *States of Wheat the Changing Dynamics of Public Procurement in Madhya Pradesh*, vol xlvII no 52, 73, Dec. 29, 2012, Economic & Political Weekly (last visited Nov. 7, 2022).

[68] *Id.* at 77.

[69] *Supra* note 60.

[70] *Supra* note 53 at 15.

overwhelming expansion in the other sectors.[71] The agricultural sector failed to take edge due to the absence of inner liberalisation and domestic reforms. [72] Thereupon, the system became slanted towards a few commodities, contributing to abundance production and a demand-supply mismatch, together with disadvantageous export price competitiveness of commodities in the global market, making it challenging to deflect. In contrast, the importation of extensive quantities of edible oil and pulses owing to a dearth of marketing facilities, post-harvest infrastructure, logistics, and threats in diversification oppresses the state treasury.[73] Correspondingly, the non-performance of other sectors owing to the scarcity of government intervention makes the situation more deplorable.[74]

Overprotective Mechanisms

Preliminary, the government, through central and state legislations, endeavoured to accomplish self-sufficiency, farmer's-consumer welfare, canning supply-side constraints, controlling malpractices, and orderly functioning of the markets through the adoption of transparency in storing, packing, quality, blending, and processing. Regardless, numerous enactments like The Prevention of Food Adulteration Act, 1954, the Essential Commodities Act, 1955, and the Agriculture Produce (Grading & Marketing) Act, 1986, regulate every component between producer and consumer. In addition, the enforced constraint on the notified commodities marketing in APMCs, mandatory license conditions, disallowance of direct sales, and specific orders regulating products like meat, vegetable oils, milk, fruit, pulses, edible oilseeds, and edible oils

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[71] *Supra* note 15 at 3.

[72] RAMESH CHAND, *Farm Incomes in India :the context of Development and Institutions* ,Agricultural development, Rural Institutions and Economic Policy, 59-81 (Gopal K.Kadekodi and Brinda Viswanathan, Oxford University Press 1d. 2009).

[73] *Supra* note 15 at 4.

[74] *Id.*

act as a deterrent.[75] The state APMCs oblige farmers to sell in government-controlled marketing yards to limited traders; as a result, they are readily manipulated and acquire hardly a portion of customer price.[76] The deliberated legislative instruments, with duration, outlasted its utility and experienced disproportionate control; and strengthened a monopoly in favour of states, discouraging the private sector and cooperative sectors from establishing and operating markets correlated with storing marketing and processing commodities. This culminated in minimum transparency in marketing and licensing procedures, deterioration of the producer-consumer relationship, and impeding access to an alternative market. Correspondingly, the sector remained immune from imminent investments or capital formation from the corporate and outlasted with less than 0.5% annual investments.[77]Concerning the Essential Commodities Act, the NCF pointed out continual modifications, even the Model Act of 2003, which prescribes removing restrictions on licensing, storage, and movement of food grains, including sugar, oilseeds, and edible oils. However, these transformations were retrogressed in 2006. This resumption of restrictions under a government order of 2016 devised apprehension in investors, intellects and caused severe setbacks to agricultural infrastructure, storage, logistics, and supply chain modernisation. In the era of surplus production, the act broke down to mitigate the price hike and harboured a meager conviction rate of 0.27% in 2017.[78]

Relation between MSP and APMCs

As stated, the state contradicted any relationship between the APMCs and MSP. However, evidence revealed that MSP

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[75] *Supra* note 42 at 131.

[76] Government of India , *Raising Agricultural Productivity and Making Farming Remunerative for Farmers An Occasional* , NITI Aayog, Dec. 16, 2015, https://www.niti.gov.in/sites/default/files/2019-07/RAP3.pdf (last visited Oct. 11, 2022).

[77] *Supra* note 15 at 5.

[78] *Id.* at 7, 8.

connected with actual procurement and expansion of APMC instead of dismantling[79] would ultimately benefit farmers.[80]

Besides, the public good essence of APMCs cannot be undermined, as it brings roads and development, contributing to other externalities.[81] In 2006, Bihar dismantled APMCs and envisioned an increment in agricultural markets, whereas it remained stagnant. Also, a new informal market is established roadside with 1% municipal tax without state obligation to deliver infrastructure.[82] Bihar constitutes 97% of small or marginal farmers, and 96% farmers are impelled to auction paddy below 30% of MSP,[83] and public agencies, procurement percentage remains at 8%. Here, the private bodies determine the costs and grade, which is under no obligation to adhere to state mandates. Also, the unsatisfactory operation of PACS in settlements, sluggish procurement, and the dearth of convenient storage facilities forced farmers to auction below the MSP.[84]

The green revolution consolidated and profited the northern states and assembled market segmentation and income disparities,[85] and agri-markets endured as an instrument of the success of the green revolution by furnishing a guaranteed market for produce at prefixed prices, which further incentivised farmers to accept the technology.[86] Even market interventions

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[79] Manish Kumar, *The Government's Retreat from Agricultural Policy Experiences from Bihar,* Vol. 56, No. 4,Jan. 23, 2021, Economic and Political Weekly, (last visited Nov. 11, 2022).

[80] Deepankar Basu & Kartik Misra, *An Empirical Investigation of Real Farm Incomes across Indian States between 1987–88 and 2011–12*, Vol. 57, No. 26-27, Jun. 25, 2022, https://www.epw.in/journal/2022/26-27/review-rural-affairs/empirical-investigation-(last visited Nov. 5, 2022).

[81] *Supra* note 14 at 21.

[82] *Supra* note 79 at 17.

[83] *Supra* note 14 at 21.

[84] *Supra* note 79 at 18.

[85] S Mohanakumar & Premkumar, *Minimum Support Price and Inflation in India*, Vol. 53, No. 47, Dec. 01, 2018, Economic & Political Weekly (last visited Nov. 1, 2022)

[86] *Supra* note 14 at 19.

designed to achieve self-sufficiency, food security, control inflation, and income support to farmers through APMCs, against market fluctuations achieved a monumental triumph. About 879 lakh tones (LT) of paddy, amounting to Rs 1.66 trillion, and 390 LT of wheat costing about Rs 75,000 crore was procured in 2020-21, spawning around 2.1 crore farmers.[87] It is disconcerting that after colossal procurement and government expenditure, the FCI's share is less than 10% of total production,[88] even the MSP awareness remains below 6%, and only 26% of farmers accessing APMCs.[89] Almost 60% concludes with private traders barring Punjab and Haryana, with dominant government procurement; the proportion remains at 43.39% and 47.32%. Presently, deterioration in market arrivals is documented owing to accessibility, as pointed out by the Committee on Doubling Farmers Income, which is 434.48 sq km less than the 80 sq km recommended by the NCF.[90] It establishes a mismatch between consumers, and farmers, prices and depresses direct sales for high-value crops and quality produce.[91] Additionally, carrying the production to APMCs without MSP as a statutory right does not guarantee the price.[92] Even the MSP announced is insufficient, as C2 is the base/reference of the MSP estimation with an additional 50% margin determined by the Swaminathan commission. The government used the formula A2+ FL and a 50% margin[93] and, as per estimates, merely 6% of agricultural produce is solicited

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[87] Krishna Veera Vanamali, *What is the Minimum Support Price, or MSP?* , Business standard (Dec. 21, 2021), https://www.business-standard.com/podcast/economy-policy/what-is-minimum-support-price-ml (last visited Sep. 30, 2022)

[88] *Supra* note 9 at 7.

[89] Harish Damodaran , Explained: Why it's an underestimate to say only 6% farmers benefit from MSP, Oct. 6, 2020, The Indian Express, https://indianexpress.com/article/explained/explained-why-its-an-underestimate-to-say-only-6-farmers-benefit-from-msp-6704397/ (last visited Oct.28, 2022)

[90] *Supra* note 19 at 34, 35.

[91] *Id.*

[92] *Supra* note 5 at 12.

[93] *Id.*at 13.

at MSP.[94] These unequal state interventions allowed merchant cartels to manipulate and further exacerbate distressed sales without storage or transportation facilities.[95] As APMCs and local markets/small traders operate at proximate foundations, MSP will become a minimum threshold price.[96] With bulk trading beyond APMCs, these recent regulations do not bring any meaningful transitions.[97] Also, it is acknowledged that statutory-backed MSP cannot function unless supported by demand and supply-side factors. After price declaration by the Commission for Agricultural Costs & Prices (CACP), the price would depend on demand-side factors and potential open market price.[98] Farmers are fetching remunerative prices only from government procurement, as imbalance persists in the marketing system. Therefore, expanding MSP horizons towards more crops, instead creating a competitive environment in the open market, would incur a high fiscal expenditure; in the past, states dwindled to share the costs and losses in pulses and oilseeds.[99]

It can be hypothesized that both MSP and APMC are intertwined, and the positive consequences of MSP will have a multifarious influence on the other.

Issue of APMCs Market Fees and Coverage

With an improvident view of generating APMCs revenue through taxes, cess, and other charges, instead considering as an instrument of rural development. States assessed tremendous commission prices devoid of enhanced services, which is 4 to 6 times higher; however, it appears sustained in government acquisition.[100] The obligated trading of agricultural commodities

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[94] *Id.* at 12.

[95] *Supra* note 85.

[96] *Supra* note 15 at 8.

[97] *Supra* note 14 at 20.

[98] *Supra* note 60.

[99] *Supra* note 15 at 6.

[100] *Id.* at 10.

in APMCs, associated with market fees, user charges, levies, and commissions, fluctuates broadly across states, as is 3.5% in Karnataka, 2% in Madhya Pradesh, 1–2% in Uttar Pradesh, and 5-8.5% in Arunachal Pradesh, West Bengal, Punjab, and Haryana., against the prescribed 1.5%.[101] Besides multiple levies on sale/purchase transactions, incumbent farmers are constrained to pay Mandi cess or user charges without usage though indirectly, along with disproportionate broker /commission agents'fees, though they are statutorily fixed.[102] Further, the complicated administrative structures, center-state, and inter-state multiple taxations misstate trade and marketing.[103] In comparison, APMCs mandate revenue to operate adequately and would be dysfunctional if the government continued putting hindrances like farm laws. The earnings generated by Uttar Pradesh APMCs post farm laws is barely Rs. 614 crores in 2021-22[104] against Rs 1,823 crore in 2018-19 and Rs 1,211 crore in 2017-18.[105] Even Punjab earned Rs 3,600 crore from trade fees, FCI extends 2.5 % to commission agents, and approximately 36,000 traders secured Rs 1,600 crore; roughly three lakh workers comprise a proportion of Rs 1,100 crore.[106]

Even though the present interventions, destined to assemble a unified market, culminated with two markets and tax

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[101] *Supra* note 15 at 9.

[102] *Id.* at 11.

[103] *Id.* at 6.

[104] The Times of India, *CM sets ₹1,500 cr target for mandis*, Jul. 22, 2022, http://timesofindia.indiatimes.com/articleshow/93042116.cms?utm_scppst, (last visited Nov. 11, 2022).

[105] VIRENDRA SINGH RAWAT , *UP SETTING UP PRIVATE AGRICULTURAL MANDIS IN BID TO DOUBLE FARM EXPORTS,* DEC. 2, 2019, BUSINESS STANDARD, HTTPS://WWW.BUSINESS-STANDARD.COM/ARTICLE/ECONOMY-POLICY/UP-SETTING-UP-PRIVATE-AGRICULTURAL-MANDIS-IN (LAST VISITED NOV. 1, 2022).

[106] Parikshit Goyal, *Why Punjab stands to lose from farmers,produce trade and commerce ordinance*, Jun. 30, 2020, https://www.downtoearth.org.in/blog/economy/why-punjab-stands-to-lose-from-farmers-produce-trade-and-commerce-ordinance-72040 (last visited Nov. 13, 2022).

structures. Concerning coverage, the best-performing state, Punjab, has an APMCs coverage of 74 Sq. Km, which protracts to 2257 Sq. Km in Assam.[107] The average primary wholesale agricultural markets are parked at a spread of 50 km from the farm gates.[108] The small and marginal farmers, over 70%, control an average of 1.1 hectares of land, cultivating small agri-commodities, and have an inadequacy of capabilities and the inefficiency to substitute for high-value crops.[109]Further, the high transportation and transaction costs and the APMCs locations impede the accessibility and engagement of buyers; this aggravates distress sales to the local agents or village traders at locally dictated prices. Consequently, these agents, devoid of any value addition, auctioned them at the APMCs at an optimal and market-linked price.[110]

Lack of Infrastructure

It was examined that the public expenditure in the agriculture sector diminished below 1%. The growth of APMCs downgraded to 22% compared to production, which ascended to 70%. The number of APMCs fell short of 42,000, as the National Commission on Farmers recommended.[111] Even the majority requires the basic infrastructure of grading, storage, and drying facilities, resulting in wastages of approximately Rs. 44,000 crores at 2009 wholesale market prices.[112] With high insistence on regulation instead of trade promotion, without increasing storage capacity, entrepreneurial competencies, [113] standardisation, appropriate grading arrangements, as they are

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[107] *Supra* note 24 at 403.

[108] Ministry of Agriculture, *Operational Guidelines for Operation and Management of Gramin Agricultural Markets (GrAMs)*,1, https://agricoop.nic.in/sites/default/files/Operational%20Guidelines%20for%20Operation%20and%20Management%20of%20Grameen%20Agricultural%20Markets%20%28GrAMs%29.pdf(last visited Nov. 11, 2022).

[109] *Supra* note 15 at 5.

[110] *Supra* note 24 at 286.

[111] *Supra* note 14 at 19.

[112] *Id.*

[113] *Supra* note 24.

voluntary in domestic markets, and market infrastructure, which remains at quarter compared to output growth, is functioning as a bottleneck in achieving domestic growth and export prospects. Likewise, no substantial growth has registered in exports, and inadequate APMC infrastructure is ignored to sync with output growth and regulations restricting transactions outside the APMC markets, leaving farmers with no preferences except local traders.[114] This relationship has exacerbated access to credit; and engendered a system of interlocked transactions, further pilfering the farmers, bargaining power. [115]

Technical Know-How

The State Land Use Boards should be conferred with the obligation via their professional experts on meteorological, marketing, and management information. The benefits of commodity futures markets forget to be passed on to farmers, as there is a necessity for accurate data on commodity prices for farmers and agro-food processing industries to speculate the crops grown and post-harvest sales.[116]

Hills Agri-markets

The underperformance of hill agricultural markets hinges on inadequate storage, private markets near the production areas, route connectivity, APMCs network, and high transportation costs; besides, allocating space distribution for periodic markets and restricted pre-harvest sales to specified traders is a contributing element. With minimal government intervention, private players are reticent to invest in rural market yards and collection points in remote areas. The commodities food parks sponsored by the state and diversification towards horticulture, plantation, medicinal, and aromatic plants instead perishable

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[114] *Supra* note 15 at 9.

[115] *Id.* at 8, 9.

[116] *Supra* note 24 at 38.

products can furnish the requisite augmentation. The experiments of the Himachal Pradesh Marketing Committee's model on apple trading can illuminate new insights.[117]

Government Initiatives

Together, the government strengthened APMCs, increased farmers' participation, and ensured competitive and profitable production. A scheme for extending financial assistance from the Agriculture infrastructure fund to APMCs encompasses interest subvention at 3% up to Rs. 2 crores for seven years. Further, under the National Agriculture Market (e-NAM), financial assistance of Rs. 75 Lakh for generating capacity through assaying equipment and infrastructure. Presently, 1000 Mandis from 18 states have harmonised with the e-NAM. Also, a Central Sector Scheme for establishing 10,000 FPOs by 2027-28 has been proffered; the primary pursuit would be the enhancement of productivity through efficient, cost-effective, and sustainable resource use and acknowledging higher returns through better liquidity and market linkages. The assumption would be the produce cluster area and specialised commodity-based approaches for strengthening the One District One Product. The arrangement detected a productive impact, and relatively 1963 FPOs have registered.[118]

Gramin Agricultural Markets

Another climacteric development in the rural agricultural market infrastructure came via Gramin Agricultural Markets (GrAMs). The preamble states that the small and marginal farmers consist of prevalence; both production and post-production activities are confronted with efficiency. The market establishes the produce price; agriculturalists must be integrated with a transparent and efficient market network.[119]

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[117] *Id.* 38.

[118] *Supra* note 29.

[119] *Supra* note 108.

These rural agri-markets strengthen farmers 'bargaining power by ensuring preparatory or preconditioning services and access to wholesale agri-markets and concurrently facilitate farmers 'ability to auction their supply directly to the consumers without APMCs, physical negotiation, or via e-NAM.[120] Many states solicited to establish direct producer-seller markets under diversified designations; the DFI Committee has endorsed the installation of 22,000 primary retail and agricultural markets by seizing the benefit of the continuing periodical markets across the country.[121] In 2018-19, integration with Mahatma Gandhi National Rural Employment Guarantee Scheme, which promoted GrAMs. Also, a corpus of Rs. 2000 crore for upgrading GrAMs and 585 APMCs is established through Agri-Market Infrastructure Fund (AMIF).[122] In response to a question in the parliament, the government responded that GrAMs would be electronically linked to e-NAM, also calling for excluding the same from state APMC and forming an inter-Ministerial Committee to coordinate.[123]

E-National Agricultural Markets

Elicit the enduring impediments and disseminate information on prices, as they were unavailable.[124] A Central Sector Scheme for promoting the National Agriculture Market (NAM) through the Agri-Tech Infrastructure Fund (ATIF) was inaugurated in 2015. The objective is to stimulate Pan -India trade in agricultural commodities, streamline marketing procedures, and uniformity and transparency in auctions.[125] Also, fostering

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[120] *Id.* at 5.

[121] *Id.* at 2, 3.

[122] Press Information Bureau , *Development of Agricultural Marketing Infrastructure*, Mar.20, 2020, https://pib.gov.in/PressReleasePage.aspx?PRID=1607344(last visited Nov. 10, 2022).

[123] Lok Sabha , *Gramin Agriculture Markets* , unstarred question No. 1782, Jul.2,2019,https://loksabhaph.nic.in/Questions/QResult15.aspx?qref=1938 &lsno=17(last visited Nov. 8, 2022).

[124] *Supra* note 14 at 20.

[125]Ministry of Agriculture and Farmers Welfare, *Operational Guidelines for promotion of National Agriculture Market (Nam) through Agri-Tech*

competition through the eradication of trading cartels, price manipulations, interstate movement from surplus to deficit states,[126] market-driven diversification, along with narrowing reliance on MSP. [127] Lastly, doubling farmers, income and furnishing quality products at affordable prices to consumers.[128] It is an electronic trading portal that incorporates the APMC *Mandis;* trading initiates in virtual form, sponsored by the physical market. The significance can be assembled from the initial budget allocation of 200 crores in 2015 to Rs. 1171.93 Crores, and asserted that 1000 Mandis of 18 States covering 1.72 Crore farmers and 2 lakh traders have registered, and integration of 1000 is planned.[129] Regardless, the coverage of over 6000 APMCs and 22,932 periodic rural markets emerges as a mammoth task, where considerable trading concludes with village-level intermediaries. The online platform's progress implies impractical without strengthening coordination among states, regulatory reforms, and institutional, infrastructural, and logistical investment in APMCs. Also, a deficiency of trained personnel handling computer software, laboratories, and testing equipment for assaying and quality specification prevailed.[130] In states like Punjab, with an extensive APMCs network, markets flooded the yield within days of harvesting. During this brief window, assuring the marketing of produce and remunerative price without the present procurement arrangement would be troublesome.[131]

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*InfrastructureFund(ATIF),*Sep.2016https://enam.gov.in/web/docs/namguidelines.pdf (last visited Nov. 6, 2022).

[126] *Supra* note 53 at 17.

[127] *Id.* at 18.

[128] *Supra* note 125.

[129] Press Information Bureau , *Integration of E-MANDI'S into E-NAM Platform,*Feb4,2022,https://pib.gov.in/PressReleasePage.aspx?PRID=1795508#:~:text=Since%2031st%20March%202018,integrated%20with%20e%2DNAM%20platform. (last visited Nov. 10, 2022).

[130] Mekhala Krishnamurthy & Shoumitro Chatterjee,*Understanding and misunderstanding e-NAM*, Jan. 30, 2020, https://cprindia.org/journalarticles/understanding-and-misunderstanding-e-nam/(last visited Nov. 3, 2022).

[131] Sukhpal Singh & Shruti Bhogal, *Commission Agent System What Ought To Be Done* vol I, No.32 ,Aug. 6, 2016,131,Economic & Political Weekly (last visited Nov. 3, 2022).

Due to payment constraints and collection, it predominantly became demanding for traders to fulfill high-volume commodities online orders within duration. Swapping towards direct electronic payments for all transactions is challenging in a credit advancement and cash disbursement system. Indeed Karnataka preferred to exit owing to the omission of competition from external traders. Although economic integration facilitates barrier-free movement, it supplements competition and specialisation by expanding the output and competition in the intermediation and logistics sectors. However, there are associated risks affecting food security; even competition and intermediation are hinged on personal relations at various levels of the commodity system and distributed across different elements of exchange and circulation. The trading competition would undervalue only the retail and the farm gate price and be unable to raise consumer prices. [132]Therefore, economic integration mandates greater institutional capacity, public investment, and regulatory innovation; lastly, the transition would be consummated by acknowledging the workforce depending on the APMCs.[133]

It is unmistakable from the explanations deliberated that the regulated markets could have performed effectively if these abnormalities are discharged.

The Way Out

The discussion established that policy interventions would not manage the structural annoyance of the agricultural sector, and substantial reforms were mandated. The impairment of APMCs emanates from the government's flawed policies, marginalising them via legislation after disregarding the public good character, extracting intermediaries, introducing private players, and trivialising the operation of the public sector in the agri-market

[132] *Supra* note 130.

[133] *Id.*

system exhibit the improvident supposition of government in a competitive environment.[134]

APMCs and MSP beneficiaries are nearly 90 million farmers, both providing a substantial opportunity to engage with daily price discovery. Also, researches pointed out that farmers accumulate more in APMCs compared to private markets.[135] About 1 lakh small farmers in the United States have vanished without regulated markets and insufficient prices.[136] Therefore, the role of APMCs cannot be negated. Correspondingly, bolstering APMCs reinforces cooperative federalism, states should be given pre-eminence in discharging constitutional obligations on reforming agriculture, and Union and States should renounce from instituting any measures distorting production and undermining the agri-markets. As the union disseminates subsidies of about 1%–1.2% of GDP, it should incarcerate itself to extensive farmers, interests, like discovering new varieties of seeds and climate change.[137]

The dissension around APMCs deciphers new vistas for states to revolutionise them into farmer-oriented institutions and bureaus of economic upliftment. Establishing post-harvest management services, combining information, credit, transportation, storage, and quality assessment-based transactions, such as warehouse-based sales, can give the requisite push.[138] Also, strengthening of MSP, public marketing infrastructure, reducing farm costs, improving market efficiency, expanding APMCs[139] or assured markets to augment the MSP scope in remote areas helps to downsize the transportation costs that FCI incurs and become workable for

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[134] *Supra* note 128 at 133.

[135] *Supra* note 19 at 38.

[136] *Supra* note 14 at 21.

[137] Shoumitro Chatterjee &Devesh Kapur, et al., *Agricultural Federalism New Facts, Constitutional Vision*, Vol. l Vii No. 36, Sep.3, 2022, 46, Economic & Political Weekly, (last visited Nov. 13, 2022).

[138] *Supra* note 19 at 38.

[139] *Supra* note 5 at 15.

procurement in troubles like the pandemic would enable to achieve the aspiration.[140] Concerning legislative upgrade, the functioning, upgrading, and extension, after a warning from Bihar,[141] exacerbating competition via allocating more licenses without shop allotment under the model APLM Act, 2017, and recurrent review of commission agent licenses as they pass over, like family property, would enhance the efficiency. Therefore, eliminating institutional support would only be practicable by resorting to better alternatives; otherwise, it would exhaust time and resources.[142]

In contrast, the private sector is well recognised for its exclusionary characteristics, price-setting mechanism, and subverting the provincial conditions;[143] subjecting farming to corporate aspirations and relentless market forces would be catastrophic.[144] Besides that, the NCF analysing their versatile role in regulated markets, advocated the admittance of private players in establishing infrastructure projects via the reduction of bureaucratic controls, simplification of procedures, like land acquisition for designating markets and collection centres, and deregulating the APMC Act before specifying new markets.

Further, the commission proposed subsidy provisions, availability, accessibility of credit at a concessional rate, foreign technical assistance or machinery, complementary investment by the government, designation of market development projects as 'infrastructure projects under Section 10(23G) of Income Tax Act, of 1961. In the legislative sphere, the NCF specified arrangement for empowering private and cooperative sectors to establish, operate, levy, and collection of service charges on agriculture marketing infrastructure and supporting services, marketing without licensed traders, and operational guidelines for contract farming towards processing and marketing firms,

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[140] *Supra* note 14 at 20, 21.

[141] *Id.*

[142] *Supra* note 79 at 17.

[143] *Supra* note 14 at 20.

[144] *Supra* note 5 at 15.

including minimising of tax incidence with single point levy.[145] As specified, the APMCs encounter vast technical and marketing inefficiencies, and implementing some fundamental provisions of the model APMC Act of 2003 can advance towards requisite marketing reform and remunerative prices. The APMCs and Essential Commodities Act, 1955, responsible for creating an environment of mistrust and thwarting the admittance of private players, demands scrutiny and reconsideration.[146]

Through farm laws and commission investigations, one frequent element surfaced is the continuation of intermediaries in the APMCs. It is recognised that excluding them would upset revenue and sustainability, as they sustain long-term liaisons with farmers based on credit advancements linked to the sale. Even Punjab and Haryana state agencies solicit through commission agents; they do the first transaction and make instant payments to farmers. These agents are politically well-associated and can confront if eliminated.[147] Therefore, cooperatives should be given primacy over commercial entities, as they are another form of commission agents. The former can fetch state grants, export incentives, tax exemptions, land leases at a nominal rate, and marketing support.[148] The inspiration can be elicited from successful APMCs market models; structural readjustments emerge as a better option, as numerous buyers in APMC markets with guaranteed and immediate payments exist. It has been experienced that the culmination of marketing transactions via the tender process can retrieve better prices, and completion of the trading process within a day, coupled with payments from the cooperative, can generate better results. Strong credit-marketing inter-linkages devoid of rent-seeking practices make it lucrative for farmers to satisfy their liquidity demands from cooperatives on the pretext of a future sale. The cooperatives also work as a buyer with an assured sale. In contrast, the traders profited from the reduced

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[145] *Supra* note 24 at 406.

[146] *Supra* note 76.

[147] *Supra* note 67 at 76.

[148] *Supra* note 130 at 130, 131.

transaction costs, significant market arrivals, and preferences to purchase quality produce. The cooperatives play the dual role of agents and buyers, offering farmers benefits and excluding intermediaries.[149]

Empowering the small/ marginal farmers associated with expanding the agri-markets, prospects through establishing retail market platforms near the suburbs facilitates producers and consumers connect. This will culminate in remunerative prices to farmers and optimal return of consumers, money. The institutions like GrAMs turned out to be better option than APMCs. For optimal operation, it should be precluded from the APMCs domain. Also, the DFI endorsed New Market Architecture, scheme in which GrAMs, at the village level, should be the first mile facilitators and service transactions point for terminal destinations.[150]

It is suggested that commodity-based farmers, markets, farmer's producers, organisations, involvement of cooperatives in agricultural marketing, formulation of modalities for contract farming, and increasing awareness about quality products can transmit outstanding developments. Also, after the pandemic, the role of the supply chain supported by upgrading information systems, capacity building, bio-safety standards, and trade literacy for farmers has become more significant.

Therefore, an inclusive approach towards production, processing, marketing chain for other stakeholders, infusion of marketing credit, and minimisation of post-harvest losses through training and equipment can also positively impact.

Advancements in research and technology, enhanced appearance of the private players in pre and post-harvest of produce, and efficient markets will endow agriculture to address the challenges of the 21st century and assist towards the aim of a new BHARAT. A carefully harmonised action between the centre and the states can ensure that agriculture proceeds

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[149] *Supra* note 19 at 38.

[150] *Supra* note 108.

towards the successive development phase alongside other sectors.[151] These agri-market reforms demand tangible political support and field-level efficiencies to implement and regulate the market.[152]

The drafted arrangements are leaned on flawed premises, invariant without considering stakeholders; therefore, resolutions demand constitutional frameworks on which the APMC structure endures. Therefore, actual performance otherwise, the enthusiastic endeavours of doubling the farmer's income, reaching the 5 trillion dollar economy, and ATMANIRBHAR will stay a distant imagination.

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[151] *Supra* note 60.

[152] *Supra* note 67 at 76.

EFFICACY OF LEGAL INSTITUTIONS IN PROTECTING ASSAM'S RAMSAR SITE: ASSESSING WASTE POLLUTION IN DEEPOR BEEL THROUGH THE LEGAL LENS

Diptimoni Baruah[*]
Kangkana Goswami[**]

Abstract

Wetlands are highly productive ecosystem and the most biologically diverse habitats on earth. In addition to this, wetlands are of critical importance for sustenance and survival of humans too, as their functionality range from climate control to flood attenuation etc. It is due to these reasons that wetlands are accredited international importance under international environmental concerns and are a relevant subject matter of serious research and analytical study. However, it happens to be a matter of grave concern that wetlands around the world are disappearing and almost on the verge of global non-existence. Same is the situation with the internationally significant Ramsar Site of Assam, the Deepor Beel, which is gasping for breath due to human interventions, rampant pollution and flouting of crucially sensitive environmental norms. The irretrievable damage in the form of pollution of the water body has endangered biodiversity, broken ecological chains and also affected local livelihood. The striking paradox however is that even after being backed by an international convention, a concrete national legal framework has not been shaped up to specifically deal with Ramsar sites. Also, the umbrella parent national and State laws, rules and regulations have not been able to address the concerns of rampant and unabated environmental pollution. This study therefore is intended to identify at the first place, the

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environmental threats pertaining to pollution the Ramsar site of Deepor Beel and then revolve around scrutinizing the efficacy of laws, institutions and practices in adhering to Ramsar Convention norms.

Key Words: Wetland, Ramsar Convention, Pollution, Deepor Beel, Protection

Introduction:

The ecosystem valuation of wetland is very important as wetlands have various functions and roles when it comes to containing environmental pollution. The multitude of functions include ground water recharge, flood control, temperature maintenance, carbon sequestration, abatement of pollution and overall climate change control.[1] As such pollution control and maintenance of ecological characteristics of wetlands should be a primary part of wetland conservation policies.[2]

The Deepor Beel in Assam, which is the lone Ramsar Site[3] in Assam, is reeling under the threat of extinction, leading to degrading ecosystem and deteriorating habitat since 2004. The dimensions of unlimited anthropogenic activities are multiple. However, one of the most prominent among them is municipal waste dumping and effluent channelling in the bed of this internationally important Wetland.

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[1] David Farrier and Linda Tucker, Wise use of wetlands under the Ramsar Convention: A challenge for meaningful implementation of international law, JOURNAL OF ENVIRONMENTAL LAW, 12(1), OXFORD UNIVERSITY PRESS, (2000).

[2] Nitin Bassia, M. Dinesh Kumarb, Anuradha Sharmac, P. Pardha-Saradhia, *Status of wetlands in India: A review of extent, ecosystem benefits, threats and management strategies*, JOURNAL OF HYDROLOGY: REGIONAL STUDIES, Volume 2, (Aug 13, 2014), https://www.sciencedirect.com/science/article/pii/S221458181400010X.

[3] The Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb2,1971, T.I.A.S. No.1084,996 UNTS 245.

Interactions with local inhabitants has revealed that water contamination in the Beel has reached unprecedented levels due to various reasons including draining of filth and effluents from Mora Bharalu, Bahini and Basistha through Pamohi channel, leaching of toxic water from garbage dumping yard in Boragaon and accumulation of huge chunks of thermocol and plastic waste from Beharbari fish market. As a matter of fact, Guwahati city alone produces 550 tonnes per day of solid waste per day and all of these are dumped at the Boragaon waste dumping site on a daily basis. What is more alarming is the fact that this waste is dumped without segregation at the source, as a result of which plastic waste is not separated from municipal waste. This is turn has rendered the concept of the sewage treatment plant futile, as sewage cannot be treated if not segregated at source. The end result is the Greater Adjutant Storks and rag-pickers sharing foraging spaces in the heaps of unsegregated and untreated solid waste with noxious stink infusing into the air and toxic content permeating into the water body. This scale of water pollution, along with reduction of water spread area, and blocking of water entrants and release gates of the Beel has adding more dimensions to the problem. To add on unplugged encroachment has added more dimensions to the problem of waste pollution.

In India, Wetland protection has received very less targeted attention in the national legal and administrative action grid. Lack of political will and administrative lethargy may be attributed to be the primary reasons. However legal research gap in the subject matter is also an important cause behind the void in catering to a stringent and punitive legislative framework to contain waste dumping and effluent channeling in wetlands.

Municipal Solid Waste: A Determinant factor for Wetland Pollution

Wetlands are a combination of aquatic and terrestrial ecosystem and therefore are they are susceptible to variations which occur both in the hydrological surface and terrestrial texture or composition. The wetland ecosystem can be affected by physical

conditions like soil compaction, surface hardening, change in vegetation status and other changes in the land biome, like introduction of non-native alien species stressors. Apart from these physical influences, the wetland ecology may also get drastically influenced by changes in chemical compositions, toxins, nutrients and alien nutrients and other organic accumulations. To add on, human interruption may also have drastic impact on tempering with the physio-chemical parameters of water and soil. These human induced changes may aggravate the deterioration quotient of the wetland to a point where it surpasses the tolerance level of the wetland species.

The purity quotient of the Wetland ecosystem is interrupted by a lot of interventions from point sources as a well as non-point sources. The potential contributors in terms of point sources which are more localised and established may be domestic and industrial effluents and the potential pollutant donor in terms of non-point sources may include run-offs and sewage from intensively cultivated catchment areas and urban centres.

There is a diverse range of broad factors, interferences and negative interventions that generally determine the health of a wetland system from pollution perspective. 'Municipal Solid Waste Dumping' is one major factor which can impact the pollution quotient of the wetland to a point of 'no return'. This is so because, municipal solid waste is an unsegregated mixture of wet biological waste combined with hazardous wastes like plastic waste, electronic waste, medical waste, sanitary waste, industrial waste etc. The dimension of toxicity generated from this unsegregated mixture of biological and hazardous waste dump sites and the consequential contamination to the water, land and air ecosystem in the vicinity is of unprecedented level.

Various physiochemical quotient of the wetland like water pH value, alkalinity, turbidity, electrical conductivity, water temperature, dissolved solids, dissolved micro-plastics, composition of cations and anions, saturation of sodium, potassium, nitrate, bio-carbonate, phosphates and chlorides

etc. get tempered and effected by the presence of an unscientific waste dumping site without a bio membrane.

Scientific studies in case of Deepor Beel, have revealed that areas of the Beel which were in close vicinity of the municipal garbage dumping site had abnormally high values of the chemical parameters and constituents.[4] The contents in terms of sediments, nutrients, metals, micro-plastic fibres, and consequent macro-phytes were found to be much more than the other areas of the water body which were not in close vicinity of the garbage dumping site.

Impact of Municipal Solid Waste Pollutants on Wetlands

At this junction, it is important to note that before delving into the details of the current status of Deepor Beel, it is pertinent to first understand at length, the impact of sewage, effluent and waste dumping on wetlands.

Various studies in India have revealed about irreparable loss to wetlands as a result of rampant dumping of pollutants at large scale in the vicinity of wetlands. Environmental experts have pointed out that water quality is directly proportionate to human populace and anthropogenic activities. Acknowledging the fact that India has a landscape with clusters of inhabitants on riparian banks, the impact of human intervention on waterbody in India is grave. It has been specifically pointed out in various studies that in India, more than fifty thousand (50,000) water bodies are poisoned to the extent of being considered 'dead', and the major contaminating factors being municipal waste, sewage, industrial pollution and highly cosmetic agricultural runoff.[5]

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4 Kapil, Nibedita , Water Quality Of The Urban Wetland System A Case Study With Deepor Beel, Department Of Chemistry ,GU, https://shodhganga.inflibnet.ac.in/bitstream/10603/114344/9/09_chapter%201.pdf.

5 S.N. Prasad, T.V. Ramachandra, N. Ahalya, T. Sengupta1, Alok Kumar, A.K.Tiwari,V.S. Vijayan1 & Lalitha Vijayan, *Conservation of wetlands of India – a review*, 1,Tropical Ecology, (2002),

When it comes to unscientifically established municipal solid waste dumping facility, leachate permeating from the landfill is the most evident pollutant of major concern. Landfill leachate is a liquid with high pollutant concentration formed from decomposition and leaching of waste carried by water permeating through the soil profile. This leachate is the primary carriers of toxic compounds from landfills into the wetlands and water bodies in vicinity. This leachate has major concentrations of heavy metals, alien nutrients, ammonia, and carbon which eventually seep out into the water body and dissolve with the hydrology of the wetland. This is turn converts the water into poisonous toxic interface for the aquatic bio-diversity of the wetland.

The leachate from landfills is composed mainly of very high concentration of organic matter, inorganic pollutants (chemicals) and heavy metals, COD (chemical oxygen demand) and BOD (biological oxygen demand) and compounds such as polychlorinated biphenyls which is a xenobiotic compound. Also, the waste chromium compounds dumped by the tanneries, dense blue-grey streams of metallic compounds are of major and particular concern.

A more concrete and distinct description of the chemical composition of the landfill leachate depends on the landfill design, waste composition rate, the waste segregation status, the climatic conditions, the temperature, the soil quality, and the age of the waste and time duration of the landfill.[6] One of the major issue of concern is that these leachate have high concentration of ammonia and organic nitrogen and therefore highly toxic both for the soil and the water.

Apart from these, micro-plastic fibres, bio-medical waste, hazardous sewage, electronic waste and industrial effluent

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https://www.academia.edu/3991557/Conservation_of_wetlands_of_India_-_a_review.

[6] Alexandros Stefanakis, Vassilios A. Tsihrintzis, *Treatment of Special Wastewaters in Vertical Flow Constructed Wetlands*, SCIENCE DIRECT (2014),https://www.sciencedirect.com/topics/earth-and-planetary-sciences/landfill-leachate.

contribute towards irreparable and fatal damage to the ecosystem and the human health. Among its significant impact, contamination of the water, eutrophication of aquatic systems, toxic effect on flora and fauna, decrease in fertility of the catchment areas are the main. Introduction of invasive species, depletion of biotic communities, breaking of ecological chain, changes in hydrology, remote changes to land use and geography, changes in temperature, and also depletion in ozone layer and other variations in climate change control quotients are also evident. Once the food chain is broken due to loss of aquatic flora, fauna and other migratory species, the entire ecosystem breaks down.

An extensive study of the impact of pollutants on the aquatic health of the Bhoj wetlands revealed a plethora of problems relating to wetland ecology as an immediate consequence of municipal, industrial and agricultural pollution. The study divulged that penetration of toxic substances and chemical laden water spills into the wetland water body leads to nutrient enrichment of the water body. This is turn leads to various consequent adverse manifestations like water quality degradation, loss of water spread area because of siltation, excessive algal blooms and excessive growth of macro-phytes and introduction of invasive plants due to alien nutrient load in the water body.[7] Similar facts were revealed in the study of the *Kabartal* wetland.[8]

In Kashmir, *the Hokersar* and *the Wular wetlands* which are declared as Ramsar Sites are reported to be reeling under the

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[7] EPCO Case Study: Conservation and management of Bhoj Wetlands, India, #329http://www.epco.in/epco_projects_international.phphttps://www.gwp.org/globalassets/global/toolbox/case-studies/asia-and caucasus/India_Conservation_and_management_of_Bhoj_Wetlands_329.pdf

[8] Kalpana Ambastha, ,Syed Ainul Hussain ,Ruchi Badola, Social and Economic considerations in conserving wetlands of Indo-Gangetic plains, a case study of Kabartal wetland India, 27 ENVIRONMENTALIST ,261 (2007) https://doi.org/10.1007/s10669-007-9003-1.

pressure of municipal solid waste dumping.[9] As described by an environmental RTI activist, the National Green Tribunal has pointed out solid and liquid waste management in these areas as issues of grave concern, apart from encroachment. A petition before the NGT highlighted that the catchment areas of the Wular wetland was used by the Bandipora Municipal Council as waste dumping site for the last 15 years and the Municipal Council of Hajin executes unscientific dumping of solid waste near the Gandbal area on the southern shore of the Wular wetland.

Solid waste dumping in the lakes and wetlands of Kashmir is a constant lingering problem and several instances of Judicial environmental activism has been instrumental in whistleblowing this practice of serious environmental concern. In affirmative decisions taken by the Jammu and Kashmir High Court, municipal waste dumping at one of the wetlands executed by the Municipal Council of Sopore was stopped.

These cognitions by the Judiciary are however discouraged by administrative and political lethargy. To cite an example, even though the funds under Swachh Bharat Mission Gramin for rural waste management can be used for wetland restoration and pollution control, neither these funds are requisitioned to be used in the aforesaid purpose nor any detailed reports are prepared for the same.[10]

Similarly in Gujrat, the Vadgam wetlands, located in the estuary region of the Sabarmati river, was used as a dumping ground for hazardous waste. This wetland which was earlier a potential

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[9] Raja Muzaffar Bhat, Why are kashmir wetlands drowning in waste? , THE LEAFLET(April 3, 2021), https://www.theleaflet.in/why-are-kashmir-wetlands-drowning-in-waste/

[10] DR RAJA MUZAFFAR BHAT, *MUNICIPAL WASTE IN WULLAR LAKE*, DAILY EXCELSIOR 20/02/2019, https://www.dailyexcelsior.com/municipal-waste-in-wullar-lake/.

body for prawn cultivation has now been converted to a body of toxic liquid and hazardous substance.[11]

In an incident reported in Bengaluru, chunks of dead fish were washed ashore in the banks of the Ulsoor Lake, depicting the toxic state of the water of the lake. Reportedly in Karnataka, the city lakes are drowned in the piles of waste and toxic liquid and experts have confirmed that oxygen levels in the lakes in Bengaluru have depleted because of leachate and sewage seeping into the lake water contaminating the water to a level which is absolutely poisonous to the aquatic ecology of the water bodies. In Bengaluru, more than half the percentage of waste water generated in the city gets into the water bodies in the vicinity.[12]

Pollution and poisoning of water in the coastal mangroves and lagoons and the famous Dal lake of Kashmir have resulted into the water becoming unsuitable for agriculture, fishing or even bathing. The local administration has taken cognizance of the fact that very sophisticated, intricate and expensive measures like dredging, laying of sewer pipe, artificial aeration (for organic pollution) and water diversion needs to be undertaken until organic pollution is reduced.

The Status of the Deepor Beel

The lone Ramsar site of Assam, the Deepor Beel, is reeling in the quagmire of irreversible pollution due to over-loaded dumping of waste and channeling of effluents.

The West Boragaon dumping site lies in the fringe areas of the internationally accredited Ramsar Site, Deepor Beel. Unfortunately, this municipal waste dumping site is neither

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[11] *INDIA'S WETLANDS 2016: ENCROACHED AND POLLUTED,* FEBRUARY 2, 2017SANDRP, https://sandrp.in/2017/02/02/indias-wetlands-2016-encroached-and-polluted/

[12] *Id.*

scientifically designed nor it is technically separated from the main water body

There are a plethora of environmental problems emanating from the positioning of this dumping site.[13]

Location and Physical Characteristics of West Boragaon Dumping Ground

The 24-hectare Boragaon dumping site is located in the bed of the Deepor Beel and therefore the piles of legacy waste dumped from 2004 have been spreading from the peripheral areas to the midsection of the Beel. It is an open dumping facility, which is in strict contradiction to the norms specified in Schedule (I, II, III, IV) of the Municipal Solid Waste Management Rules 2000.[14]

The site also doesn't have a scientifically designed geo-membrane lining/separation or a rubber belt separation to stop the leachate oozing out of the waste percolating into the water of the Beel. It also doesn't have a leachate collection facility. The Planning Commission of India in its report on Deepor Beel back in 2008 has pointed out that since the dumping facility is abutting the margin of the water body, the potentiality of the leachate percolating from the water heap reaching the core areas of the water body is very high.[15] Also, as mentioned in the CAG report 2016, the dumping site at Boragaon did not comply with the stipulated parameters as set by the Central Public

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[13] Priyanka Gogoi, *Saving Deepor Beel, Assam's Lone Ramsar Site*,1 JOURNAL FOR ENVIRONMENTAL LAW, RESEARCH AND ADVOCACY (2016).

[14] *Municipal Waste (Management and Handling) Rules, 2000*, INDIA KANOON, https://indiankanoon.org/doc/10681868/.

[15] Report on Visit to Deepor Beel in Assam – a wetland included under National Wetland Conservation and Management Programme of the Ministry of Environment & Forests, PLANNING COMMISSION, GOVERNMENT OF INDIA, 13-14 (August 2008), https://niti.gov.in/planningcommission.gov.in/docs/reports/E-F/DeeporBeel.pdf.

Health and Environmental Engineering Organization (CPHEEO)[16].

Waste Profile of Deepor Beel and Leachate Characteristic

As the leachate characteristic is assessed on the basis of the kind of waste, it is very important to first study the kind of waste dumped in the Boragaon west dumping site. The variety of waste material dumped in the Boragaon include solid and wet bio-waste of households, heaps of plastic waste, industrial waste, e-waste, medical waste including syringe, heavy metals, Aluminum cans etc. Currently, another issue of major threat potent is COVID waste including masks, PPE kits and other forms of COVID medical waste being dumped in the open.

The waste profile of Deepor Beel also include filth and effluents from Mora Bharalu, Bahini and Basistha through the Pamohi channel, construction waste from encroachments and constructions in the catchment areas and accumulation of thermocol and plastic waste from Beharbari fish market.[17]

From the study of the waste profile and several scientific studies conducted has been summarized that the leachate concentration contains high values of BOD, COD, heavy metals, organic and inorganic pollutants, medical pollutants, micro-plastic leachate etc. The pH value of the water is also more acidic towards the near end of the dump site.

A rigorous study and monitoring of the various parameters of the water and the sediment of the wetland has exposed the truth

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[16] *Municipal Solid Waste Management Manual*, CENTRAL PUBLIC HEALTH AND ENVIRONMENT ENGINEERING ORGANIZATION, MINISTRY OF URBAN DEVELOPMENT, GOVERNMENT OF INDIA, chromeextension://efaidnbmnnnibpcajpcglclefindmkaj/http://cpheeo.gov.in/upload/uploadfiles/files/Part2.pdf.

[17] P.P Baruah, Impact of developmental Interventions in Algal diversity in Deepor Beel-a Ramsar Site, Submitted to UNIVERSITY GRANTS COMMISSION. (JUNE 2011).

that the Municipal Waste Dumping facility at Boragaon happens to be the primary point source of pollution to the water body.[18]

Impact of Pollutants on Deepor Beel

It has been pointed out in various scientific studies that, physio-chemical characteristics and heavy metal concentration showed that water quality of the Wetland is in deteriorating state and the minimum permissible limits of the concentrations as per WHO standards has been exceeded.[19]

Recent study on water pollution has also revealed the fact that in the Deepor Beel water, the carcinogenic values have increased to unprecedented levels. This has happened substantially due to industrial waste, mainly batteries.[20]

The Institute of Advanced Study in Science and Technology, under Union Department of Science and Technology has cautioned against rampant and irretrievable pollution of water connected to the Deepor Beel, because of toxic water percolating from landfills. The study voiced concerns about the municipal solid waste facility being positioned close to human habitation which could not only pollute water bodies or the ground water but also air and also create health hazards for residents nearby. The Institute feared that the area could become a potential breeding ground for cockroaches, mosquitoes and other pests transmitting fatal diseases like dengue, malaria, encephalitis

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[18] Sonali Borpatra Gohain & Sabitry Bordoloi, *Impact of municipal solid waste disposal on the surface water and sediment of adjoining wetland Deepor Beel in Guwahati, Assam, India, Environmental Monitoring and Assessment,* SPRINGERLINK,(Apr 16, 2021), ink.springer.com/article/10.1007/s10661-021-09040-y.

[19] *Id.*

[20] Hiranya Barman, *GMC Dumping ground, A threat to Deepor Beel,* GPLUS, (Oct 20,2018), https://www.guwahatiplus.com/guwahati/gmc-dumping-ground-a-threat-to-deepor-beel#:~:text=GUWAHATI%3A%20Deepor%20Beel%20is%20home,birds%20and%20water%20body%20species.&text=%E2%80%9CThe%20dumping%20ground%20is%20causing,%2C%20plastics%2C%20aluminum%20cans%20etc.

etc. Accordingly a three member committee was formed by the High Court and the GMC was ordered to ensure spraying of pesticides in the area. In 2008, the State Government of Assam passed the Guwahati Water Bodies (Preservation and Conservation) Bill.

Legal Provisions to address 'Pollution of Wetlands' in India

The Ramsar Convention, 1971[21]:

The first modern legal instrument of international importance that purported to specifically protect wetlands and create national responsibilities at a global scale was the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 1971. It was a remarkable treaty where 18 nations around the world put their signatures and undertook responsibility and accountability to preserve their respective wetlands. The Ramsar Convention is a worldwide treaty that restraints nations joining it from undertaking rampant and irresponsible exploitation of their wetlands and also binds nations to undertake policies at national level to identify, protect and conserve wetlands of national and international significance.[22]

India has also ratified the Ramsar Convention of 1971 and therefore undertakes responsibilities to protect and conserve its wetlands. Article 51 (c) of the Constitution of India stipulates that the State should make endeavours to foster respect for international law and treaty obligations. The provisions under Article 51(c) makes allegiance and obligation to international treaties, a part of the 'Directive Principles' under the Constitution of India. As such, these obligations are not

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[21] The Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, Feb2,1971,T.I.A.S. No.1084,996 UNTS 245.

[22] GVT Matthews, *The Ramsar Convention on Wetlands, Its History and Development*, Ramsar Convention Bureau, Glands, Swithzerland (1993), https://www.ramsar.org/sites/default/files/documents/pdf/lib/Matthews-history.pdf.

enforceable unless they are made a part of the national laws of the nation through legislative Acts. Under Article 253[23] of the 'Constitution Of India', the Parliament has been given absolute powers to make domestic laws for implantation of International treaties, even if such implementation is a prerogative included in the State list.

India has identified 42 nos. of Ramsar sites and has adopted the domestic Wetlands (Conservation and Management) Rules, 2017 which pegs for management, conservation and sustainable wise use of its Ramsar sites.

The Wetland (Conservation and Management), 2017 prohibits conversion of wetlands for non-wetlands uses which includes solid waste dumping, channeling of sewage and effluents and use of wetlands in a way that will pollute the wetland to an irreversible extent.

Provisions under 'The Constitution of India'

The Constitution of India stipulates various provisions as a part of the 'basic structure' of the Constitution, which embarks upon the need to protect and conserve the Environment.

The Constitution of India was amended in 1976 by The Constitution (42nd Amendment) Act, 1976, inserting Article 48A in the Directive Principles of State Policy. Article 48A lays an obligation on the State Government to protect and safeguard the environment and wildlife. In *Sachidanand Pandey*[24] case it was held by the Supreme Court of India that Article 48A must be kept in mind in matters relating to maintenance of ecology.

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[23] Article 253 :"Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

[24] Pandey & Ors. v. The State of West Bengal & Ors. A.I.R 1987 S.C.R 223 (India).

Commitment to environment protection has also been mandated in the form of "Fundamental Duties" in the Constitution of India. Article 51-A (g) specifies that it shall be the duty of every citizen to protect and improve the natural environment. Therefore, while the 'Directive Principles of State Policy' imposes an obligation upon the government to protect the environment, the fundamental duties mandate the citizens to strive towards improvement and conservation of the environment and wildlife. In broader sense these Articles provide a spinal legal infrastructure for ecosystem conservation and also includes wetland conservation and protection in its ambit.

In a landmark decision in the case of State of *Gujarat* v. *Mirzapur Moti Kureshi Jamat & Others*[25], the Supreme Court observed and held that while enacting the provisions of Art 51(c), the Parliament has to ensure that the spirit of Article 48 and Article 48(A) are to be honoured.[26]

Provisions under the Environment (Protection) Act, 1986[27]

The Environment (Protection) Act, 1986 is a parent legislation or an umbrella legislation meant for protection of the Environment. As such, the subject matter of Wetland Protection was also construed to be part of the broader objective of Environment protection, because the definition of 'Environment" as stipulated under Sec. 2 of the Act included Air, Water, Land and also the inter-relationship that exist in the entire ecosystem.

The Environment (Protection) Act ,1986 was therefore used as a base legislation for providing protection to wetlands and several rules, regulations and notifications were issued under the aegis

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[25] State of Gujarat v. Mirzapur Moti Kureshi Jamat & Others , A.I.R 2006 S.C. 212 (India)

[26] Priyanka Gogoi, *Saving Deepor Beel, Assam's Lone Ramsar Site*,1 JOURNAL FOR ENVIRONMENTAL LAW, RESEARCH AND ADVOCACY (2016).

[27] The Environment (Protection) Act, 1986, No.29 Acts of Parliamnet ,1986 (India).

of the said Act for protection to wetlands and Ramsar sites of international importance.

Sec.3 of the Act [28] confers power upon the Central government, the power to take steps as it considers necessary for the protection and conservation of the environment, improving the quality of the ingredients of the environment and prevention, control and abatement of environmental pollution.

Sec 3(v) specifies areas in which certain operations, processes or functioning of industries shall not be carried out.

Sec 25 of the Act empowers the Central Government to make regulations for marking the standards, in excess of which environmental pollutants shall not be discharged. Such rules also cover compliance and handling of hazardous substances.

The provisions of this parent legislation have been useful in formulating a number of derivative rules and legislations. This Act also formed the edifice of several judicial decisions in terms of protection and conservation of Wetlands. The prohibition of aqua-culture that mushroomed in coastal areas, protection of the Dahanu Wetlands[29] in Maharashtra from industrial pollution etc. are just to cite a few examples.

Provisions under 'The Wetlands (Conservation and Management) Rules, 2017'[30]

India is a party to the Ramsar Convention**.** However, India did not have a formal and specific set of rules for protection and conservation of wetlands or the internationally accredited Ramsar Sites. It was this void in terms of a formal arrangement

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[28] *Id*

[29] Dahanu Taluka Environmental Welfare Association v. Union of India

[30] The Wetland (Conservation and Management) Rules, 2017, https://www.forests.tn.gov.in/tnforest/app/webroot/img/document/legislations/02.%20WETLANDS-RULES-2017.pdf.

of wetland regulation that the need for a specific set of regulations surfaced.

The 'Constitution of India' empowers the Indian Government to make laws for implementation of international treaties. Therefore, in execution of its commitments under the Ramsar Convention, and based on the directions under the National Environment Policy ,2006 and the recommendations of the National Forest Commission, the Parliament of India notified the Wetlands (Conservation and Management)Rules, 2017, under Section. 25 read with Sec. 3 of the Environment (Protection) Act ,1986[31].

The Wetlands (Conservation and Management) Rules, 2017, are meant for regulating identification of Wetlands and furthering technical and financial assistance to the States for the conservation of these Wetlands. The objectives of these set of rules are aimed towards ensuring institutional conservation of wetlands and containing their degradation.

The Wetlands (Conservation and Management) Rules, 2017, have specific provisions to check wetland pollution and activities that contribute towards the same, including dumping of municipal solid waste and channelling of sewage and effluents towards the wetlands.

Sec.4 of the Wetlands (Conservation and Management) Rules, 2017 imposes strict restrictions on certain activities within protected wetlands. These activities are prohibited in tune with the environmental pollution perspective as a part of the ecological approaches of wetland protection.

Sec.4 (iii) prohibits any kind of storage, disposal, manufacture or handling of substances which are hazardous in nature and

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[31] Nitin Bassia, M. Dinesh Kumarb, Anuradha Sharmac, P. Pardha-Saradhia, *Status of wetlands in India: A review of extent, ecosystem benefits, threats and management strategies*, Journal of Hydrology: Regional Studies, (Aug13,2014),https://www.sciencedirect.com/science/article/pii/S2214581814000010X

are covered under the Manufacture, Storage and Import of Hazardous Chemical Rules, 1989.

Sec.4 (iv) specifically prohibits dumping of municipal solid waste in the Wetland vicinity.

Sec.4 (v) of the aforementioned Rules[32], imposes strict restrictions on dumping and discharge of untreated waste and effluents from households, cities, and industries.

Municipal Waste (Management and Handling) Rules, 2000

The Municipal Waste (Management and Handling) Rules, 2000[33] specifically deals with management of municipal solid waste and specifications for landfill site.

Sec 7(2) stipulates that the waste processing and disposal facility should comply with the standards as mentioned in Schedule III and IV of the Rules.

Schedule III of the Rules deals with 'Specification of landfill sites' and states that the selection of the landfill sites should be based on proper study and examination of environmental issues and risks (Rule 2). The clearance for landfill sites should be assessed only after proper environment impact assessment of the proposed site and the department of Urban Development shall assist and coordinate with the concerned departments and organizations for procuring required clearances and approvals.

Specifications for Landfill Sites

Rule 8 of Schedule III clearly specifies that the landfill site should be placed away from environmentally sensitive areas such as wetlands, forest areas, water bodies, National parks, and also habitation clusters.

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[32] *Supra* Note 30.

[33] *Supra* Note 14.

Rule 6 of Schedule III stipulates that Bio-medical wastes shall be disposed off in accordance with the Bio-medical Wastes (Management and Handling) Rules, 1998 and hazardous wastes shall be managed in accordance with the Hazardous Wastes (Management and Handling) Rules, 1989, as amended from time to time.

Rule 18 to 21 of Schedule III deals with 'Specifications of Landfilling'. It states that, in landfills sites waste should be covered with minimum 10 cm of soil/debris/construction material after each working day to contain air pollution. It also states that prior to monsoon season an intermediate cover of 40-65 cm thickness of soil shall be placed along with proper grading and compaction, to prevent seepage and infiltration during the rains. Also the landfill should be facilitated with scientific design to minimize infiltration and erosion.[34]

Again Schedule IV of the Rules deals with standards for composting, treated leachate and incineration. It stipulates that in order to check pollution from composting remnants the waste storage area should be in a covered state. It further provides that even if such composting is done in an open area it should be provided with impermeable membrane at the base with facility for collection and disposal of run off and leachate. The run off from landfill should not be entering any stream, pond, lake or any other water body.

Other Legal Provisions

Apart from these legislations, rules and regulatory frameworks, there are a host of other legislations which remotely cover the matters of Wetland protection from pollution.

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[34] The final cover shall meet the following specifications, namely: -- a. The final cover shall have a barrier soil layer comprising of 60 cm of clay or amended soil with permeability coefficient less than 1 x 10-7 cm/sec. b. On top of the barrier soil layer there shall be a drainage layer of 15 cm. On top of the drainage layer there shall be a vegetative layer of 45 cm to support natural plant growth and to minimize erosion.

Legislations like 'the Indian Fisheries Act, 1897'[35] penalises destruction of fish by poisoning of waters. The legislation speaks about poisoning of waters by release of toxic, noxious or poisonous materials into the water, causing death of fish.

Legislations like 'the Water (Prevention and Control of Pollution) Act, 1974'[36] and 'the Water (Prevention and Control of Pollution) Rules, 1975' are umbrella legislations covering the issue pertaining to water pollution and discharge of sewage and pollutants into water bodies. Under Sec 25 of the Act[37] , sewage or pollutants cannot be released, channelized or discharged in a way that it enters the water body and it is the duty of the State Pollution Control Body to deals such matters with utmost responsibility and if required to intervene and stop such activity.

Besides these legal provisions, other legislations can also be used for the protection of wetlands in the country. Some of them are as the Wildlife (Protection) Act, 1972[38], the Forest Conservation Act, 1980[39], the Air (Prevention and Control of Pollution) Act, 1981[40], the Biological Diversity Act, 2002[41] etc.

The Guwahati Water Bodies (Preservation and Conservation) Act, 2008 [42]

This Act was constituted for protection, preservation and conservation and regulation of water bodies and to convert water-bodies into reservoirs and eco-tourism park and protect water bodies from encroachers and damages. Sec 4 of this Act

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[35] The Indian Fisheries Act, 1897, No. 4, (India)

[36] The Water (Prevention and Control of Pollution) Act, 1974, No. 6, Acts of the Parliament ,1974 (India).

[37] *Id*

[38] The Wildlife (Protection) Act, 1972, No.53, Acts of the Parliament ,1972 (India).

[39] The Forest Conservation Act, 1980, No.69, Acts of the Parliament ,1980 (India).

[40] The Air (Prevention and Control of Pollution) Act, 1981, No. 14, Acts of the Parliament, 1981 (India).

[41] The Biological Diversity Act, 2002, No.18 Acts of the Parliament,2003 (India).

[42] The Guwahati Water Bodies (Preservation and Conservation) Act,2008, Assam Act No XX of 2008.

specifically lays down that the land area specified under Schedule I, II, III and IV of this Act should not be used for waste dumping. The problem however, with this legislation is that it doesn't cover all the areas surrounding Deepor Beel including the West Boragaon dumping site.

State Specific Laws

To facilitate the site-specific problems of specific wetlands, several States in Indian have their own set of laws concerning wetlands. For example the Kerala Conservation of Paddy Land and Wetland Act, 2008[43], the Andhra Pradesh Water, Land and Trees Act, 2002[44], the Jammu and Kashmir Wildlife (Protection) (Amendment) Act, 2002 etc. the West Bengal Wetlands and Water Bodies Conservation Policy (2012)[45] recommends that no wetlands and water bodies can be filled up, degraded, drained, converted or subjected to any kind of activity that is incompatible with the ecological integrity of the wetlands[46].

Judicial Interventions

The Indian Judiciary has time and again made several interventions in the form of both judicial decisions and suo-moto cognizance of cases (Judicial Activism) to uphold the principles of the Indian Constitution in terms of environmental protection and adherence to international treaties and conventions of environmental importance.

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[43] The Kerala Conservation of Paddy Land and Wetland Act, 2008, No. 28, 2008 (India).

[44] The Andhra Pradesh Water, Land and Trees Act, 2002,No. 10, 2002 (India).

[45] *West Bengal wetlands and water bodies conservation policy 2012*, INDIA ENVIRONMENTAL PORTAL, (July 19, 2012),http://www.indiaenvironmentportal.org.in/content/360933/west-bengal-wetlands-and-water-bodies-conservation-policy 2012/#:~:text=West%20Bengal%20wetlands%20and%20water%20bodies%20conservation%20policy%202012.

[46] *Id.*

Polluter Pays Principle

The 'Polluter Pays Principle' which was first introduced by the OCED[47] to regulate the economic aspects of environmental policies was also subsequently enshrined in Principle 16 of the 'Rio Declaration on Environment and Development'[48] imposing liability on the person who pollutes the environment, the principle establishes and introduces the elements of both 'responsibility' and 'accountability'. According to the principle, a person who pollutes the environment should bear the cost of pollution and also compensate for the damage inflicted upon the environment while making endeavours to restore the environment to its original state.

The India Judiciary has in several landmark judgements incorporated and applied the principle of 'Polluter pays' as a core principle of environmental jurisprudence in its legal regime.

In *Vellore Citizen's* case[49] the Court interpreted the 'Polluter Pay Principle' as an absolute liability, where the responsibility for harm or damage caused to the environment extends not only to the point of compensating the victims of pollution but also to the extent of paying the cost of restoring the environment from the state of degradation.

In India *Council for Enviro-Legal Action* case[50] the Court held that once the person carries on an activity that is inherently hazardous or dangerous, he is liable to make good the loss, even if he undertook reasonable care and caution while carrying on the activity.

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[47] Organization for Economic Cooperation and Development.

[48] Principle 16: National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

[49] Vellore Citizen's Welfare Forum v. Union of India ,1996(5) S.C.C 647 (India).

[50] Indian Council for Enviro-Legal Action v. Union of India, 1996(3) S.C.C 212 (India).

Again, in the *Oleum Gas Leak* case[51], the Court held that if an enterprise engaged in a hazardous or inherently dangerous industry which poses threat to health and safety of persons residing in surrounding areas, it is absolutely liable for any damage caused. Similarly in *M.C Mehta* v. *Kamal Nath & Ors*[52], the Court held that the act of causing pollution should be construed as a civil wrong and also as a tort committed against the community as a whole.

Even in matters specific to solid wasting dumping, sewage and effluent channelling and release of toxic and hazardous substances to the waterbodies of the wetlands, there are several instances where the National Green Tribunal can be seen directing the administration and even taking a activist stance on the same.

In *Subhas Datta V. State of West Bengal & Others*[53], the NGT has enforced the provisions under the East Kolkata Wetlands (Conservation and Management) Act, 2006 and has directed the State Government to stop all prohibitory activities in the vicinity of the East Kolkata Wetland Area[54]. Among the activities that the NGT prohibited, it also asked the State government to take immediate steps to relocate the waste dumping site from the Mollar Bheri area which is close to the wetland water body. It also directed the government to work towards the restoration of degraded land and recuperate the land to its original character. The tribunal specifically mandated against plastic, leather, and rubber pollution and tannery waste processing unit in the vicinity of the wetland.

The authorities has been directed to come up with an 'Integrated Waste Management Plan, and also to make an assessment of the damage compensation that may have been inflicted upon

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[51] The Oleum Gas Leak case (M.C. Mehta vs. Union of India), A.I.R 1987 S.C 1086 (India).

[52] M. C. Mehta vs Kamal Nath & Ors**,** (1997)1S.C.C 388 (India).

[53] Subhas Datta V. State of West Bengal & Ors , O.A No. 33/2014/EZ (India).

[54] *Id.*

the ecosystem and environment of East Kolkata Wetlands by effluents and solid waste.

Demonstrating highest order of judicial responsibility towards matters of serious environmental concern, the National Green Tribunal on its own *Motion* v. *State of Kerala* took cognizance of Municipal solid waste pollution in the water bodies around the Bangalore city.[55] The tribunal considered remedial action for restoration of the Varthur, Agara and Bellandur lakes and preventing solid waste and dumping and discharge of effluents in the lakes. The tribunal also considered removing of encroachment from the catchment areas as human settlements on the banks of the lake lead to pollution and open defecation in the lakes.

The issue of irresponsible and unscientific dumping of waste in the vicinity of wetlands also came up for consideration in the matter of *Raja Muzaffar Bhat* v. *State of Jammu and Kashmir*[56]. The tribunal ordered prevention of municipal solid waste dumping, sewage channeling and encroachment of the Wular Lake, the Hokersar Wetlands and the Kreento-Chandhara wetland in Jammu & Kashmir.

In another order dated 8/7/2020 the dumping of solid waste around Ningli Tarzoo in the Wullar Lake was questioned. The Wular Lake being a Ramsar Site and an eco-sensitive zone is an environmentally sensitive area. The NGT directed a factual reporting of action taken by the State Wetland Authority.[57]

In 2016, the matter of municipal solid waste dumping in Anchar wetland of Jammu & Kashmir, serious concerns were raised when the local commissioner informed detection of bio-medical waste in the heads of solid waste dumped on the bank of the wetland. The National Green Tribunal, via its earlier orders

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[55] The National Green Tribunal in the matter of Court on its own Motion v. State of Karnataka, O.A. No. 125 of 2017,(India).

[56] Raja Muzzaffar Bhat v. U.T. of Jammu & Kashmir, O.A No. 351/2019, (India).

[57] *Id.*

dated 13/01/2015, had directed commissioning of Municipal Solid Waste Treatment Plant to protect the Anchar Lake wetland from solid waste dumping. The Court also directed the State of Jammu & Kashmir to report facts regarding the findings in terms of Bio-waste disposal in the wetland. The status regarding Bio-Medical Waste treatment plants in the major cities of the State was also asked for. The NGT however noted with disappointed that no steps were taken by the concerned departments of the State government in terms of either bio-medical waste treatment plants or waste-to-energy plants.[58]

In Mulund-Thane belt, The Bombay High Court has directed for a halt to the unscientific and rampant practice of municipal solid waste dumping on the mangrove plots and wetland beds in the area. While responding to a PIL filed by an environmental organization named 'Vanashakti' the Court took cognizance of the environmental pollution in an area which was embarked for being declared as special economic zone. In the aforesaid order, the division bench comprising of Chief Justice Mohit Shah and Justice Roshan Dalvi, directed the Ministry of Environment and Forest of the State government to respond to the allegations of severe environmental pollution due to waste dumping in the area. The PIL filed by 'Vanashakti' alleged that the Ministry of Environment and Forest had granted clearance for declaring the environmentally sensitive belt as 'Special Economic Zone' without introspection into the environmental impact of the same.[59]

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[58] Dr. Irfan Ahmad & Ors. v. Mr. Nawang Rigzin Jora & Ors, O.A No. 277 of 2013 (India).

[59]Staff Reporter, *Halt dumping of waste on Thane mangrove plot: HC, Times Of India*, TIMES OF INDIA (Jan 6, 2012) , https://timesofindia.indiatimes.com/city/mumbai/Halt-dumping-of-waste-on-Thane-mangrove-plot-HC/articleshow/11382244.cms.to

NGT Orders and Responses: Deepor Beel Waste Dumping Cases

Several PILs pertaining to unscientific municipal waste dumping and encroachment in the Deepor Beel area have been raised to draw the attention of the judiciary in terms of abrogation of environmental rights. In 2007, the residents and locals of Deepor Beel area filed a PIL to check rampant dumping of untreated waste by the Guwahati Municipal Corporation since 2006.

During the hearing of a petition filed by RTI activist Rohit Choudhury on Deepor Beel, the National Green Tribunal, while making a crucial remark stated that, "the earth is not for humans alone and that all creatures, including wildlife, have a right over it".

RTI activist Rohit Choudhury has been constantly fighting against several issues concerning the environmental aspects of the Deepor Beel, which are as follow:

a. In 2014, Rohit Choudhury petitioned the National Green Tribunal for halting solid waste dumping in the Deepor Beel area (Original Application No: 19/ 2014).[60] The NGT admitted the application which relates with contravention of the provisions of the Wetland (Conservation and Management) Rules,2010[61] and the Municipal Solid Waste (Management and Handling) Rules, 2000[62] in the Deepor Beel wetland. Mr Choudhury also raised concerns about the contamination of the Beel water and its impact upon the elephant herds and other species of birds and aquatic fish that feed on the water of the Beel. Mr. Choudhury pleaded the NGT to look into the matters of

[60] Rohit Choudhury v. Union of India & Ors., O.A. No. 19/2014/EZ (India).

[61] Wetland (Conservation and Management) Rules,2010, https://www.forests.tn.gov.in/tnforest/app/webroot/img/document/legislations/02.%20WETLANDS-RULES-2010.pdf

[62] *Supra* note.33

unregulated and illegal dumping of sewage and municipal effluents in the core areas of the Beel and issue direction so as to check rampant abrogation of environmental and human rights norms.

b. In response, the NGT had directed the Chief Secretary of the State to file response with respect to the matter of solid waste dumping and environmental pollution in the Deepor Beel[63]. The NGT also directed the State Government to identify an alternative site for garbage dumping and immediately stop dumping of garbage in the wetland site.
c. In May 2016, the NGT further directed that the State Government should consider the Solid Waste Management Plant as a matter of top priority. Earlier in 2015, the NGT had imposed fine upon the Chief Secretary, Govt. of Assam and the Additional Chief Secretary, Revenue Department for non-filling of affidavits and non-compliance of the orders of the NGT on several occasions.[64] However, on the part of the government it was contended that an alternative site for garbage dumping was already identified by the authorities and such details have been handed over to the concerned department for manufacture of the infrastructure of the dumping site.

In 2018, the NGT had ordered the local administration to remove the municipal solid waste dumping site form Deepor Beel area by 31st Dec, 2019.

In later stages, the State government filed affidavit stating that alternative sites for garbage dumping were identified in Chandrapur and Sonapur and that a compost plant was also

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[63] Sushanta Talukdar, *"NGT notice to Assam on garbage dumping on wetland*", THE HINDU (Oct 24, 2014), http://www.thehindu.com/news/national/other-states/ngt-notice-to-assam-on-garbage-dumping-on-wetland/article6529069.ece.

[64] Staff Reporter, "*NGT slaps penalty on top State bureaucrats*", THE ASSAM TRIBUNE (June 2, 2015), http://www.assamtribune.com/scripts/detailsnew.asp?id=jun0215/at052 .

been constructed in Boragaon. The affidavits also stated that the target date for removal of legacy waste from Boragaon is April 2020 and that a study in this regard will be conducted by the State Bio-Diversity Board.

Recent Development and Challenges

After multiple hearings on the issue of rampant pollution of the Deepor Beel, The National Green Tribunal directed the Guwahati Municipal Corporation to halt dumping of solid waste in West Boragaon dumping site close to Deepor Beel. This came as a fresh leash of hope for the activists and locals of Deepor Beel who have been fighting for the cause since 2014. Two years after the order was issued on 29th of April, 2019, the Guwahati Municipal Corporation finally ordered for halting of the process of channeling and dumping the municipal solid waste of Guwahati in West Boragaon on June 28, 2021.

The next prominent task for this decision to sustain and show results was shifting of the dumping site to another appropriate site with scientific approach. This is where the campaign to save the Deepor Beel received another jolt.

The National Green Tribunal ordered the state government to identify another site for sustainable solid waste dumping. Accordingly, five months after the order, on September 21, 2019, the Guwahati Municipal Corporation signed a Memorandum of Agreement with Assam Power Generation Corporation Limited. As per the agreement, APGCL has given its no-objection consent to GMC to dump municipal waste and setting up scientific Solid Waste Management Facility in its campus in Chandrapur. The agreement also stipulated that GMC will take all due care to ensure scientific handling, segregation and storage of waste. In return APGCL (Assam Power Generation Corporation Limited) proposed to plan and construct Waste-to-Energy treatment plant near the site.

However, the entire process of planning and execution met with heavy protest from the locals of Chandrapur due to several crucial reasons. At the foremost, the locals have contended that

GMC has started dumping waste in open and environmentally sensitive spaces in Chandrapur with a solid waste management facility in place. They also allege that the dumping of waste was neither carried out in scientific manner nor there was proper segregation, handling and storage of the heaps of toxic municipal waste.

In the light of such irresponsible execution, the locals fear that the conversion of Chandrapur into an open dumping ground will pollute the tributaries like Digaru, Kolong and Kopili in Chandrapur. Having said that, in the light of such protest and blockade in the public domain, the shifting of the dumping ground might meet severe constraints and might also succumb to judicial activism, media cognizance of public outrage. If such eventualities occur, then the entire gamut of developments may succumb back to square one and the West Boragaon dump site which is already overloaded may have to bear additional burdens for another couple of years. In fact, it has been reported that hearing to a PIL filed by Mr. Pradip Baruah, the Gauhati High Court has already asked for discontinuation of the said dumping site at Chandrapur for two weeks. Also, as far as the Deepor Beel is concerned, it is already overburdened with the legacy waste and the water has been contaminated to unprecedented levels. Therefore, just shifting of the garbage dump might not severe the entire process and a judicious scientific execution of treatment of the legacy waste and purifying the waterbody through technological methodology is the need of the hour.

Concluding Observations

A close understanding of the subject matter brings into surface a plethora of legal and administrative lacunae that needs to be addressed. From the void in terms of a precise, specific and targeted, scientifically framed, strong legal outline, to the induction of real-time punitive and deterrent measures in the legal instruments, to addressing and minimizing the conflicts of overlapping laws and departments, to the introduction of

inclusive approach for continuous and consistent protection and conservation exercise etc., the gap areas are diverse.

The need for a customized site -specific laws to address the needs of a specific wetland, depending on its geographic, hydrological and other distinct specifications is another area of concern. This diverse array of issue needs to be introspected upon under different heads.

Lack of targeted approach

In India legislative, political, administrative and institutional aspects of Wetland protection have received very little and remote attention. Loosely framed words in umbrella legislations have been able to touch 'Wetlands' only from a broad and remote perspectives. Pollution of wetlands also have never received targeted and special attention as it is broadly covered under water, air and soil pollution. Moreover the lack of strict penal and punitive sanctions have made the available rules and regulation less effective and efficient and flouting of rules have become an open practice. To cite an example, dumping of municipal solid waste in wetlands have been prohibited both under the Wetlands (Conservation and Management) Rules 2010 and The Municipal Waste (Management and Handling) Rules, 2000. However, most of the Indian waterbodies and wetlands today are used for solid waste dumping and effluent discharge.[65]

In the light of the following facts. it is crucial that the national wetland strategy should encompass both prevention of loss and restoration[66] . In this regard it is also important to note that 'Sustainable Management' is an indispensable part of wetland policy formulation. This is so because unlike other

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[65]S.N. Prasad, T.V. Ramachandra, N. Ahalya, T. Sengupta1, Alok Kumar, A.K.Tiwari,V.S. Vijayan1 & Lalitha Vijayan, *Conservation of wetlands of India – a review*, 1TROPICAL ECOLOGY (2002), https://www.academia.edu/3991557/Conservation_of_wetlands_of_India_-_a_review.

[66] *Id.*

environmental entities, some amount of anthropogenic intervention is a must for wetlands for maintenance of its ecological balances. Therefore, wetlands need a separate targeted set of rules, scientifically framed to fit the specifications of wetland conservation requirements.

Addressing Multiple Sources of Pollution

Various interactions with locals and activists, revealed and administrative officers of the concerned department have revealed that water contamination of the Deepor Beel has reached to a level which has become fatal for the migratory birds, fish and other aquatic animals of the water body. It has also been reported that even agricultural produce like the indigenous '*Bao Dhan*' couldn't sustain the toxicity of the water. This has happened not just because of the municipal dumping and leachate from the landfills but also due to various other reasons including draining of filth and effluents from Mora Bharalu, Bahini and Basistha through Pamohi channel, and accumulation of huge chunks of thermocol and plastic waste from Beharbari fish market. Also, as per reports a channel containing industrial effluents from Guwahati Oil Refinery connects through the Bharalu River and enters the Deepor Beel.[67] Therefore, it is very important to acknowledge the fact that pollution from various point and non-point sources have exacerbated the pollution quotient to an irretrievable angle and therefore the problem needs to be addressed from various angles.

It is now for the administrative to undertake the uphill task of checking inlets into the Beel and diverting those channels in a way that it doesn't enter the Water body of the Beel.

Effective Sluice Gate Management

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[67] Mobaraque Hussain, *Detailed study of Deepor Beel mooted, The Assam Tribune*, (Sep 15, 2010), https://assamtribune.com/detailed-study-of-deepor-beel-mooted

The inlet and outlet characteristics of the *Khanajan* Channel is very crucial for the aquatic health and overall survival of the Deepor Beel as it is a point through which running water from the Brahmaputra enter the Beel diluting and flushing out pollutants from the wetland waterbody. Closing of sluice gates for maximum time of the year leads to increase of pollution concentration in the stagnant wetland bed. This phenomenon proves to be fatal.

In various instances, death of fish varieties have been reported in Deepor Beel, the primary reason being lack of oxygen due to decomposition of grass in stagnant toxic waters[68]**.**The closing of the sluice gates of Khanajan during most of the time of the year lead to blockage of flow of water to the wetland (which is an intrinsic need of an wetland), decrease in water content and increase in mud-filling,[69]increase in turbidity and increase in toxic content in stagnant water.

Opening and closing of sluice gates should therefore be regulated by the concerned authority or the 'State Wetland Authority' in sync with other departments in the best interest of the health of the wetland. It is therefore very important to have strict rules and regulations on the part of the administration to ensure operation of sluice gates in a way to maximize the flow of water into the wetlands without jeopardising flood control management. Even during monsoon season sluice gates should be opened at frequent intervals to flush out toxic run-offs from agricultural fields.

Ineffectiveness of Penal Provisions

The essence of 'intergenerational equity' and 'sustainable development' as mentioned in Principle 3 of 'Rio Declaration on

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[68] *Id.*

[69] Vijay Singh, *Greens win battle as sluice gates open to save wetlands*, THE TIMES OF INDIA,(Oct 12, 2018), https://timesofindia.indiatimes.com/city/navi-mumbai/greens-win-battle-as-sluice-gates-open-to-save-wetlands/articleshow/66172002.cms

Environment and Development 1992'[70] is also followed by facilitating doctrines like the 'Precautionary Principle' and 'Polluter Pays Principle'.

One cannot deny the penal sanction and the retributive impact that the 'Polluter Pays Principle' have had to reduce polluting tendencies. However according to legal theorist this principle is only replete with loopholes making it only mildly effective in practical terms.

To begin with, when it comes to executing the Polluter Pays Principle, it is ambiguous as to identify who the actual polluter is. This is because, in the lengthy economic cycle, the polluter generally is a part of a 'production chain' and therefore it is difficult to concretely identify the exact polluter and the extent of their contribution in the damage caused. Moreover, the 'Polluter Pays Principle' doesn't apply to 'historical waste'. Also, the penalty under this principle seems to be effective only in penalizing industries and companies. In case of poor households, informal sector firms and subsistence farmers, they cannot bear any additional charges slapped on them for waste disposal. This renders the entire provision futile.

Also, the principle has not been implemented properly appropriately and adequately. For example in Vellore Citizen's case[71], an amount of only Rs. 10,000/- was slapped on the tanneries for spreading pollution in the nearby areas. Also, in Kamal Nath's case[72] Rs. 10 lakh is too small an amount to be considered as exemplary damage for a big corporate house like Span Motels. As such it is very important to ensure that the punishment imposed or the penalty slapped is proportionate to the damage caused, so that it deters polluters from polluting.[73]

Therefore, it can be concluded that even though the Polluter Pays Principle has been able to whistle blow the polluters and

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[70] Principle 3:The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

[71] *Supra* note 44.

[72] *Supra* note 47.

[73] Himangshu Chaudhury, *Interpretation of 'Poluter Pay Principle'(PPP) in India, Legal Service India*, http://www.legalserviceindia.com/article/l54-Interpretation-of-Polluter-Pays-Principle.html.

make them accountable for damage caused, in practice the provisions remain inadequate.

Recommendation of targeted Legislation by Assam Wetland Authority

The Assam Wetland Authority which is a high-level authority to decide on policy formulation should shoulder the responsibility to recommend and assist the Government in framing of targeted legislation for the Wetlands of the state. This is so because different wetlands have different site-specific characteristics. For example, the problems of coastal wetlands are different from urban-wetlands. Site-specific legal regimes can therefore provide tailored provisions for each type of wetlands.

Moreover, the umbrella legislations covering wetland protection are sometime contradictory to the demands of the specific wetland. To site an example, the National Wildlife laws ban 'grazing' within all National Parks which are protected areas. However, grazing in a controlled way is essential to control aquatic macrophytes colonizing the wetland and altering its ecology. Therefore, wetlands flourish with grazing while the umbrella laws covering wetlands mandate the contradictory. Hence some amount of controlled human intervention is important to ecological integrity of wetlands.

To add on, it is a matter of concern that while the Ramsar Convention of 1971 provides for wetland compensation in a limited way(Article 4.2), it does-not provide for wetland restoration. This is where a specific targeted legislation should fill the gap. The legal provision should provide for issuance of restoration orders by competent authority,

Also, provisions should be inserted so as to ensure that breach of these restoration orders constitute criminal offence and be subject to financial or other punitive penalties. The Spanish

Water Act of 1985 and Uganda's National Environment Statute of 1995 is an example in this regard[74].

'Green Police' and Inclusive Approach

In addition to formulation of specific and targeted legislation for protecting the wetlands of the state the Assam Wetland Authority may also explore avenues for coming up with a contingent of personnel in the form of 'Green Police' specially trained to monitor and police environmental pollution. This contingent of personnel may be selected from the locals, NGOs and environmental activists working on these wetlands. This approach may prove to be very inclusive as it will increase participation from the common man, increase monitoring and surveillance at ground level and make the locals and the activists 'Stakeholders' themselves and hence more connected to the cause.

Sustainable Alternative

As legacy waste is a huge lingering problem, scientific studies to be conducted to devise out ways in which the pollutants can be used in an affirmative way. In this regard, the Calcutta wetland sewage system has set a very good precedent by introducing fish varieties in the sewage pool filled with organic pollutants. The sediments of the organic ponds are removed at regular intervals and used as fertilizers for nearby vegetable farms. The rich soils and humid tropical growing conditions allow farmers to produce approximately 30% of the vegetables supplied to Calcutta.

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[74] Clare Shine And Cyrille De Klemm , Wetlands, Water And The Law ,Using Law To Advance Wetland Conservation And Wise Use 259, (Iucn 1999).

INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE) RULES 2021 & OTT PLATFORMS: A CRITICAL EVALUATION FROM THE CONSTITUTIONAL PERSPECTIVE

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"Dis-moi ce que tu manges, je te dirai ce que tu es."

Meaning – Tell me what you eat and I will tell you what you are.

- Anthelme Brillat-Savarin,
French Lawyer, 1826

Abstract

Not only what you eat, but also what you receive through your five senses matters in deciding who you are. In today's world, the young to old generations are using their eyes and ears on online platforms such as social media, YouTube, OTT etc. Amidst the pandemic, the consumption of OTT platforms and time spent on social media platforms has increased manifold. Online Curated Content streaming on OTT Platforms and unlawful content published on social media platforms also acts as food that plays a crucial role in affecting and changing the mind-set or opinion of an individual. However, this surge on these platforms also gave birth to various controversies and regulatory issues as the published and streaming content was feeding obscenity,

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violence, abusive and defamatory language to its consumers, which the current legal framework was unable to resolve. Consequently, different petitions were filed in various Hon'ble courts to regulate such content. The Indian Government in February 2021 came up with the hotly debated Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 to regulate OTT platforms and other different intermediaries. Though these rules have positive implications, concerns were also raised by various stakeholders. The underlying concerns that are needed to be chalked out for better regulation of the intermediaries and OTT platforms. The primary objective of this article is to analyse the IT Rules, 2021 and regulation on OTT platforms from the constitutional view point. The possible tussle between the IT Rules 2021, OTT platforms and the fundamental rights is the core focus point in the article. The article attempts to analyse the need for bringing the legislation and also puts forth their positive and negative aspects in an unbiased manner by comparatively analysing them with Constitutional principles and to provide suggestions.

Keywords: IT Rules 2021, Intermediaries, OTT Platforms, Constitution, Fundamental Rights,

Introduction

"Everything comes at a cost. Just what are you willing to pay for it?"

~ Serena Williams

The internet was set on foot in India by VSNL on August 15, 1995,[1] which revolutionized the lives of the people and subsequently became an essential component under Articles 19(1)(a) (freedom of speech and expression) and 19(1)(g) (freedom to practice any profession) of the Indian constitution

[1] Deepali Moray, *20 years of Internet in India: On August 15, 1995 public internet access was launched in India* (August 15, 2015, 07:48 AM), NEWS 18 INDIA, https://www.news18.com/news/tech/20-years-of-internet-in-india-on-august-15-1995-public-internet-access-was-launched-in-india-1039859.html.

by the Hon'ble Supreme Court of India in 2020.[2] Thus, creating the internet as a base, various start-ups set up and launched their respective online platforms to connect people (known and unknown) from each other. In the early 2000s, different online apps such as LinkedIn, Facebook, Twitter, YouTube, etc., gained prominence all over the world, thereby creating a considerable consumer base.[3] Although these platforms had a good chunk of the population using them, their utilization time was restricted to less than two and a half hours before the outbreak of the COVID-19 pandemic. However, after the outburst, India saw an upsurge of nearly 87% users to the online platforms, which means that people started using online platforms more than four and a half hours a day.[4]

The entertainment industry also underwent significant revolution with the booming of the information technology and internet; and the realms of entertainment have changed from wired television connections to free or paid wireless audio and video hosting and streaming services. Such services are known as Over The Top (hereinafter referred to as OTT) services that provide users a range of content like short movies, web series, feature films, documentaries, etc., to watch for entertainment purposes. Unlike the content provided by film or television that is managed by CBFC, BCCC, and so on, the OTT platforms have no administrative body over them to control the content streamed and consequently enjoy their freedom. These services reach their targeted audience through the internet on the platforms like Netflix, Amazon Prime, Hotstar, etc., which might be accessed through any digital source or gadget. As per the

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[2] Anuradha Bhasin v. Union of India (2020) 3 SCC 637.

[3] Drew Hendriks, *The Complete History of Social Media: Then and Now* (January 22, 2021), SMALL BUSINESS TRENDS, https://smallbiztrends.com/2013/05/the-complete-history-of-social-media-infographic.html.

[4] *Coronavirus: 87% increase in social media usage amid lockdown; Indians spend 4 hours on Facebook, WhatsApp* (March 30, 2020, 09:28 AM), BUSINESS TODAY. IN, https://www.businesstoday.in/technology/news/story/coronavirus-87-percent-increase-in-social-media-usage-amid-lockdown-indians-spend-4-hours-on-facebook-whatsapp-253431-2020-03-30.

reports, amidst the pandemic, these OTT platforms gained immense popularity. For instance, in India, there was a 30 percent rise in paid subscribers from 22.2 million to 29 million in just five months in 2020.[5] Platforms like Netflix, Amazon Prime Video, Hotstar are some of the biggest gainers whose paid subscribers base surged drastically.

However, with an unprecedented surge in the popularity of OTT platforms, new challenges and controversies also mushroomed. The controversy to have a streamline balance between the artistic freedoms and reasonable restrictions with further compliance on the same. The controversy not only involved Indian shows, but the foreign streaming content was also inciting violence, hurting religious sentiments, and disseminating obscenity without abiding by the Indian laws.[6]

The Indian Government, in an attempt to resolve issues arising as a result of social media and OTT platforms, processed the complaints within the pre-existing legal framework i.e., Information Technology Act, 2000 (IT Act),[7] Indian Penal Code, 1860 (IPC),[8] etc. However, the same was felt insufficient, thereby in order to shut the opened floodgate of litigations; Indian Executive got compelled to enact these unprecedented regulations. The regulations were notified on February 25, 2020, in the form of rules as Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021[9] (popularly known as 'IT Rules 2021') under Section 87 of the IT

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[5] Venkata Susmita Biswas, *2020: Rise of paid subscribers* (January 18, 2021, 07:18 AM), FINANCIAL EXPRESS, https://www.financialexpress.com/brandwagon/2020-rise-of-paid-subscribers/2172942/.

[6] *Netflix's 15 most controversial movies, shows and documentaries* (September 04, 2020, 07:45:40 AM), THE INDIAN EXPRESS, https://indianexpress.com/photos/entertainment-gallery/netflix-most-controversial-series-movies-documentaries-6580238/.

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

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

[9] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Ministry of Electronics and Information Technology, Government of India.

Act.[10] The rules are enacted to regulate internet streaming content, social media intermediaries, online news, and current affairs websites.[11]

The IT Rules, 2021 though were brought to regulate the OTT platforms and social media platforms, it has to face the wave of criticism for abrogation of freedom of speech and expression guaranteed under Article 19(1)(a) and freedom to carry on trade, profession and business guaranteed under Article 19(1)(g) of the Indian Constitution. The mooting question dealt in this article is whether the IT Rules, 2021 are well-balanced so as to ensure effective regulatory mechanism of OTT Platforms without prejudice to the enjoyment of the guaranteed fundamental rights. The article attempts to analyse the background facts regarding regulating intermediaries and OTT platforms, overview of the IT Rules, 2021, positive and negative aspects of the IT Rules, 2021, possible legal challenges from the constitutional view point and to suggest the remedies to remove the gaps in the regulatory framework.

Need for Regulating Intermediaries and OTT Platforms

Though the question of regulation of social media is debatable, it is said that the cons of social media clearly outweigh the pros. For instance, the role of Facebook and other functioning intermediaries in Delhi riots,[12] role of Twitter and other platforms in US elections,[13] etc. are evident enough to bolster the claim that social media can play a major role in sensitizing/instigating an individual or a group of individuals to perform something. Further, an increase in Child Sexual Abuse Material Content streaming on social media platforms without

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[10] The Information Technology Act, 2000, § 87.

[11] *Supra* note 12.

[12] Sourav Roy Barman, *Delhi Assembly panel links riots to social media messages* (September 01, 2020, 10:24:48 AM), THE INDIAN EXPRESS, https://indianexpress.com/article/cities/delhi/delhi-assembly-panel-links-riots-to-social-media-messages-6578101/.

[13] Scott Nover, *2020 Was The Twitter Election* (November 09, 2020), ADWEEK, https://www.adweek.com/media/2020-was-the-twitter-election/

any check is also a crucial factor urging the government to determine the rules to regulate such intermediaries.[14]

Furthermore, after the commencement of the internet and subsequently OTT platforms equipped with 'unregulated content' in name of entertainment, compelled various sections of the society to raise their voices for censorship or regulation. Moreover, due to the narrower definition of 'cinematograph,'[15] 'cable service'[16], and 'cable television network'[17], the pre-existing laws applicable to films and cable television broadcasts are ill-equipped to deal with OTT platforms. Therefore, there was an urgent need for a better framework to regulate OTT platforms.

Recently, in 2020, various petitions were filed against a web series released by Amazon Prime Video – 'Pataal Lok'. It was argued in the petitions that anti-social, vulgar, and violent content has been displayed and Section 67 of the IT Act has been violated.[18] Attention was also drawn to the Indecent Representation of Women (Prohibition) Act 1986[19] for depicting a 'gang rape' scene. It was also alleged that provisions of the IPC and State Emblem of India (Prohibition of Improper Use) Act, 2005[20] have also been violated. However, Hon'ble Allahabad

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[14] Ramesh Babu, *Sharp rise in child pornography cases worry experts* (January 24, 2021, 08:47 AM), HINDUSTAN TIMES, https://www.hindustantimes.com/india-news/sharp-rise-in-child-pornography-cases-worry-experts-101611457879318.html.

[15] The Cinematograph Act, 1952, § 2(c).

[16] The Cable Television Networks (Regulation) Act, 1995, § 2(b).

[17] The Cable Television Networks (Regulation) Act, 1995, § 2(c).

[18] *Punjab & Haryana HC Issues Notices On Plea Against Amazon Prime Web Series Pataal Lok* (June 16, 2020, 07:14 AM), LIVE LAW, https://www.livelaw.in/news-updates/punjab-haryana-hc-issues-notices-on-plea-against-amazon-prime-web-series-pataal-lok-read-order-158404.

[19] Indecent Representation of Women (Prohibition) Act 1986, No. 60, Acts of Parliament, 1986 (India).

[20] The State Emblem of India (Prohibition of Improper Use) Act, 2005, No. 50, Acts of Parliament, 2005 (India).

High Court[21] and Calcutta High Court[22] rejected the petition asking the petitioners to reach competent authority first.

Another instance was where trending Indian original series, 'Sacred Games' also faced a suit on the grounds of defamation.[23] Several Indian politicians filed a complaint that the series contained defamatory statements about former Prime Minister Rajiv Gandhi.[24] The petitioners requested for content censorship of some scenes and dialogues in the series. However, the Delhi High Court followed its precedent of *Justice for Rights Foundation* and dismissed the petition.[25] The court continued to regard the cliché provisions of the IT Act to be adequate legislation for dealing with such complaints.[26] The Hon'ble Court was of the view that the show might be against individual interest but is not against the public interest. It took a liberal view and adhering to judicial restraint, restrained itself from formulating any new regulation for such platforms.

'Tandav' a web series by Amazon Prime Video was also criticized for hurting the religious sentiments of the Hindu community. Subsequently, the makers issued an apology and also removed various scenes from the series.[27] However, these steps were not

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[21] Akshita Saxena, *Allahabad HC Dismisses Pleas Against Streaming Of Web Series Paatal Lok And XXX-Season 2* (September 30, 2020, 01:02 PM), LIVE LAW, https://www.livelaw.in/news-updates/allahabad-hc-dismisses-pleas-against-streaming-of-web-series-paatal-lok-and-xxx-season-2-read-orders-163729.

[22] *'Consider Grievances Raised' : Calcutta HC Disposes PIL Against Amazon Web Series 'Paatal Lok'* (July 26, 2020, 09:31 PM), LIVE LAW, https://www.livelaw.in/news-updates/calcutta-hc-disposes-pil-against-paatal-lok-160537.

[23] Nikhil Bhalla v. Union of India, WP (C) 7123 of 2018, Order dated 09.04.2019 (Del).

[24] Pritam Pal Singh, *Remark against Rajiv Gandhi in Sacred Games: Centre underlines freedom of speech* (December 8, 2018, 7:49:44 AM), THE INDIAN EXPRESS, https://indianexpress.com/article/entertainment/entertainment-others/remark-against-rajiv-gandhi-in-sacred-games-centre-underlines-freedom-of-speech-5483933/.

[25] *One down, three to go!* (April 24, 2019), INTERNET FREEDOM FOUNDATION, https://internetfreedom.in/one-down-two-to-go/.

[26] *Id.*

[27] *Amazon Prime Video issues apology over 'Tandav', edits 'objectionable' scenes* (March 02, 2021, 05:27 PM), THE NEWS MINUTE,

satisfactory as a result multiple FIRs were filed against producers, directors, actors as well as against Amazon Prime National Head – Aparna Purohit.[28] Amazon Prime National Head is been interrogated and the Hon'ble court decided to grant her interim protection against arrest on the condition that she has to cooperate with investigating agencies.[29] However, she failed, thereby the court rejected her bail application.[30]

Besides, the necessity for OTT rules rises out of the way that the past laws have shown deficient in overseeing matters concerning OTT content. OTT stages qualify as 'intermediaries' under 2(1)(w) of the IT Act, 2000. [31] Therefore, if they are overseeing outsider data, mediators don't have the obligation regarding the substance distributed on the stage and are for the most part subject to the guidelines set by the stages themselves. Regardless, in fact, enormous quantities of the OTT stages appreciate making their substance, thusly moving away from hazard under this game plan. These aforesaid few cases (these cases have been selected from many such other cases to project the magnitude of the problem) featured concerns with respect to the current administrative system, and it was felt that there should be regulations to control and manage the web-based media mediators and OTT Platforms.

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https://www.thenewsminute.com/article/amazon-prime-video-issues-apology-over-tandav-edits-objectionable-scenes-144496.

[28] Alok Pandey, *No Protection From Arrest For Amazon Top Executive In 'Tandav' Row* (February 25, 2021, 06:58 PM), NDTV INDIA, https://www.ndtv.com/india-news/no-protection-from-arrest-for-amazon-top-executive-aparna-purohit-in-tandav-row-2378618.

[29] *Tandav row: SC grants Amazon Prime Video India head Aparna Purohit interim protection from arrest*, (March 5, 2021, 02:23 PM), THE NEW INDIAN EXPRESS, https://www.newindianexpress.com/nation/2021/mar/05/tandav-row-sc-grants-amazon-prime-video-india-headaparna-purohit-interim-protection-from-arrest-2272619.html.

[30] Kamini Sharma, [Tandav] "Cheap And Objectionable", ALL HC rejects bail application of aparna purohit. holds, submission of apology or withdrawal of scene after streaming would not absolve criminal liability, SCC ONLINE, (MAY 26, 2021, 12:45 PM), https://www.scconline.com/blog/post/2021/02/26/tandav/.

[31] The Information Technology Act, 2000, § 2(1) (w).

IT (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021

On 25th February 2021, the Ministry of Information and Broadcasting (MIB), out of the blue, notified the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules 2021 (hereinafter referred to as 'the rules' or 'IT Rules 2021') under nearly two-decades-old pre-existing IT Act. The Rules will supersede the 2011 guidelines[32] for the internet intermediaries.[33] The rules were notified at the time when giant tech companies are being served notices or sued by the government for disseminating fake news, rumours, religious disharmony, promoting hate speech, and inciting violence.

The rules have been brought about in three parts. Part I basically deals with definitions. Part II deals with the regulation of intermediaries. The rules divide intermediaries into two parts viz. 'social media intermediary' and 'significant social media intermediary.' As per the rules, the 'social media intermediary' means an intermediary, *which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services* while significant social media intermediary means one that has the number of users greater than the threshold notified by the Indian Government.[34] On the very same date, the Central Government, side by side issued a notification, whereby it defined a 'significant social media intermediary'. It stated that any social media intermediary that has fifty lakh registered users or more will be considered as a significant social media intermediary.[35]

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[32] The Information Technology (Intermediaries guidelines) Rules, 2011, Ministry of Electronics and Information Technology, Government of India.

[33] N. Raja Sujith, Shreya Ellentala and Rahul Datta, *New Rules For Digital Media Intermediaries: How Far Is Too Far?* (March 12, 2021, 06:51 PM), LIVE LAW, https://www.livelaw.in/law-firms/articles/new-rules-for-digital-media-intermediaries-171096.

[34] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 2(v), 2(w).

[35] *Platforms with over 50 lakh users to be 'significant social media intermediaries'* (February 28, 2017, 07:12:09 AM), THE INDIAN EXPRESS, https://indianexpress.com/article/technology/tech-news-

Part III of the rules primarily deals with 'the publishers of news and current affairs content' and 'publishers of Online curated content.' The definition of 'online curated content' in the rules is vast enough that OTT platforms fall under the same category. Consequently, Part III of the rules becomes a linchpin for regulating the OTT platforms. The said part is formulated with the prime intention to ensure adherence to the code of ethics by the OTT platforms that are laid down in the *Appendix* of the rules.

The rules provide for due diligence to be paid by Intermediaries in form of ten pointers while publishing any information.[36] It also states that the intermediary should inform its users that publishing any content in contravention to the rules mentioned on that intermediary would lead to termination of the access and usage rights from that user.[37] The rules also require for the intermediaries to appoint a Grievance Redressal Officer (GRO) to acknowledge the complaints filed within twenty-four hours and dispose them off within fifteen days. The rules also state that the GRO shall receive and acknowledge any order, notice or direction issued by the Appropriate Government, any competent authority or a court of competent jurisdiction.[38]

For intermediaries, the rules also maintain that the significant social media intermediaries shall also deploy 'adequate technology-backed mechanisms including automated tools or other mechanisms to proactively identify information that depicts or simulates in any form of rape, child sexual abuse or conduct, whether explicit or implicit, or any information which is exactly identical in content to information that has previously been removed or access to which has been disabled on the computer resource of such intermediary.'[39] The rules also provide for identification of first originator of the information as

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technology/platforms-with-over-50-lakh-users-to-be-significant-social-media-intermediaries-7207876/.

[36] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(b).

[37] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(c).

[38] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(2)(a).

[39] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 4(4).

may be required by a judicial order passed by a court of competent jurisdiction.[40]

The rules for intermediaries also mention that if any intermediary platform fails to duly abide by these rules, then the intermediary status under Section 79 of the IT Act[41] would be snatched from that tech giant and it shall be liable for any punishment under any law for time being in force in India, including IT Act and IPC.[42] Section 79 of the IT Act provides a 'safe harbour' to the intermediaries, which states that any unlawful information or content published on any intermediary shall make such intermediaries liable and no legal action shall be taken against them.

A. Code of Ethics

These rules provide for classifying the content based on Themes and messages, Violence, Nudity, Sex, Language, Drug and substance abuse, and Horror. The definitions of all these classifications mentioned are subjective in nature that would be determined by the MIB time-to-time.[43] The code further maintains that the platform adhering to the Constitutional provisions will take due caution while featuring any content related to (a) Content that affects the sovereignty and integrity of India; (b) Content that threatens, endangers or jeopardizes the security of the State; (c) Content which is detrimental to India's friendly relations with foreign countries; (d) India's multi-racial and multi-religious context; (e) Activities, beliefs, practices, or views of any racial or religious group in India.[44]

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[40] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 4(2).

[41] Information Technology Act, 2000, § 79.

[42] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 7.

[43] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Appendix II (B)(ii).

[44] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Appendix II (A) (b), Appendix II (A) (c).

Furthermore, the rule categorizes content into five different categories based on violence, nudity, sex, etc. as:

- "U" would be suitable for everyone irrespective of their age.
- "U/A 7+" would be suitable for those who are above seven years and can be watched by children below seven years with parental guidelines.
- "U/A 13+" would be suitable for those who are above 13 years and can be watched by children below 13 years with parental guidelines.
- "U/A 16+" would be suitable for those who are above 16 years and can be watched by children below 16 years with parental guidelines.
- "A" that would be restricted to adults only.[45]

The rules not only categorized the content but also take its effective implementation into account and suggest platforms about access control mechanisms, including parental locks, which should be made available for content that classify as U/A 13+ or higher. The rules also suggest applying all efforts to restrict a child from accessing content classified as "A" and implement a reliable age verification mechanism for the viewers of such content.

B. Grievance Redressal Mechanism

In order to ensure adherence to the delineated code of ethics, the rules lay down a three-tier grievance redressal mechanism primarily based on self-regulating principles.[46] Level I of the Grievance Mechanism provides that any person aggrieved with content showcased on the OTT platform can lodge his grievance with the grievance officer, as appointed by the concerned publisher. The grievance officer must be based in India and shall act as the nodal

[45] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule Appendix (B) (i).

[46] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 9(3).

point of interaction between the Ministry (MIB), aggrieved complainant, and self-regulating body.[47] Moreover, the rules also provide for a time limit to be adhered to by the grievance officer. As per the rules, he must acknowledge receipt of the complaint within 24 hours and dispose of it of within 15 days.[48]

If the grievance office fails to resolve the grievance within the stipulated time limit, then the grievance shall be escalated to Level II providing for the self-regulating body or self-regulating bodies as established by the publishers or their association.[49] Such a body has to register itself with the MIB, and the MIB shall take care that the body formulated is in accordance with the rules and agree to perform the functions as laid down by the rules.[50] The body has the power to warn, censure, admonish or demand an apology or disclaimer or reclassify the content, make appropriate modifications, and edit synopsis.[51] In case the body satisfies itself with that there is a need to take appropriate action to delete or modify the content as it is likely to disrupt the public order by providing an incitement for cognizable offences, then it can also refer the case to the third tier.[52]

Finally, the Third Level provides for an Oversight Mechanism in which there shall be an inter-departmental committee constituted by MIB for hearing appeals arising out of the decision taken by the self-regulating body, or where the self-regulating body fails to resolve the grievance

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[47] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 11(2)(a), 11(3)(b).

[48] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 10.

[49] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 12(1), 12(3).

[50] *Id.*

[51] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 12(4).

[52] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 12(4)(e).

within the stipulated time, or if a complaint is referred to it by the MIB or self-regulating body.[53] In addition to the powers similar to self-regulating body, this committee will have the power to take down objectionable content and even take *suo motu* cognisance of any issue pertaining to an OTT release. The joint secretary or an officer of above joint secretary rank of MIB shall be the Chairman of the committee.[54]

Rule 16 provides emergency powers to MIB in cases where 'no delay is acceptable'. As per the rules, the secretary can issue directions for blocking online content without giving them an opportunity of being heard.[55] Thus, this way, the rules endeavour to provide a robust mechanism for regulation of intermediaries and OTT platforms.

IT Rules 2021: Too Much Boast, Little Roast

At a cursory glance, the much-awaited IT rules are likely to seem appropriate, but an in-depth study of the same provides a clear image of the underlying intricacies. However, let us first consider the positive aspects of these rules, then we would delve deep into the challenges and the unaddressed issues.

A. Positive Aspects

As per the Rules, the intermediaries are required to provide the information asked by any specialized government authorities for the prevention, investigation, detection, and prosecution of any cybercrime. Further, the intermediaries have to abide by the laws and are restricted from hosting any unlawful content in contravention to those legislations. Another positive aspect in the rules is that, in case, any

[53] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 13, 14.

[54] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 13(2).

[55] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 16.

content in contravention to the laws is displayed then they are required to remove it within 36 hours of receiving an order.

Another significant aspect of due diligence is the grievance redressal mechanism, which requires mandatory appointment of a Grievance Redressal Officer (GRO) based in India and whose contact details must be easily accessible to the public. Moreover, the guideline will also make the online platform safer for women by increasing free and fair expression with minimised intimidation. The provision of retaining the information is also increased to 180 days from 90 days according to the Information Technology Rules, 2011. It will ensure due compliance for a long period of time.

Furthermore, the rules came up with the Code of Ethics that provides for self-classification of content by the OTT platforms, which was an urgent need of the hour. Instances such as the killing of a girl by her lover after getting inspired by 'Munna Bhaiya' – a character in Mirzapur web series streamed by Amazon Prime Video,[56] bludgeoning of grandmother by a class 12 boy after watching the online streaming TV serials,[57] gang rape of a ten years old girl by eight minors and one 18 years old boy after watching a pornographic content streaming on OTT platforms,[58] are enough in numbers to substantiate the claim that

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[56] Tauseef, who was harassing and forcing Nikita to convert to Islam, decided to kill her after watching web series 'Mirzapur': Report (March 26, 2021), OPINDIA, https://www.opindia.com/2020/10/nikita-murder-case-tauseef-inspired-by-mirzapur-web-series/.

[57] *Inspired by Tv crime serials, Class 12 boy bludgeons grandmother to death in Punjab, sets body on fire*, (April 14, 2021, 10:40 AM), INDIA TV NEWS, https://www.indiatvnews.com/crime/inspired-by-tv-crime-serials-class-12-punjab-boy-bludgeons-grandmother-to-death-sets-body-on-fire-697614.

[58] Sunil Rahar, *18-yr-old, 8 minors held for gang raping Class-5 girl in Rewari village* (June 10, 2021, 01:24 AM), HINDUSTAN TIMES, https://www.hindustantimes.com/cities/chandigarh-news/18yrold-8-minors-held-for-gang-raping-class-5-girl-in-rewari-village-101623268390215.html.

streaming content on the OTT platform was playing a crucial role in adulterating the mindset of the individuals.

Furthermore, owing to India's multi-racial and multi-religious context, the rules suggested an exercise of due caution and discretion to the OTT platforms while featuring the activities, beliefs, practices, or views of any racial or religious group. The rules also provided a time stipulated three-tier robust grievance redressal mechanism (from the perspective of a consumer), which was much needed as the aggrieved persons have to raise their grievance in front of different authorities or file a petition in different courts, which used to consume their considerable amount of time and money. Moreover, due to over-burdened courts, the Hon'ble benches used to take significant time in considering the petitions, which already used to make the content disseminated to a major chunk of the population in the meanwhile due to the presence of high-speed data and easily accessible platforms.

Furthermore, the rules also provide for the display of classification specific to each content or program prior to watching the program, together with a content descriptor informing the user about the nature of the content to facilitate the user in making an informed decision.[59] Inclusion of access control mechanisms, including parental controls for the content rated above U/A 13+, is a much-appreciated step as it provided parents a method to keep a check on the content watched by their children and restrict the inappropriate content.

Moreover, the Code of Ethics also mentions a clause stating platforms shall, to the extent feasible, take reasonable efforts to improve the accessibility of online curated content transmitted by it to persons with disabilities through the

[59] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Annexure II (C).

implementation of appropriate access services.[60] However, this point is yet hardly discussed anywhere. This clause is also a much-appreciated one as it not only provides a level playing field to the person with disabilities but shows that the government is also concerned with providing the best to them.

Negative Aspects Vis-À-Vis Constitutional Issues

Apart from these positive aspects, there are some underlying intricacies in the rules that it fails to address. The Hon'ble Supreme Court, while passing an order in the so-called 'Tandav web series case,' expressed its disappointment and dissatisfaction with the new IT rules.[61] The Hon'ble Supreme court's seat headed by Justice Ashok Bhushan likewise caused to notice the way that the standards are simply rules and need compelling guideline for screening and furthermore don't accommodate suitable activity against those people who abuse them.[62] Solicitor General of India, Tushar Mehta, responded by agreeing to the remarks made by the Hon'ble Apex Court.[63]

On wherein one hand, the appraisals will help watchers settle on an educated decision, however what might be said about the watcher who keeps on watching a series or show regardless of

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[60] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Annexure II (E).

[61] Prabhjote Gill, Supreme Court challenges India's new rules for governing Netflix, Amazon Prime Video and other OTTs — no 'appropriate action' listed against those who violate regulations (March 5, 2021, 2:46 PM), BUSINESS INSIDER, https://www.businessinsider.in/policy/news/sc-challenges-new-rules-for-netflix-amazon-prime-video-disney- hotstar-by-indian-government/articleshow/81346798.cms.

[62] Krishnadas Rajagopal, *Supreme Court says new rules to regulate OTT platforms lack teeth* (March 05, 2021, 11:28 PM), THE HINDU, https://www.thehindu.com/news/national/sc-says-new-rules-to-regulate-ott-platforms-lack-teeth/article33995501.ece.

[63] Samanwaya Rautray, *Centre promises to tighten new digital media rules after Supreme Court says they lack teeth* (March 06, 2021, 07:21 AM), THE ECONOMIC TIMES, https://economictimes.indiatimes.com/news/economy/policy/centre-promises-to-tighten-new-digital-media-rules-after-supreme-court-says-they-lack-teeth/articleshow/81359441.cms?from=mdr.

the notice? Would he be able to in any case enlist a complaint under this instrument? The principles don't determine the grounds on which grumblings can be enrolled against OTT platforms. Taking into consideration the diverse viewers and their sensibilities, there will be a multitude of complaints.

Nowadays, there is a practice prevalent in society to download or get access to the content with the help of pirated sites, tor browser, and Telegram (famous social media platform) are some of the most prominent ones.[64] The rules fail to answer what if the children download and consume adult content or the content not specified for them from these sites. For instance, even after the Central Government banned nearly 3500 porn sites, India is still the world's third-largest porn consumer.[65] In a similar way, these rules won't serve the purpose unless any concrete mechanism is laid down to stop children from accessing the content not created for them.

In relation to intermediaries, the Part II of the rules create separate classes of 'social media intermediaries' and 'significant social media intermediaries' that are to be determined by the government. It would grant wide discretionary power to the government in determining which social media intermediary will be exposed to what type of norms. This arbitrary classification within the same group of companies violates the right to equality enshrined under Article 14 of the Constitution of India.[66] Moreover, the Apex Court in *L.I.C. of India v. Consumer Education and Research Centre*,[67] stated that '*the doctrine of classification is only a subsidiary rule evolved by the courts to*

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[64] Yasmin Ahmed, *Move over torrents, Indians now use Telegram to pirate movies and TV shows* (September 16, 2020, 03:47 PM), INDIA TODAY, https://www.indiatoday.in/technology/news/story/move-over-torrents-indians-now-use-telegram-to-pirate-movies-and-tv-shows-1722374-2020-09-16.

[65] TV Ramchandran, *IT Rules 2021 – Over the top?* (April 04, 2021), THE HINDU BUSINESS LINE, https://www.thehindubusinessline.com/opinion/it-rules-2021-over-the-top/article34238342.ece

[66] Constitution of India, 1950, art. 14.

[67] L.I.C. of India v. Consumer Education and Research Centre, AIR 1995 SC 1811, 1822 : (1995) 5 SCC 482

give practical content to the doctrine of equality, over-emphasis on the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equity enshrined in Art. 14 of the Constitution.'[68]

The rules also distinguish between online news portals and print media news, which is also an irrational classification of similar entities, thereby violating Article 14 of the Indian Constitution. Online News Portals will be subjected to the same regulations so as to be followed by social media intermediaries, subsequently to similar grievance redressal mechanisms, which provide enough powers to the government to delete, modify, and block content as well as ask for a compelled apology, thereby resulting in violation of Article 19(1)(a), freedom of speech and expression and Article 19(1)(g), freedom to practice any trade and profession enjoyed by the news media.[69] Owing to these very issues, subsequent petitions were filed by different news media portals, including The Wire, Quint, and Live Law.[70] India's largest News Agency, The Press Trust of India (PTI), even challenged the same stating the new rules allow the government *to virtually dictate content to digital news portals, and squarely violate media freedom.*[71]

Further, the identification of first originator of any unlawful information violates the right to privacy declared as a fundamental right under Article 21 of the Constitution of India by the Apex Court in *Justice K.S. Puttuswamy (Retd.)* v. *Union of India.*[72] Owing to the same issues, WhatsApp also filed privacy

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[68] *Id.*

[69] Constitution of India, 1950, art. 19(1)(a), 19(1)(g).

[70] *Delhi HC Issues Notice to Centre on The Quint's Petition Against New IT Rules* (March 19, 2021), THE WIRE, https://thewire.in/media/delhi-hc-issues-notice-to-centre-on-the-quints-petition-against-new-it-rules.

[71] *'Violative of Constitution': PTI Challenges New IT Rules in Delhi HC* (July 08, 2021, 01:00 PM), THE QUINT, https://www.thequint.com/tech-and-auto/violative-of-constitution-pti-moves-delhi-hc-on-new-it-rules.

[72] K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1

lawsuit against these rules.[73] According to WhatsApp, the traceability clause would force private companies to collect who-said-what and who-shared-what for billions of messages sent each day to facilitate law enforcement agencies.[74] This way, even the person who has not created the content, shared it out of concern, or check its accuracy could get caught for investigation for sharing the same if the content becomes problematic in the eyes of the government in the future. It would act as a deterrence for people even in their privacy settings from sharing any content or information further, thereby violating their freedom of speech and expression (Article 19(1)(a)) and right to privacy (Article 21).

Moreover, the rules are mere guidelines rather than in the form of legislation backed by the consent of the Indian Legislators. If the OTT platforms would have governed at par with theatrical releases and regulated by CBFC, then it would have been a much cumbersome and time-consuming process. Consequently, the government came up with these "*soft-touch regulatory architecture rules*" that provide it legal and informal methods to monitor and regulate these platforms more closely.

Furthermore, the rules are in the form of self-regulation but the underlying clauses on which this mechanism thrives provides enormous power to the government. For instance, the rules tie up the mechanism with Section 69A of the IT Act.[75] Thus, providing an overriding power to the government to step in and block the content. The concerned section also provides for imprisonment up to seven years in any contravention to the

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[73] Nandagopal Rajan, *WhatsApp moves Delhi HC against traceability clause in IT rules, calls it is unconstitutional* (May 26, 2021, 02:30:41 PM), THE INDIAN EXPRESS, https://indianexpress.com/article/technology/tech-news-technology/whatsapp-moves-delhi-high-court-over-traceability-clause-social-media-rules-7330558/.

[74] Nupur Thapliyal, *Whatsapp Moves Delhi High Court Challenging Traceability Clause Under New IT Rules As Being Violative Of Right To Privacy* (May 26, 2021, 04:48 AM), LIVE LAW, https://www.livelaw.in/top-stories/whatsapp-moves-delhi-high-court-challenging-traceability-clause-as-being-violative-of-right-to-privacy-174704.

[75] Information Technology Act, 2000, § 69A.

orders of the governments,[76] thereby also acting as deterrence for content makers violating their artistic freedoms.

Conclusion

Theatres, TV shows, and OTT are the three primary sources of entertainment for the masses in India as on today. However, owing to the technological changes, they all are being regulated through different frameworks and governed by respective bodies. As Winston Churchill once said, "*If you make 10,000 regulations, you destroy all respect to the law.*"[77] Broadcast media i.e., television, is regulated by Broadcasting Content Complaints Council (BCCC). Theatrical releases are regulated by Cinematographic Act, 1952 and certified by the Central Board of Film Certification (CBFC). But there is no specific law in India regulating OTT platforms except these recently notified guidelines. Thus, the Indian legislators must ponder over the issue and formulate one wholesome legislation backed with Parliamentary debate to regulate cinemas, TV shows, and also OTT platforms.

The Centre decided to bring all OTT platforms under the ambit of the Ministry of Information and Broadcast (MIB). Subsequently, MIB took the charge over the jurisdiction of online curated content from the Ministry of Electronics and Information Technology (MeitY).[78] Earlier, the jurisdiction of MIB was limited only to cinemas and radios and not to digital media. However, backed with recent IT rules 2021, the MIB would now enjoy enormous powers over OTT platforms without any specific law in place. This change of jurisdiction and informal backing of the powers raises censorship concerns.

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[76] Information Technology Act, 2000, § 69A(3).

[77] *Thoughts on Business of Life*, FORBES QUOTES, https://www.forbes.com/quotes/10331/ (last visited on July 29, 2021).

[78] Javed Farooqui, *Govt brings online news platforms, content providers under MIB* (November 11, 2020, 03:01 PM), EXCHANGE 4 MEDIA, https://www.exchange4media.com/digital-news/govt-brings-online-news-platforms-content-providers-under-mib-108983.html.

It is quite evident that neither censorship nor notified guidelines provide a permanent solution as the censorship would unleash havoc on artistic freedom, and it is also argued that the content on OTT platforms is available through subscription, which is completely upon the viewer to select to watch. Moreover, even after the censorship of the movies such as Padmavat,[79] PK,[80] etc., various disputes arose, thereby substantiating the claim that censorship would not be a conclusive solution in the regulation of OTT platforms. Further, the so-called guidelines neither provide for punishment and fines nor the mechanism to be followed by the person after being aggrieved by the Level III Oversight Mechanism.

Moreover, another concern is that most filmmakers do not have enough financial stability to portray their thoughts through cinema or television, and OTT platforms have come to their rescue. They are fearless to show any socio-political issue that is not generally streamed in cinemas. Thus, wherever required government control should be included but such governmental control should not curtail the freedom of speech and expression provided under Article 19 of the Constitution[81] subject to reasonable restrictions imposed under Article 19(4).[82]

Another concern is the determination of criminal liability of OTT platforms. For instance, Section 292(2) of the IPC provides punishment for dissemination of obscene content '*put into circulation in any manner*'[83] and Section 67A, 67B and 67C of the IT Act also provide imprisonment or fine or both '*for publishing or transmitting or causing to be published or*

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[79] *Padmaavat and the long trail of controversies: A timeline of obstacles the film has faced* (January 24, 2018, 11:49 AM), HINDUSTAN TIMES, https://www.hindustantimes.com/bollywood/padmavati-to-padmaavat-and-a-long-trail-of-controversies-a-timeline-of-obstacles-the-film-faced/story-MjHzviRwxD6sAiaPyEMSSK.html.

[80] *'PK' controversy: Aamir Khan film sparks outrage in several Indian cities* (December 29, 2014, 05:28 PM), DNA INDIA, https://www.dnaindia.com/india/report-pk-controversy-aamir-khan-film-sparks-outrage-in-several-indian-cities-2047859.

[81] Constitution of India, 1950, art. 19.

[82] Constitution of India, 1950, art. 19(4).

[83] Indian Penal Code, 1860, § 292(2).

transmitted in electronic form.'[84] It makes cumbersome for not only the law enforcement agencies but also layman to understand what Sections to be applied while examining the legality of the content streaming. Thus, the government should also come up with clear definitions to prevent any form of confusion.

Further, the government also has to clearly determine the criminal liability of the sites providing pirated content or the social media intermediaries providing premium content to the public at large. It not only infringes the copyright of the makers but also feeds inappropriate content to the inappropriate audience.

Under Article 77(3) of the Constitution of India,[85] the President has authority to implement rules for convenient business transactions and for allocation of the same among Ministers. It was exercised by the President on November 9th, 2020, to bring OTT platforms under the ambit of MIB.[86] Further, it can also be exercised to make good the existing lacunae in rules by the President.

So, the lacunas in the 2021 guidelines should be remedied, or in the opinion of the authors, one comprehensive legislation catering to the needs of consumers and such platforms by addressing all issues and covering all forms of expressions should be made so as to have equality before law along with equal protection of the law.

Although the suggestions and recommendations provided are not exhaustive in nature, they might play a crucial role in resolving most of the issues that intermediaries, OTT platforms and their consumers are likely to face. The instances elucidated and the views of the Apex Court while hearing plea on Tandav that '*few platforms show pornographic content at times and there*

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[84] Information Technology Act, 2000, §§ 67A, 67B, 67C.

[85] Constitution of India, 1950, art. 77(3).

[86] Farooqui, *supra* note 91.

should be some mechanism to regulate them'[87] are evident enough to showcase that the OTT Regulation is need of the hour. These rules backed with concrete and wholesome legislation passed by the Parliament of India to deal with intermediaries and OTT platforms shall act as a panacea in resolving the mushrooming disputes.

To sum up, the advocates of cyber sovereignty such as John Perry Barlow always argue against being regulated. John Perry Barlow in his work, '*A Declaration of the Independence of Cyberspace, 1996'* stated the following:

'Governments of the Industrial world, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.'

The demand for cyber sovereignty can have legitimate meaning as long as the usage of the cyber freedom is used for righteous purposes. The moment, the cyber sovereignty is misused,

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[87] *A few OTT platforms show pornographic content, there should be some screening of such shows: SC* (March 04, 2021, 02:15 PM), THE NEW INDIAN EXPRESS, https://www.newindianexpress.com/nation/2021/mar/04/a-few-ott-platforms-show-pornographic-content-there-should-be-some-screening-of-such-shows-sc-2272096.html.

regulations are must. Hence, it is justified to regulate social media intermediaries and OTT Platforms through IT Rules, 2021, but with caution approach of not encroaching upon the fundamental freedoms guaranteed under Part III of the Indian Constitution and the ultimate objective of regulation shall be reasonable and contribute towards encouragement of creativity in a socially acceptable mode.

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INSIDER TRADING AN UNETHICAL PRACTICE: WITH SPECIAL REFERENCE TO INDIAN SECIRITIES MARKET[1]

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Abstract

Insider trading is buying or selling of securities by a person who is part of or connected with the company. Law does not ipso facto prohibit trading of securities by insider but prohibits when he trades the securities by using unpublished price sensitive information. The Insider gains the profit by buying the securities or averts the losses by selling the securities as per the information which is beneficial for his own interest. The person who gets price sensitive information could potentially make larger profit than their fellow investors. The material information is that of any information which could substantially impact the decision of investor to buy or sell the securities. The Unpublished/Non-published information is information that is not available legally to the outside world or public. The insider trading generally takes place in publicly traded companies/listed companies' securities by someone who has non-public material information about that stock. Insider trading is legal or illegal it depends upon information which will affect the fluctuation in the securities of the company on the recognized stock exchange.

The Securities and Exchange Commission (SEC) in U.S., Financial Conduct Authority (FAC) in U.K., and Securities and Exchange Board of India (SEBI) in India made stringent regulations to prohibit insider trading with an object of protecting the interests of investors in the Securities market with regard to the publicly traded companies where the minority shareholders mostly

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affected from insider trading. In U.K, U.S and India the insider trading is a serious white color crime which affects the nation's economy in general and genuine investors in particular.

In keeping into consideration, the above objectives, the researchers wish to throw some light on the Concept and historical perspective of Insider trading. The researchers focus on various dimensions of national and international perspective pertaining to the insider trading. The researchers concentrate on legal framework and enforcement of insider trading in U.K., U.S., and India. Further the researchers want to mention the judicial contours and finally give the conclusive remarks and suggestions.

Key Words: Insider Trading, Price Sensitive Information, Securities Exchange Board of India

Introduction

Securities market plays a significant role in the economy of the Nation in general and corporate sector in particular. The securities market is part of financial market and includes the Primary market and secondary market. The primary market deals with the fresh issue of securities to the investors where the secondary market facilitates trade the securities on recognized stock exchanges issued in the primary market. The transactions of selling and buying of securities in secondary market take place between investors and investors through the stock brokers. The performance of primary market depends upon the performance of the secondary market. The Securities and Exchange Board of India regulates both the primary market as well as secondary markets. As far as the public issue is concern the Company as to fulfill various provisions of SEBI Act and relevant Regulations pertaining to the public issue by the corporation, which admits its securities on recognized stock exchange or it desirous to place its securities on any one of the recognized stock exchanges in near future.

Insider is a person who is an access to the un-published price sensitive information of the Corporation.

He may be director, senior officer or individual who is have nexus to the Unpublished price sensitive information. According to Regulation 2 (g) of "SEBI (Prohibition of Insider trading) Regulations, 2015[2] Insider means any person who is:

(i) A connected person or
(ii) In possession of or having access to unpublished price sensitive information"

According to the SEBI regulations Insiders maintains the "Unpublished price Sensitive Information". Specific information needs to be used only for the Legal purpose and in compliance with the any law or requirement of regulations. Apart from the specific legal purpose, the specific information shall not be shared with anyone else.

Insider trading is the trading of the securities of the corporation by individuals with potential access to un-published price sensitive information which highly fluctuate the stock of the corporation. The insider who has the price sensitive information will take advantage of gaining the profit or averting the losses by selling and buying the securities for his own benefit. At present the insider trading is on the Main street level rather than at the Wall Street level. Buying, selling and dealing in securities of any corporation is a legal activity for everyone. When it comes to the insider such as directors, managers and employees of a corporation can also buy or sell the securities subject to fulfilment of the provisions and the SEBI Act as well as Regulations. The SEBI Regulations clearly provides that it will be considered illegal if the insiders of Publicly Traded Company trade on the basis of price sensitive undisclosed/unpublished/non-published price sensitive information to make profits or avert losses. The insiders of the company is expected to trade in securities in order to maintain positions for a long period of time. Trading securities frequently or entering into reverse transactions at small intervals is considered as insider trading. This type of activity taken by the

[2] SEBI (Prohibition of Insider Trading Regulations), 2015, Regulation 2(g).

insiders of the company shall be liable for the legal consequences under the relevant SEBI regulations. The regulator is the key watch dog for the controlling of these types of activities.

Patel committee in its report in the year 1986 defined, 'insider trading' as, "which generally means trading in the shares of a company by the person who are in the management of the company or are close to them on the basis of undisclosed price sensitive information regarding the working of the company, which they possess but which is not available to others".

Insiders of the Company

Insiders in the companies means not only those persons who are directly connected with the company because of their position but those persons who are connected to or deemed to be connected with the company and have reasonable connection with "Unpublished price sensitive information" of the company. The following persons come under the ambit of insiders:

- Merchant Banker, Debenture Trustee, Stock Brokers;
- Accountancy firms, Law firms and financial Consultants;
- Subsidiary of a company and relatives of connected persons;
- Asset Management Company;
- Shareholders and employees of the company;
- Independent Directors/Non-executive directors, it includes a person who is a person connected six months prior to an act of insider trading;
- Registrar and Share Transfer Agents;
- Portfolio Manager, Investment advisers;
- Trustee and Investment Companies.

Unpublished Price Sensitive Information

It is the information which is with the Company and is accessible to insider but has not been made to public. In other

words, “the Prince sensitive information means any information which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of company”. This information will be having impact on the securities prices and leads to fluctuation in the secondary markets. The “unpublished price sensitive information” which is not in the public domain or the securities market is not aware of it. The person who is having this “unpublished price sensitive information” may use for gaining the profits or avert the losses according to the situation. The scope of such information is having highest sensitive value in the course of the administration of the company and affects directly or indirectly on the prices of the securities. The scope of such information may include:

- Business development and reconstruction of the company.
- Information relating to existing and future contracts.
- Legal consequences and future litigation of the company.
- Proposed change in the structure of the share capital of the Company.
- Change in the board of directors and change in the senior officials.
- Information on Dividend declaration.
- Information relating to the quarterly and yearly results of the company.
- Issue of securities or buy-back of securities of the Company
- Information relating to Inorganic reconstruction such as Amalgamation or Mergers or Take-over etc.
- Information relating to part or whole winding up of the company.
- Any significant changes in policies, plans or operations of the Company

History behind the Regulatory Framework of Insider Trading in India

In India Insider trading was unhindered in its 125-year-old stock market till about 1970. It was in the late 1970s this practice of insider trading was recognized as unfair. The first attempt to curb insider trading was made in India in the year 1948 by appointing the Thomas Committee. As per the Committee recommendations there were certain provisions incorporated in the Companies Act 1956. Sections 307 and 308 of the "Companies Act 1956" emphasize on various disclosures by directors and managers, but it was not effective to stop insider trading.[3]

Following the recommendations by the committees, the SEBI made regulations pertaining to Prohibition of Insider trading by exercising its powers conferred on them under section 30 read with section 11 of "Securities Exchange Board of India Act, 1992". Later the "Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations 1992" has been replaced by the "Securities Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015". Prior to these regulations there were no specific provisions in India for prohibition or prevention offence of insider trading. Prior to the regime of the present SEBI regulations there were highest instances in the cheating small investors in the secondary market by using the techniques of Insider Trading. Simply the insiders which gives tips to the near ones in terms of that they take gifts. The famous tipper theory involved in these types of activities. The tipper for the tip in concern gives the information to the tippee.

Legal Framework on Insider Trading in India

Due to rapid increase in the fastest growth of financial markets in India at par with the economies of the world, the financial crimes also associated with the Securities market. In order to

[3] The Companies Act, 1956, Sec 307, 308.

repose the confidence of the common investor in its securities market, the Government of India made certain specific laws and regulations. One of the current regulations which deals with prohibition of insider trading is that "SEBI (Prohibition of Insider Trading) Regulations, 2015" apart from some stringent provisions under SEBI Act, 1992. These Acts and Regulations made an attempt to curb insider trading was in the shaping of a disclosure requirement regarding shareholdings of Directors of the company. Considerable progress has been made since passing of these Acts and Regulations.

The objective of the "SEBI (Prohibition of Insider Trading) Regulations, 2015[4] is to prevent Insider Trading by prohibiting trading, communicating, counselling or procuring 'unpublished price sensitive information' relating to a company to profit at the expense of the general investors who do not have access to such information".

As per Sub-regulation 4 of Regulation 9 of the aforesaid regulation, promoters are included in the definition of "Designated Person". This regulation further covers the board of directors, compliance officer, employees of listed company, CEO, other managerial and secretarial staff who have access to unpublished price sensitive information[5].

The Companies Act, 2013 provides under section 195 that, "no person including any director or Key Managerial Personnel of a company shall enter into insider trading". In this context "Unpublished price sensitive information (UPSI) means any information, which relates directly or indirectly, to the company or its securities, that is not generally available which upon becoming generally available, is likely to materially affected the price of the securities of the company"[6].

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[4] The objective of SEBI (Prohibition of Insider Trading) Regulations, 2015

[5] The SEBI (Prohibition of Insider Trading Regulations), 2015, regulation 9(4).

[6] The Companies Act, 2013, Section 195.

The "unpublished price sensitive information" includes the following:[7]

- Financial results of the company.
- Dividends which include both interim and final.
- Material events in accordance with the listing regulations/agreement.
- Change in capital structure.
- Mergers and acquisitions.
- Change in board or key managerial personnel.

The Indian Stock market had the history of over hundred years old, the insider trading was outlawed, when the stock market was liberalized following the end of "License Raj". In the year 1992, the SEBI Act and Regulations were passed to prevent insider trading. There are certain Committees which worked on with a view to prevent and prohibit the insider trading in India. The following committees which recommended the policies need to be taken for the prevention of Insider trading in the companies.

The Sachar Committee (1979)

This committee mentioned in its report that the company key managerial persons such as directors and other officers may have some price sensitive information that could be used to change or malpractice the stock prices which may cause financial losses to the retail investors. The committee further recommended that the amendments to Companies Act to incorporate the provisions relating prohibition of Insider trading which need to contain huge penalties and punishments.

The Patel Committee (1986)

This committee recommended that there is need of amendments in "Securities Contracts (Regulations) Act, 1956"

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[7] SEBI (Prohibition of Insider Trading) Regulations, Regulation 2(1) (n).

to make all the stock exchanges which will control the insider trading and unfair stock dealing. This committee further suggested that heavy fines shall need to be imposed along with the imprisonment. Further stated that the gains from Insider trading also need to be recovered from the persons involved in the particular activity.

The Abid Hussain Committee (1989)

This committee recommended that the activities of insider trading may be penalized in terms with both civil and criminal proceedings and further suggested that the Securities Exchange Board of India needs to formulate the regulations and relevant governing codes to prevent unfair dealings in securities market.

The Sodhi Committee (2013)

This committee made a range of recommendations with regard to the legislative framework for prohibition of Insider trading in India. It further suggests that we need a combination of principle-based regulation and rules that are backed by principles.

The Viswanathan Committee (2017) on Insider Trading

This Committee has made recommendations to reduce the malpractices and prohibit the benami transactions in the securities to reduce the financial malpractice. Further the committee recommended for the two different codes for prohibition of Insider trading. Out of that the first one is relating to minimum standards need to be placed for the listed companies to deal with the Inside information. The second one is relating to put standards on market intermediaries and related persons on handling of price sensitive information.

International Perspective of Insider Trading

The researchers would like to focus some of the dimensions pertaining to insider trading regulations in U.K and U.S to prohibition of insider trading.

United Kingdom Legal Framework on Insider Trading

U.K has developed strict regulation against insider trading recently but has a very low enforcement rate. The Financial and Services Markets Act, 2000 has been repealed by the Finance Act, 2012 and "Criminal Justice Act, 1993" provide the statutory framework for insider trading. The Criminal Justice Act prohibits dealing in securities on the basis of insider information or price sensitive information and market malpractices can incur custodial sentences of up to 7 years and fine which is unlimited[8].

United States Legal Framework on Insider Trading

The United States is the strict implementer for the protection of investors from insider trading. After the Great Depression of 1929, it was the first country that formally enacted a legislation to control insider trading and prevent the malpractices through the Securities and Exchange Act, 1934. This Act has incorporated the Securities Exchange Commission (SEC) to prevent insider trading in the United States of America. Further the legislations relating to "The Insider trading sanction Act of 1984" and "The Insider Trading and Securities Exchange Act of 1988" also governs the provisions relating to prohibition of Insider trading.

[8] The provisions under U.K Criminal Justice Act, 1993.

Judicial Contours

Judiciary plays a significant role in prohibiting the insider trading both in India and abroad. The researchers would like to focus some land mark judgments pertaining to the insider trading.

Salman v. *Securities Exchange Commission*

This case has delivered the jurisprudence relating to giving insider information to the family members and on the basis of that information trading in the securities which is completely prohibited in the United States of America. The American Supreme Court held that this type activity is enough to convict the accused.

Dirks v. *Securities Exchange Commission***:**

In this case the United States Supreme Court propounded the "tipper – tippee" theory on Insider trading. On the basis of tip given by the tipper which means violation of fiduciary duty of the insider for providing the sensitive information, that would lead to liability from the "tippee" side who provides a personal benefit to the tipper.

Mr. Raja Ratnam and Rajat K. Gupta case

In this case the SEC which alleged that Rajat tipped his business associate Rajaratnam relating to price sensitive information available at Goldman Sachs Group on Berkshire hatchway investments. Rajaratnam who used sensitive information and traded in securities made a reasonable profit. On the basis of this activity the securities exchange commission raised an allegation. The court held that the activities taken by both the person in this case is violation of securities law and Insider trading regulations.

Rakesh Aggarwal v. *SEBI*

In the present case the Securities Appellate Tribunal ordered for the compensation on promoters who traded in the securities on the basis of "unpublished price sensitive information".

Further the Tribunal held that acting against the objectives of the Securities Exchange Board of India Act, 1992 and insider trading principles is prohibited. The SEBI need to control these types activities.

Samir.C.Arora v. *SEBI*[9]

The present case is important in prohibition of Insider trading at the companies. The case observed the Jurisprudence on the circumstances which are leading to the Insider trading and its related activities. Further in this case the board which held that the activities come under the Insider trading.

Cases under Spotlight

Cyrus Mistry's case

In the recent days this case became familiar on effect of this regulations. The case came to the lime light due to the sharing of material information with the insiders which is not to be done as per the SEBI, 2015 regulations. The case also got familiarity towards the role of corporate governance in India.

Uday Kotak Committee (2017)

*T*he SEBI committee on governance of companies, in its report, had proposed that, "any material information be shared with a promoter or promoters or a group having shareholding of more than 25 per cent in the company, who is in direct or indirect control of the shareholders or has nominated a director on the board of director of the listed company".

The above said committee further specified certain conditions for disclosing of the unpublished price sensitive information and proposed several amendments in the Indian jurisprudence towards the decreasing of cases relating Insider trading.

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[9] (2002) 38 SCL 422

Conclusion and Suggestions

The Indian jurisprudence on laws relating to prohibition of insider trading is well regulated after the "SEBI (Prohibition of Insider trading regulations), 2015". Prior to these regulations the complaints and cases relating to insider trading received by the regulator on the basis of price sensitive information used to be operated by connected persons in the companies. The present regulations is working towards complete prohibition of Insider trading. The penalties and other liability provisions under the regulations is creating impact on the connected persons in the companies on the involvement in Insider trading. On the other side some flaws like absence of criminal punishments in the present regulations on comparison with the developed jurisdictions like United States of America and United Kingdom is affecting the actual objectives of the Prohibition of Insider trading regulations. In this sense some more criminal liability measures required under the present regulations in order to further decrease of Insider trading. In lieu of this some of the suggestions in relation to further strengthening of the prohibition of insider trading regulations include:

a) Incorporation of criminal liability measures under the "SEBI (Prohibition of Insider trading regulations), 2015".

b) Requirement of the provisions relating to Prohibition of Insider trading under the Companies Act, 2013 and specific watch dog mechanism in relation to listed companies.

c) Incorporation of the provisions relating to duty of the stock exchanges in the case of Insider trading under the Securities contract regulations Act, 1956.

d) Need to be clear about the role of stock exchanges in the case of prohibition of Insider trading.

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AUTOMATIC STAY AND ACCREDITATION OF ARBITRATORS: A CRITICAL ANALYSIS OF THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021

Shibam Talukdar[*]
Ashish Shukla[**]

Abstract

Since 2015, the Arbitration and Conciliation Act, 1996 has been amended three times. These amendments, enacted within a span of six years, have introduced several significant changes to the operability of the Principal Act. Considerable focus of these Amendment Acts has been on provisions relating to the automatic stay on an arbitral award, and on the accreditation of arbitrators. Both the aforesaid elements have been equally contentious. Uncertainties, as regards the forenamed conceptions, have plagued the practice area of arbitration for a substantial stretch of time, owing to the rapid enactments of Amendment Acts altering the provisions of the Principal Act, and the varied—often inconsistent—interpretations of the same, by the courts of this country. The exercise by the Parliament and the courts of India, of their inherent legislative and interpretative powers respectively, thereby seeking to assert their immanent authority, has further facilitated the development of the said uncertainties. The Arbitration and Conciliation (Amendment) Ordinance, 2020 which was subsequently replaced by the Arbitration and Conciliation (Amendment) Act, 2021, tried to bring about an end to the incertitude surrounding 'automatic stay' and 'accreditation of arbitrators' with finality. However, it remains to be ascertained whether the Act will succeed in establishing a concrete position as to the aforementioned conceptions, which is aligned with the

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judicial pronouncement(s) of the Supreme Court of India, and quell the ambiguity that existed prior to its enactment. This article will attempt to understand the changes introduced by the Amendment Act of 2021 into the Principal Act in light of the preceding amendments, judicial pronouncements, and committee/law commission reports.

Introduction

Over the years, India has seen rapid developments in diverse fields of law but none has been so radical as the last three amendments to the Arbitration and Conciliation Act, 1996[1] (hereinafter referred to as the 'Principal Act'). The legal fraternity of India appears to have been largely polarised on its opinions pertaining to these amendments. The judiciary of the country has, on several occasions, evinced its position, as regards such changes to the Principal Act. On 4th November 2020, the President of India, in the exercise of his legislative powers, promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2020 (hereinafter referred to as the '2020 Ordinance'), which amended the Principal Act for the third time in the last six years.[2] The Government of India (hereinafter referred to as the 'Government'), in June 2019, released a statement wherein it tried to proclaim its position in trying to make India "the hub of International Arbitration".[3] To facilitate the fulfilment of this objective, the New Delhi International Arbitration Centre Act, 2019, was passed which was deemed to have come into force on 2nd March 2019.[4] Such frequent enactments of legislation and amendments thereto indicate a

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[1] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996.

[2] Arbitration and Conciliation (Amendment) Ordinance, 2020, No. 14, Ordinance Promulgated by President, 2020.

[3] *The Quest for making India as the Hub of International Arbitration*, PMINDIA.GOV.IN (June 12, 2019), https://www.pmindia.gov.in/en/news_updates/the-quest-for-making-india-as-the-hub-of-international-arbitration/ (last visited Aug. 5, 2021, 7:16 PM).

[4] New Delhi International Arbitration Centre Act, 2019, No. 17, Acts of Parliament, 2019.

gradual shift towards greater institutionalisation of alternative dispute resolution mechanisms in the country.

The Arbitration and Conciliation (Amendment) Act, 2021 (hereinafter referred to as the '2021 Amendment Act') passed by the Parliament, received the presidential assent on 11th March 2021, and consequently, assumed the force of law.[5] The 2021 Amendment Act stipulates that it is deemed to have come into force retrospectively with effect from 4th November 2020, i.e., the date on which the 2020 Ordinance was promulgated, while concurrently repealing the said ordinance.[6] The 2021 Amendment Act was enacted with the vision that it would address the concerns raised by the concerned parties bearing a vested interest in the matter, after the adoption of the Arbitration and Conciliation (Amendment) Act, 2019[7] (hereinafter referred to as the '2019 Amendment Act') and to ensure that all stakeholders get an opportunity to seek an unconditional stay on enforcement of arbitral awards where the underlying arbitration agreement or contract, or the making of an arbitral award, is induced by fraud or corruption.[8]

The 2020 Ordinance, subsequently replaced by the 2021 Amendment Act, introduced three significant changes into the Principal Act, viz., it amended Section 36 of the Principal Act which deals with the enforcement of arbitral awards; it amended Section 43J of the Principal Act which pertains to the norms of accreditation of arbitrators; and finally, it omitted the Eighth Schedule to the Principal Act which dealt with the experience and qualification of arbitrators.

The first part of this article will discuss the concept of 'automatic stay' and how the newly amended Section 36 affects the traditional practice in the field. It will analyse the judgments of

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[5] Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021.

[6] Arbitration and Conciliation (Amendment) Act, 2021, §§ 1(2), 5(1).

[7] Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019.

[8] Arbitration and Conciliation (Amendment) Act, 2021, § 2.

the Supreme Court in *NALCO*[9], *BCCI*,[10] and *Hindustan Construction*[11]. It will then trace the history of the preceding amendments to the said provision and examine their impact on the realm of domestic arbitration. The second part of this article will delve into the issue apropos of the accreditation of arbitrators and what the implications of the 2021 Amendment Act are, on the arbitrators in India. The article will conclude with an inspection into the reason(s) behind the subsistence of the uncertainties in the sphere of arbitration, and how the 2021 Amendment Act might impact the practice domain of alternative dispute resolution in the country.

The Conception and Evolution of Automatic Stay

Section 36 of the Principal Act, as enacted originally, prescribed an 'automatic stay' on the enforcement of an arbitral award, once an application challenging that award was filed before the "Court"[12] under Section 34, and such a stay would be operative as long as the application was pending before the Court. These provisions, collectively, impaired the immediate enforcement of an arbitral award, and were said to have placed the decree holder at a disadvantageous position, since the proceedings would often take an enormous amount of time to draw to a close. The aforesaid problem was recognised by practitioners in the arbitration regime as being an impediment to the attainment of speedy justice, which is a primary tenet of arbitration. In 2015, the Government amended the Principal Act via the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the '2015 Amendment Act') which came into force on 23rd October 2015.[13] Among an array of changes, the 2015

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[9] National Aluminium Company Ltd. v. Pressteel & Fabrications (P) Ltd. and Anr., (2004) 1 SCC 540.

[10] Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd., (2018) 6 SCC 287.

[11] Hindustan Construction Company Limited & Anr. v. Union of India & Ors., (2019) SCC OnLine SC 1520.

[12] Arbitration and Conciliation Act, 1996, § 2(e).

[13] Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2016.

Amendment Act provided that there would be no automatic stay on an arbitral award as was previously stipulated in Section 36 of the Principal Act.[14] This implied that the parties to an arbitral dispute would have to seek a specific stay order on the operation of the arbitral award. Before the enactment of 2015 Amendment Act, there was no clarity on whether or not there would be an automatic stay on the enforcement of a domestic arbitral award, if there was an ongoing judicial proceeding to set it aside under Section 34 of the Principal Act.

The Supreme Court considered the problem in *National Aluminium Company Ltd.* v. *Pressteel & Fabrications (P) Ltd and Anr.* (hereinafter referred to as '*NALCO*').[15] In connection with the automatic stay of arbitral award, N. Santosh Hegde, J. observed that a domestic arbitral award, when challenged under Section 34 within the prescribed time, automatically becomes unexecutable.[16] According to the Court, this automatic suspension would stay in force till the proceedings were concluded. Thus, automatic stay required an award holder to await the conclusion of the ongoing judicial proceedings before the said award could be enforced. Hegde, J. further asserted that the legislative intent behind the enactment of the Principal Act indicated that it was impermissible for the Court to direct the passing of an interlocutory order as regards an arbitral award, and that the Court could only adjudicate on the correctness of a claim made by an applicant under Section 34 of the Principal Act.[17] In *Afcons Infrastructure Limited* v. *The Board of Trustees, Port of Mumbai*, the Bombay High Court reiterated the same principle as was employed in *NALCO*, and applied it to the extent of powers of a "Court" under Section 9 of the Principal Act.[18]

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[14] Arbitration and Conciliation (Amendment) Act, 2015, § 19.

[15] (2004) 1 SCC 540.

[16] *Id.* at 10.

[17] *Id.*

[18] (2014) (1) Arb LR 512 (Bom).

For a considerable while, uncertainty loomed over the applicability of the provisions of the 2015 Amendment Act, even though Section 26 contained therein sought to make the position clear by providing that unless the parties to an arbitral dispute agreed otherwise, provisions of the Act would not be applicable to the arbitral proceedings that were instituted in keeping with Section 21 of the Principal Act, before the coming into force of the instant Act.[19] Section 26 of the 2015 Amendment Act also prescribed that the Act would be applicable only to arbitral proceedings that commenced on or after the date of coming into force of the Act. The primary issue as regards the aforementioned uncertainty pertained to the ambiguity over the applicability of the 2015 Amendment Act to the ongoing court proceedings that had commenced before 23rd October 2015, i.e., the date on which the 2015 Amendment Act was deemed to have come into force. Owing to the absence of a concrete authoritative position on this issue, the prevalent conditions facilitated the opening of floodgates for numerous differing judicial pronouncements by High Courts all over the country, which sought to clarify the unsettled position. This attracted the attention of the Law Commission of India which in its Two Hundred and Forty-Sixth Report, submitted in August 2014, criticised the subsisting state of affairs and recommended changes.[20]

Ultimately in *Board of Control for Cricket in India* v. *Kochi Cricket Pvt. Ltd.* (hereinafter referred to as '*BCCI*'),[21] the Supreme Court put the matter to rest by clarifying the applicability of Section 36 of the 2015 Amendment Act. In the immediate case, the Supreme Court was presented with the question as to whether or not Section 36 of the Principal Act as amended via the 2015 Amendment Act, was applicable to the challenge petitions filed under Section 34 of the Principal Act before the commencement of the 2015 Amendment Act. The judgment rendered by the

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[19] Arbitration and Conciliation (Amendment) Act, 2015, § 26.

[20] Law Commission of India, Amendments to The Arbitration and Conciliation Act 1996 (No. 246, 2014).

[21] (2018) 6 SCC 287.

Supreme Court provided for the applicability of the 2015 Amendment Act in the manner as stated under:

1. Court proceedings, in relation to arbitral proceedings, that had commenced on or after the coming into force of the 2015 Amendment Act;
2. Arbitration proceedings that had commenced on or after the coming into force of the 2015 Amendment Act.[22]

In connection with the matter, the Court asserted that the judgment debtor does not possess any substantive right either with regard to fulfilling the obligations of the decree passed against him, or a question concerning the executability of the decree. The Court also ruled that the amending provision regarding specific application by parties for stay on the operation of an arbitral award would be applied retrospectively to a pending case.[23]

Nullification of 'BCCI', the 2019 Amendment Act, and the Entailing Developments

The impact of the *BCCI* judgment was short-lived for while the case proceedings were underway before the Supreme Court, the Government tabled in the Lok Sabha the Arbitration and Conciliation (Amendment) Bill, 2018 which proposed the insertion of Section 87 in the Principal Act. This provision was reckoned to settle the incertitude surrounding the applicability of the 2015 Amendment Act. It provided that the 2015 Amendment Act would be applicable to arbitral proceedings, and court proceedings arising out of or in relation to the said arbitral proceedings, which began on or after 23rd October 2015. Therefore, it essentially meant that any arbitral award that was

[22] *Id.*

[23] *Id.* at 42.

challenged, where the arbitral proceedings had commenced before the stipulated date, would automatically be stayed.[24]

In 2019, the Parliament passed the bill into law in the form of the 2019 Amendment Act[25] and thereby, omitted Section 26 from the Principal Act and inserted Section 87 therein. Section 13 of the 2019 Amendment Act sought to provide for the application of the 2015 Amendment Act, unless the parties otherwise agreed, in the following manner:

1. The 2015 Amendment Act was not to be applicable to arbitral proceedings that commenced prior to 23rd October 2015, i.e., the date of coming into force of the said Act. The non-applicability of the said Act would extend to all court proceedings arising out of or in relation to the aforesaid arbitral proceedings; it would be immaterial whether such court proceedings commenced before or after the coming into force of the said Act.
2. The 2015 Amendment Act was to be applicable to arbitral proceedings that commenced on or after the date the said Act came into force. The applicability of the said Act would extend to all court proceedings arising out of or in relation to the aforesaid arbitral proceedings.[26]

The 2019 Amendment Act, thus, nullified the judgment of the Supreme Court in *BCCI* as it made the amended Section 36 inapplicable to all court proceedings that had commenced after the date of coming into force of the 2015 Amendment Act, but which had arisen out of or in relation to an arbitral proceeding that had commenced prior to such date.

Subsequently, in *Hindustan Construction Company Limited & Anr.* v. *Union of India & Ors.*[27] (hereinafter referred to as

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[24] Arbitration and Conciliation (Amendment) Bill, 2018, Bill No. 100 of 2018, § 13.

[25] Arbitration and Conciliation (Amendment) Act, 2019.

[26] *Id.* at § 87.

[27] Hindustan Construction Company Limited & Anr. v. Union of India & Ors., (2019) SCC OnLine SC 1520.

'*Hindustan Construction*'), the constitutional validity of Section 87 was challenged before the Supreme Court. The counsel for the petitioner argued that due to the insertion of Section 87, Hindustan Construction Company Limited was being pushed into insolvency even though the National Highways Authority of India owed it a sum of INR 6070 crores.[28] A three-judge bench of the Court decided that the Court's interpretation in *NALCO* was bad in law.[29] The Court further declared the newly introduced Section 87 of the Principal Act to be unconstitutional on the ground of arbitrariness and reinstated the position affirmed by the Court in the *BCCI* judgment.[30] The Court referred to the report prepared by a high-level committee headed by Retd. Justice B.N. Srikrishna (hereinafter referred to as the 'Srikrishna Committee Report'), published on 30th July 2017, which had recommended the inclusion of Section 87 in the Principal Act because it believed that in relation to the question of applicability of the 2015 Amendment Act, the various views of the High Courts across the country had become inconsistent and conflicting. The bench held that whatever ambiguity had arisen in relation to the applicability of the 2015 Amendment Act had been taken care of in the *BCCI* judgment. R.F. Nariman, J., in writing the judgment, also pointed out that the Court had, even in the *BCCI* judgment, cautioned against the insertion of Section 87 in the Act, an excerpt of which is reproduced as under:

> *"The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons, '. . . have*

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[28]Arpan Chaturvedi, *Section 87: Supreme Court Strikes Down Provision Granting Automatic Stay On Arbitral Award*, BLOOMBERG QUINT (Nov. 27, 2017, 2:37 PM), https://www.bloombergquint.com/amp/law-and-policy/section-87-supreme-court-strikes-down-provision-granting-automatic-stay-on-arbitral-award (last visited Aug. 21, 2021, 5:03 PM).

[29] NALCO, (2004) 1 SCC 540.

[30] BCCI, (2018) 6 SCC 287.

> *resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act', and will now not be applicable to Section 34 petitions filed after 23-10-2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act."*[31]

In enacting the 2019 Amendment Act, the Government was thus found unable to take into consideration the aforementioned reasoning. The Court, therefore, in *Hindustan Construction*, found that the Parliament had deleted Section 26 from the Principal Act and inserted Section 87 therein without much deliberation, and consequently, rendered these sections unconstitutional on the grounds of being arbitrary and counterproductive to the ideal of public interest that should have been the objective of the enactment of the 2019 Amendment Act. The Court pointed out that whenever an appeal is filed against the judgment of a court in any civil suit, the operation of that judgment is not automatically stayed. Therefore, the Court said that Section 87 was arbitrary because the filing of a challenge should not lead to an automatic stay, which the provision sought to do. As was more pertinent to the case in question, the Supreme Court also noted that the Srikrishna Committee Report had not taken into account the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Insolvency Code'). This was made obvious by the fact that the insertion of a provision like Section 87 in the Principal Act prevents the award holder from recovering their dues, and

[31] Hindustan Construction, (2019) SCC OnLine SC 1520.

because of this, they also face a threat of proceedings under the Insolvency Code.[32]

The impact of this judgment was that 'automatic stay' would be unavailable to award debtors even if the arbitral proceeding, in which the award was issued, took place prior to the commencement of the 2015 Amendment Act.[33] It also provided an opportunity to award debtors who had applied for a stay order on the operation of such award under Section 36 (after the pronouncement of the *BCCI* judgment) and were rendered futile by the insertion of Section 87 in the Principal Act, to file for fresh applications seeking a stay order on the award.

A Brief on the Recent Changes to Section 36 Effectuated by the 2021 Amendment Act

The 2021 Amendment Act addresses the issue of automatic stay once again. By virtue of Section 2 of the said Act, the following lines have been added to Section 36(3) of the Principal Act, retrospectively, with effect from 23rd October 2015:

"Provided further that where the Court is satisfied that a prima facie case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award."[34]

The proviso seems to be a step toward clarification of automatic stay with finality. However, there are a few pertinent points that

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[32] Insolvency and Bankruptcy Code, 2016, No.31, Acts of Parliament, 2016.

[33] Arbitration and Conciliation (Amendment) Act, 2015.

[34] Arbitration and Conciliation Act, 1996, § 34(2A).

have to be examined with regard to the 2021 Amendment Act. Only an applicant who has filed an application challenging the arbitral award under Section 34 of the Principal Act can benefit from the proviso, because the proviso itself depends on Section 36(2) which comes into play only if the application has been filed under Section 34. However, Section 34 itself does not provide for setting aside an arbitral award where the arbitration agreement or contract was induced by fraud, as noted in the proviso. The only scenario in which fraud is considered to be a ground for challenge is when the making of the award was induced with fraud.[35] Therefore, an inconsistency may exist with respect to the issue that, if the nature of fraudulent act as per Section 36(3) is not a ground for challenge under Section 34, then how the application for stay may proceed. Further, Section 34(2A) provides that an award shall not be set aside on the ground of reappreciation of evidence.[36] An arbitration agreement or contract being induced by fraud is a question of fact that would necessarily arise during court proceedings in connection with the arbitral proceedings. This proviso to Section 34 may bar a High Court from revaluating questions of such nature.

Accreditation of Arbitrators and the Eighth Schedule

The Srikrishna Committee Report,[37] submitted to the Law Minister in 2017, drew attention to the issue of accreditation of arbitrators in the country that would result in the creation of a well-trained and qualified pool of arbitrators. The committee, after having acknowledged the problems arising out of the unavailability of an accreditation mechanism under the Principal Act, went on to discuss, at length, the accreditation criteria and related practices prescribed by several arbitration institutions around the globe including those of the Chartered

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[35]Arbitration and Conciliation Act, 1996, § 34(2)(b)(ii).

[36]Arbitration and Conciliation Act, 1996, § 34(2A).

[37] JUSTICE B.N. SRIKRISHNA ET AL., REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA (2017).

Institute of Arbitrators, Singapore Institute of Arbitrators (SIArb), and the Resolution Institute. It examined prescribed criteria like age, qualifying examination, peer interviews, etc., and came up with a set of recommendations as regards the ongoing discourse, stated as follows:

1. The Arbitration Promotion Council of India (hereinafter referred to as the 'APCI'), whose creation was proposed in this instant report, was recommended to recognize professional institutions that would accredit arbitrators on the basis of the methods employed for such accreditation, training, review mechanism, etc.
2. The central and state governments were recommended to mandate the insertion of clauses in arbitration agreements stipulating that only institutionally accredited arbitrators were to be appointed.[38]

Subsequently, the Government introduced Section 43J into the Principal Act through the 2019 Amendment Act. The Act prescribed the institution of an independent body of arbitrators, the Arbitration Council of India (hereinafter referred to as the 'ACI'), based on the model of the recommended APCI. The ACI was to be responsible for identifying and acknowledging institutions which in turn would accredit arbitrators under Section 43J. Through Section 43J, the Eighth Schedule, which laid down general norms for the accreditation of arbitrators, was inserted. The relevant norms were as follows:

1. The arbitrators were required to be impartial and neutral while refraining from entering into financial or any other such relations that might affect their impartiality or suggest an impression of bias.
2. The arbitrators were expected to be well conversant with the provisions of the Constitution of India, principles of natural justice, commercial and labour laws, common and customary laws, law of torts, domestic and relevant international legal systems, among others.

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[38] *Id.* at 50.

3. The arbitrators should be able to recommend/suggest a reasoned arbitral award in a dispute that they may be adjudicating.

The primary criticism against the provision relating to the minimum qualification for arbitrators was that it would meddle with party autonomy, which is one of the fundamental tenets of arbitration. This criticism was particularly directed at the exclusion of foreign legal professionals who were made ineligible to practise as arbitrators in India. This had particular ramifications on the idea of India as an international arbitration hub.

Through the 2021 Amendment Act, Section 43J has been amended yet again. The amended Section 43J reads:

"43J. The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations."[39]

The amendment also omitted the Eighth Schedule that was provided for in the original Section 43J, first inserted via the 2019 Amendment Act.

Ever since the Eight Schedule was inserted in the Principal Act, it had become a subject of controversy. The potential violation of party autonomy was a glaring question pertaining to the forenamed schedule. The criticism was primarily centered on the issue that it imposed restrictions that were unfair and arbitrary. The fact that with its operation it would have been impossible to appoint a foreign arbitrator to adjudicate in arbitrations seated in India was discouraging for many. However, there were also those who believed that these conditions and restrictions were indispensable if appointments to arbitration tribunals were to be improved. But, the schedule also sent mixed signals from the Government which had been trying to establish itself as a pro-arbitration regime. The schedule was never notified by the Government and hence,

[39] Arbitration and Conciliation (Amendment) Act, 2021, § 3.

never came into force. Now that it has been done away with, there is a clearer indication of its intent before the global arbitration community.

Conclusion

The origin and development of the incertitude as regards 'automatic stay' and 'accreditation of arbitrators', that afflicted the arbitration practice regime in India, may be attributed to the inconsonant exercise of powers by the Parliament and the Supreme Court. While it cannot be negated that such assertion of authority was legitimate, what enabled the rise of the said uncertainties was the absence of a shared vision between the forenamed organs of the Government. Before the enactment of the 2021 Amendment Act, arbitrators had, time and again, expressed their discontent against the ambiguity prevailing in the legal system pertaining to arbitration, thereby resulting in judicial pronouncements and amending enactments that sought to resolve the subsisting challenges. It may be acknowledged that when/where lacunae exist in any law, revisions are required to be made, if need be, repeatedly so, in order to meet the demands of the prevailing circumstances. The 2021 Amendment Act has been hailed as a well-intended step towards establishing a favourable legal arbitration framework. The proviso on conditional automatic stay in Section 36(3) has still made many question its necessity. Previous experiences with similar laws raise apprehensions of misuse and abuse of the vested power(s). However, the deletion of the Eight Schedule has found praise in all quarters of the arbitration community. Reasonably, it may be averred that this will help India's position as an international arbitration hub and encourage foreign arbitrators and parties to seat their arbitration in the country.

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THE POTENTIAL FOR ARTIFICIAL INTELLIGENCE IN HEALTH CARE

Chintu Jain[*]

Abstract

The complexity and rise of data in healthcare means increasing use of artificial intelligence (AI) in the field. Several types of AI are already being used by payers and providers of care, and life sciences companies. The main types of applications include medical recommendations, patient interaction and care, and administrative tasks. Although there are many areas where AI can outperform humans in healthcare tasks, the difficulty in implementing it will prevent a large scale for a considerable period. There are also ethical issues to consider and discuss. This article discuss the ethical issues while considering the potential of artificial intelligence in health care.

KEYWORDS: Artificial intelligence, clinical decision support, electronic health record systems

Introduction

Artificial intelligence (AI) being increasingly prevalent in sectors like business and society, is now being used for health care too. AI technologies have the potential to transform patient care and the administrative processes governing healthcare within provider, payer and pharmaceutical organizations. Several studies point that the AI outperforming humans in crucial healthcare tasks, for instance in diagnosing diseases, research, spotting tumors etc. Despite this, the belief is that AI will not replace humans in healthcare anytime soon. This piece debates

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about of AI in healthcare and the obstacles to its implementation.

Types of AI relevant to Healthcare

Artificial intelligence (AI) is not one technology, but rather a collection of them, out of which most are important for healthcare. However the specific tasks they carry out differ greatly. Some particular AI technologies of high importance to healthcare are defined and described below.

Machine Learning – Neural Networks and Deep Learning

Machine learning is an application of AI which can function without instructions by using algorithms and statistical models to analyze and draw inferences from patterns in data. It is one of the most common forms of AI; employed by majority of companies according to survey done among 1100 US managers from different companies in the US.[1] It is a broad technique at the core of many approaches to AI and there are many versions of it. Machine learning has different forms based on its complexity.

The most common and least complex is precision medicine. It involves predicting what treatments are likely to succeed based on various patient attributes and the treatment context.[2] The great majority precision medicine applications require a training dataset (the initial data used to train the machine learning

[1] Deloitte Insights. State of AI in the enterprise. Deloitte, 2018. www2.deloitte.com/content/dam/insights/us/articles/4780_State- of-AI-in-the-enterprise/AICognitiveSurvey2018_Infographic.pdf.

[2] LeeSI,CelikS,LogsdonBA etal.Amachinelearningapproach to integrate big data for precision medicine in acute myeloid leukemia. Nat Commun 2018:9:42.

models) where the outcome variable (e.g. onset of disease) is known; this is called supervised learning.

A more complex form of machine learning is the neural network – a technology that is well established in healthcare research for several decades.[3] Neural network has been a remarkable machine learning AI technology for healthcare institutions. This weighs in inputs, outputs, and variables to predict whether a particular disease might be acquired by a patient in the future. It functions similar to human brain's neural process when it receives information. It is used for categorisation applications i.e. whether a patient will acquire particular diseases. According to the inputs, the networks will generate the best possible results.

The most complex forms of machine learning involves deep learning. This is neural network but with many layers which predict outcomes. It has been used in oncology and radiology for accurate diagnosis. There may be multiple hidden features in such models which can be uncovered faster due to today's technology. Deep learning is often used to recognise cancerous tissues in radiology.[4] It can recognise potentially cancerous lesions in radiological images and radiomics to detect clinically relevant data invisible to the naked eye. Deep learning has also been used for speech recognition. However, this type of learning is complex and beyond the interpretation of common human observers. Artificial intelligence (AI) being increasingly prevalent in sectors like business and society, is now being used for health care too. AI technologies have the potential to transform patient care and the administrative processes governing the healthcare sector. Several studies point out that AI outperforming humans in crucial healthcare task, for instance in diagnosing diseases, research, spotting tumors etc. Despite this, the belief is that AI will not replace humans in healthcare anytime soon. The article

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[3] Sordo M. Introduction to neural networks in healthcare. OpenClinical, 2002. www.openclinical.org/docs/int/neuralnetworks011.pdf

[4] Fakoor R, Ladhak F, Nazi A, Huber M. Using deep learning to enhance cancer diagnosis and classification. A conference presentation. The 30th International Conference on Machine Learning, 2013.

discusses the potential of AI use and the barriers to implementation.

Natural Language Processing

Understanding human language has been a key goal of AI researchers for a long time. This technology attempts to recognize human language to transcribe details and involves speech recognition, textual analysis, and translation. This is helpful in the healthcare domain for documentation, publication of research, analysis of unstructured clinical notes on patient diagnosis and care, preparation of notes, and transcription of patient interactions. NLP utilizes the following approaches – statistical and semantic. Statistical NLP incorporates deep learning neural networks to gain better accuracy in speech recognition.

Rule-based Expert Systems

These systems combine a series of rules in the pattern of "if-then" coding to provide information about a medical domain. This is employed in aiding clinical decisions and is in use today by several Electronic health record (EHR) providers.[5] While this system is effective and easy to understand, it is liable to breakdowns due to conflicts between a large number of rules. These rules are not consonant to the evolving knowledge in the medical field and editing them requires a lot of time. Thus, more effective machine learning algorithms are taking its place.

Physical Robots

Physical robots are well known by this point, given that more than 200,000 industrial robots are installed each year around

[5] Vial A, Stirling D, Field M et al. The role of deep learning and radiomic feature extraction in cancer-specific predictive modelling: A Review. Transl CancerRes2018;7:803–16.

the world. They perform pre-defined tasks like lifting, repositioning, but have increasingly become more collaborative and easy to train by humans. With other AI capabilities being fused into their 'brains' i.e. operating systems, they are becoming more intelligent. Due to increasing AI capabilities and human collaboration, surgical robots are being popularised to help surgeons in performing operations by enhancing their ability to see and create precise and minimal incisions, stitches, etc.[6] Though not involved in major medical decisions, these surgical robots are used for gynaecological surgery, prostate surgery, and head and neck surgeries.

Robotic Process Automation

This computer program conducts administrative tasks such authorisation, updating records and billing. Compared to other forms of AI they are cheap, easy to program and transparent in their actions. Robotic process automation (RPA) involves computer programs on servers. This technology combines workflow, business rules, and presentation layer with an information system to follow a set of rules to complete digital tasks. It can be combined with varied technologies such as image recognition to extract data from faxed images and transcribe digitally.[7] The combining will ensure more composite solutions in the future.

Diagnosis and Treatment Applications

Diagnosis AI has played an imperative role in the diagnosis and treatment of diseases since the 1970s but has seen severe implementation lacks in healthcare organisations. The development of MYCIN by Stanford for diagnosing blood-borne

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[6] Davenport TH, Glaser J. Just-in-time delivery comes to knowledge management. Harvard Business Review 2002. https://hbr.org/2002/07/just- in-time-delivery-comes-to-knowledge-management.

[7] Hussain A, Malik A, Halim MU, Ali AM. The use of robotics in surgery: a review. Int J Clin Pract 2014;68:1376–82.

bacterial infections was significant,[8] however, these rule-based systems were not entirely efficient and failed to integrate with clinical practice. IBM's Watson presented a more accurate system for precision medicine, especially for cancer treatment. This technology combined machine learning and NLP and included a set of cognitive services such as application programming interfaces, speech vision, and machine learning-based data analysis. However, Watson could not be a major facilitator in the healthcare market as teaching it new cancer diagnoses proved difficult,[9] and failed to compete with free open-source programs.[10] Watson is a set of cognitive functions and thus using it for cancer treatment was a very ambitious project. The implementation of AI in healthcare has stumped many even though such technologies are used even in the NHS.[11]The sustenance of these ruled-based systems in the organisations has been problematic as they are unable to handle the constantly evolving medical knowledge, especially genomic, proteomic, metabolic healthcare approaches. The technology for AI has seen improvement over the years, with advancement in techniques for radiology analysis,[12] retinal scanning,[13] or genomic-basedprecision medicine,[14] claiming higher accuracy than practitioners as they use statistics based on evidence and probability. But there are several ethical concerns for the

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[8] Bush J. How AI is taking the scut work out of health care. Harvard Business Review 2018. https://hbr.org/2018/03/how-ai-is-taking- the-scut-work-out-of-health-care.

[9] Buchanan BG, Shortliffe EH. Rule-based expert systems: The MYCIN experiments of the Stanford heuristic programming project. Reading: Addison Wesley, 1984.

[10] Ross C, Swetlitz I. IBM pitched its Watson supercomputer as a revolution in cancer care. It's nowhere close. Stat 2017. www.statnews.com/2017/09/05/watson-ibm-cancer.

[11] Davenport TH. The AI Advantage. Cambridge: MIT Press, 2018.

[12] Right Care Shared Decision Making Programme, Capita. Measuring shared decision making: A review of research evidence. NHS, 2012. www.england.nhs.uk/wp-content/uploads/2013/08/7sdm-report.pdf.

[13] LoriaK.PuttingtheAIinradiology.RadiologyToday2018;19:10. www.radiologytoday.net/archive/rt0118p10.shtml.

[14] Schmidt-ErfurthU,BogunovicH,SadeghipourAetal. Machine learning to analyze the prognostic value of current imaging biomarkers in neovascular age-related macular degeneration. Opthamology Retina 2018;2:24–30.

patient-clinician relationships.[15] Companies such as Google have collaborated with health delivery networks to create predictions models that warn about high-risk conditions such as heart failure.[16] Jvion has created a clinical success machine that accurately identifies high-risk patients and the relevant treatments. Certain firms such as Foundation Medicine have adopted diagnostic and treatment-centric approaches for cancer, based on genetic profiles, to identify cancer variants and the response to drug treatments. There has been increasing use of population health machine learning models by providers and payers for care as well to predict populations at risk of specific diseases,[17] accidents,[18] or decide on hospital readmissions.[19]

While these models are effective at predictions, they suffer from a variety of challenges. Most of the emerging technologies remain confined to research laboratories especially due to challenges in medical ethics and patient-clinician relations, leading to a lack of integration within the clinical workflow. Several AI technologies only address one issue, limiting the involvement in the care process. Population health-based models also do not consider factors such as the socio-economic status of patients, thereby providing a not wholly accurate picture.

Integration into clinical workflow and EHR systems, of AI, regardless of nature can be challenging. And it is such integration that is a great barrier of implementation of AI into

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[15] Aronson S, Rehm H. Building the foundation for genomic-based precision medicine. Nature 2015;526:336–42.

[16] Rysavy M. Evidence-based medicine: A science of uncertainty and an art of probability. Virtual Mentor 2013;15:4–8.

[17] Rajkomar A, Oren E, Chen K et al. Scalable and accurate deep learning with electronic health records. npj Digital Medicine 2018;1:18. www.nature.com/articles/s41746-018-0029-1.

[18] ShimabukuroD,BartonCW,FeldmanMD,MatarasoSJ,Das R. Effect of a machine learning-based severe sepsis prediction algorithm on patient survival and hospital length of stay: a randomised clinical trial. BMJ Open Respir Res 2017;4:e000234.

[19] Aicha AN, Englebienne G, van Schooten KS, Pijnappels M, Kröse B. Deep learning to predict falls in older adults based on daily-Life trunk accelerometry. Sensors 2018;18:1654.

healthcare. Some EHR vendors have begun limited use of AI,[20] but in their early stages. Therefore, substantial integration of AI into the healthcare system is necessary to develop an effective mechanism.

Patient engagement and adherence applications

Patient engagement and adherence has been the bridge between ineffective and good health outcomes. The more patients proactively participate to take care of their well-being, the better the outcomes in terms of utilisation, financial outcomes and member experience. With AI, these elements are being catered to. Providers and hospitals often use their clinical expertise to develop a treatment plan for chronic or acute patients' health. However if the patients do not comply with the treatment plan and take measures on their own like eating right, weight loss etcor are in non-compliance i.e. not taking the medications as prescribed then the medical advice will not acquire desired results. This can have fatal implications. It was found via a survey that most patients do not comply with the treatment plan laid down for them by their clinicians.[21] To generate better results, patients need to be engaged. There is growing emphasis on using machine learning and business rules engines to intervene and produce better patient care.[22] Messaging alerts and relevant, targeted content that can provoke patients to act in the manner they need to at vital moments which benefit their health, is a promising field in research.

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[20] Low LL, Lee KH, Ong MEH et al. Predicting 30-Day readmissions: performance of the LACE index compared with a regression model among general medicine patients in Singapore. Biomed Research International 2015;2015;169870.

[21] Davenport TH, Hongsermeier T, Mc Cord KA. Using AI to improve electronic health records. Harvard Business Review 2018. https://hbr.org/2018/12/using-ai-to-improve-electronic- health-records.

[22] Volpp K, Mohta S. Improved engagement leads to better outcomes, but better tools are needed. Insights Report. NEJM Catalyst, 2016, https://catalyst.nejm.org/patient-engagement- report-improved-engagement-leads-better-outcomes-better-tools-needed.

Another growing focus in healthcare is on the way choices are presented to patients to get them to choose and behave in a more anticipatory way (choice architecture). This is done based on real-world evidence. Through information provided by provider EHR systems, like watches, smartphones etc, software can cater to patients with appropriate recommendations to combat their ailments, by comparing the patient data to other effective treatment given to others with similar cases. The suggestions can be issued to different stakeholders in healthcare like patients or nurses and such.

Administrative Applications

There are also many administrative applications in healthcare, which are not as revolutionary as in patient care, but are very efficient in healthcare nevertheless. The average US nurse spends quarter of work time on regulatory and administrative activities.[23]AI technology can be used for a variety of administrative applications in healthcare, including claims processing, documentation, medical records management.[24]

Some healthcare organisations have also experimented with chatbots for patient interaction, health, and telehealth. These chat boxes may be useful for simple transactions like refilling prescriptions, but they require sharing of personal data which can cause concern to the patient regarding revealing such data. Patients have expressed privacy concerns about revealing such confidential information and how it was going to be used.[25]

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[23] Berg S. Nudge theory explored to boost medication adherence. Chicago: American Medical Association, 2018. www.ama-assn.org/ delivering-care/patient-support-advocacy/nudge-theory-explored- boost-medication-adherence.

[24] Commins J. Nurses say distractions cut bedside time by 25%. HealthLeaders, 2010. www.healthleadersmedia.com/nursing/ nurses-say-distractions-cut-bedside-time-25.

[25] UtermohlenK. Four robotic process automation (RPA) applications in the healthcare industry. Medium, 2018. https://medium.com/@ karl.utermohlen/4-robotic-process-automation-rpa-applications-in- the-healthcare-industry-4d449b24b613.

Machine learning is very useful for administration tasks like claims and payments. Insurers have to verify whether the bulk of claims are correct. Reliably identifying, analysing and correcting coding issues and incorrect claims saves all stakeholders in healthcare. Incorrect claims that slip through the cracks constitute significant financial damage waiting to be unlocked through data-matching and claims audits.

Implications for the Healthcare Workforce

There has been considerable discussion on the concern that AI will lead to loss of jobs and displacement of the workforce, due to workers being replaced by AI i.e. automation. It was suggested that a significant chunk of healthcare jobs could be automated within 10-20 years in the UK.[26] Other studies have suggested that while some automation of jobs is possible, a variety of external factors besides technology could limit job loss. These factors include the significant cost of AI technologies, labour market, benefits of automation beyond simple labour substitution, acceptance in regulations and society.[27] These factors might restrict actual job much lesser than what is speculated. Thus far there have been no known job eliminations by AI in health care. The difficulty of integrating AI into the healthcare system has been somewhat responsible for the lack of job impact. If automation is to happen, it would likely be for jobs involving digital information, radiology as opposed to jobs dealing with direct patient contact. [28] But even in such jobs

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[26] User Testing. Healthcare Chatbot apps are on the rise but the overall customer experience (cx) falls short according to a User Testing Report. San Francisco: User Testing, 2019.

[27] Deloitte.Frombrawntobrains:Theimpactoftechnologyonjobsin the UK. Deloitte, 2015. www2.deloitte.com/content/dam/Deloitte/ uk/Documents/Growth/deloitte-uk-insights-from-brawns-to-brain.pdf.

[28] McKinsey Global Institute. A future that works: automation, employment, and productivity. McKinsey Global Institute, 2017. www.mckinsey.com/~/media/mckinsey/featured%20insights/ Digital%20Disruption/Harnessing%20automation%20for%20 a%20future%20that%20works/MGI-A-future-that-works- Executive-summary.ashx.

like in radiology, the penetration of AI into these fields is likely to be slow.

While deep learning is finding its way within radiology, there are multiple reasons why radiology jobs are not in any immediate risk of automation.[29]

First, is the limitation of AI to perform radiology tasks. Thousands of detection tasks are necessary for radiology beyond just image recognition and deep learning can only perform certain specific tasks like recognising only certain kind of images. Radiologists also consult with other physicians on diagnosis, and treat diseases based on images which need to be generated by tailoring it to the particular patient's medical condition, relate findings from images to other medical records and test results, discuss procedures and results with patients, and many other activities.

Second, AI-based images are a long way from being ready for daily use in healthcare. Different imaging technology learning algorithms have different focus points which make it very difficult to embed deep learning systems into current clinical practice.

Third, deep learning algorithms for image recognition require labelling of data as there are millions of images from patients who have received a definitive diagnosis of cancer, a broken bone or other pathology and they need to be organised within labels. However, there is no such storage of radiology images and data, for deep learning to function with.

Finally, substantial changes will be required in medical regulation and health insurance for AI to be used in image analysis to take off. Because of these reasons, automation of healthcare is unlikely anytime soon. There is also the possibility that new jobs will be created to work with where AI technologies can be used. But same or more employment of people in

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[29] Davenport TH, Kirby J. Only humans need apply: Winners and losers in the age of smart machines. New York: HarperBusiness, 2016.

healthcare also means that medical costs would not substantially reduce anytime until it is possible to properly integrate AI into the healthcare sector.

Ethical Implications

Finally, the ethical issues surrounding AI needs to be addressed. The most obvious are privacy, transparency, accountability, and use of the confidential data being shared via AI. Transparency is perhaps the most difficult. Many AI algorithms particularly used for image analysis are virtually impossible to explain. Thus, while a patient may know if they have cancer, they will not be able to know why or what exactly is wrong as such algorithms can even stump physicians who are familiar with their functioning. With explanations being difficult to interpret, if mistakes are made by AI systems in patient diagnosis and treatment it may be difficult to establish accountability for them. There are also likely to be incidents in which patients receive medical information from AI systems which they would prefer to receive from a doctor who would be more empathetic to their condition being a human, thus jeopardizing patient interaction. Machine learning systems in healthcare may also be subject to algorithmic bias, and it might result in medical predictions based on gender or race when those are not actually causal factors.[30]

We are likely to come across many ethical, medical, occupational and technological changes with AI in healthcare. It is important that healthcare institutions, as well as governmental and regulatory bodies, establish structures and a proper policy to monitor key issues react in a responsible manner and establish governance mechanisms to limit negative implications.

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[30] Davenport TH, Dreyer K. AI will change radiology, but it won't replace radiologists. Harvard Business Review 2018. https://hbr.org/2018/03/ ai-will-change-radiology-but-it-wont-replace-radiologists.

The Future of AI in Healthcare

We believe that AI via machine learning has an important role to play in the healthcare in the future. In the form of machine learning, it is the primary capability behind the development of precision medicine, widely agreed to be a sorely needed advance in care. Although initial AI integration in providing diagnosis and treatment recommendations has had obstacles, it is expected that AI will ultimately master that domain as well. Given the rapid inroads AI is making in image analysis, AI will take over radiology and pathology images sometime are what are anticipated. Speech and text recognition are already employed for tasks like patient communication and capture of clinical notes, and their usage will increase.

The greatest barrier to AI in these areas is not if the technologies will be capable enough to be useful, but rather ensuring proper implementation in daily clinical practice. For large scale adoption to take place, AI systems must be properly standardized for use and physicians must be properly trained in handling these technologies. It will take a long time to overcome these barriers and thus AI in healthcare is an idea that is still sometime away from implementation.

It has also become apparent that AI systems will not replace medical personnel on a large scale, but rather will augment their efforts to care for patients. Over time, these personnel may move onto jobs which require human skill along like human qualities of empathy and persuasion. Perhaps the only healthcare providers who will lose their jobs over time may be those who refuse to work alongside artificial intelligence.[31]

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[31] Char DS, Shah NH, Magnus D. Implementing machine learning in health care – addressing ethical challenges. N Engl J Med 2018;378:981–3.

PEGAGUS SPYWARE-MANOHAR LAL SHARMA V. UNION OF INDIA: STATE HEGEMONY OR MISCONCEPTION 2021 SCC ONLINE SC 985

Subhash P.[*]

If you want to keep a secret, you must also hide it from yourself.[1]

Introduction

Now, we are living in digital age where our daily life is intrinsically connected with the digital world. This interrelationship of human existence and virtual world is acknowledged by many as 'data is the new oil' due to its commercial value as well as political significance. The freedom of political parties and people are essential for effective functioning of any democratic system. So, any kind of secret surveillance on the liberty of political expression will affect our cherished constitutional values. Modern technologies can be used for surveillance on anyone due to easy access to mobile and internet.

In this case, the allegation is that the Union Government uses Pegasus software of Israeli origin to conduct surveillance on targeted people. This alleged surveillance will have huge political repercussion. The tapping of telephone and mobile of political opponent was a storm few years before due to the abusive use of the Indian Telegraph Act, 1885.[2] Thus, this case is strongly intertwined in political rhetoric and the Court need to avoid entering political thicket. The Court need to focus only on constitutional values and rule of law to uphold what is right and

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[1] George Orwell, 1984, 280 (Amazing Reads 2014).

[2] People's Union for Civil Liberty v. Union of India, (1997) 1 SCC 301.

strike down what is wrong. Any surveillance will infringe the right of privacy and other fundamental rights including human dignity.[3] Human dignity is the foundation of human rights.

To note, government transparency and openness is a celebrated principle of our Constitution.[4] The Court quoted the opinion of Judge Khanna that "Judicial review is not intended to create what is sometimes called as Judicial Oligarchy, the Aristocracy of the Robes, Covert Legislation or Judge made law".[5] The best place to judge misuse or abuse of legislative function is through public opinion and elections. The Judges need to keep themselves away from the din and controversies in politically sensitive cases. The primary duty of Judges is to uphold the Constitution and other laws without any fear or favour.

Background of the Case

In September 2018, the Citizen Lab of University of Toronto, Canada published a detailed report stating the capabilities of a software i.e. spyware suite called 'Pegasus'. It is produced by an Israeli company, NSO Group. This report alleged 45 countries were affected by this Spyware. This software infects the Digital devices of the targets by 'zero click vulnerabilities' i.e. there is no need for any actions from the target like opening an email, link, attachment file etcetera. Once the device is infiltrated the software allegedly has the capacity to take control of entire data storage, real time access to multiple functions in the device and can remotely operate the device like switching on and off different functions of the infested device. It is claimed in the NSO website that this powerful software is solely sold to the government agencies.

In May 2019, the global giant WhatsApp found out infiltration of Pegasus due to some software vulnerability of WhatsApp. The

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[3] K.S. Puttuswamy v. Union of India, (2017) 10 SCC 1, AIR 2017 SC 4161.

[4] Anuradha Bhasin v. Union of India, 2020 SC 1308.

[5] Keshavananda Bharathi v. State of Kerala, (1973) 4 SCC 225, p. 503, para. 1596.

Minister of Law and Electronics acknowledged the impact of Pegasus over certain Indians. Consequently, the Citizen Lab along with Amnesty International discovered the spyware campaign on nine Indians. On July 18, 2021, the global consortium of Journalist alleged the use of Pegasus over 50,000 people including nearly 300 Indians. The Minister refuted the allegation of Pegasus use on Indians and said there is no factual basis over these allegations. He stated that the law of surveillance and communication interception is extremely rigid in India and cannot be abused. So, there can be no illegal surveillance. Many applicants raised the issue of cyber-attack on Indians by its own Government as well as by some foreign government because NSO claimed that it sold this software exclusively to the Governments. Thus, the petitioners pleaded for independent investigation on Pegasus issue.

Contention of the Parties

The Respondent Indian Government denied the allegations and claimed it lacks any veracity because the captioned petition is based on conjectures and surmises without any substantial evidence. Further, the deponent assured that they will constitute a Committee of Field Experts to thoroughly investigate the issue at hand. The deponent filed 'limited affidavit' due to paucity of time and also claimed threat to national security and defence of the State. The Court directed to declare non-sensitive facts before it.

The learned Solicitor General submitted that the certain information cannot be placed for public debate due to its sensitive character and it may be used by terrorist groups for anti-national activities. He assured that unauthorised or illegal surveillance cannot be taken place in India. However, Senior Advocate Kabil Sibal argued that the respondent State cannot escape from submitting necessary documents to the Court for rendering justices to the claimants for the alleged infringement of their fundamental rights. He claimed a completely independent investigation which should be supervised by the Supreme Court Judge like *Jain Hawala case*. The petitioners

claim inaction from the Union Government for the allegation of Pegasus attack on Indians. This inaction of the Union Government is a grave concern. It rises doubt that whether Indian government itself used Pegasus to spy its own people.

Senior Counsel Shyam Diwan claimed that he was one of the affected persons by Pegasus software. He elaborated that using this software implantation of false documents and evidences can be made in any device. He argued about the nature and function of the software. So, it is the supreme responsibility of the State to take immediate action of the alleged surveillance because it can be used by foreign States too including Pakistan and China due to their hostile relation with India. Therefore, it is essential to constitute Special Committee or Special Investigation Team to investigate the spying allegations. Further, there is no credible statement from the Union about the non-use of Pegasus by it. Also, the establishment of committee by the Union can raise a credibility question because the Union itself a respondent in this case. Otherwise, it will violate the Principle of Natural Justice i.e. no person cannot be a judge in its own case and "justice must not only be done, but also be seen to be done".[6] It is expressed in the maxim *nemo judex in propria causa sua*.

The Union Government indirectly supported the use of such software due to the presence of legal mechanism on surveillance and communication interception.[7] Any attack on the journalist infringes two cherished fundamental right i.e. right to privacy and right to freedom of free speech and expression including freedom of press. This freedom of speech is also recognised by the Universal Declaration of Human Rights, 1948.[8]

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[6] Manohar Lal Sharma v. Union of India, 2021 SCC OnLine SC 985, p.38, para. 57.

[7] *Id*, p.16, para. 25.

[8] Universal Declaration of Human Rights, Preambular Recital 2.

Article 13 of the UDHR states that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.[9]

Character of Privacy:

The right to privacy has become an intrinsic part of right to life and personal liberty under Article 21.[10] The Court noted the historical evolution of the right of privacy. It observed that the right to privacy was 'property centric' rather than 'people centric'.[11] Also, the Court observed that the citizens' privacy shall not be invaded by the State. In India, the right to privacy was judicial invention under Article 21 of the Constitution of India, 1950. The term 'privacy' derives its meaning from other rights relating to dignity and freedom.

The term 'life' in Article 21 is subjected to numerous interpretations by the Honourable Supreme Court and High Courts, the expounded jurisprudence enriched the meaning of life to have certain qualities for cheerful existence and not mere animal existence.[12] The right to privacy is not the singular concern of journalist or social activist.[13] The privacy relates to the choices, liberty and freedom of the concerned individuals which in turn mould their personality. In the *K. S. Puttuswamy* v. *Union of India*, the SC recognised the sacrosanct nature of privacy for human existence.[14] Also, it is inseparable aspect of human dignity and autonomy. Though, the right of privacy is not an absolute right, it can be reasonable restricted, if the law

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[9] *Supra* Note at 8, art. 13.

[10] K.S. Puttuswamy v. Union of India, (2017) 10 SCC 1, AIR 2017 SC 4161.

[11] Semayne, 77 ER 194 (KB). The Court noted in this case that "every man's house is his castle".

[12] Kharak Singh v. The State of Uttar Pradesh, 1963 AIR 1295.

[13] *Supra* Note at 6, p.18, para. 32.

[14] (2017) 10 SCC 1

is able to withstand threefold conditions laid in *Puttuswamy case*. They are as follow:

a) legality or the existence of law,
b) need or legitimate aim of the State, and
c) proportionality or a rational relation between the objects sought and deployed means to achieve it.[15]

Firstly, there shall be an existing legislation that allows surveillance. This is the essential mandate of Article 21 i.e "No person shall be deprived of his life and personal liberty except according to a procedure established by law".[16] Therefore, to deprive personal liberty, there shall be an authorising act for surveillance or spying. However, there is a limitation prescribed by the Court that it should follow 'due process of law' for violating life or personal liberty. Secondly, the legitimate aim of the State must not be arbitrary and unreasonable in restriction, in order not to offend Article 14. Thirdly, the law should be proportionate to the legislative objectives. This test is a safety valve against the excessive arbitrary power of the State. Therefore, there is an inverse relationship between fundamental guarantee on non-arbitrariness and right to life and personal liberty.

The Court rightly pointed out the need for balancing the legitimate State interest *vis-a-vis* the rights of the individuals. The need to counter violence, crime, corruption, and terrorist activities through surveillance cannot be questioned but indiscriminate use of such technology for political and critique silencing is dangerous for any democratic functioning. The renowned scholar Daniel Solove is of the view that privacy can be protected without compromising the security needs of the State. For mere mentioning of security threat to State, the Court should not keep silence on this issue. Without privacy, the

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[15] *Supra* Note at 10.

[16] The Constitution of India, art. 21.

individuality of the person may be killed and power may be effectively concentrated in the hands of few people. They will become masters as well as monsters for our democratic values and purposes which we cherished for long time.

The biggest threat to privacy and surveillance are from the government. Due to its immense money power, muscle power and authority it wields. The modern digital age converts humans to mere data generating source which can be used to create digital footprints. These data can be analysed to know every details about the individuals like their preferences and political behaviour. This potential abusive character of the State is known as 'governmental eavesdropping'.

This illegal governmental eavesdropping may create a chilling atmosphere on the minds of the people not to criticise its own government due to potential harm from pro-governmental actors. Thus, it will affect the behaviour of people in exercising their choices in every aspect of their life. Also, it will affect the way of functioning of the press and its role as a watch dog of our democracy. So, there is an ultimate duty on every responsible citizen to support for safeguarding the freedom of press from potential destruction from illegal surveillance and spying. The Court touches upon an important aspect of freedom of press i.e. protection of informational source. The snooping technique can compromise the anonymous identity of informational source and may threaten their life and liberty for disclosing certain information about the government or private persons.

In the case of *Anuradha Bhasin* v. *Union of India*, the SC stressed the importance of free press for disseminating information to all people, particularly during disturbed times. It noted that "Journalist are to be accommodated in reporting and there is no justification for allowing a Sword of Damocles to hang over the press indefinitely".[17] The Court is wholly aware that the filling of Writ Petitions is based on newspaper reports and other international agencies reporting. The jurisprudence

[17] (2020) 3 SCC 637.

of this Court is not to take cognisance wholly based on newspaper reporting without any due diligent work done by the Petitioners to prove the credentials of the case.[18]

As held in the *Case of Ram Jethmalani* v. *Union of India*, adversarial stand must not be taken by the Union government, if fundamental rights are threatened.[19] It is a well-established principle to prove the case with evidences on the party who claims it. Albeit in most of the cases, requisite materials and documents of the case are with Union Government. So, the Union Government is duty bound to submit all documents pertaining to the case at hand. However, if any limitation is invoked by the State, it is duty of the State to expressly cite the constitutional principles or prohibited grounds of disclosure. To note, the ultimate duty to protect the fundamental rights of the people is vested on the State. So technically, the State cannot hinder the process of administration of justice by non-submission of case details before the Court.[20]

Finally, the Court held that it has *prima facie* case on the allegations raised by the Petitioners and also the Union Government failed to deny these allegations in any concrete terms. So, in any rationality, it is imperative to constitute an independent Committee to find the truth on the issues raised. A huge weightage is given to the potential abuse of such software on large scale surveillance which will violate the fundamental rights of our people.[21]

Conclusion:

The Court rightly agreed to examine the allegation of infringement of the right to privacy and freedom of speech and

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[18] Rohit Pandey v. Union of India, (2005) 13 SCC 701.

[19] (2011) 8 SCC 1.

[20] *Supra* Note at 6, p. 31-32, para. 77-78.

[21] Refer, Ram Jethmalani v. Union of India, (2011) 8 SCC 1; Extra Judicial Execution Victim Families Association v. Union of India, (2013) 2 SCC 493 and G. S. Mani v. Union of India, W.P. (Crl) No. 348 of 2019.

expression encompassing freedom of press. It is important to instill confidence of the people that they are free from any surveillance and spying. The involvement by foreign States, foreign authorities and players cannot be ruled out due to the nature of interconnected digital world. Also, this surveillance allegation is made against the Indian Government and State Governments. The Court acknowledges the jurisdictional limitation to deal with factual aspects under Writ jurisdiction.

Finally, the Court appointed Justice R.V. Raveendran to oversee the functioning of the Committee which consists of experts from cyber security, digital forensics, networks and hardware.[22] Also, Justice Raveendran is given the power to take assistance from any officers, legal experts and technical experts in discharging his mandate. To note, the honorarium for the Committee members will be fixed after consultation between the supervisory Justice and the members itself. Thus, independency of the Committee is assured. The honorarium shall be paid by the Union with immediate effect. Also, the Government of the Union and States shall provide full facilities for the functioning of the Committee.

The Committee is empowered to make suggestions for amending or enacting new surveillance law in India, to enhance the cyber security infrastructure, to ensure prevention of cyber-attacks, to establish grievance redressal mechanism on illegal surveillance, to create independent institution for investigating, assessing the cybercrimes vulnerability, to suggest any ad-hoc arrangement to fill legislative gaps in surveillance laws as an interim measures and other related ancillary matters. Further, the Committee is empowered to device its own procedure, to conduct enquiry and investigations, to take statement from 'any person' related to enquiry and call for records from 'any authority' or 'individuals'. Thus, the Committee is effectively empowered to act independently and come up with truth on the

[22] *Supra* Note at 6, p. 39, para. 59.

allegations of espionage on Indian nationals. The terms of mandate of the Committee are as follow:

1. Whether Pegasus is used against Indian Citizens?
2. If yes, the details of the victims of spyware attack,
3. What are the steps taken by the Union Government for the alleged WhatsApp hacking using Pegasus?
4. Whether Indian governmental agencies used Pegasus and on what lawful basis?
5. Whether any domestic entities or persons used this software on Indian nationals?
6. To report on other ancillary and incidental matters.

To conclude, the Court noted that the Government of India didn't cooperate with the Committee which itself showed a strong presumption that the G.O.I used the software. Otherwise, it would have cooperated with the committee openly and effectively. Also, malwares were found in 5 out of the 29 phones submitted for thorough analysis before the Committee.[23] But they failed to prove that the malware is Pegasus. Finally, the Government should have submitted to openness, transparency and democratic freedom which is a fundamental building block of our Constitution.

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[23] Indian Express, https://indianexpress.com/article/explained/explained-sci-tech/supreme-court-verdict-pegasus-spyware-case-explained-8110710/ (Last Visited on Nov. 15, 2022).

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FORM IV

Statement of ownership and other particulars about the journal

NLUJA Law & Policy Review

1.	Place of Publication	:	Guwahati
2.	Periodicity of its publication	:	Annually
3.	Printer's Name	:	Digits Enterprise, Maligaon, Guwahati - 11
3.	Publisher's Name	:	Dr. Indranoshee Das
	Nationality	:	Indian
	Address	:	Hajo Road, Amingaon, Guwahati – 781031
4.	Editor's Name	:	Dr. Diptimoni Boruah
	Nationality	:	Indian
	Address	:	Hajo Road, Amingaon, Guwahati – 781031
5.	Name of the owner	:	National Law University and Judicial Academy, Assam

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Registrar
National Law University and
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Hajo Road, Amingaon, Guwahati – 781031, Assam.
Tel: +91-361-2738891

Email: registrar@nluasam.ac.in Website: www.nluassam.ac.in

ISSN : 2455-8672