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# CONTENTS

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**Dr. Pradeep Kumar**
**Executive Editor & Managing Director**
**Journal of Legal Studies**

# Enforcement of Interim Measures of Protection in International Commercial Arbitration: Issues and Challenge

***Toshali Pattnaik***[1]

## Abstract

*The granting of interim measures plays a crucial role in protecting the efficiency of arbitration and the efficacy of final award. Conventionally, the function of issuing interim measures of protection was vested with domestic courts. But this power has eventually been given to, and exercised by, arbitral tribunals. However, the power of granting such measures, without the coercive power of executing the same, is argued to be meaningless. Though most arbitration laws and rules recognize the power of the arbitral tribunal to issue/grant interim measures of protection, none of them provide for enforcement of these tribunal-ordered measures. The paper investigates the issues associated with the power to enforce tribunal-ordered interim measures in international commercial arbitration. It acknowledges the inconsistencies and uncertainties in the subject matter and stresses on the need to align national laws with the international standards. The paper also discusses the conditions which have to be fulfilled for an arbitral tribunal to order interim measures and also gives an outline of the limitations of the exercise of such power by the tribunals. Further, the paper highlights the problems encountered by the parties when they seek assistance from courts to enforce the interim measures granted by the arbitral tribunals. Lastly, the paper elaborates on the emerging trend of recognizing concurrent jurisdiction of courts and arbitral tribunals.*

***Keywords:*** *Interim Measures, Arbitration, International Commercial Arbitration, UNCITRAL Model Law.*

## Introduction

Arbitration has become a favoured alternative mechanism for dispute resolution among international trading partners[2], owing to its simplicity of procedures, cost-effectiveness, confidentiality, and expediency[3]. However, arbitration too, is plagued with certain drawbacks, which frequently causes problems, especially when the parties are from different jurisdictions. Some of these problems include enforceability of interim measures of protection, lack of procedures available for the parties to request arbitral interim measures of protection before the formation of the arbitral tribunal, the reluctance of the arbitral tribunals to order interim measures of protection[4] and the debate on whether an interim measure of protection is an award or not. However, for the purpose of this article, the debate around enforcement of tribunal-ordered interim measures has been chosen as the central theme.

[1] ***Assistant Professor, Presidency School of Law, Presidency University, Dibbur, Karnataka, Email Id- toshali2014pattnaik@gmail.com.***

[2] H. Stephen Harris, Jr. & Jack P. Smith, III, Statutory Enforcement of International Arbitration Awards in the United States, 15-SPG Int'l L. Practicum 54,54 (2002).

[3] Richard Allan Horning, Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (In Toto), 9 Am. Rev. Int'l Arb. 155, 156 (1998)

[4] Stephen M. Ferguson, Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results, 12 Currents: Int'l Trade L.J. 55 (2003).

An interim measure of protection is a temporary relief sought by the parties, during the pendency of arbitration proceedings, in order to preserve the status quo or to protect their rights, without such measure the final award would lose its efficacy. Traditionally, this power to grant interim measures was reserved for the domestic courts. However, the recent trend has been to give this power to the arbitral tribunal, which is more acquainted with the case concerned. Though in most jurisdictions, this power of the arbitral tribunal has been recognized, some countries still lag behind and provide exclusive jurisdiction to the domestic courts to grant interim measures of protection.

With the recognition of the arbitral tribunal's power to grant interim measure, issues of enforcement of such measures arose. Shockingly, though most arbitration statutes and rules provide for the power to grant such measures, most of these legislative tools lack content on the enforcement of such award. Generally, the parties turn to the courts for enforcement purposes. However, this creates a whole new range of problems that the claiming party encounters. All these issues have been elaborately dealt with in the later parts of the paper.

**Objectives**

- To examine the power of the arbitral tribunals to grant interim measures and study the limitations on them.
- To understand the reasons behind the reluctance of arbitral tribunals in exercising the power to grant interim measures
- To investigate the issues surrounding the enforcement of tribunal-ordered interim measures.
- To study the problems encountered by the parties when they turn to courts for assistance in enforcement of interim measures.
- To examine the mid-way approach adopted by various jurisdictions to resolve the problem of enforcement of interim measures.

**Scope and Limitation**

For the purpose of this paper, the researcher has limited the scope of the paper to the issue of enforcement of tribunal-ordered interim measure of protection, the reluctance of the arbitral tribunals in exercising the power to grant interim measures, the problems faced in court-assisted enforcement, issues of concurrent jurisdiction and subsidiary jurisdiction. The researcher has particularly chosen UK, Singapore and India for the purpose of examining the above issues at hand.

**Research Questions**

- Which body has the power to grant such interim measures of protection?
- What are the resulting limitations and weaknesses when interim measures of protection are granted by the arbitral tribunals?
- Why are the arbitral tribunals reluctant in exercising the power to grant interim measures, in spite of recognition of such power?

- What are the problems surrounding the enforcement of tribunal-ordered interim measure?
- What are the hindrances faced by the parties when they seek judicial assistance for enforcement of tribunal-granted interim measures?
- What is the probable approach in case of a clash between the jurisdiction of the courts and the arbitral tribunals?

**Research Methodology**

The methodology adopted for the completion of this research paper is purely doctrinal. The researcher has relied upon primary sources of data like statutes, international rules, U.N. Documents, and judicial decisions for analysis of the position in various jurisdictions. The researcher has heavily relied on the secondary sources of data as well, such as books and articles. The research design is analytical and descriptive. Further, NALSAR Law Library and e-resources have played a significant role in data collection for the project. Lastly, the researcher has adhered to Bluebook Citation (20th ed.)

**Interim Measures of Protection**

A final award may not be of much value to the successful party if, in the meantime, the actions of the other party renders the outcome of the arbitration proceedings largely inefficacious by disbanding its assets or placing them in a jurisdiction where enforcement of the award is either cumbersome or largely impossible. To avoid such situations, the precautionary claimant may file for interim relief seeking some kind of protection of assets or property during the time when the ultimate determination of rights and obligations of the parties is still being made[5]. Therefore, interim measures of protection provide the precautionary claimant with immediate and temporary protection of rights or property during the time when the decision of the arbitral tribunal remains pending[6]. They can include any temporary measure ordered by an arbitral tribunal pending the issuance of a final award which would finally settle the dispute.[7]"

They significantly increase the chances for the claimant to arbitration proceedings to realise the awarded claim. Art. 17 (2) of the UNCITRAL Model Law on International Commercial Arbitration lists four functions of interim measures: (a) maintenance of status quo until a final decision is rendered on the merits of the case[8], (b) protection of arbitration process[9] by preventing a party from engaging in any action that may obstruct or delay the arbitral process, (c) preservation of assets[10] to secure the effective enforcement of the final award, and (d) preservation of evidence[11] that may be relevant to the resolution of dispute and material to the

[5] Marianne Roth, Interim Measures, 2012 J. Disp. Resol. 425 (2012).
[6] Gary B. Born, International Commercial Arbitration 1942 (2009).
[7] Raymond J. Werbicki, Arbitral Interim Measures: Fact or Fiction? 57-JAN Disp. Resol. J. 62, 64-65 (2003).
[8] Art. 17(2)(a), UNCITRAL Model Law on International Commercial Arbitration, 2006.
[9] Art. 17(2)(b), UNCITRAL Model Law on International Commercial Arbitration, 2006.
[10] Art. 17(2)(c), UNCITRAL Model Law on International Commercial Arbitration, 2006.
[11] Art. 17(2)(d), UNCITRAL Model Law on International Commercial Arbitration, 2006.

smooth conduct of the proceedings[12]. However, this list is not exhaustive and an interim measure can go forward and serve more purposes at the same time.

There are various kinds of interim measures of protection ordered by the courts and arbitral tribunals, the most common ones include attachments, injunctions, partial payment of claims, and posting of security for costs[13]. The primary objective of these measures is to compel the parties to behave in a manner that is conducive to the success of the arbitral proceedings, preserving the rights of the parties, ensuring amicable settlement of disputes by keeping peace between the parties, preventing aggravation of dispute[14] and ensuring the effective implementation of an award[15]. Many scholars, practitioners and commentators opine that interim measures of protection are an integral step towards the passing of a favourable final award[16]. Without such measures or its enforcement, the final award loses its authority, as the parties may likely engage in removing goods or assets from a jurisdiction, hiding or destroying evidence, selling assets etc. This would significantly diminish the appeal of arbitral proceedings and would defeat its aim of providing an alternate mechanism to civil litigation[17]. Therefore, just as the popularity of arbitration as an alternative dispute resolution process is significantly increasing, so is the importance of interim measures of protection.

**Legal Status of Interim Measures of Protection**

An analysis of legal status of interim measures of protection requires a probe into the power of the arbitral tribunal to grant these measures and necessitates examination of the power to ensure compliance with these measures within the arbitral framework i.e. to determine the binding force of such arbitral interim measures of protection.

***Power of Arbitral Tribunal to grant interim measures:***

The UNCITRAL Model law, which serves as a model for national legislators drafting their own arbitration rules, gives the arbitral tribunal a non-mandatory power to order interim measures of protection at the request of a party, unless differently agreed by the parties[18]. Thus, the power of the arbitral tribunal to grant interim measures of protection emanates either from the arbitration agreement between the parties or from the arbitration rules chosen by the parties i.e. the chosen procedural law[19]. In the absence of such applicable procedural law, the

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[12] UNCITRAL Model Law on International Commercial Arbitration, 18th Sess., Annex 1, U.N. Doc. A/40/17 (June 21, 1985) revised by Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, 39th Sess, Annex, U.N. Doc. A/61/17 (July 7, 2006), Art. 17 (2), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

[13] Gregoire Marchac, Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA and UNCITRAL Rules, 10 Am. Rev. Int'l Arb. 123, 123 (1999).

[14] Andrea Camargo Garcia, Internal Protection Measures in CIADI Arbitration, 4 ACDI 71 (2011).

[15] Noah Rubins, In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration, 11 Am. Rev. Int'l Arb. 307, 315 (2000)

[16] Stephen M. Ferguson, *Supra note 3*.

[17] Id. at 55

[18] Art. 17(1), UNCITRAL Model Law on International Commercial Arbitration, 2006.

[19] Kang-Bin Lee, The Powers and Interim Measures of the Arbitral Tribunal in International Commercial Arbitration, 18 J. Arb. Stud. 103 (2008)

law of the place of arbitration shall be the source of power of the arbitral tribunal[20]. When such powers emanate from the agreement between the parties, it is limited by certain restrictions, such as:

a) Such powers can only be exercised in respect to the parties to the disputes and not towards the third parties. This is because the arbitration agreement, from which such power emanates, is binding only on the parties concerned[21].
b) The injunctions ordered by the tribunal create private law rights and obligations between the parties. It is not enforceable with an executory force, like in case of an injunction granted by the courts.[22]

An analysis of the relevant provisions of UNCITRAL Model Law[23], the London Court of International Arbitration (LCIA)[24], Arbitration Rules of International Chamber of Commerce (ICC)[25], and the International Centre for Dispute Resolution (ICDR)[26] reveal that while most arbitral regimes grant wide powers to arbitrators to issue any measure as they deem appropriate, under some arbitral frameworks like LCIA, the tribunal may only take measures that they deem fit in respect to the subject matter of the dispute. Thus, the scope of interim measures is more limited under LCIA Rules[27].

Generally, arbitrators have wide discretionary powers in deciding whether the requested interim measure is necessary. Yet, in practice, in most cases, arbitrators exercise this power reluctantly to prevent coming across as an adjudicatory body which decides the merits of a case before the facts are firmly established[28]. Also the lack of uniformity in national statutory provisions on interim measures invites uncertainty. This creates dilemma as to the scope and extent of these powers. As a result of this uncertainty, arbitrators tend to err on the side of caution and decline to order such interim measures of protection[29]. Further, when parties are uncertain as to the procedure to be adhered to in seeking interim measure from the tribunal, they may turn to the courts for assistance. However, this may not be an appealing option if quick and easy recourse to the courts is unavailable[30]. Presently, though the trend is to vest arbitrators with express powers to grant interim measures, some national laws[31] still accord exclusive jurisdiction to their domestic courts for issuance of interim measures of protection[32].

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[20] Marianne Roth, *supra note. 6.*
[21] Zhivko Stalev, Interim Measures of Protection in the Context of Arbitration, International Arbitration in a Changing World (Van den Berg (ed.); Jan, 1994).
[22] *Id.*
[23] Art. 17, UNCITRAL Model law of international commercial arbitration, 2006.
[24] Art. 25, London Court of International Arbitration, 2014.
[25] The International Chamber of Commerce Rules, 2017
[26] The ICDR International Arbitration Rules, 1996.
[27] Marianne Roth, *Supra note 6.*
[28] *Id.* at 428
[29] Sundaresh Menon and Elaine Chao, 'Reforming the Model Law Provisions on Interim Measures of Protection', 2 Asian International Arbitration Journal 5 (2006).
[30] *Id.* at 5.
[31] Finland, Greece, Italy Thailand.
[32] Marianne Roth, *Supra Note*. 6 at 429.

***Conditions for granting Interim Measures of Protection by an Arbitral Tribunal***

Though most of the arbitral rules are silent on the precise conditions under which an interim measure may be granted by the arbitral tribunal, certain standards have been developed by the tribunals themselves[33] that would ensure uniformity in issuance of such measures. The usual requirements include imminent harm and the likelihood of success on the merits on the part of the applicant[34]. These practices were expressly adopted by the UNCITRAL Model Law, which requires both the conditions to be equally satisfied[35] and the burden of convincing the tribunal that both conditions have been fulfilled, lies on the applicant[36]. Further, the arbitral tribunal must take into account the effect of interim measure on the parties to ensure that the harm caused by the measure is not disproportionate to the benefit gained by the applicant.[37]

In order to prevent abuse of interim measures, the arbitral tribunal may order for appropriate security in the exercise of its discretionary powers[38]. Further, the Model law also grants the tribunals the power to modify, suspend, or terminate an interim measure upon application of the party[39] or when granted on erroneous or fraudulent basis[40]. The Model Law also codifies the obligations of the parties to disclose any material changes in the circumstances or grounds on which interim measure was requested or granted[41]. Finally, the Model law and arbitral rules expressly acknowledge the liability of the requesting party as to costs and damages incurred by the interim measure if it is later proved to be unjustified[42].

***Analysing the position in various jurisdictions***

The LCIA Arbitration Rules grants arbitration panels the ability and power to issue interim measures only after parties have had enough time to respond to a request for interim measures and the parties have been able to argue before the tribunal[43]. However, the LCIA rules are silent on the necessary criteria for a tribunal to issue interim measures. This lack of detail creates confusion[44]. Further, at the request of either party, both the arbitral tribunal and the

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[33] Gary Born, *Supra Note 7*, at 1980.
[34] Art. 17A, UNCITRAL Model law on International Commercial Arbitration, 2006.
[35] MARIANNE ROTH, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶ 14.282 (Frank-Bernd Weigand Ed.) (2nd ed. 2010)
[36] *Id.* at ¶ 14.288
[37] ALAN REDFERN, INTERIM MEASURES, THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 229 (Lawrence W. Newman & Richard D. Will eds. 2008)
[38] Art. 17E(1), UNCITRAL Model Law on International Commercial Arbitration, 2006; *See also* Art. 25(1), (2), LCIA Rules.
[39] Art. 17D, UNCITRAL Model Law on International Commercial Arbitration, 2006.
[40] U.N. Working Group on Arbitration, Report of the Working Group on Arbitration on the Work of its Thirty-Ninth Session, ¶ 38, U.N. Doc. A/CN.9/545 (2003)
[41] Art. 17F, UNCITRAL Model Law on International Commercial Arbitration, 2006.
[42] Art. 17G, UNCITRAL Model Law on International Commercial Arbitration, 2006 and Art. 26 (8) UNCITRAL Arbitration Rules. See also ANDREY KOTELNIKOV, SERGEY ANATOLIEVICH KUROCHKIN, ET AL. (EDS.) ARBITRATION IN RUSSIA 152 (2019)
[43] Rule. 25 , The LCIA Arbitration Rules, 2014.
[44] Stephen Benz, Strengthening Interim Measures in International Arbitration, 50 Geo J. Int'l 143 (2018)

national court may grant interim and conservatory measures[45]. The national court or competent judicial authority may approve interim measures, before the formation of the arbitral tribunal or, in exceptional cases, thereafter, with the authorization of the arbitral tribunal, until the passing of the final award. Thus, The LCIA does not prevent the right of a party to apply to a state court for any interim measure before the formation of the arbitral tribunal[46]. Further, under LCIA rules, the tribunal may only take measures that they deem fit in respect to the subject matter of the dispute. Thus, the scope of interim measures is very limited under LCIA Rules[47].

Under the SIAC Rules 2006, an arbitral tribunal is empowered to issue interim measures of protection at the request of a party at its discretion[48]. Further, a party can make a request for interim measures to a judicial authority prior to or after the constitution of the arbitral tribunal. Such a request won't be considered incompatible with the SIAC Rules[49].

Under the Arbitration and Conciliation Act, 1996, in India, it is not incompatible with the arbitration agreement for a party to seek interim measures of protection from a court either before or during the arbitral proceedings[50]. However, there is no consensus between the various high courts on whether the Indian courts would have the jurisdiction to grant interim measures of protection when the seat of arbitration is outside India.

*Limitations on interim measures of protection issued by arbitral tribunal:*

When an interim measure of protection is granted by the arbitral tribunal, it suffers from the following weaknesses:

a) No interim measure can be granted until the constitution of the arbitral tribunal. However, this is not the case with the courts, which are permanent bodies[51].
b) Interim measures ordered by the tribunal are not appealable and therefore, the tribunal has to ensure that it does not violate the rights of the parties to be heard. Thus, there can be no ex-parte interim measure[52].
c) The interim measures granted by the tribunal are not as efficacious as those ordered by courts because the exequatur requires new proceedings before the competent court, and they cost new efforts, time and money.

### *Problem of Enforceability of Interim Measures of Protection ordered by the Arbitral Tribunal*

A review of the existing arbitration rules reveal that though these arbitral frameworks have recognized the power of the tribunals to *grant* the arbitral awards, they are silent on the issue

[45] Rule 25(1) &(2), The LCIA Arbitration Rules, 2014.
[46] D.L. Hogas, Considerations for Interim Measures in the International Arbitration, 2015 Conf. Int'l Dr. 296 (2015).
[47] Marianne Roth, *Supra Note 6* at 428.
[48] Rule 30(1), The SIAC Rules 2006.
[49] Rule 30(1), The SIAC Rules 2006.
[50] § 9, The Arbitration and Conciliation Act, 1996.
[51] Zhivko Stalev, *Supra note*. 22
[52] *Id.*

of *enforceability* of these interim measures of protection. This has instigated large scale debate around the issue of enforceability. The common concern expressed by the practitioners is that grant of an interim measure would be of no use in the absence of provision for its effective implementation. Without the coercive powers to enforce the interim measures, the effectiveness of a final award will also diminish because of the obstructive actions taken by the non-complying party[53].

Under the existing arbitration rules, a party, to enforce an interim measure of protection against a non-complying party, has to seek enforcement through the national courts[54]. However, there is consensus among practitioners that such judicial assistance is often disruptive to the arbitral proceedings[55] and many of the advantages sought in choosing to arbitrate are substantially diminished in the process[56]. Lengthy delays, problems of jurisdiction, possibility of refusal to enforce interim measures by courts are some of the problems encountered by a party in arbitration when their only recourse is to seek judicial enforcement[57].

While some scholars stress on the need for statutory provisions, others argue that such statutory rules are not necessary to ensure enforcement because parties usually voluntarily comply with the orders of interim measures of protection[58]. The basis for this argument rests on the assumption that parties desire to look favourable in the eyes of the arbitral tribunal in order to have a better chance at obtaining a favourable order[59] and the parties also don't want the tribunal to draw an adverse inference by reason of non-compliance with its orders[60]. Another reason cited for the voluntary compliance of the parties is that they do not want to be responsible for any costs incurred in the process of neglecting to abide by the ordered measure[61]. However, the plethora of cases wherein parties fail to comply with interim measures of protection hits at the foundation of the argument that enforceability clauses are not required in arbitration rules[62]. Placing too much trust in the parties' cooperative spirit seems to be an idealist echo of the good old days when arbitration was considered to be amicable settlement mechanism where parties looked to their business peers for an answer to their differences[63]. Today, there is a real need for enforcement of tribunal-ordered interim measures of protection.

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[53] Stephen M. Ferguson, *Supra note 3*.
[54] Harris *Supra note 2*
[55] Rubins *Supra note 16.*
[56] Stephens, *Supra note 4.*
[57] *Id.* at 57.
[58] MANUEL ARROYO (ED.), ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE, 2557 (2nd ed. 2018).
[59] U.N. GAOR UNCITRAL, Possible Future Work in the Area of International Commercial Arbitration Note by the Secretariat, , 32nd Sess, ¶ 118, U.N. Doc. A/CN.9/460 (1999.
[60] Sundaresh Menon and Elaine Chao, *Supra note 29* at 17.
[61] *Id.*
[62] *Id.*
[63] MANUEL ARROYO, supra note 59 at 2557.

In *CE International Resources Holdings LLC v. SA Minerals Ltd et al*.[64], the Federal District Court in New York held that an interim award was separable from the merits of arbitration and was therefore, capable of immediate recognition and enforcement. Similarly in 2015, the Singapore Court of Appeals held that the awards ordering interim relief are final with regard to the issue they adjudicate and therefore, they are capable of enforcement under the Singapore Arbitration Act[65]. Likewise, in May 2018, the Cairo Court of Appeal recognized and enforced interim measures issued by a foreign tribunal, seated in Paris[66]. Thus, though certain jurisdictions demonstrate an increasing inclination towards enforcing tribunal-ordered interim measures, some other nations are still reluctant. For instance, though the Korean Arbitration Act, 2016 contains extensive provisions on interim measures, it nevertheless limits its enforcement to those issued by tribunals situated in Korea.

In India, though the provisions under the Arbitration and Conciliation Act, 1996 provides for grant of interim measures, it is noticeably silent on its enforcement. This has led the high courts to pass innovative legal orders to secure compliance with the interim measure issued by the arbitral tribunal. In *Sri Krishna v. Anand*[67], it was observed that a person who does not comply with the interim measures granted by the arbitral tribunal would be deemed guilty of contempt of the arbitral tribunal[68].

Further, though there is a consensus among practitioners on the issue of delegation of some power of enforceability to the arbitral tribunal, there are opposing views as to the method of accomplishing the same. One view is that the power to delegate should be left to the parties, which they may or may not exercise, through conscientious drafting of the arbitration clause. But firstly, it is necessary for the parties to be in consensus as to the enforceability of interim measures. However, this is not a feasible solution because such power is often not utilized by the parties[69]. Another view is that institutional arbitration rules and model legislation should be modified to incorporate enforceability provisions that would require domestic courts to enforce interim measures of protection ordered by arbitral tribunals. This would enhance the likelihood of compliance by the parties[70]. A third view presented by practitioners is that provisions for enforcement of interim measures of protection must be left to the procedural law of each individual country[71]. Finally, some others advocate a modification to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) to incorporate such enforcement provisions[72].

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[64] *CE International Resources Holdings LLC v. SA Minerals Ltd* et al. No. 12 Civ. 8087, WL 2661037 (2013)
[65] Five Ocean v. Cingler Ship 311 SGHC (2015).
[66] *Damietta International Port Company v. Doosan Heavy Industries and* Construction (Case no. 44 of 134) (2018).
[67] *Sri Krishna v. Anand* 3 Arb LR 47 (Del) (2009) .
[68] *India bulls Financial Services v. Jubilee Plots*, OMP 452-453/2009, order dated August 18, 2009.
[69] Stephens *Supra note* 4 at 59.
[70] Werbicki, *Supra note* 8 at 65-66
[71] Possible Future Work, *Supra note* 49, ¶ 124
[72] *Id*. at ¶ 121

In *Resort Condominiums International Inc. V. Bolwell & Anr.*[73], the arbitrator has issued an interim measure to enjoin the respondent to carry out the parties' agreement and to refrain from entering into any similar agreement with another entity. The claimant sought to enforce this interim measure under NYC in its home country. However, the domestic court refused jurisdiction on the ground that it was not a final award which was final and binding on the parties, but was an interim measure which could be reopened, varied or suspended by the tribunal pronouncing it. However, this position has been largely criticized on the ground that though interim measures do not finally dispose of the dispute, but they do finally resolve a particular part of the dispute.

Thus, the lack of power for arbitral tribunals to enforce interim measures of protection is still a problem plaguing international commercial arbitration. The rules of Arbitral Institutions, UNCITRAL Model Law and domestic legislations need to address this issue to preserve the advantages that arbitration enjoys over civil litigation. Rather than filing for enforcement before judicial authorities, it would be better if parties could make their requests directly to the arbitral tribunals, which has more expertise on the subject matter[74] as compared to courts of law[75].

***Court Assistance in Enforcement***

Under the UNCITRAL Model Law, an interim measure of protection issued by an arbitral tribunal would, subject to certain provisions, be recognized as binding on the parties and, unless otherwise provided by the arbitral tribunal, be enforceable in a competent court upon an application made to it, irrespective of the jurisdiction in which such measure has been issued[76]. Further, the provision also limits the circumstances in which a court may refuse to enforce an interim measure[77], thereby diminishing instances of non-enforceability of such measures. Additionally, the power of enforcement vested in the courts does not include the power to review the substance of an interim measure[78]. This expedites the enforcement process and reinforces the tribunal's power and authority.

***Concurrent Jurisdiction of the courts and the Arbitral Tribunal***

Even though under most arbitration rules and laws the arbitral tribunal has jurisdiction to grant interim measures of protection, it may not be sufficient to ensure a smooth and effective conduct of arbitral proceedings and to preserve the rights of the claimant. This is because the arbitral tribunals have not been vested with coercive powers required to execute an interim measure. In this situation, there has been a growing acceptance that national courts and

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[73] *Resort Condominiums International Inc. V. Bolwell & Anr.* 118 ALR 655 (1993).
[74] *Id*. at ¶ 120.
[75] Stephens *Supra note* 4 at 59.
[76] Art. 17(1), UNCITRAL Model Law on International Commercial Arbitration, 2006
[77] *Id*.
[78] Art. 17 (2), UNCITRAL Model Law on International Commercial Arbitration, 2006.

arbitral tribunals have concurrent powers to order interim measures[79]. Two consequences that flow from this approach include:

a) Even in the presence of an arbitration agreement, the parties may apply to the national courts to obtain an interim measure of protection. Such an application shall not be regarded as incompatible with the arbitration agreement[80].
b) Arbitration agreement would not automatically be waived when a party applies to a court for grant of an interim measure[81]. Thus, the arbitral tribunal remains competent to resolve the disputes between the parties to arbitration.

Presently, though most jurisdictions are inclined towards accepting the principle of concurrent jurisdiction between courts and arbitral tribunals, some national laws[82] still accord exclusive jurisdiction to their domestic courts for issuance of interim measures of protection[83].

***Subsidiary Jurisdiction of the Courts***

While most countries advocate for concurrent jurisdiction between the courts and the arbitral tribunals, some countries like UK and Singapore follow the Court-subsidiary model. As per this model, the jurisdiction of the State court is limited only to those situations where the tribunal is unable to grant an interim measure of protection[84]. Thus, application for interim measures of protection is first made before the arbitrators and Court intervention is the last resort[85].

***Court-ordered interim measures***

In some countries, domestic courts issue interim measures of protection in support of arbitral proceedings held in that country. In other countries, the domestic courts may grant interim measures of protection in support of foreign arbitral proceedings, subject to certain conditions. In yet other countries, the position is unclear either because the issue is un-addressed by the national legislations or because of lack of reported cases on the particular issue[86]. Thus, there is a need for harmonization of the position due to the constant tendency of the parties to seek

[79] E. Gaillard and J. Savage, Fouchard Gaillard Goldman On International Commercial Arbitration 710 (1999).
[80] Art. 23 (1), The ICC Arbitration Rules, 2014.
[81] *Id*.
[82] These national jurisdictions include Finland, Greece, Italy, Thailand.
[83] D.L. Hogas, *Supar note* 45 at 290.
[84] MANUEL ARROYO,, *Supra note* 58 at 2564.
[85] Joseph Lee, 'Court-Subsidiarity and Interim Measures in Commercial Arbitration: A Comparative Study of UK, Singapore and Taiwan,' 6 Contemp. Asia Arb. J. 227 (2013)
[86] Sundaresh Menon and Elaine Chao, *Supra note 29* at 22.

court assistance where the tribunal has not been constituted[87] or where orders against third parties are required[88].

**Conclusion**

Arbitration is frequently favoured over civil litigation owing to its simplicity, cost-effectiveness, confidentiality and expediency. The popularity of the arbitral process has increased enhanced the need of the parties to file for interim measures for protection in order to preserve their rights and maintain the authority of the final award. Though most arbitration rules recognize the power of the arbitral tribunals to grant interim measures of protection, they are noticeably silent on the enforcement of these measures by the tribunals.

This forces the parties to turn to courts for assistance, thereby vanquishing the benefits that arbitration has over civil litigation. This article addressed some of the problems in the existing arbitration rules which include failure to incorporate provisions for enforcement of interim measures of protection, lack of procedural clarity among the parties, reluctance of the tribunals to grant interim measures of protection and the hesitation of the courts to secure compliance of tribunal-ordered interim measures.

The existing rules of arbitration offer way too much discretion to the arbitral tribunals for granting interim measures of protection. A clarification on the rights and responsibilities of the arbitral tribunal would go a long way in answering the issues of enforceability. In this context, the role of Art. 17 of the UNCITRAL Model Law on International Commercial Arbitration is commendable. Further, there is an on-going debate on the harmonization of national laws in order to bring them in line with the international regime. This would provide a promising outlook for future disputes in international commercial arbitration.

[87] Donald Francis Donovan, 'The Allocation of Authority between Courts and Arbitral Tribunals to order Interim Measures: A Survery of Jurisdictions, the Work of UNCITRAL and a Model Proposal', ALBERT JAN VAN DEN BERG (ED), 12 New Horizons In International Commercial Arbitration and Beyond , ICCA CONGRESS SERIES, 204 (2005).

[88] 'Chapter-9: Conservatory and Interim Measures in Arbitration', in Andrey Kotelnikov, Sergey Anatolievich Kurochkin, et al. (eds.) 155 (2019).

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# An analysis of Laws relating to use of Emojis: Sri Lanka and India

***H. Niluka Damayanthi***[1]
***&***
***Sandya Hewameealla***[2]

## Abstract

*Emoji as a 'universal language" remains a powerful supplement to the written forms of all languages. Due to the increasing use of technology, people have started using different digital communication platforms to express themselves. Emojis are visual symbols that stand in for feelings, things, and ideas. They are becoming a necessary part of modern communication in the digital era. They are regarded as useful instruments for communication that are primarily employed to overcome barriers and restrictions posed by language. Although their utilization has a positive background, it is widely acknowledged that the inherent ambiguity and multiplicity of applications of this new trend have led to a number of legal difficulties. Courts find it difficult to understand the various connotations of emoticons, and to deal with the subtleties when emojis are used as evidence. The legality of these emojis is still up for controversy, and the extent to which people should be held responsible for using these symbols has gained prominence in legal and judicial discourse. This article explores the legal complexities surrounding the use and protection of emojis in digital communication. The article aims to provide a comprehensive and comparative overview of the legal landscape of emojis, focusing on the freedom of expression guaranteed under Sri Lankan and Indian constitutions and other legal regulations of both countries. The research looks at how the law is changing in relation to emojis in an effort to shed light on the potential and problems facing different rights in the digital era. It discusses to what extent the use of emojis has been accepted and safeguarded, particularly in the basic law and other legislation in Sri Lanka and India. After reviewing the relevant legal provisions, the research considers whether the current regulations should be changed to allow for the acceptance of emoji messages in court.*

***Keywords****: Digital Communication, Emojis, Freedom of Expression, Legal Challenges, Regulations.*

## Introduction

Humans use spoken and written language, as well as other creative forms of communication, to express their thoughts, experiences, knowledge, opinions, and ideas. With the widespread use of technology in daily life, individuals have turned to various forms of digital communication to express themselves, such as using capital letters to convey shouting, exclamation points to express excitement, and emoji to depict facial expressions.[3] Therefore,

[1] ***Senior Lecture, Department of Legal Studies, The Open University of Sri Lanka, Nawala, Nugegoda, Sri Lanka Email Id- hndam@ou.ac.lk.***
[2] ***Senior Lecture, Department of Legal Studies, The Open University of Sri Lanka, Nawala, Nugegoda, Sri Lanka, Email Id- shewa@ou.ac.lk.***
[3] Bai Qiyu, Dan Qi, Mu Zhe & Yang Maokun, A Systematic Review of Emoji: Current Research and Future Perspectives, 10 Frontiers Psych. (2019), 10.3389/fpsyg.2019.02221. Patricia Vilma Graham, Emojis: An Approach to Interpretation, 46 UC LAW SF COMM. & ENT. L.J. 123 (2024). Available at: https://repository.uclawsf.edu/hastings_comm_ent_law_journal/vol46/iss2/3.

the 21st century marked the beginning of the digital age and the world is gradually changing to symbolic communication as an alternative to text and words. Emojis are visual representations of emotions, ideas, and actions and have now become an integral part of digital communications, allowing users to convey their ideas creatively. The digital platforms are rather new and still going through evolution. They are considered attractive and effective communication tools that are essentially used for communicating across language obstacles and boundaries. Emojis can facilitate communication and understanding between people from different backgrounds because they are visual representations instead of words. In other words, emojis promote universal language in communication. On the other hand, symbolic speech has been considered one of the most basic forms of human expression. It has been used since ancient times as an ineffective mode of communication.

In *Stormberg v. California*, the idea that speech can sometimes be nonverbal was acknowledged, and some symbolic forms of communication were given legal protection. [4] Justice Jackson clarified in *West Virginia State Board of Education v. Barnette* that even though symbolism is primitive, it is an efficient means of conveying ideas and a shortcut form of mind.[5] Despite the positive background of their usage, it is a well-accepted fact that the inherent ambiguity and variety of applications of this new trend have given rise to a wide range of legal challenges. Hence, it becomes a burning research area among the researchers. There are ample studies available emphasizing the challenges in the courts in general. Thus, in this research, it is expected to discuss to what extent the use of emojis has been accepted and safeguarded, particularly in the basic law and other legislation in Sri Lanka and India.

**Constitutional protection and use of Emojis**

Article 14 (1) (a) of the Constitution of Sri Lanka[6] guarantees that every citizen is entitled to freedom of speech and expression, including publication. The Sri Lankan Supreme Court has interpreted the freedom of expression broadly when addressing the fundamental right applications. It extends to all forms of communication, expression other than oral or verbal placards, picketing, the wearing of black armbands, the burning of draft cards, the display of any flag, badge, banner or device, the wearing of a jacket bearing a statement, etc. It covers digital medium of communication such as emojis as well. Hence, the use of emojis to express thoughts and emotions falls under the umbrella of freedom of expression.

It is interesting to note that, recently the Supreme Court of Sri Lanka had to determine the right to free speech, expression, and publication of the virtual petitioner.[7] The court looked into the matter that fundamental right the virtual petitioner when he posted the statement on Facebook. Moreover, the Supreme Court inquired whether the response of the first respondent and the state to the publication of that post on Facebook was within the purview of restrictions that may be imposed on the exercise of the fundamental right to free speech,

[4] 283 U.S. S 359(1931).
[5] 319 U.S. 624 ( 1943).
[6] The Constitution of Sri Lanka 1978.
[7] SC/FR Application135/2020.

expression, and publication and carried out in a lawful manner. In this case, the court emphasized that other creative forms of communication include signs, sound, photography, art, music, theatre, and film sculpture, as well as video. It can include even seemingly insignificant actions like picketing, protesting, making noise, donning clothing or accessories that are a specific colour, shape, or contain a specific word, symbol, or design, burning an effigy, and attending or refusing to attend an event. This is a paradigm shift in both private and public communication and have developed different opportunities for the exercise of the right to free speech and expression, which includes publication.

However, there are no absolute and unrestricted individual rights exist in a modern state. All rights are only relative, not absolute and reasonable limitations are needed to be imposed. Therefore, as with the other form of expression, the use of emojis is subject to limitations under Article 15(2) of the Constitution. It has specifically stated that "the exercise and operation of the fundamental right declared and recognized by Article 14(1) (a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence."[8] Further, Article 15(7) states that it shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.

For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.[9] Constitution while acknowledging the freedom of any form of expression broad restrictions have been recognized to balance the respect for the rights and freedoms of others. Therefore, every citizen is entitled to express their ideas or opinion by using this novel digital mode subject to the restrictions imposed by the basic law of the country. Unlike text or words, emojis are complex in nature, context, and user dependent. Therefore, it needs to be balanced carefully by ensuring fundamental rights as well as other legal and ethical boundaries. It must be navigated with awareness of the broad legal and social implications.

When it comes to the Indian context, the legal framework of India does not specifically address the use of emojis. However, the application of general legal principles and existing statutes, including those related to freedom of expression, defamation, obscenity, harassment, and cybercrime, can govern the use of emojis in digital communication. The use of emojis is protected under the freedom of speech and expression guaranteed by the Indian Constitution, provided they do not convey illegal content or hate speech. Emojis, as a form of symbolic speech, fall under the protection of Article 19(1) (a). However, their use is subject to the same reasonable restrictions as any other form of speech. For example, using an emoji to convey

[8] Article 15(2) of the Constitution 1978.
[9] Article 15(7) of the Constitution 1978.

hate speech, defamation, or incitement to violence can be subject to legal action under the existing laws of the land.

While the use of emojis is protected under the freedom of speech and expression guaranteed by the Indian Constitution, it is subject to reasonable restrictions under Article 19(2). The judiciary in India has consistently upheld the importance of this freedom while also affirming the necessity of reasonable restrictions to maintain public order, decency, and morality. As with other forms of expression, the legality of emoji use will be judged on a case-by-case basis, considering the context and content of the communication.

The principles laid down can be extended to other forms of media, including digital communications involving emojis. In *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd* [10]the Supreme Court held that commercial speech (advertisements) is also protected under Article 19(1) (a). This implies that emojis used in advertisements or marketing communications are similarly protected, subject to reasonable restrictions. The case of *R. Rajagopal v. State of Tamil Nadu*[11] reinforced the right to privacy and freedom of the press. The principles of privacy versus public interest discussed in this case can apply to the use of emojis, especially when considering issues like defamation or hate speech. The use of emojis in India is covered under the broader umbrella of freedom of expression guaranteed by the Constitution. However, the context, intent, and impact of their use are crucial in determining their legality. Judicial interpretations and precedents, while not specific to emojis, provide a framework within which their use is assessed. It's essential to consider both constitutional protections and statutory limitations when using emojis in communication.

**Legislative enactments and emojis**

Defamation is one of the major grounds to curtail the right to freedom of expression under Article 15(2) of the Constitution. Therefore, it may be possible to sue someone over defamatory comments made via social media. Even though the Constitution makes such provisions, the Penal Code (Amendment) Act No. 12 of 2002 of Sri Lanka abolished criminal defamation. Hence it is no longer an element of Sri Lankan law. Reintroducing criminal defamation to the Sri Lankan legal system would be effective in addressing issues arising from digital diplomacy, as other legislations, like the Computer Crimes Act, do not extend to cover defamatory acts in digital forms to protect national security and inter-state relations.

An offence under section 120 of the Penal Code[12] of Sri Lanka pertains to the offence of 'exciting or attempting to excite disaffection' against the government. It states that "whoever by words, either spoken or intended to be read, or by signs; or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the President or to the Government of the Republic, or excites or attempts to excite hatred to or

[10] 1995 AIR 2438.
[11] 1994 SCC (6) 632.
[12] No 2 of 1883 As Amended.

contempt of the administration of justice, or excites or attempts to excite the People of Sri Lanka to procure, otherwise than by lawful means, the alteration of any matter by law established, or attempts to raise discontent or disaffection amongst the People of Sri Lanka, or to promote feelings of ill-will and hostility between different classes of such People, shall be punished with simple imprisonment for a term which may extend to two years. The growing usage of emojis in digital communication opens new possibilities for the application of Section 120 of the Penal Code. While Section 120 of the Penal Code of Sri Lanka did not originally include digital communication, its application could extend to the use of emojis in specific contexts. Particularly when it is used in political communication about the government, it could be possibly scrutinized under Section 120 of the Penal Code if it is interpreted as inciting disaffection or hostility towards the government. Emojis depicting bombs, weapons, or other violent symbols related to the government might be seen as inciting violence. Emojis that convey negative emotions, such angry faces, may also encourage disdain for or hostility against the government. Therefore, it is important to give much thought to whether emojis are illegal under this clause.[13]

Indian Penal Code (IPC) various sections of the IPC may be relevant if emojis are used inappropriately. Section 499 defines defamation as any spoken or written words, signs, or visible representations, including emojis, made or published with the intent to harm the reputation of a person. If an emoji is used in a manner that damages someone's reputation, it could be considered defamatory. Emojis can be considered a form of expression. If an emoji is used in a manner that conveys a defamatory message, it can be subject to the same legal scrutiny as a written or spoken word. Section 354A includes various forms of unwelcome sexual behavior, such as physical contact, advances, and sexually colored remarks. Sending sexually explicit emojis could be interpreted as a form of sexual harassment under this section. Section 292 deals with the sale, distribution, or public exhibition of obscene materials. This section can be applied to the digital world, including the use of obscene emojis. If an emoji is considered obscene and its use is deemed to corrupt public morals, it could be regulated under this section.

The IPC has provisions that can be applied to the misuse of emojis. Although emojis are relatively new, their inappropriate use can have serious legal consequences under defamation, sexual harassment, and obscenity laws. The interpretation of these laws in the context of emojis requires considering the context and the impact of the communication on the recipient. In India, one of the primary legal frameworks that could cover aspects of emoji use is the Information Technology Act, 2000 (IT Act, 2000). Section 67 addresses the punishment for publishing or transmitting obscene material in electronic form. Misuse of emojis to convey obscene or offensive content could fall under this section. Section 69 empowers the government to issue directions for interception or monitoring of any information through any computer resource. Emojis used in digital communications could be subject to scrutiny under this section if there are concerns about national security or cybercrime. Section 79 provides for the exemption from liability of intermediaries in certain cases.

[13] SC/FR Application135/2020.

Intermediaries like social media platforms might be required to act if emojis are used to violate content policies or laws. These provisions highlight how the IT Act, 2000, could be applicable in regulating the use of emojis, particularly in cases where they are used to transmit offensive or harmful content. Landmark judgment *Shreya Singhal v. Union of India*[14] dealt with Section 66A of the Information Technology Act, which was struck down for being unconstitutional. The section criminalized sending offensive messages through communication service, etc. The Supreme Court held that the provision was vague and overly broad, thus impinging on the right to free speech. Although the case did not specifically address emojis, it set a precedent for digital expression, including the use of emojis.

In the year 2024 the Parliament of Sri Lanka has passed the Online Safety Act, with the objectives of protecting persons against harm caused by communication of prohibited statements, by way of an online account or through an online location.[15] Section 52 the Act interpreted the word "statement" as any word including abbreviation and initial, number, image (moving or otherwise), sound, symbol or other representation, or a combination of any of these. Therefore, symbolic speech such as emojis can be included in the word "statement". Section 4 of the Act established the Online Safety Commission which has much more power to curtail the rights to freedom of expression.

According to Section 12 of the Act "any person, whether in or outside Sri Lanka, who poses a threat to national security, public health or public order or promotes feelings of ill-will and hostility between different classes of people, by communicating a false statement, commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding five hundred thousand rupees or to both such imprisonment and fine. "Section 13 states that any person, whether in or outside Sri Lanka who communicates a false statement by way of an online account or through an online location which amounts to contempt of court, in the opinion of any court which exercises the special jurisdiction to punish the offence of contempt of court, in terms of paragraph (3) of Article 105 of the Constitution or any other relevant written law, commits an offence and the provisions of that Article and relevant written law shall, mutatis mutandis, apply in sentencing such person. The Act is a tool that the government can use to control the online platforms. Therefore, unlike in the past, the citizens must be more vigilant to use emojis and symbols in the present context and the courts must adapt to this new form of communication as well.

In the context of contractual obligations emojis may be used as proof of the intention of the parties and purpose about the terms of the contract. However, interpreting might be wide, vague, and subjective which can cause confusion and even arguments.

While there are no specific laws for emojis in Sri Lanka as well as in India, it can be categorized under broader legal provisions, depending on the context and intent behind their

[14] AIR 2015 SC 1523.
[15] No 9 of 2024.

use. However still there are legal hurdles appeared in the legal landscape and it requires urgent legal attention.

## Conclusion

Emojis are like a universal language that transcends languages and reading comprehension. Emojis are becoming a common and recognized method of communication in the digital era, it is unclear if they have legal standing in most of the areas. Although they could be used as an effective communicating method their meaning is up to interpretation, which could result in confusion and disagreements. Therefore, it is crucial to pay more attention to address the challenges posed by this digital communication method by incorporating and changing the existing legal frameworks.

# Exploring the Complexities and Legal Frameworks of Group Insolvencies

***Yasir D. Pathan***[1]

## Abstract

*Group bankruptcies can be complicated. Include a look at legal frameworks and regulations. To gain an understanding of this subject, consider factors such as the group's size, the nature of its business, and the current economic conditions. It is also critical to examine the frameworks that govern group bankruptcies, such as bankruptcy and corporate governance laws. The purpose of this study is to delve into the complexities of group bankruptcies by focusing on their financial and operational dimensions. It identifies any gaps or inconsistencies that may impede the resolution process. The research looks at developments and effective strategies for dealing with situations in which multiple companies are facing insolvency. It delves into legal system improvements and innovative methods for making group insolvency proceedings more successful. A critical component of this research is a comparative analysis of different jurisdictions' legal frameworks and insolvency regimes, emphasizing the importance of harmonization and cooperation in managing cross-border group insolvencies. The evolving landscape of international insolvency law and emerging best practices receive special attention. The study investigates the role of international organizations such as UNCITRAL and INSOL International in promoting cooperation and standardization in the resolution of group insolvencies. The paper also examines the current state of affairs in India, which has not yet enacted a comprehensive legislation on cross-border insolvency, and analyses the recent judicial pronouncements that have attempted to fill the gap by applying the principles of the Model Law in some cases. The paper concludes by highlighting the need for a robust and coherent legal framework for cross-border insolvency in India, and suggests some possible reforms and recommendations for achieving the same.*

***Keywords:*** *Insolvencies, bankruptcies UNCITRAL Model Law, group solution, cross-border insolvency.*

## Introduction

The complexities of group insolvencies, intricate webs of challenges involving group structures and diverse insolvency systems, underscore the significance of addressing cross-border issues. The EU Insolvency Regulation and the UNCITRAL Model Law stand as pivotal instruments in tackling these challenges. However, the inherent tension between global coordination and local control often gives rise to conflicts within cross-border insolvency frameworks, impacting communication, cooperation, and the determination of creditor and shareholder compensation.

The concept of a “group solution” in insolvency and bank resolution is shaped by the influence of divergent legal frameworks, adding layers of complexity to the resolution process. This challenge becomes particularly pronounced in the realm of cross-border banking groups, where the necessity to navigate financial distress within a multitude of legal systems

[1] ***LL.M. (IBL) NALSAR, University of Law, Hyderabad, Email Id- yasirpathan@nalsar.ac.in.***

further complicates matters. The feasibility of centralizing proceedings and the predictability of such an approach become critical considerations in the dynamic landscape of group insolvencies. Recognizing the need for evolution, this research suggests a comprehensive approach to reshape the framework for cross-border insolvency. One key proposal involves explicit provisions within the global cross-border insolvency framework, advocating for a universalist centralized approach in administering insolvency proceedings for enterprise groups. The implementation of innovative mechanisms, such as substantive consolidation and a nuanced choice of law regime, emerges as a strategic means to streamline the resolution process, enhance efficiency, and offer clearer solutions to the intricate challenges of group bankruptcies. Furthermore, the study calls for improvements in legal systems through the adoption of frameworks like the UNCITRAL Model Law on Enterprise Group Insolvency and the European Insolvency Regulation (recast). Emphasizing the necessity for specialized coordination proceedings and a holistic approach tailored to the distinctive challenges posed by group insolvencies, these frameworks aim to provide a more coherent and effective resolution process[2].

In essence, this research highlights the imperative to bridge the gap between existing challenges and evolving solutions in the realm of group insolvencies. By embracing a universalist centralized approach, incorporating innovative mechanisms, and adopting specialized frameworks, the aim is to create coherence in addressing the nuances of group insolvencies while navigating the intricate tapestry of conflicting legal systems.

The landscape of cross-border insolvency in India has witnessed significant developments, with the application of Model Law principles playing a pivotal role in addressing the complexities of such cases. However, the absence of comprehensive legislation necessitates substantial reforms to establish a robust legal framework for cross-border insolvency. This research underscores the need for explicit provisions and rules, emphasizing the adoption of the UNCITRAL Model Law on Cross-Border Insolvency to guide and enhance India's insolvency framework. Examining recent judicial pronouncements, the study highlights instances where Model Law principles were invoked, yet acknowledges the imperative for more comprehensive legislation. Notable cases, such as *State Bank of India v. Jet Airways* and *Embassy Property Developments Pvt. Ltd. v. State of Karnataka*, showcase the pragmatic application of Model Law principles by Indian courts. Despite these strides, the research underscores the need for legislative reforms, proposing the incorporation of a separate chapter on cross-border insolvency, the establishment of a dedicated tribunal, and the introduction of mechanisms like a group representative or administrator. These reforms aim to align India's legal framework with international standards, fostering efficiency and effectiveness in addressing cross-border and group insolvency challenges[3].

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[2] https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3350877_code2179868.pdf?abstractid=3350877

[3] Title: Report on Cross-Border Insolvency Rules by Regulation Committee II - Group Insolvency Website: TaxGuru URL: https://taxguru.in/corporate-law/report-cross-border-insolvency-rules-regulation-committee-ii-group-insolvency.html

**Resolving Group Insolvencies Across Conflicting Legal Systems: Measures for Harmonizing Legal Frameworks on an International Scale**

The challenges surrounding the harmonization of legal frameworks in group insolvencies are intricate and multifaceted. This research delves into the theories of universalism and territorialism within cross-border insolvency frameworks, with a pronounced emphasis on advocating for a universalist approach. The need for a flexible and tailored strategy to harmonize legal frameworks in group insolvencies is underscored, acknowledging the intricacies of group structures and the potential for conflicts. Examining two pivotal instruments in this context, the EU Insolvency Regulation and the UNCITRAL Model Law, the research highlights their shared focus on cooperation and coordination[4]. However, it also underscores the necessity for evolution in the cross-border insolvency framework to provide more explicit and comprehensive solutions for group insolvency challenges. The research explores the divergent perspectives of universalism and territorialism. Universalism proposes a unified process of estate administration during insolvency, advocating for a single jurisdiction to govern proceedings and apply its laws. This approach promotes global cooperation across jurisdictions. In contrast, territorialism argues the impracticality of a universalist approach, emphasizing local control and sovereignty in insolvency proceedings based on the territorial location of assets and creditors. This dichotomy raises concerns about the feasibility and predictability of centralizing proceedings.

In the realm of group insolvencies on an international scale, conflicting legal systems significantly impact the resolution process. The concept of a "group solution" in insolvency law and bank resolution reflects the challenges arising from varying legal frameworks across jurisdictions. These conflicts can impede communication and cooperation, introducing complexities in determining creditor and shareholder compensation[5]. The difficulties are compounded in the context of cross-border banking groups, where the imperative to address group financial distress collides with the diverse legal systems at play. The overarching theme centers on the need for a nuanced and adaptive approach to cross-border insolvency frameworks. Whether considering the contrasting perspectives of universalism and territorialism or grappling with conflicts in legal systems during the resolution of group insolvencies, the research underscores the importance of evolving the framework to strike a balance between global coordination and local control. Ultimately, the goal is to provide clearer and more comprehensive solutions for the intricate challenges posed by group insolvencies in a cross-border context.

Some issues that may arise from these conflicts include the lack of coordination and cooperation among courts and insolvency practitioners of different countries, which may result in delays, duplication, inconsistency, and inefficiency in the resolution process. The risk

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[4] Author(s): Ilya Kokorin Title: Intra-Group Finance: A Comparative Analysis of Legal and Regulatory Frameworks Year: 2020 URL: https://www.iiiglobal.org/file.cfm/12/docs/2020_gold_ilya_kokorin_intra-group_finance.pdf

[5] Title: Group Insolvency in India Website: Jus Corpus, URL: https://www.juscorpus.com/group-insolvency-in-india/

of forum shopping and asset shifting by group members or creditors may also arise, as they may seek to take advantage of more favorable laws or procedures in certain jurisdictions. The difficulty of preserving and maximizing the value of the group, especially if the group operates as an integrated economic unit with interdependent assets, liabilities, and functions, may also be disrupted or destroyed by separate and uncoordinated proceedings. The conflicting legal systems can significantly impact the resolution of group insolvencies on an international scale. This impact arises from the potential for inconsistent outcomes, lack of recognition of foreign insolvency proceedings, and difficulties in coordinating the insolvency processes of related companies across different jurisdictions. These challenges can lead to inefficiencies, increased costs, and delays in the resolution of group insolvencies[6].

**Harmonize legal frameworks across jurisdictions, several measures can be taken:**
Insolvency proceedings and group insolvencies are complex issues that require a comprehensive approach. Model laws, such as the UNCITRAL Model Law on Cross-Border Insolvency, can provide a common legal framework for resolving these cases. International cooperation and recognition of foreign insolvency proceedings can promote consistency and efficiency in resolving group insolvencies. Standardized rules and mechanisms for linking affiliates in insolvency cases under domestic laws can promote harmonization and consistency in outcomes across different legal regimes. Clear and objective tests for linking mechanisms and insolvency tools can provide guidance and certainty in decision-making across jurisdictions, leading to more predictable outcomes and reduced conflicting legal interpretations. This approach can lead to more efficient and effective processes for handling multinational corporate group insolvency cases.

Legal instruments and initiatives can also help address the challenges of enterprise group insolvencies, providing a framework for cross-border cooperation and the recognition of insolvency proceedings in different jurisdictions. Harmonizing legal principles related to creditor and shareholder compensation, substantive consolidation, and the "no-creditor-worse-off" principle can contribute to a more consistent approach to group insolvencies across jurisdictions. Strengthening domestic laws and institutions for dealing with group insolvencies, such as separate legal personality, asset partitioning, and limited liability, can ensure the availability and accessibility of effective insolvency procedures and remedies for group members and creditors.

Policy alignment is a crucial process in corporate insolvency and bank resolution, as it ensures that the policy objectives and societal values of different legal systems are consistent and compatible. These mechanisms are essential for dealing with the financial distress or failure of corporations and banks, which may have significant implications for the economy, the financial system, and society. However, in the case of group insolvencies, which involve multiple entities, creditors, stakeholders, and jurisdictions, the policy objectives and societal

[6] Ilya Kokorin, Intra-Group Finance: A Comparative Analysis of Legal and Regulatory Frameworks Year: 2020 URL: https://www.iiiglobal.org/file.cfm/12/docs/2020_gold_ilya_kokorin_intra-group_finance.pdf

values of different legal systems may not be aligned or harmonized, which may create conflicts and challenges in the resolution process[7].

Aligning policy objectives and societal values in corporate insolvency and bank resolution across different legal systems can help promote a more cohesive and effective approach to resolving group insolvencies. Benefits of policy alignment include enhancing cooperation and coordination among courts and insolvency practitioners of different jurisdictions, preventing forum shopping and asset shifting by group members or creditors, preserving and maximizing the value of the group, increasing the certainty and predictability of the outcome of the resolution process, and ensuring fairness and equity among creditors and stakeholders of different group members[8]. To achieve policy alignment, measures can be taken such as adopting and implementing international standards and guidelines for dealing with group insolvencies, developing and enhancing regional and bilateral arrangements and agreements for cooperation and coordination in cross-border insolvency matters, promoting and encouraging the use of alternative and informal methods and tools for resolving group insolvencies, and strengthening and harmonizing domestic laws and institutions for dealing with group insolvencies[9].

Pareto-efficient solutions, which benefit at least one party while harming no other party, can aid in achieving the goals of insolvency law and bank resolution across international borders[10]. Various approaches and tools can be utilized for attaining these solutions, including fostering cooperation and coordination among courts and insolvency practitioners across jurisdictions, adopting and implementing collective solutions, and leveraging alternative and informal methods to resolve group insolvency. Ensuring policy alignment is crucial to corporate insolvency and bank resolution, promoting a cohesive approach to addressing group insolvencies. By ensuring that policy objectives and societal values are consistent and compatible across different legal systems, group members can work together to address the financial distress and failure of corporations and banks, ultimately benefiting the economy, the financial system, and society[11].

**Improving Legal Systems for Group Bankruptcies and Innovative Methods for Successful Group Insolvency Proceedings**

The complexities of group bankruptcies can be addressed by implementing innovative methods that promote cooperation and coordination across multiple jurisdictions. One approach is to develop explicit provisions and rules regarding group insolvencies within the

[7] Title: Group Insolvency in India Website: Jus Corpus, URL: https://www.juscorpus.com/group-insolvency-in-india/

[8] Cross-Border Bank Resolution: A Joint Paper by the Resolution Committees of the Basel Committee on Banking Supervision and the International Organization of Securities Commissions

[9] Author(s): N/A Title: Article Journal: N/A Year: N/A Volume: N/A Issue: N/A Page Range: N/A DOI: 10.1002/iir.1370 URL: https://onlinelibrary.wiley.com/doi/pdf/10.1002/iir.1370

[10] DOI: 10.1007/s40804-021-00220-4 URL: https://link.springer.com/article/10.1007/s40804-021-00220-4

[11] Pareto Efficiency, Website: Investopedia, URL: https://www.investopedia.com/terms/p/pareto-efficiency.asp, Year Accessed: N/A

global cross-border insolvency framework, which could involve formulating regulations that endorse the practice of centralization in group insolvency cases. This would provide more clarity and direction for the administration of insolvency proceedings involving enterprise groups. When insolvency occurs within an integrated group, the legal system can be improved by ensuring that a global centralized approach is available.[12]. Implementing a universalist centralized approach, where all processes take place in one forum that applies its laws, is one innovative method for making group insolvency proceedings more successful.

This concentration of the process and laws can help to facilitate a group-wide solution, which benefits integrated groups that go bankrupt as a whole. Strategic use of coordination mechanisms, as well as procedural or substantive consolidation, can improve group treatment efficiency during insolvency proceedings. These innovative methods can help streamline the administration of group insolvencies, promote efficiency, and provide clearer solutions for the complexities of enterprise group bankruptcies. A universalist centralized law solution is often the preferred choice for group insolvency, where all the processes take place in one forum. This concentration of the process and laws can help to facilitate a group-wide solution, which benefits integrated groups that go bankrupt as a whole. The adoption of the UNCITRAL Model Law on Cross-Border Insolvency is one approach to harmonizing legal frameworks across jurisdictions[13].

A sufficiently nuanced choice of law regime can be adopted to address conflicts between pre-insolvency rights and post-insolvency restructuring, allowing the central (main) group forum to address the applicable law question more flexibly. A private international law analysis will enable efficient solutions during insolvency and promote insolvency goals[14].

The determination of a multinational enterprise group's center of main interests (COMI) raises the possibility of conflict. These disagreements arise from the clash of pre-insolvency rights and post-insolvency restructuring efforts. Addressing these conflicts necessitates a nuanced choice of legal regime, allowing the central group forum to navigate applicable legal questions. If a dispute arises, the main group forum, which is usually located at the group headquarters, may be required to honor creditor pre-insolvency entitlements under the subsidiary's COMI insolvency law. However, caution is advised because the blanket application of local laws may prove counterproductive to achieving comprehensive and effective group-wide solutions. Other rules and processes emanating from the group center are justified, as they align with the overarching goal of promoting insolvency goals and facilitating efficient solutions during insolvency proceedings. Nonetheless, the significant impact of conflicting legal systems on the international resolution of group insolvencies introduces inefficiencies and conflicting court rulings. To address these challenges and

[12]: NLIU Law Review Year: 2021 Volume 9 Issue 12 Page ,https://www.nliulawreview.nliu.ac.in/wp-content/uploads/2021/01/M403.pdf

[13]Cross-Border Insolvency, UNCITRAL Model Law and Indian Insolvency and Bankruptcy Code, https://uncitral.un.org/sites/uncitral.un.org/files/pages/RCAP/panel_1_dr._risham_garg.pdf

[14] Mevorach, Irit ,2007, Appropriate treatment of corporate groups in insolvency a universal view Journal European Business Organization Law Review, Volume 8 Issue: 2 Pages: 179-194 ISSN: 1566-7529

promote cross-jurisdictional harmonization, two proposed measures include a greater reliance on substantive consolidation for determining the COMI and a requirement for the adoption of a Protocol as a prerequisite to accessing the Model Law's procedural benefits[15].

In an effort to enhance legal systems and address the complexities of group bankruptcies, the incorporation of innovative methods and mechanisms is essential. One such approach involves introducing clear and objective tests to evaluate proposed mechanisms, thereby promoting certainty and clarity in judicial outcomes. This initiative seeks to establish a standardized set of rules that fosters harmonization, increasing the likelihood that judgments on such matters will be universally recognized and enforced by national courts. Moreover, innovative methods designed to bolster the success of group insolvency proceedings include the utilization of flexible tools[16]. These tools should be tailored to accommodate the unique needs of each case while judiciously limiting their capacity and scope. The overarching objective is to develop mechanisms that leverage functional factors related to the implementation of insolvency laws, thereby seeking solutions that are minimally disruptive to corporate personality and limited liability. In cohesively integrating these approaches, the aim is to create a more streamlined and effective framework for addressing the inherent challenges in group insolvencies on a global scale.

**Improving Legal Systems to Address the Complexities of Group Bankruptcies Involves Several Innovative Methods and Measures.**

The UNCITRAL Model Law on Enterprise Group Insolvency is a comprehensive framework for promoting improved coordination and cooperation among regulatory authorities and insolvency practitioners from different jurisdictions. This can help group companies manage insolvency proceedings more efficiently by allowing for the recognition and relief of foreign proceedings as well as the development and implementation of group solutions for restructuring or liquidation. Specialized group coordination proceedings can assist in concentrating insolvency proceedings in a single court and appointing the same insolvency practitioner for separate proceedings, thereby streamlining the resolution process for group insolvencies.

The European Insolvency Regulation (recast) establishes a common legal framework for the recognition and coordination of insolvency proceedings within the European Union, providing specific rules and mechanisms for dealing with group insolvencies. Legal systems should recognize the specific challenges posed by group insolvencies and adapt to the group reality. This involves acknowledging the close operational and financial links between group members and adopting a more holistic approach to insolvency proceedings. Benefits of adopting a more holistic approach include preserving and maximizing the value of the group,

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[15] Commissions Basel Committee on Banking Supervision and International Organization of Securities Commissions https://www.bis.org/publ/gten06a.pdf

[16] Henry Peter describes this phenomenon as privileging "form over substance." Cf Henry Peter, Insolvency in a Group of Companies, Substantive and Procedural Consolidation: When and How?, in THE CHALLENGES OF INSOLVENCY LAW REFORM IN THE 21' CENTURY 199 (Henry Peter et al. eds., 2006).

enhancing the efficiency and effectiveness of the insolvency process, increasing the certainty and predictability of the outcome, and ensuring fairness and equity among creditors and stakeholders of different group members.

Modern legal instruments, such as the Bank Recovery and Resolution Directive (BRRD) and the European Insolvency Regulation (EIR) Recast, can offer specialized mechanisms and tools for dealing with the challenges of enterprise group insolvencies. Promoting and encouraging the use of informal and alternative methods and tools for resolving group insolvencies, such as mediation, arbitration, protocols, and guidelines, may provide greater flexibility, speed, and cost-effectiveness than formal and judicial proceedings. Intra-group rescue financing can be improved further by allowing enterprise group members who are insolvent to provide or facilitate post-commencement finance or other financial assistance to other group members who are insolvent[17]. Intra-group rescue financing can take many forms, including intra-group loans, cross-guarantees, collateral provision, and equity injections. Intra-group rescue financing, on the other hand, can create conflicts of interest and agency issues among members, creditors, and insolvency practitioners, who may have different incentives and objectives for providing or receiving financial assistance. It can also call into question the bedrock principles of modern commerce and corporate law, such as separate legal personality, asset partitioning, and limited liability, potentially exposing group members and creditors to the risk of transaction avoidance or claw back actions, which may call into question the validity or enforceability of intra-group financial transactions and may require repayment or return of financial assistance.

Legal systems can be improved by allowing enterprise group members to provide post-commencement finance or other financial assistance to other group members in insolvency proceedings. However, safeguards and conditions must be established for such transactions. These include requiring the approval of the court or insolvency practitioner for intra-group financial assistance, granting priority status to intra-group financial assistance, and encouraging the development and implementation of group solutions for restructuring or liquidation. UNCITRAL and the World Bank have issued international standards and guidelines for dealing with group insolvencies, such as the UNCITRAL Model Law on Enterprise Group Insolvency1 and the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes[18]. These instruments provide a flexible framework for cooperation and coordination among courts and insolvency practitioners, recognition and relief of foreign proceedings, and development and implementation of group solutions. They also recognize and support the provision of intra-group financial assistance, subject to certain safeguards and conditions. Harmonization of legal principles related to group insolvencies can contribute to a more consistent approach across jurisdictions, especially in the context of cross-border insolvencies and group solutions. Cross-border insolvencies involve entities, creditors, assets,

[17] Mevorach, Irit ,Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge.

[18] ed.Christoph G. Paulus, Group Insolvencies - Some Thoughts about New Approaches, 42 TEX. INT'l L.J. 819 (2007). ALWD 7th ed. Christoph G. Paulus, Group Insolvencies - Some Thoughts about New Approaches, 42 Tex. Int'l L.J. 819 (2007).

or proceedings in more than one jurisdiction, while group solutions provide a comprehensive and holistic solution for restructuring or liquidation of an integrated economic unit.

The UNCITRAL Model Law on Enterprise Group Insolvency[19] is a framework designed to increase participation and coordination among courts and insolvency practitioners in different jurisdictions. It creates a flexible and comprehensive framework for collaboration and coordination among courts and insolvency practitioners, preventing gathering shopping and asset shifting by group members or creditors. The law also ensures that the group's value is preserved and increased, particularly if it operates as a coordinated monetary unit with related assets, liabilities, and functions.

The UNCITRAL Model Regulation on Enterprise Group Insolvency establishes a flexible and comprehensive framework for court and insolvency expert collaboration and coordination, recognition and assistance with unfamiliar proceedings, and improvement and execution of group solutions for restructuring or liquidation. It also strengthens territorial and respective arrangements and agreements for cross-border insolvency participation and coordination, such as the recast European Insolvency Guideline. Adopting and implementing the principles of separate legitimate personality, asset parceling, and limited liability, as well as strengthening and harmonizing domestic laws and institutions for managing group insolvencies, is critical for ensuring the accessibility and accessibility of compelling and productive insolvency procedures and remedies for group members and creditors[20].

By implementing these innovative methods and measures, legal systems can be improved to address the complexities of group bankruptcies and make group insolvency proceedings more successful. This includes implementing substantive and procedural consolidation, which allows for the coordination of insolvency proceedings for multiple entities within a group, increasing efficiency and reducing the burden of multiple separate proceedings. Innovative methods to make group insolvency proceedings more successful include the adoption of the universality principle, which allows for secondary proceedings to be opened in every member state where the debtor has an establishment, streamlining the process while respecting the territoriality principle. Increased deliberations and recognition of the need for intensified discussions, particularly in continental Europe, have been observed following the enactment of the European Insolvency Regulation in mid-2002[21].

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[19] Paulus, Christoph G., Group Insolvencies - Some Thoughts About New Approaches Journal

[20] Mevorach, I. (2014). Cross-border insolvency of enterprise groups the choice of law challenge Journal Article Type, Article Publication Jan 1, 2014, Sep 2, 2015 Publicly Available Date Sep 2, 2015 Journal Brooklyn Journal of Corporate, Financial and Commercial LaElectronic ISSN,1934-2497Peer Reviewed Peer Reviewed,Volume9, Issue 1

[21] Sexton, Anthony V. (2012) "Current Problems and Trends in the Administration of Transnational Insolvencies Involving Enterprise Groups: the Mixed Record of Protocols, the UNCITRAL Model Insolvency Law, and the EU Insolvency Regulation," *Chicago Journal of International Law*: Vol. 12: No. 2, Article 10.

**Recent Judicial Pronouncements on Cross-Border Insolvency and Reforms needed for a Robust Legal Framework**

In India, the Insolvency Guideline has been a significant consideration in addressing the complexities of cross-border insolvency cases. The Model Law principles were used to interpret foreign proceedings against related companies, including those registered in the nearby discussion, within the jurisdiction of the group head office. This centralized administration of group proceedings and material laws has been subject to conditions reflecting decentralization scenarios and the protection of neighborhood creditors' interests. Reforms are required in India to establish a strong legal framework for cross-border insolvency. These reforms could include the inclusion of express provisions and rules governing group insolvencies within the global cross-border insolvency framework. The country may also need to consider developing choice of law rules to address international insolvency groups, as well as clarifying relief provisions to provide greater clarity and guidance for group insolvency cases. The requirement for such rules has been perceived by UNCITRAL, which is currently considering the improvement of its system to manage insolvent global groups.

It has stated that it intends to extend the selection of legitimate rules in ongoing projects. Such initiatives are especially significant considering the Model Law's sometimes inconsistent application, especially the enigmatically characterized alleviation provisions[22]. In the absence of comprehensive legislation, ongoing judicial pronouncements have applied Model Law principles to address cross-border insolvency issues. Several reforms are required in India to establish a strong legal framework for cross-border insolvency. These reforms should concentrate on increasing the requirement for foreign insolvency judgments and advancing more notable assurance and proficiency in cross-border insolvency cases. The Insolvency The regulatory framework is based on the concept of "modified universality," which states that an insolvency proceeding initiated in one member state is automatically recognized in all other member states. The adoption of the universality principle, which allows for secondary proceedings to be opened in every member state where the debtor has an establishment, may be one of the reforms required to establish a robust legal framework for cross-border insolvency in a country. This streamlines the process while respecting the territoriality principle.

**Perspective and applicability on India and its legal framework**

Because India's insolvency framework lacks comprehensive cross-border insolvency legislation, cases involving foreign creditors, assets, or proceedings are resolved using Model Law principles. The Indian judiciary has recognized the need to align its insolvency framework with international best practices, with the Model Law serving as a guide. Reforms, including the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, are required to establish a strong legal framework for cross-border insolvency. India's domestic

[22] Henry Peter describes this phenomenon as privileging "form over substance." Cf Henry Peter, Insolvency in a Group of Companies, Substantive and Procedural Consolidation: When and How? in The Challenges of Insolvency Law Reform in the 21' Century 199 (Henry Peter et al. eds., 2006).

insolvency laws may also need to be amended to facilitate cooperation and coordination with foreign jurisdictions, as well as the recognition and enforcement of foreign insolvency proceedings[23]. which is widely accepted as the global standard for dealing with cross-border insolvency issues[24]. Some of these pronouncements are:

**In the case of State Bank of India v. Jet Airways (India) LtD[25],**
The NCLT recognized the foreign insolvency proceedings initiated against Jet Airways in the Netherlands and allowed the Dutch administrator to participate and cooperate in the domestic insolvency proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC). The NCLT applied the principle of comity of courts and the doctrine of modified universalism, both of which are consistent with the Model Law, and determined that recognition of foreign proceedings would facilitate maximization of the value of the corporate debtor's assets and the interests of all stakeholders.

**In the case of Embassy Property Developments Pvt. Ltd. v. State of Karnataka[26] ,**
The Supreme Court of India upheld the validity of the bilateral investment treaty (BIT) between India and Mauritius, and ruled that the foreign award rendered in favor of the foreign investor by the arbitral tribunal in Singapore was enforceable in India. The Supreme Court noted that the BIT was intended to promote and protect cross-border investments, and that the enforcement of foreign awards was consistent with the Model Law's principle of cooperation and coordination among different jurisdictions.

**In the case of Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd[27],**
The Supreme Court of India ruled that a foreign operational creditor can initiate insolvency proceedings against a domestic corporate debtor under the IBC without seeking permission from the Reserve Bank of India or any other authority. The Supreme Court also ruled that a foreign creditor can send a demand notice to a corporate debtor via email, and that a foreign bank can obtain a certificate from a financial institution confirming the existence of a debt. The Supreme Court applied the principles of access and non-discrimination, which are also enshrined in the Model Law, and held that for the purposes of the IBC, the foreign creditor should be treated equally with the domestic creditor. The pragmatic approach taken by Indian courts in addressing cross-border insolvency cases, grounded in the application of Model Law principles, is a commendable step towards international best practices. However, recognizing the need for a more robust and comprehensive legal framework, additional reforms are imperative to establish a coherent cross-border insolvency regime in India.

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[23] Dr. Risham Garg, Cross-Border Insolvency: UNCITRAL Model Law and Indian Insolvency and Bankruptcy Code, https://uncitral.un.org/sites/uncitral.un.org/files/pages/RCAP/panel_1_dr._risham_garg.pdf.
[24] Cross-Border Insolvency Law Website: SCC Online Blog https://www.scconline.com/blog /post/2021 /04/16/cross-border-insolvency-law/ April 16, 2021.
[25] *Jet Airways (India) Limited vs State Bank of India & Anr* 26 September, 2019 Bench: S.J. Mukhopadhaya Chairperson, A.I.S. Cheema, Kanthi Narahari National Company Law Appellate Tribunal New Delhi Company Appeal (AT) (Insolvency) No. 707 of 2019.
[26] *Embassy Property Developments Pvt. Ltd. v. State of Karnataka* is 2019 SCC OnLine SC 1542.
[27] Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd is (2018) ibclaw.in 283 NCLAT.

To bridge this gap, reforms should center around enacting and implementing cross-border insolvency legislation based on the Model Law, albeit with suitable modifications tailored to the unique context of India. Key reforms encompass the incorporation of a dedicated chapter on cross-border insolvency within the Insolvency and Bankruptcy Code (IBC)[28]. This addition would signify a clear commitment to addressing the intricacies of cross-border cases and would provide a structured legal framework for such scenarios. Further reforms involve the establishment of a specialized tribunal or authority exclusively designated to handle cross-border insolvency cases. This initiative aims to streamline proceedings, ensuring a more efficient and focused resolution process. Additionally, introducing a group representative or administrator, along with the creation of a group creditor committee, would enhance the inclusivity and representation of diverse stakeholders in the decision-making process. The development of a group insolvency resolution plan is another pivotal reform. This strategic document would provide a comprehensive roadmap for addressing insolvency within a group context, aligning with international standards and facilitating effective coordination among various entities[29].

In essence, these proposed reforms collectively aim to align India's cross-border and group insolvency legislation with international best practices, ensuring conformity and enhancing the overall efficiency and effectiveness of the insolvency regime in the country. By introducing dedicated provisions, specialized authorities, and inclusive mechanisms, these reforms seek to create a more coherent and adaptive framework capable of addressing the complexities inherent in cross-border insolvency cases while fostering global compliance.[30].

**Findings and recommendations**

In the realm of insolvency law and bank resolution, there has been a rise in the concept of group solutions as an alternative to the traditional approach of addressing each entity separately. These group solutions aim to safeguard and optimize the value of the insolvency estate, ultimately benefiting the creditors. However, implementing such solutions is not without its challenges, including conflicts of interest, communication and cooperation barriers, and the need to strike a balance between short-term and long-term advantages for creditors and stakeholders. To tackle these hurdles, it is crucial to improve coordination and collaboration among regulatory authorities and insolvency practitioners worldwide.

Additionally, adopting international standards like the UNCITRAL Model Law on Enterprise Group Insolvency serves as an important legal foundation and tool in the realm of group insolvency, specialized group coordination proceedings, recognition of group reality, modern legal instruments such as the Bank Recovery and Resolution Directive (BRRD) and the

[28] https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd0138211640994127c27.pdf.

[29] Author: Paulus, Christoph G. Year: N/A Title: Group Insolvencies - Some Thoughts About New Approaches Journal: N/A.

[30] Cross-Border Insolvency Regime in India, Mondaq, N/A, https://www.mondaq.com/ india/ insolvency bank ruptcy/1123982/cross-border-insolvency-regime-in-india.

European Insolvency Regulation (EIR) Recast, intra-group rescue financing, legal principle harmonization, substantive and procedural consolidation, and the universality principle. Coordination and cooperation among regulatory authorities and insolvency practitioners around the world is critical for dealing with group insolvencies. Modern legal instruments, such as the Bank Recovery and Resolution Directive (BRRD) and the European Insolvency Regulation (EIR) Recast, can provide specialized mechanisms for dealing with the unique challenges of enterprise group insolvencies. Implementing substantive and procedural consolidation can reduce inefficiencies and administrative burdens by streamlining insolvency proceedings for multiple entities within a group.

**Recommendations**

In the realm of Indian insolvency and bankruptcy, group insolvencies pose a significant challenge. To address this issue, the UNCITRAL Model Law on Cross-Border Insolvency serves as a vital tool. However, the current approach in India lacks a binding legal framework, relying instead on case-specific interpretations. This legislative gap necessitates reforms to establish a strong foundation for cross-border insolvency. These reforms may encompass the inclusion of a dedicated chapter on cross-border insolvency within the existing Indian Insolvency and Bankruptcy Code (IBC), the establishment of a specialized tribunal or authority, the introduction of roles for group representatives, the formation of a group creditor committee, and the creation of a comprehensive plan for resolving group insolvencies. It is crucial for India to align its insolvency laws with global standards, recognizing the significance of international harmony. By harmonizing domestic laws with the UNCITRAL Model Law and embracing international best practices, effective resolution of cross-border insolvencies can be achieved. The proposed reforms aim to enhance the efficiency and effectiveness of India's insolvency regime, particularly in managing intricate group insolvencies. Through the provision of a clear legal basis and procedural mechanisms, these reforms will facilitate cooperation, coordination, and the development of solutions that encompass the entire group.

**Conclusion**

Finally, as a response to the challenges posed by enterprise group insolvencies, the concept of a group solution in insolvency law has emerged. The traditional entity-by-entity approach frequently results in the loss of group synergies and suboptimal results for creditors and stakeholders. The recognition of the specificity of problems related to the insolvency of enterprise groups has influenced the emergence of group solutions, leading to the development of various approaches, tools, and practices to address these challenges. However, a clear and well-defined legal principle for group solutions has yet to emerge. Instead, it represents a collection of various approaches, tools, and practices addressing issues common to enterprise groups.

This variability ensures flexibility, but it may stymie efforts at harmonization and the development of cross-national group solutions. The international resolution of group insolvencies is a complex and difficult task, owing to conflicting legal systems across

jurisdictions. The opposing theories of universalism and territorialism highlight the disparities in approaches to administering insolvency proceedings and applying laws across borders. The difficulties resulting from these conflicts include a lack of coordination, the risk of forum shopping, and the difficulty in preserving the group's value. Legal framework harmonization efforts are critical for addressing these challenges. Adopting model laws, promoting international cooperation, and establishing standardized rules can all help to make the resolution process more cohesive and efficient.

Initiatives emphasizing cooperation and coordination include the UNCITRAL Model Law on Cross-Border Insolvency and the EU Insolvency Regulation. Clear and objective linking mechanism tests, as well as the development of legal instruments, can improve predictability and reduce conflicting interpretations. Policy convergence emerges as a critical factor in promoting a consistent approach to group insolvencies. Aligning policy objectives and societal values across jurisdictions can help to avoid forum shopping, maintain group value, and ensure fairness among creditors and stakeholders. International standards, regional agreements, and alternative dispute resolution methods can all help to achieve policy alignment. Despite their challenges, Pareto-efficient solutions offer a promising avenue for addressing the goals of insolvency law and bank resolution across borders. Cooperation, group solutions, and alternative methods can all help to maximize the value of group assets, preserve the business, and protect creditors' rights.

Harmonizing legal frameworks in group insolvencies requires a comprehensive and flexible approach. The recognition of diverse group structures, as well as the need for cooperation and coordination, highlight the significance of evolving the cross-border insolvency framework. Developing effective and efficient solutions in the complex landscape of international group insolvencies requires striking a balance between global coordination and local control while respecting the rights and interests of all stakeholders. Despite the country's lack of comprehensive legislation, recent judicial pronouncements in India have demonstrated a willingness to apply Model Law principles to cross-border insolvency cases. These decisions reflect Indian courts' pragmatic approach to aligning the domestic insolvency framework with international best practices. Creating a comprehensive legal framework that is aligned with international best practices will help the country resolve cross-border insolvency cases more effectively and efficiently.

# Enhancement in Delinquency and Riots: Impact of Social Media

***Prashant Gupta***[1]

## Introduction

Freedom of speech is a fundamental human right essential to the functioning of democratic societies. This includes the freedom to share and receive information without fear of censorship or reprisal, in addition to the freedom to voice one's thoughts and beliefs. The protection of free speech promotes diversity of opinion, critical thinking, and the ability for people to question established structures and conventions. However, in order to strike a balance between the defence of individual liberties and the maintenance of public order and the rights of others, it is necessary to understand that freedom of speech is not unrestricted and may be subject to restrictions, such as laws banning hate speech or the inciting of violence. Unchecked hate speech propagation can plant seeds of distrust and enmity within communities, which can eventually result in acts of vigilante justice. the right to free speech can occasionally have unforeseen repercussions, especially when it combines with false information and calls for violence. Mob lynching occurrences have been connected in recent times to the dissemination of aggressive speech and misleading information through various media channels.

Lynching phenomenon is not new in Indian context but recent increase in the lynching incidents is not only surprising but utterly shocking for any person who believes in democratic principles. India is observing a high rise in cases relating to lynching. When the people take law into their own hands it can be dangerous for the victim who is in threat of their lives. While it is difficult to say whether the number of lynching cases have gone up in India, the broadcast of such crimes on social media must worry us because it will normalise such heinous crimes.[2] Mob lynching also raise another disturbing question: are people losing faith in the judicial/democratic system of governance? And because a mob dispenses what it thinks is justice by itself, it often chooses its victim and the mode of justice. The targets are often the most vulnerable of society.

Hon'ble Supreme Court in *Tehseen S. Poonawalla v. Union of India*[3] held that "It is our constitutional duty to take a call to protect lives and human rights. There cannot be a right higher than the right to live with dignity and further to be treated with humanness that the law provides. What the law provides may be taken away by lawful means; that is the fundamental concept of law. No one is entitled to shake the said foundation. No citizen can assault the

[1] ***LL.M. (Constitutional and Administrative Law) 2nd Semester, Shri Ramswaroop Memorial University, Lucknow, Email Id- guptaprashant9015@gmail.com.***
[2]Why India doesn't need a lynching law, Hindustan Times, dt. 9.7.2018
[3](2018) 6 SCC 72-90 at p. 86.

human dignity of another, for such an action would comatose the majesty of law. In a civilized society, it is the fear of law that prevents crimes. Commencing from the legal space of democratic Athens till the legal system of modern societies."

There is no particular arrangement in IPC (Indian Penal Code) which states lynching as a wrongdoing. There is no specific provision in IPC (Indian Penal Code) which states lynching as a crime. The fervour of the lynch mobs was largely facilitated by social media, which efficiently delivered rumours to solidify a "common cause. “So, the big difference between the lynching phenomenon of the past and the present acts is the role of social media”.[4]

**Meaning of the Term**

The origin of the word ‘lynch’ is said to have originated during the American Revolution phrased as ‘Lynch Law’ which is a punishment without trial. The word ‘lynch’ or ‘lynch law’ has been derived from two Americans known as Charles Lynch and William Lynch who were from Virginia. During 1782, Charles Lynch had wrote that the ‘Loyalist’ or ‘Tories’ who were supporters of British side were provided Lynch Laws to deal with the ‘Negroes’.

Lynching is the summary execution by private persons for alleged offenses without due process of law, or simply death at the hands of a mob. Lynch deaths were usually by hanging but also could be by shooting, burning, or beating.[5] James E. Cutler, one of the first lynching researchers, said in 1905, "There 1s usually more or less public approval, or supposed favourable public sentiment, behind a lynching. Indeed, it is not too much to say that popular justification is the sine qua non of lynching," distinguishing it from murder, assassination, or insurrection.[6]

"Lynching" means any act or series of acts of violence or aiding, abetting such act/acts thereof, whether spontaneous or planned, by a mob on the grounds of religion, race, caste, sex, place of birth, language, dietary practices, sexual orientation, political affiliation, ethnicity or any other related grounds or on mere suspicion of commission of a cognizable crime not amounting to heinous one.[7] “Mob” means a group of two or more individuals, assembled with a common intention of lynching.[8] Thus if two or more individuals commit a crime on any of the above ground they can be termed as offenders of mob lynching.

**Causes of Mob Lynching**

There can be no incident without any cause, several causes of mob lynching are as follows:

**Psychological Causes**

There are 2 popular theories from which the psychology of mob can be understood. Deindividuation theory argues that in typical crowd situations, factors such as anonymity,

[4]Bhaskar Chakravorti, A Lynching in Digital South, The Indian Express, dt. 17.7.2018.
[5]James E. Cutler, Lynch-Law (New York: Negro Universities Press, 1905) 276.
[6]id at 277.
[7]s. 2(d) of The Manipur Protection from Mob Violence Ordinance, 2018.
[8]s. 2(e) of The Manipur Protection from Mob Violence Ordinance, 2018.

group unity, and arousal can weaken personal controls (e.g. guilt, shame, self-evaluating behaviour) by distancing people from their personal identities and reducing their concern for social evaluation. This lack of restraint increases individual sensitivity to the environment and lessens rational forethought, which can lead to antisocial behaviour. More recent theories have stated that deindividuation hinges upon a person being unable, due to situation, to have strong awareness of their self as an object of attention. This lack of attention frees the individual from the necessity of normal social behaviour.[9]

Convergence theory holds that crowd behaviour is not a product of the crowd, but rather the crowd is a product of the coming together of like-minded individuals. Floyd Allport argued that "An individual in a crowd behaves just as he would behave alone, only more so." Convergence theory holds that crowds form from people of similar dispositions, whose actions are then reinforced and intensified by the crowd.[10]

**Political Causes**

These hate crimes flourish most of all because of the enabling climate for hate speech and violence which is fostered and legitimised from above, which frees people to act out their prejudices; and the impunity assured by state administrations to the perpetrators. Senior ministers and elected representatives frequently come out in open defence of the attackers, charging the victims with provoking the attacks.[11]

**Social Causes**

There can be nothing which is free from social factors. Social change is the truth of present time and due to these changes various problems in the society occurs like unemployment, lack of good education, poverty, drug addiction etc. Social control theory proposes that people's relationships, commitments, values, norms, and beliefs encourage them not to break the law. Thus, if moral codes are internalized and individuals are tied into and have a stake in their wider community, they will voluntarily limit their propensity to commit deviant acts. Hence in contemporary scenario the social control weakens in the society which led into violence and ultimately results into mob violence.[12]

**Effects of Mob Lynching**

**Effects on state:** It is against the constitutionalism of our Indian Constitution. Each and every person (for some rights citizen) have certain fundamental rights guranteed by The Constitution of India violation of which would result into curtailment of their rights. This may led to grow the feeling of sub nationalism. Some radical organization may take benefit of such incident which will be harmful for the state machinery.

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[9]Manstead, ASK; Hewstone, Miles (1996). Blackwell Encyclopedia of Social Psychology. Oxford, UK: Blackwell. pp. 152–154

[10]Allport, Floyd (1924). Social Psychology. Boston. p. 295.

[11]Several times it was said as spontaneous, Newton's third law of motion, a puppy etc. cited from www.thewire.in /communalism/mob-violence-lynching-government-legal-process

[12]Mitchell, Role Taking and Recidivism: A Test of Differential Social Control Theory

**Effects on Society**

This impact social solidarity and idea of unity in diversity. These incidents generate a phenomenon of majority v minority. It could enhanced the hatred on the basis of caste, class or community. This may led to internal conflict among the citizens of the country.

**Effects on Economy**

These events impact both domestic as well as foreign investment thereby adverse effect could be seen on economy. Many international organization took cognizance of incidents of mob lynching. Internal migration took place and because of which it affects economy. Large rumour deployed to tackled such menaces enhanced the burden on state exchequer.

**Legal Regime for Mob violence**

Presently there is no separate law dealing with mob lynching but it could be brought under various present provisions of The Indian Penal Code, 1860 (hereinafter referred as IPC). If a mob kills a person his case will be brought under s.302[13] or s.304.[14] If death has not been committed and instead of death any other harm has been caused then for that purpose liability under s.323[15], s.324[16], s.325[17] and s.326[18] may be imposed. Mob is an unlawful assembly so the offences related to unlawful assembly also applicable on mob. Being an offence

[13]Punishment for murder.-- Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

[14]Punishment for culpable homicide not amounting to murder.-- Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death. or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

[15]Punishment for voluntarily causing hurt.-- Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

[16]Voluntarily causing hurt by dangerous weapons or means.-- Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[17]Punishment for voluntarily causing grievous hurt.- Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[18]Voluntarily causing grievous hurt by dangerous weapons or means.-- Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

committed by two or more persons the provisions relating to joint and constructive liability[19] are also applicable. Attempt[20] as well as abetment of the offences above-mentioned are also punishable.

Hon'ble Supreme Court in *Poonawalla case*[21] gave following guidelines

**Preventive Measures**

(i) The State Governments shall designate, a senior policeofficer, not below the rank of Superintendent of Police, as Nodal Officer in each district. Such Nodal Officer shall be assisted by one of the DSP rank officers in the district for taking measures to prevent incidents of mob violence and lynching. They shall constitute a special task force so as to procure intelligence reports about the people who are likely to commit such crimes or who are involved in spreading hate speeches, provocative statements and fake news.

(ii) The State Governments shall forthwith identify Districts, Sub-Divisions and/or Villages where instances of lynching and mob violence have been reported in the recent past, say, in the last five years. The process of identification should be done within a period of three weeks from the date of this judgment, as such time period is sufficient to get the task done in today's fast world of data collection.

(iii) The Secretary, Home Department of the concerned States shall issue directives/advisories to the Nodal Officers of the concerned districts for ensuring that the Officer In-charge of the Police Stations of the identified areas are extra cautious if any instance of mob violence within their jurisdiction comes to their notice.

(iv) The Nodal Officer, so designated, shall hold regular meetings (at least once a month) with the local intelligence units in the district along with all Station House Officers of the district so as to identify the existence of the tendencies of vigilantism, mob violence or lynching in the district and take steps to prohibit instances of dissemination of offensive material through different social media platforms or any other means for inciting such tendencies. The Nodal Officer shall also make efforts to eradicate hostile environment against any community or caste which is targeted in such incidents.

(v) The Director General of Police/the Secretary, Home Department of the concerned States shall take regular review meetings (at least once a quarter) with all the Nodal Officers and State Police Intelligence heads. The Nodal Officers shall bring to the notice of the DGP any inter-district co-ordination issues for devising a strategy to tackle lynching and mob violence related issues at the State level.

(vi) It shall be the duty of every police officer to cause a mob to disperse, by exercising his power under Section 129 of CrPC, which, in his opinion, has a tendency to cause violence or wreak the havoc of lynching in the disguise of vigilantism or otherwise.

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[19] S.34-38 and s.141, s.149 of IPC

[20] Attempt to murder is punishable under s.307 of IPC, attempt to culpable homicide is punishable under s.308 of IPC and for rest of the offences s.511 is applicable.

[21] Supra note 3.

(vii) The Home Department of the Government of India must take initiative and work in co-ordination with the State Governments for sensitising the law enforcement agencies and by involving all the stake holders to identify the measures for prevention of mob violence and lynching against any caste or community and to implement the constitutional goal of social justice and the Rule of Law.

(viii) The Director General of Police shall issue a circular to the Superintendents of Police with regard to police patrolling in the sensitive areas keeping in view the incidents of the past and the intelligence obtained by the office of the Director General. It singularly means that there should be seriousness in patrolling so that the anti-social elements involved in such crimes are discouraged and remain within the boundaries of law thus fearing to even think of taking the law into their own hands.

(ix) The Central and the State Governments should broadcast on radio and television and other media platforms including the official websites of the Home Department and Police of the States that lynching and mob violence of any kind shall invite serious consequence under the law.

(x) It shall be the duty of the Central Government as well as the State Governments to take steps to curb and stop dissemination of irresponsible and explosive messages, videos and other material on various social media platforms which have a tendency to incite mob violence and lynching of any kind.

(xi) The police shall cause to register FIR under Section 153A of IPC and/or other relevant provisions of law against persons who disseminate irresponsible and explosive messages and videos having content which is likely to incite mob violence and lynching of any kind.

(xii) The Central Government shall also issue appropriate directions/advisories to the State Governments which would reflect the gravity and seriousness of the situation and the measures to be taken.

**Remedial Measures**

1) Despite the preventive measures taken by the State Police, ifit comes to the notice of the local police that an incident of lynching or mob violence has taken place, the jurisdictional police station shall immediately cause to lodge an FIR, without any undue delay, under the relevant provisions of IPC and/or other provisions of law.
2) It shall be the duty of the Station House Officer, in whose police station such FIR is registered, to forthwith intimate the Nodal Officer in the district who shall, in turn, ensure that there is no further harassment of the family members of the victim(s).
3) Investigation in such offences shall be personally monitored by the Nodal Officer who shall be duty bound to ensure that the investigation is carried out effectively and the charge-sheet in such cases is filed within the statutory period from the date of registration of the FIR or arrest of the accused, as the case may be.
4) The State Governments shall prepare a lynching/mob violence victim compensation scheme in the light of the provisions of Section 357A of CrPC within one month from the date of this judgment. In the said scheme for computation of compensation, the State Governments shall give due regard to the nature of bodily injury, psychological injury and loss of earnings including loss of opportunities of employment and education and

expenses incurred on account of legal and medical expenses. The said compensation scheme must also have a provision for interim relief to be paid to the victim(s) or to the next of kin of the deceased within a period of thirty days of the incident of mob violence/lynching.

5) The cases of lynching and mob violence shall be specifically tried by designated court/Fast Track Courts earmarked for that purpose in each district. Such courts shall hold trial of the case on a day to day basis. The trial shall preferably be concluded within six months from the date of taking cognizance. We may hasten to add that this direction shall apply to even pending cases. The District Judge shall assign those cases as far as possible to one jurisdictional court so as to ensure expeditious disposal thereof. It shall be the duty of the State Governments and the Nodal Officers in particular to see that the prosecuting agency strictly carries out its role in appropriate furtherance of the trial.
6) To set a stern example in cases of mob violence and lynching, upon conviction of the accused person(s), the trial court must ordinarily award maximum sentence as provided for various offences under the provisions of the IPC.
7) The courts trying the cases of mob violence and lynching may, on application by a witness or by the public prosecutor in relation to such witness or on its own motion, take such measures, as it deems fit, for protection and for concealing the identity and address of the witness.
8) The victim(s) or the next of kin of the deceased in cases of mob violence and lynching shall be given timely notice of any court proceedings and he/she shall be entitled to be heard at the trial in respect of applications such as bail, discharge, release and parole filed by the accused persons. They shall also have the right to file written submissions on conviction, acquittal or sentencing.
9) The victim(s) or the next of kin of the deceased in cases of mob violence and lynching shall receive free legal aid if he or she so chooses and engage any advocate of his/her choice from amongst those enrolled in the legal aid panel under the Legal Services Authorities Act, 1987.

**Punitive Measures**

Wherever it is found that a police officer or an officer of the district administration has failed to comply with the aforesaid directions in order to prevent and/or investigate and/or facilitate expeditious trial of any crime of mob violence and lynching, the same shall be considered as an act of deliberate negligence and/or misconduct for which appropriate action must be taken against him/her and not limited to departmental action under the service rules. The departmental action shall be taken to its logical conclusion preferably within six months by the authority of the first instance.

In terms of the ruling of this Court in *Arumugam Servai v. State of Tamil Nadu*[22] 21 , the States are directed to take disciplinary action against the concerned officials if it is found that (i) such official(s) did not prevent the incident, despite having prior knowledge of it, or (ii)

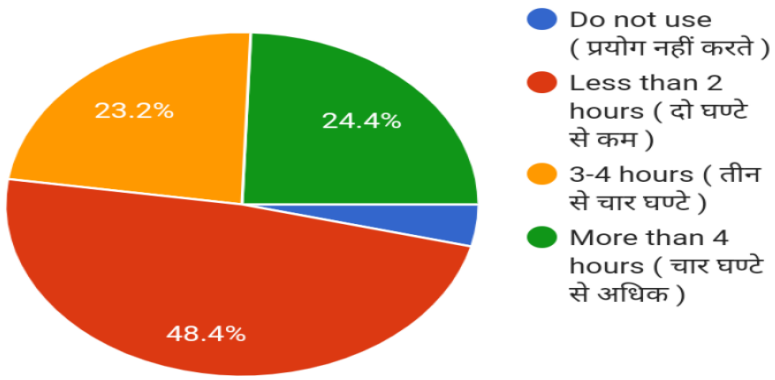
[22]CrLJ 2899, Criminal Appeal 958 of 2011.

where the incident has already occurred, such official(s) did not promptly apprehend and institute criminal proceedings against the culprits.

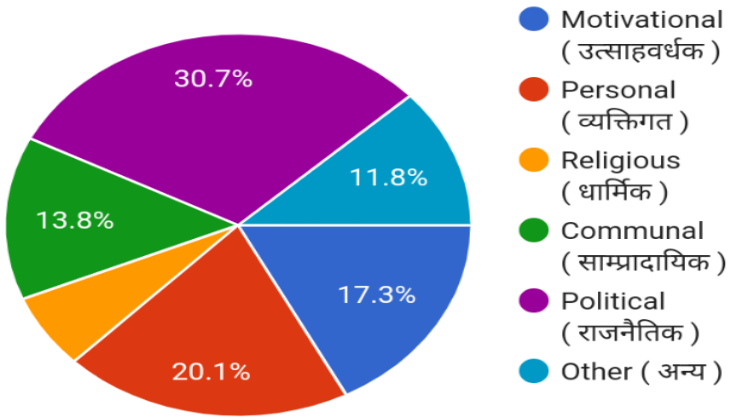
**Role of Social Media**

The incidents of mob lynching have been increased these days and one of the most important factors in such increasing is the use of social media. Social media is used to spread fake news and to create propaganda. India is a religious country and being a country as such many times it happens that the persons for their own, use social media to spread fake news in which religious interference is shown. For the purpose of knowing the role of social media in mob lynching, we have done a survey through google forms. The results of more than 250 responses on various questions are given below:

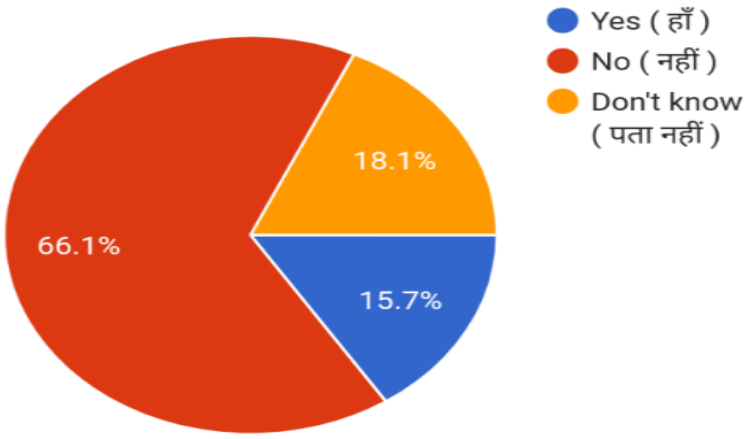
1.In the chart given below it was asked that how much time you spent on social media? As the result could have seen that 47.6% people have said that they spend more than 2 hours time a day.



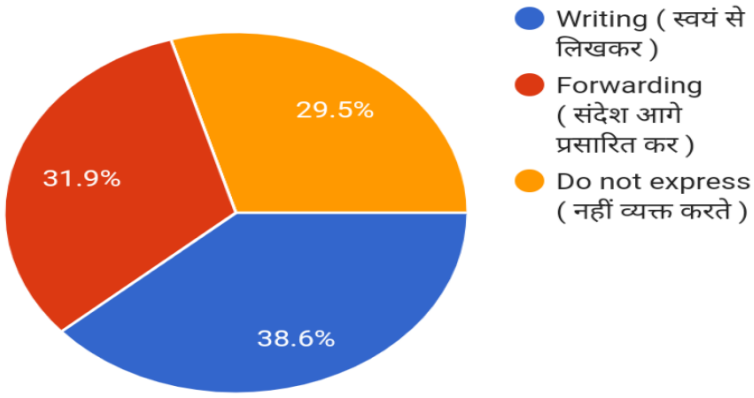

2. In the chart given below it was asked that which kind of messages you get on social media? The result was mixed..



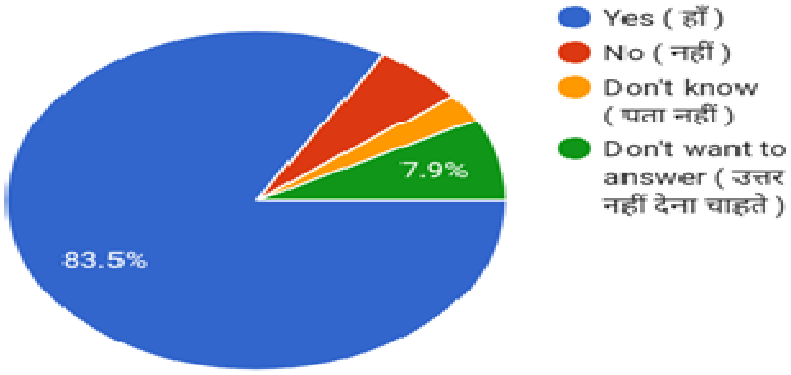
3. In the chart given below it was asked that **whether messages on social media are reliable?** The result gave the clear picture only 15.7% people think that they are reliable.



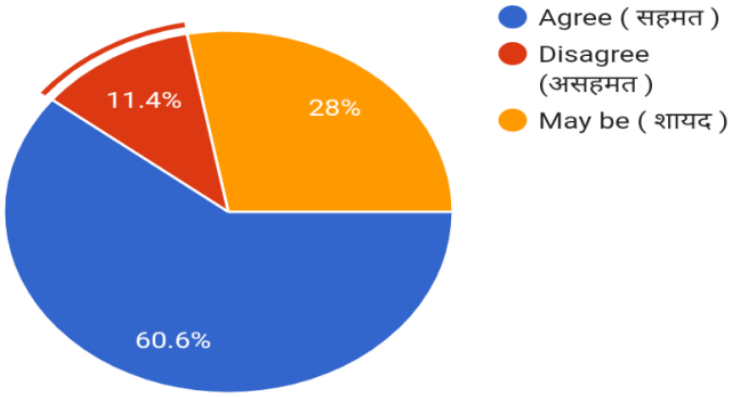

4. In the chart given below it was asked that how will you express your opinion? The answers states that 31.9% people forward the messages without any modification or inquiry.




5. In the chart given below it was asked that whether social media is used as a tool to spread fake news? 83.5% people think that it is used as a tool to spread fake news even though 31.9% people spread those messages.

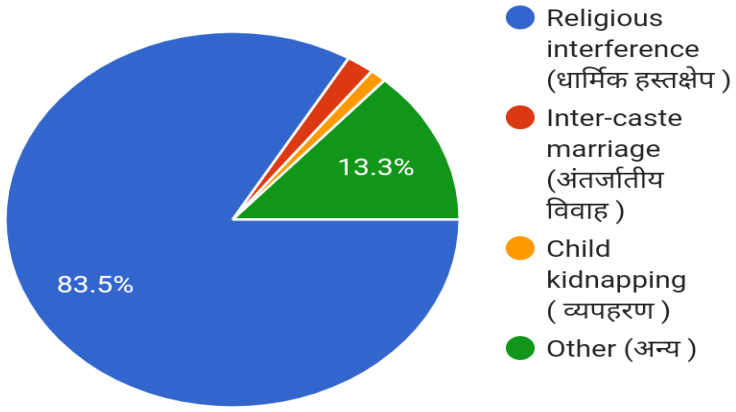



6. In the chart given below it was asked that whether social media plays a role in mob violence?Only 11.4% people think it has no role rest of all either think that it may have a role or it have a role.




7. In the chart given below it was asked that what kind of messages led to mob lynching**?**
Almost all of the people said that it is due t religious interference.

From the above charts it is very much clear that the social media plays a vital role in spreading the fake narratives which leads not only the cases of mob lynching but disturb the harmony of the society too. It is the need of time to regulate social media for better society. Steps have




been taken by some social media platforms like you cannot forward a message on WhatsApp to more than 5 contacts at a time but it is not enough in prevention of fake news. We as a member society are also duty bound to check the truthfulness of any forward prior to forwarding it.

**Conclusion**

Freedom of speech is a fundamental right, but every right has limitations, and any person is entitled to exercise that right subject to these limitations. Speech must not be fake speech or hate speech. In the digital age, social media is a tool to connect with each other, but some people are using it to spread hatred among people. From the survey conducted, it clearly seems that people are forwarding messages without checking the veracity and truthfulness of the messages, causing society at large to suffer. There is a need to regulate social media, and by doing so, we can better serve society.

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# The Role of Artificial Intelligence to Ensure Substantive Equality

***Aashee Somani***[1]

**Abstract**

*Human selection is inevitably coloured by intentional and subconscious bias that disproportionately impact different individuals and social groups. This may be influenced by one's past achievements and generated "merit", or the recognition and reward of one's inherited traits and social capital. Such bias is more starkly observed within the hiring and promotions process as it largely depends on a subjective analysis of skills and qualifications. Further, bias within these processes has greater implications for the individual and society, threatening rights to livelihood and impacting the social ascension towards equality for marginalised communities. To combat such human influence, many organisations are turning towards applications of Artificial Intelligence (AI), a seemingly objective yet effective solution. This paper demonstrates how AI is not the panacea to biased selection as it perpetuates and reproduces historical patterns of disproportionate merit under the guise of neutrality. The ill-applications of AI are further proved in light of Robert Nozick's theory of discrimination. This conclusion is achieved by a deep examination of the process of hiring and the impact thereof, illuminating the knowledge gaps within to uncover covert discriminatory practices. These practices are also imported to the Indian context in light of judicial decisions and legislative intent. Finally, the results of this study are used to guide the path of policymakers to provide legal intervention in the sphere in India by introducing a comprehensive and contemporary strategy. This is also supplemented by suggestive guiding principles to make the process more socially conscionable and bring in accountability and transparency while empowering the discriminated.*

***Keywords*** *– Artificial Intelligence, Selection Bias, Hiring Discrimination, Algorithmic Bias, Substantive Equality*

## Introduction

Robert K. Merton theorised that one's resource richness shall lead to him attracting more of it.[2] The doctrine comes from the Biblical reference of The Gospel of St Matthew, wherein it was postulated that one's goodness and selflessness shall lead to him encountering such deeds from others, thus, gathering more of the "commodity". This holds in fields such as education, one's knowledge does lead to more knowledge. However, over the years, such an effect has been proved within empirical data and human selection, with wide insinuations of a selection bias. The world around us repeatedly reinforces the theory of the rich getting richer, and the poor poorer, with added traction in recent years.

While such a pattern may also have economic reasons, it may be starkly observed in diverse fields. For example, peer-reviewing scientific journals is usually an arbitrary exercise, with a

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[1] ***Student of B.A., LL.B. (Hons.), NALSAR University of Law, Hyderabad, Email Id- aasheesomani@nalsar.ac.in***

[2] Robert K Merton, *The Matthew effect in science,* (Science 1968) 56.

few established researchers providing recommendations on a potential issue with little to no transparency or pre-determined criteria.[3] This randomises the choice of which paper would be deemed "meritorious", often leading to widely inconsistent results with deep consequences for authors and access to knowledge. The Matthew Effect, which propagates success from success, theorises that selection criteria may rely on citation bias, the work of a cooperative network, or inferred legitimacy. Resources fuel status, which amplifies advantages and rewards and, in the end, skews recognition.

Further, the resources one already owns do not necessarily need to be past achievements or associative legitimacy; one can be unfairly preferred based on cultural and social capital. For example, a person from a higher caste may be considered more competent for a higher-ranking job purely based on their generationally-inherited social capital. Such a selection would not be based on the individual's own achievements but derived through the historical treatment of their entire social group.

Another scenario could be selectors associating stereotypes or projecting communal biases, such as a Muslim person may have to face severe stigma and produce a multitude of proofs and verifications to rent a house, especially within gated communities or societies. On the other hand, a Hindu would gain access much more easily, regardless of both applicants having similar relevant characteristics. Here, the preference for a Hindu candidate was due to a perceived superiority based on an arbitrary suspicion of religiously diverse communities. This would be a first-level bias under the *Entitlement Theory of Justice* by Robert Nozick.[4] A first-level bias "involves the uneven application of existing standards". It would be reflected in the more rigorous checks for religiously diverse applicants, even though the requirement of proof was limited in reality, resulting in an uneven playing field.

Nozick also talks about a *second-level bias*, wherein the standards of proof would be structured to deliberately and consciously exclude certain "undesirable" communities. This could be done by setting up a minimum criterion of income earned to be able to rent the house or requiring a current resident to sponsor the applicant. Such standards would automatically exclude most candidates from qualifying and maintaining the gated society's desired demography. Second-level bias can also be observed when the criteria for renters is changed to only allowing families and married couples, thus, creating institutional barriers for live-in couples and deliberately preventing their entry into the sphere, closing the competition.

When such biases are reflected within the hiring process, this has consequences not just for the applicant but also on a communal level. For example, providing women with job opportunities and a real chance at excelling at the job would uplift more than her as an individual. While it would bring gender equality at the workspace, it would create a job for a housemaid or a nanny, roles typically fulfilled by women. This would facilitate their financial

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[3] Khaled Moustafa, '*Is there bias in editorial choice? Yes*' (2015) 105 Scientometrics, 2249, <https://doi.org/10.1007/s11192-015-1617-3> accessed 21/12/2022.

[4] Robert Nozick, *The Nature of Rationality* (1993) 103.

independence while providing moral support and guidance. Further, a woman in a position of power is more likely to acknowledge the merits of other women around her, which her male counterparts may have overlooked. Promoting a single woman would lead to ripple effects for the entire community. But if such a promotion is denied to her due to arbitrary grounds or discrimination, all of these social and cultural possibilities are lost. Thus, capabilities and opportunities must also be observed from the larger perspective of the community rather than just focusing on the individual. Accommodations for "merit" must strive to be inclusionary rather than exclusive, serving other interests of society.

An instrument to prevent such discriminatory choices within hiring and promotions is the application of Artificial Intelligence ("AI"), which is fast gaining traction. AI-driven software facilitates hiring by analysing objective data and shortlisting job applicants to determine who would best fit the criteria. This paper seeks to disprove the notion of AI-driven selection as the panacea for hiring and promotion discrimination and proposes solutions towards a more transparent and accountable regime.

## Research Methodology

This paper seeks to illustrate and uncover discriminatory practices exercised by corporate entities within their hiring and promotion decisions which maintain the guise of objectivity while discreetly fulfilling demographic needs of the organisation. It demonstrates how such practices are carried out and thus, highlights areas that require legal intervention.

The scope has been largely focused upon hiring practices, with promotions as a peripheral corollary to the initial selection and hiring process. Further, the paper explores whether the process allows individuals from marginalised communities to have a fair chance at a job offer, not merely the opportunity to run for the position. However, it does not explore steps after such selection, such as whether the organisation accommodates them to perform and excel at the position.

The sources for this paper have largely been secondary data collected from AI-driven software, due to the width and bulk of the data required to be analysed.

## Literature Review

The prevalence of discrimination in hiring has been observed in many studies that analyse the instances of impact as well as their extent. This paper has been influenced by such field studies that provide statistical evidence for its hypothesis. One such is *Evidence on Caste Based Discrimination* by Siddique, which undertakes an economic understanding of caste, comparing employment and corporate ascension statistics for specific social groups determined by castes.[5] The study provides empirical evidence for caste and gender discrimination for white-collar jobs in Chennai, a metropolitan city in India, uncovering bias ranging from hesitancy to employ lower-caste persons for jobs involving customer interaction

[5] Zahra Siddique, *Evidence on Caste Based Discrimination*, 18 Labour Economics, 146 (2011).

to a complete unwillingness to hire. Thorat and Attewell supplement the study by analysing the reception of job applications by an upper-caste Hindu applicant, a Dalit and a Muslim.[6]

The emergence of algorithmic tools in the context of employment has also been examined in previous work, highlighting the difficulties they present for justice. The ideas discussed by Wong influences this paper; wherein he demonstrates that algorithmic fairness creation involves more than just a set of technical tasks; rather, there is a significant political component to the issue.[7] The contentious nature of the concept of fairness and the fact that choosing a fairness measure ultimately involves choosing between conflicting values firmly establish the issue of algorithmic fairness as a political dilemma. The paper highlights the necessity of finding a political solution and suggests criteria to ensure selective software's genuine fairness, moral acceptability, and political legitimacy.

Further, Raub undertakes a study with a legal focus, advocating for paying attention to both the immediate issues with biased algorithms and the long-term problems with regulation and growing diversity in the technology sector.[8] He further analyses and establishes recruiter liability for discriminatory hires using the "4/5$^{th}$ rule" under the United States jurisdiction. From the standpoint of UK legislation, Sánchez-Monedero et al. examine some prominent vendors of bespoke algorithms, addressing issues with discrimination and data privacy.[9] Ajunwa defends against arbitrary goals like "cultural fit" and offers a legal framework for considering the issues caused by such computational tools and technology.[10]

**Artificial Intelligence in The Hiring Process**

In an increasingly automated world, the applications of Artificial Intelligence within hiring decisions have moved on from the mere selection from a large pool of applicants to highly sophisticated technology that helps an employer every step of the way. This includes selection, aptitude tests, background checks and even tests for compatibility with the organisation's work culture. Such applications are aimed towards a discrimination-free hiring process, providing fair and equal opportunity and a fair playing field for all. However, it is crucial to understand some of the fundamental problems that challenge AI's viability and reliability in these respects.

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[6] Sukhadeo Thorat and Paul Attewell, *The Legacy of Social Exclusion: A Correspondence Study of Job Discrimination in India*, 42 ECONOMIC AND POLITICAL WEEKLY, 4141 (2007), available at https://enalsar.informaticsglobal.com:2143/journal/2007/41/caste-and-economic-discrimination-special-issues/legacy-social-exclusion.html, last seen on 14/11/2022.

[7] P.H. Wong, *Democratizing Algorithmic Fairness*, 33 Philosophy & Technology, 225 (2019).

[8] McKenzie Raub, *Bots, Bias and Big Data: Artificial Intelligence, Algorithmic Bias and Disparate Impact Liability in Hiring Practices*, 71 Arkansas Law Rev 529 (2018).

[9] Javier Sanchez-Monedero et al., *What does it mean to solve the problem of discrimination in hiring? Social, technical and legal perspectives from the UK on automated hiring systems*, Proceedings of the Conference on Fairness, Accountability, and Transparency, ACM (2020).

[10] Ifeoma Ajunwa. *The Paradox of Automation as Anti-Bias Intervention*, 41 Cardozo Law Review 1671 (2020).

An AI system only computes and analyses extensions of the data that is made available to it. The task of AI is to replicate the results of human decision-making but in a much more efficient and streamlined manner. Therefore, it produces results that prioritise the individual's choices and preferences in a similar scenario. It bases such preferences on the individual's history, or in the case of hiring, the patterns of the current employee force of an organisation. The implications of this would be that a human's repeated choice of favouring a man over a woman would lead AI to believe this is an expected qualification for the position and automatically eliminate all women. Thus, earlier hiring patterns would be replicated, despite the organisation's endeavour to remove discriminatory practices. Consequently, certain social characteristics chosen due to human bias would transform into merit-based criteria.

Such a transformation would be achieved by AI's supposedly impartial and *prima facie* objective processes, which would lend it undeserving legitimacy. There would be no reason to suspect an irregularity, which would further retrospectively validate the company's earlier hires, as the algorithm would consistently give higher ranks to individuals similar to current employees. This would lead to a self-propelling cycle that formally substantiates discriminatory hiring practices. It would reinforce historical values and urge candidates to work towards achieving these determined characteristics rather than facilitating their efforts. The definition of "merit" would be entangled within the particular criteria of specific race, gender and personality traits and would unfairly deny opportunities to candidates who may be deserving in other aspects.

Moreover, the possibility of tampering with the data fed to the AI may not be ruled out. A company may wish to hire from a specific pool of candidates who meet their customised criteria. It could alter the algorithm to display such results through a seemingly "unbiased" process, which would have been tampered with in reality.

These are just some examples of how the challenges of using AI in hiring could surface. Scenarios of inconsistent results despite technical intervention are common and often go unrecognised, which deepens their overall impact. This section has highlighted the larger impact of the issues on hiring culture. The following analysis shall demonstrate how these exclude candidates from the hiring process, thus harming one's career trajectory on an individual basis.

**The Hiring Decision**

With a broadening area of functioning, AI inevitably poses wider gaps for discriminatory decisions to come into play. Moreover, while such software does not make the actual decision, it automates the rejection process, leading to many missed opportunities. The hiring decision starts with the sourcing of potential candidates and inviting applications. Predictive technology assists with the placement and optimisation of job adverts, alerting job searchers to potentially promising openings and identifying applicants who might be able to be lured away from a rival or back onto the job market. Thus, AI enters the picture much before applications are invited.

Technology based solutions often aim to streamline the hiring process by eliminating "unfit" candidates before they reach the recruiter's screen, or even the applicants'. For example, advertisements on social media allow for precise customisation of the target audience. Thus, the general demographics of who discovers the posts and who eventually applies are hand-picked. If the organization itself does not do this, the AI-powered software at the ad agency does so, in the interest of economy.

This is problematic as the patterns identified by the software would reflect and try to replicate historical trends, inevitably leaving out marginalised communities. Thus, certain social groups would be deemed not to be interested in some jobs, effectively reserving the jobs for other groups. Candidates would be excluded even before they can apply simply due to an information gap. Further, the complexity and opacity of the techniques implemented by digital advertising make it difficult, if not impossible, for aggrieved job searchers to identify discriminatory advertising practices. Even if they could, it is not always apparent who should or may be held liable for discriminatory advertising activities, the platform or the hiring organisation.

Such information gaps also arise within automated job boards, which have become increasingly popular. This technology employs suggestive software which analyses one's preferences and suggests similar results. These systems frequently use content-based and collaborative filtering to shape their personalised suggestions. Content-based filtering analyses what users appear interested in and then gives them related content based on clicks and other responses. Whereas, collaborative filtering anticipates a person's interests by examining what others who appear to share those interests are recorded to be interested in.

Such recommender systems have unique equity difficulties. For starters, methods that rely on weak substitutes for "relevance" and "interest" risk reproducing the very cognitive biases they are meant to eliminate. Further, users' preconceptions and cognitive biases may be reinforced through content-based filtering. This is a tricky issue since users' actions may correctly compute their preferences and values. However, they may also reflect ingrained biases that still contribute to systemic racial, gender, and other inequities. For instance, a woman with several years of experience may, over time, be shown lesser opportunities for ascension than she would otherwise be eligible for if she tends to click on lower-level jobs due to her scepticism about her suitability for more senior roles.

Collaborative filtering runs the danger of stereotyping consumers based on the behaviour of other, similar users. Continuing the example, even if the woman frequently selects managerial opportunities, the system may discover that other comparable women tend to select lower positions, and it may display fewer managerial positions to her than to a man—not because of her own preferences but due to the actions of people the system considers to be similar to her. Further, even when a recommender system does not explicitly take traits like race or sex into account, these impacts may occur nonetheless. Netflix, for instance, had not been collecting or explicitly implying racial factors when users started seeing suggestions that seemed to be tailored on this basis. It had simply been predicting users' preferences based on their own

behaviour and the behaviour of other, similar users.[11] Although less overtly, a similar phenomenon can develop with employment recommender systems.

People can only respond to the job seekers or opportunities shown to them. Therefore, if left unchecked, such impact may gradually become more pronounced. While these techniques do not entirely prevent recruiters from seeing particular candidates, being hidden below multiple entries on the results page could have comparable implications.

Artificial intelligence can also be used to predict and evaluate a potential hire's skills and performance using bespoke models. However, rather than providing standard assessment scores, this compares the candidates' performance with the organisation's "top" performers. Subjective and often discriminatory assessments of the "success" of current employees complicates such applications. This is also nuanced by the predictive tests, which go beyond objective performance measures, such as targets achieved, to the personal characteristics of "desirable" employees, such as teamwork or dedication to the job. These may also stretch to neuroscience applications to assess candidates' cognitive, social, and emotional qualities, including processing speed, memory, and tenacity. The checkpoints to dissuade discriminatory choices in this process are rarely disclosed.[12]

Such pre-employment screenings have a long history of controversy and have been criticised for their inherent bias against persons of colour and those with disabilities. Algorithms based on employee behaviours may reflect unfavourable social trends. Even if these tools correctly predict attributes that current, top-performing employees display, they may choose to pass over equally qualified applicants who do not have those features. The association between inferred qualities and performance may not even be causative; at worst, it may only be incidental. Nevertheless, such characteristics might be used to route some candidates to lower-status positions unjustly.

**De-Biasing the Software**

Efforts towards the "de-bias" of algorithms may be undertaken, but research outcomes have been limited. These methods frequently modify the model parameters in response to testing for inconsistent results using gathered or estimated characteristics. However, the best practices have not been consolidated yet. Many approaches continue to have a narrow emphasis on specific factors, such as race or gender, and seldom address intersectional issues which arise when numerous potentially discriminatory characteristics lead to compounded effects. Further, the results of internal tests and claims by the software are difficult to evaluate or challenge because bias testing in hiring tools is almost usually undertaken internally by firms and is not independently validated. It is almost always opaque to the public.

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[11] Nitasha Tiku, *Why Netflix Features Black Actors In Promos to Black Users*, Wired (24/10/2018), available at https://www.wired.com/story/why-netflix-features-black-actors-promos-to-black-users, last seen on 14/11/2022.

[12] Josh Jarrett and Sarah Croft, *The Science Behind the Koru Model of Predictive Hiring for Fit*, Technical report, Koru (2018).

This also raises concerns about first- and second-level biases. AI-generated results primarily focus on who has been included, not who has been excluded. This leaves significant room for the uneven application of the determined criteria, even without the explicit intention of eliminating a particular social group or characteristic - leading to first-level bias. The guise of objectivity and the complexity of the process preclude most investigation. Further, while there are tools which may identify whether such first-level bias existed in the selection of the candidates, they are not equipped to determine the motivations of such criteria in the first place. It is up to the organisation to set the selection standards, and AI cannot comment on whether the current standards were chosen for the right reasons or if they need to be changed, revised, or abandoned. Thus, institutionally-supported second-level bias eventually slips through the cracks.

The formulation and application of de-biasing approaches show promise and are anticipated to be crucial developments in predictive recruiting technology. Nevertheless, there are boundaries as to what technology can achieve. Transparency and accountability for hiring firms are what can truly bring about equality, and this must be affixed by legal measures only.

**Legal Implications and Policy Suggestions**

Disguised discrimination under AI would be more damaging to the interests of an individual and social group than mere exclusion, by limiting the eventual remedy. It would hamper the right of self-determination of such marginalised sections while also creating institutional barriers against their development. The rights of self-determination, as theorised by Dennis E. Mithaug, provide any individual with the liberty and the capacity to make choices.[13] While such rights are unevenly distributed in all societies, it is the legislative burden to bridge such gaps and optimise these rights to better advantage even the least advantaged. Thus, policymakers must accommodate abilities by providing an environment to access, support and hone the internal capability of all members of society, not just the privileged.

One of the most proactive bodies of law in this regard is that of the United States. Under the Uniform Guidelines on Employee Selection Procedures, two types of legal claims fall under employer liability - disparate treatment claims and disparate effect claims.[14] Charges of disparate treatment can be made when an employer discriminates based on a trait protected under the law. On the other hand, when an employer engages in conduct that seems neutral but has a discriminatory impact concerning a protected characteristic, it may give rise to a disparate impact claim. Such a claim arises by checking for the "*4/5$^{th}$ Rule*". This is a general guideline for cases falling under Artificial Intelligence, determining when a case of disparate impact can be made against an employer; the employer may be at risk if the selection rate for one protected group is less than 4/5$^{th}$ of the group with the highest selection rate.

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[13] Dennis E. Mithaug, *Equal Opportunity Theory* (1996).

[14] Equal Employment Opportunity Commission, Civil Service Commission, et al., *Uniform guidelines on employee selection procedures*, 43 Federal Register, 166 (1978).

Proving disparate impact in court is relatively charted - the plaintiff must first prove that there is a disparate impact from the employer's selection process. The employer may argue that some business requirement justifies the disparate impact – usually by proving the accuracy of its hiring algorithm. This may be countered by proving that the reason supplied is flawed or offer evidence of an equally efficient technique with a lesser discriminatory impact. It should be noted that the concept only holds employers accountable for unreasonable or preventable impacts. Thus, the onus rests on the vendor or the predictive software to ensure compliance.

Similar guidelines were also given by the Canadian Supreme Court in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union*.[15] It held that once it has been determined that there is *prima facie* evidence of discrimination, it is the employer's responsibility to justify the discrimination by demonstrating that it made a reasonable accommodation. The Court created a three-stage process to this effect, focused on proportionality to decide whether a company may utilise the "*bona fide* occupational requirement defence".

The Supreme Court of India also considered the rational nexus test in *Ravinder Kumar Dhariwal and Ors. v. The Union of India (UOI) and Ors*.[16] The case concerned an army officer who had developed a mental disability during service, after which disciplinary proceedings had been instilled against him. The Court established a "positive obligation" upon the State to duly transfer an employee who becomes disabled while working for the government to an appropriate position with the same pay scale and benefits. Analysing the Rights of Persons with Disabilities Act, 2016, the Court held that if it were impossible to move the employee to a different position, they may be kept in a supernumerary position until a suitable position becomes available or until they reach retirement age, whichever comes first. The Court also relied upon *Avni Prakash v. National Testing Agency*, which held that equal rights and non-discrimination include reasonable accommodations.[17]

As the nation's highest constitutional court, the Court considered it incumbent upon itself to ensure that societal prejudice does not manifest itself as legal discrimination, notwithstanding the fact that stigma and discrimination are pervasive in society. This raises questions about the Court's duty to ensure mere formal equality, which gives equal treatment before the law, compared to addressing the social stigma, which creates very real and often impenetrable barriers that also expand to other aspects of life. However, in the face of limited legislation in the area, particularly concerning under-development hiring technology, it is a step in the right direction.

Such case law operates at the forefront of employment discrimination discourse more so because legislative contribution has not been very active. The central act in the sphere in India

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[15] British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union, [1999] 3 SCR 3.
[16] *Ravinder Kumar Dhariwal and Ors. v. The Union of India* (UOI) and Ors., MANU/SC/1275/2021.
[17] *Avni Prakash v. National Testing Agency*, MANU/SC/1121/2021.

would be the ***Equal Remuneration Act, 1976***, which primarily aimed towards providing equal pay for equal work for men and women. It also worked towards alleviating gender discrimination against women in the workplace and incidental spheres, such as hiring, wages and promotions. An extension of Article 39 of the Constitution of India, the act was archaic and extremely narrow in its vision, covering only certain aspects of a much larger and crucial field. The application of the act was also minimal, with little significant impact.[18] The Act has recently been replaced by the ***Code on Wages, 2019***, and the expanse has been revised to include other forms and basis for discrimination, protecting men and other genders as well. Managerial and supervisory personnel have also been covered, and the avenues for remedy have been expanded significantly, with scope for remuneration in crores.

Other acts also safeguard aspects of employees' lives, such as the Maternity Benefit Act, 1961 or the Sexual Harassment at the Workplace Act, 2013. The body of jurisprudence operates on numerous laws that forbid specific discriminatory practices and defend the rights of vulnerable communities like workers, women, people with HIV and AIDS, people with disabilities, transgender people, and members of socially underprivileged classes. However, India currently lacks a comprehensive law that effectively addresses workplace discrimination.

Today, India must revamp this situation, especially with the advent of revolutionary hiring technology. A comprehensive law that enforces the burden of transparency and equality onto the employer rather than merely facilitating a discriminated applicant's fight for justice must be launched. Working along the lines of India's mandatory Corporate Social Responsibility Policy, the law must come down heavily to ensure accountability from employers, developers and job-sourcing platforms. All key stakeholders must be stimulated to ensure a level playing field and open competition that allows all candidates not just a fair chance at the selection process but also a genuine opportunity to develop and excel within the organisation.

This law must also be formulated with the conscious application of the principles of justice, equity and good conscience, with the discussed case law at the forefront. John Rawls' Theory of Justice may be a guiding principle, which theorises three principles to achieve justice.[19] Within this, he suggests the *Veil of Ignorance*, a temporary cognitive space for policymakers who are unaware of their social position. Such an outlook ensures the equanimous foundation of the policy, ensuring it is not discriminatory against any social group. It expects the policymakers to facilitate not just the ascension of other communities but rather make accommodations for development at their level. Thus, merit must be refocused from a concession to privilege to the cultivation of skill.

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[18] Kerala State Planning Board, Government of Kerala, *Gender Wage Gap: A Case of Non-Implementation of Equal Remuneration Act*, (2017), available at https://spb.kerala.gov.in/sites/default/files/inline-files/2.GENDER.pdf, last seen on 14/11/2022.

[19] John Rawls, *A Theory of Justice* (1971).

## Conclusion

A job offers or a rejection usually results from a succession of minor, sequential decisions that make up the hiring process. Throughout this process, hiring technology might take on a variety of very varied responsibilities. For instance, during the initial hiring stages, automated predictions might target specific demographic groups with job adverts and customised job recommendations. After candidates submit their applications, algorithms assist recruiters in evaluating and rapidly excluding applicants or prioritising them for further review. To lessen reliance on conventional, and frequently, structurally biased metrics like the university they attended or their test scores, some technologies engage candidates using chatbots and virtual interviews, analysing responses for desired character traits and skills. Therefore, predictive technology can significantly impact who ultimately succeeds in the hiring process at each step.

This paper has mapped out the possibilities for error and bias and, thus, contributed to bridging the knowledge gap on areas of improvement. It also highlights a route for legal intervention to promote more equitable and transparent hiring practices for economic development while maintaining a more conscionable society. While most available data of the workforce are admittedly and inherently flawed by default, algorithms may still be able to prevent or minimise bias. The essential question remains on how the biases they may add would compare to the human biases they are tasked to prevent.

# Legal Aspects of Compensation for Victims of Road Accidents and Personal Injury: A Comprehensive Analysis of Hit-and-Run Law in the Paradigm of Changing Statutory Status

***Anand Shankar***[1]

## Abstract

*This paper delves into the intricate legal landscape surrounding compensation for victims of road accidents and personal injury in India, with a specific focus on hit-and-run cases. As India aspires to achieve developed nation status by 2047, the increasing road accidents and fatalities pose a significant challenge, necessitating a thorough examination of the legal framework. The paper explores the evolution, current state, and challenges of compensation laws, spanning motor vehicle acts, consumer protection acts, and tort law. The analysis begins by tracing the historical evolution of compensation laws through judicial precedents, emphasizing key cases that have shaped the current legal landscape. It highlights the interplay between tort law and criminal justice, demonstrating how principles of equity, justice, and good conscience underpin compensation claims. The uncodified nature of tort law in India, influenced by statutes such as the Motor Vehicles Act of 1988, reflects a growing recognition of the importance of financial restitution for victims. Recent legislative changes, including the Motor Vehicles (Amendment) Act, 2019, and the Bharatiya Nyaya Sanhita, 2023, underscore a more stringent approach towards hit-and-run incidents, emphasizing accountability and deterrence. The introduction of the "Compensation to Victims of Hit and Run Motor Accidents Scheme, 2022" represents a significant shift in addressing the needs of victims of unidentified vehicles. The paper examines landmark judicial decisions that have broadened access to compensation, redefined dependency criteria, and prioritized notional income for unorganized sector workers. The paper also addresses the contentious aspects of the new laws, particularly the protests and concerns raised by transporters and commercial drivers regarding the enhanced punitive measures and the lack of differentiation between rash and negligent driving. It argues for a balanced approach to liability and punishment, advocating for a nuanced differentiation based on the severity and circumstances of each case. In conclusion, the paper highlights the need for a holistic and equitable legal framework that not only deters negligent behavior but also ensures just compensation for victims. By addressing the evolving nature of compensatory laws and the challenges therein, this paper aims to contribute to the discourse on enhancing road safety and justice for accident victims in India.*

***Keywords:*** *Victims of Road Accidents, Hit-and-Run, Motor Vehicles Act, Bharatiya Nyaya Sanhita.*

## Introduction

Road accident is one of the principal concerns among the policy makers at this point of time where India is claimed the gain a significant position among the world forum terming it as an era of *Amrit kaal,* the Golden Era in which we are aspiring to be a Developed nation by 2047. Legislators are making paradigm shifts in the laws, rules, statutes, and regulations to renounce its colonial pasts emphasizing the importance of economic development, technological innovation, and social change while also stressing the significance of India's traditional values and knowledge systems. But can India deny and justify the data about the pathetic state of

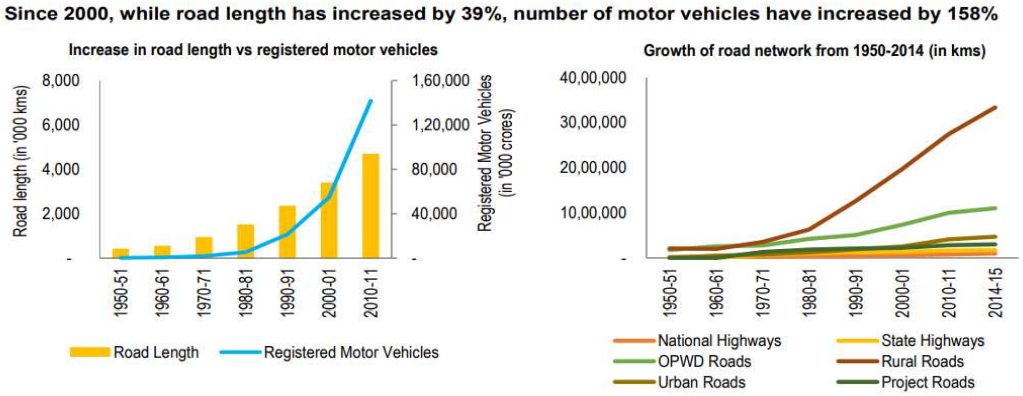
[1] ***B.A., LL.B., National Law University Jodhpur, Rajasthan, India, Email Id: anand.shankar@nlujodhpur.ac.in.***

regulations and mechanisms for road causalities?[2] India stands first among the countries for road accidents according to the data, also as the length of the road is increasing the number of road accidents and causalities is growing exponentially[3]. It raises the question for reconsideration of the legal framework for Road accidents in various legislation transcending the tort law, especially with regard to Compensation due to its interference with *right-in-rem.*

The intersection of tort law with criminal justice and consumer rights has spurred legislative efforts to codify its principles. Despite its uncodified nature, tort law's evolution, influenced by statutes like the Motor Vehicles Act of 1988, reflects a growing recognition of compensation's importance. Recent legislative changes underscore compensation's role in addressing victims' needs and ensuring justice, evident in statutes like the Constitution of India, Criminal Procedure Code 1973, Motor Vehicle Act 1988, and Workmen's Compensation Act 1923. This highlights compensation not only as a civil remedy but also within criminal justice, emphasizing financial restitution for victims' harm, reshaping legal landscapes.

In 2022, India recorded its highest number of road crash fatalities, surpassing 1.68 lakhs deaths. This alarming figure equates to an average of 462 deaths per day. Despite a global decrease of 5% in road crash fatalities, India experienced a 12% increase in road accidents and a 9.4% rise in fatalities comparatively[4]. The National Crime Records Bureau recorded 47,806 hit and run incidents which resulted in the deaths of 50,815 people in 2022.[5]

*Figure 1. Data showcasing the need of a strict legal framework for road accidents*




[2] Pal, Ranabir et al. "Public health crisis of road traffic accidents in India: Risk factor assessment and recommendations on prevention on the behalf of the Academy of Family Physicians of India." *Journal of family medicine and primary care vol. 8,3 (2019): 775-783.* doi:10.4103/jfmpc.jfmpc_214_18 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6482791/> last visited on 8th March 2024.

[3] Road accidents – an overview, Road Accidents In India 2019 <https://morth.nic.in/sites/ default/ files/ RA_Uploading.pdf> last visited on 8th March 2024.

[4] *Id.*

[5] India's Hit-And-Run Saga: Six Die Every Hour In Accidents Involving Unidentified Vehicles In 2022 <https://www.etvbharat.com/english/bharat/indias-hit-and-run-saga-six-die-every-hour-in-accidents-involving-unidentified-vehicles-in-2022/na20240106141025870870590> last visited on 8th March 2023.

In light of this trend, it becomes crucial for the legal fraternity to analyze the legal aspects of compensation for victims of road accidents and personal injury. A comprehensive analysis of hit-and-run law within the changing statutory status is essential. This analysis encompasses the evolution, current state, and challenges regarding compensation in injury cases caused by road accidents, spanning motor vehicle acts, consumer protection acts, and other relevant legislation. Understanding the implications of these legal frameworks is paramount for ensuring justice for both drivers and victims in the evolving legal landscape.

In recent times, the legislative landscape surrounding hit-and-run incidents has undergone significant revisions.[6] These changes reflect a more stringent approach to handling these unfortunate events. As we explore the intricacies of the new hit-and-run law, we'll compare it with the older legislation and highlight its implications for both drivers and victims

This piece will delve into the analysis of the evolution, present state and issues with compensation in injury caused by road accidents in motor vehicle acts, consumer protection acts and other legislations, the stand of courts in various suits where general and special damages are entertained, then the effect of the shift to the modern legal landscape of Criminal Law in the light of the Law of Tort and its related nuances in Motor vehicle Act and Consumer Protection Laws.

**Evolution Of Compensation Laws in India**

Judicial Precedents and Interpretations have been critical in upholding the realm of compensation in violation of rights relating to life and liberty[7]. In the case of *Khatri And Others vs State Of Bihar & Ors*[8] for the first time, the question was raised regarding granting monetary compensation through a writ petition before the Supreme Court in which Bhagwati, J. observed for the state to consider devising remedies for the violation of the most precious right to life and personal liberty.

This move was inclined toward the principle of "*injuria sine damno*" in tort law signifies that compensation will be granted if a person may have suffered a legal injury or wrong even if no actual damage or loss has been incurred. Indian Supreme Court affirmed this in the case of *Bhim Singh vs State Of J & K And Ors.*[9], in which the court not only accepted a writ petition but also granted compensation of Rs. 50,000 to be paid by the state.

Further various precedents of High courts held that the state would be obliged to pay of quantified sum of Rs. 3 lakhs as compensation by referring Public Law. The Judgment of Karnataka HC and Rajashthan HC in the case of *Smt. Saguna v. State of Karnataka*[10] and *Mst.*

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[6] Upholding justice and safety: The controversy surrounding the new hit-and-run law (barandbench.com) <https://www.barandbench.com/columns/upholding-justice-and-safety-controversy-surrounding-the-new-hit-and-run-law> last visited on 09 Mar. 2024.
[7] Article 21, the Constitution of India, 1950.
[8] *Khatri And Others vs State of Bihar & Ors* (1981) SCC (1) 627.
[9] *Bhim Singh vs State Of J & K And Ors* (1985) 4 SCC 677.
[10] *Smt. Saguna v. State of Karnataka* (2002) ACJ 1530.

*Madina v. State of Rajasthan*[11] respectively pave the way for the petitioner to be entitled to at least Rs. 3 lakhs as Interim relief. Although, It do not indicate the basis of quantum until the *Govt. of NCT of Delhi v. Nasiruddin*[12] held "Taking into account the decision of the Apex Court in the matter of fixation of compensation under Motor Vehicles Statutes, and the cases noted above, and also the fact that loss dependencies, if any, is that of parents and their age, the compensation is fixed at Rs. 2 lacs. Pursuant to the order passed by this Court, a sum of Rs. 1,25,000/- has been paid to the respondent."[13]

In these cases, the problem of applying provisions relating to compensation in Motor Vehicle Act in other incidents like cases of custodial violence and deaths seen in the contrary approach in the case of *Iqubal Begum v. State of Delhi*.[14]

## In the realm of Tort Law: Compensation as a Legal Remedy

The foundation of tort law rests on the principle that every harm or injury should have a corresponding remedy. Compensation denotes providing something to restore balance or to compensate for a loss, injury, or harm suffered. It refers to offering recompense, remuneration, or payment to make amends for the damages incurred. Tort law establishes the basic expectations of behavior that individuals can legally expect from each other, regardless of any specific agreements they may have. It achieves this by defining and explaining various types of actions that constitute wrongdoing, allowing individuals to seek redress in court and potentially receive a remedy if their claims are successful.[15] India being a common law country has been influenced by the Legal Jurisprudence of Law of Torts, which is largely based on the principles of equity, justice, and good conscience. Section 2(m) of The Limitation Act, 1963 defines "tort" means a civil wrong which is not exclusively the breach of a contract or the breach of a trust.[16]

Compensation in torts serves as a fundamental principle of justice, aiming to provide redress to individuals who have suffered harm or loss due to the wrongful acts of others. It embodies the idea of restoring the injured party to the position they were in before the tort occurred, to the extent possible. The principles of negligence, duty of care, and vicarious liability form the backbone of tort law governing compensation claims arising from road accidents.
Lord Ruttan J, in the case of *Ball v. Kraft*[17] laid down broad principles to govern the grant of damages, which is as follows:

1. The claimant must not have been negligent.
2. The claimant must not have engaged in improper conduct.

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[11] *Mst. Madina v. State of Rajasthan* (2000) 1 Raj LW 266.
[12] *Govt. of NCT of Delhi v. Nasiruddin* (2002) ACJ 1530.
[13] *Supra* 23 (paragraph 23, Justice PN Bhagwati).
[14] *Iqubal Begum v. State of Delhi* (2001) ACJ 2033, See also *State of Uttar Pradesh v. Mundrikar* (2001) 9 SCC 346.
[15] Ripstein, Arthur, "Theories of the Common Law of Torts", *The Stanford Encyclopedia of Philosophy* (Summer 2022 Edition), Edward N. Zalta (ed.), URL <https://plato.stanford.edu/archives/sum2022/entries/tort-theories/>
[16] Section 2(m), The Limitation Act, 1963.
[17] 1967 ACJ 230 SC of British Columbia Canada.

3. The claimant should have taken reasonable actions to mitigate the loss or injury.
4. The actions of the claimant should be lawful, just, and reasonable.
5. Damages awarded should not exceed the actual loss suffered by the claimant, and any compensation may be reduced if the claimant's own actions contributed to the negligence or made some damages too remote. This includes failure to mitigate damages by not taking steps to reduce the original loss or prevent further loss.

**The Interrelation with Criminal and Consumer Laws and Statutory Codification in India**

Although the tort law in itself distinguishes from the criminal law and liabilities arising out of contractual obligations[18]. But due to its uncodified nature and moral standing. Several attempts have been made by the legislators to crystalize its codifications, which transcends it within the other subject matter *inter alia* compensation violation of consumer rights and criminal offenses, where the *right in rem* is in question. Notably, the evolution of accident jurisprudence is influenced by the Motor Vehicles Act, of 1988, and judicial interpretation therein.

Recent legislative changes and judicial responses highlight the growing recognition of the importance of compensation within criminal justice administration.[19] Various statutes such as the Constitution of India,1950; Criminal Procedure Code 1973; Motor Vehicle Act,1988; and Workmen's Compensation Act, 1923 emphasize the provision of compensation to individuals whose rights have been infringed upon. This acknowledgment underscores the significance of compensation not only as a remedy in civil law but also within the realm of criminal law. It reflects the evolving legal landscape's commitment to addressing victims' needs and ensuring justice by offering financial restitution for the harm they have suffered.

The backing of legislation ensures that the victims get compensation from the state and goes on to evolve to include the wrongdoer himself. Since, generally, in criminal cases, victims receive no direct compensation from the wrongdoer except satisfaction as in punishment inflicted upon the wrongdoer by the state.

**The Recent Judicial Precedents on Compensation for Road Accidents: The Evolving Compensatory Law**

The stance of Judiciary with regards to the grant of compensation to the victims has been like of slippery slope where with each new arisen of facts and circumstance and judicial pronouncements thereupon widened the scope of statutory or legislative mandate to a more equitable nature. With this regard, an attempt has been made to trace cases of compensation for road accidents often deriving or deviating from the provisions of the Motor Vehicle Acts

[18] *Ibid* note 4.
[19] Giliker, P. (2008). Codifying Tort Law: Lessons from the Proposals for Reform of the French Civil Code. *The International and Comparative Law Quarterly (Cambridge University Press)*, 57(3), 561–582. <http://www.jstor.org/stable/20488231>.

and Consumer Protection Acts with discussion and their analysis in the context of the evolving nature of compensatory laws arisen out of tortious liability as follow:

**Deduction of Double Benefits Ruling**

In the case of ***Krishna and Ors. v. Tek Chand and Ors.***[20] the Supreme Court observed that the family of a deceased in a motor accident cannot seek "double benefits". If the family has received benefits from the State Government on account of the death of the deceased, then such benefits are liable to be deducted from the compensation payable under the Motor Vehicles Act. In this case, a driver employed by the Haryana State Roadways died in a road accident while performing his duties. The family members of the deceased (appellant) have filed a petition claiming compensation under Section 166[21] of the Motor Vehicle Act, 1988 ("MVA") on account of the death of the deceased Raghubir due to injuries received in a motor vehicle accident. The appellant relied on the judgment in *Sebastiani Lakra and others v. National Insurance Company Ltd (2018)*[22] to contend that the benefits are not liable to be deducted. However, the bench comprising Justices BV Nagarathna and Augustine George Masih followed the 2016 judgment passed in *Reliance General Insurance Co. Ltd. Vs. Shashi Sharma* [23]which held that ex-gratia payment by employer to the family of the deceased was liable to be deducted from the compensation.

The bench noted that *Sebastiani Lakra* had distinguished *Shashi Sharma* on the ground that the amount involved in the former case was a benefit scheme to which the deceased employee had contributed. Wheareas, in Shashi Sharma it was an ex-gratia compassionate assistance. In the *Shashi Sharma case*, the court held that the amount received or receivable by dependants of the deceased (who died in a motor accident) from the employer by way of ex gratia financial assistance on compassionate grounds can be deducted from the quantum of compensation fixed by the Motor Accident Claims Tribunal (MACT) under the head "pay and other allowances. Accordingly, after finding no merits in the petition, the court declined to entertain the petition of the deceased family members seeking the double benefit of receiving compensation under MVA and by the government.

## Redefines Dependency Criteria in Motor Accident Compensation Cases

Recently, The Supreme Court in the case of *The New India Assurance Company Limited V. Anand Pal & Ors.*[24] ordered rejection of compensation of awarded to the brothers (respondents) of the deceased victim under the Motor Vehicles Act, 1988. In the present case, the deceased died in an unfortunate vehicular accident. Following this, the respondents filed an application for compensation before the Motor Accident Claims Tribunal, Muzaffarnagar. The court rejected the notion that the victim's three older married siblings were reliant on his income. Additionally, it observed that the victim was residing separately and not with his

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[20] *Krishna and Ors. v. Tek Chand and Ors [*FAO No.1397 of 2013 (O&M)].
[21] Motor Vehicle Act, 1988 Section 166.
[22] *Sebastiani Lakra and others v. National Insurance Company Ltd* (2018) AIR 2018 Supreme Court 5034].
[23] Reliance General Insurance Co. Ltd. Vs. Shashi Sharma [2016 (9) SCC 627].
[24] *The New India Assurance Company Limited V. Anand Pal & Ors* 2023 LiveLaw (SC) 1047.

brothers. Additionally, the Court also opined that in the absence of evidence to the contrary, brothers and sisters would not be considered dependents because they would either be independent and earning or married or be dependent on the father. Here the apex court overruled the compensation order of the Motor Accident Claims Tribunal.

## Prioritizing Social Status and Notional Income in Compensation Claims for Unorganized Sector Workers in Motor Accident Cases

The Hon'ble Supreme Court of India in the case of *Kukrabibi and ors. v. oriental Insurance Co. Ltd and ors.*[25] *r*uled after rejecting the previous order of High Court and upholding the MACT order for claim of compensation even in the absence of definite proof of the income, the social status of the deceased is to be kept in perspective where such persons are employed in unorganized sector and the notional income in any event is required to be taken into consideration. Further, the court opined, "It is unfortunate to seek strict evidence with regard to the income of the deceased. Even in the absence of definite proof of the income, the social status of the deceased is to be kept in perspective where such persons are employed in unorganized sector and the notional income in any event is required to be taken into consideration."[26] Similar Stance of Court was seen in the case of *Mulchand Dhanji Shah & Anr. V. Mr. Noordam Iraj Ahmad & Ors.*[27], where the Bombay High Court ruled that lack of evidence supporting the income of the deceased does not justify ascertaining notional income at the minimum tier of wage in determining compensation, 'Future Prospects' ought to be allowed for those with notional income. It partly allowed an order of the Motor Accident Claims Tribunal, Mumbai, in an appeal against the compensation awarded to kin of a deceased of a motor accident.

## Supreme Court's Landmark Directive: Pathbreaking Scheme for Implementation of Amended Motor Vehicle Act

In the case of *Gohar Mohammed v. Uttar Pradesh State Road Transport Corporation and Ors.*[28] the Hon'ble Supreme Court Directs NALSA To Prepare Scheme for Implementation of the Amended MV Act And Rules. The facts of the case revolve around a tragic accident-causing fatal injury to Gohar Mohammad, 24-year-old Managing Director at DRV Drinks Pvt. Ltd., was driving home when his car was hit from behind by a bus owned by the appellant. The claimants (legal representatives of the deceased) filed a claim petition seeking compensation of Rs. 4,19,00,000 under various heads. The Motor Accident Claims Tribunal (MACT) awarded compensation of Rs. 31,90,000 to the claimants, to be paid by the insurance company. The appellant, owner of the bus was held liable for the compensation. The appellant appealed the MACT's decision to the High Court of Allahabad. However, the High Court

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[25] *Kukrabibi and ors. v. oriental Insurance Co. Ltd and ors* Civil Appeal No. 5461 OF 2023 (Arising out of SLP (C) No.28102/2019).
[26] *Supra* Concurring opinion of A.S. Bopanna, J. and Prashant Kumar Mishra, J.
[27] *Mulchand Dhanji Shah & Anr. V. Mr. Noordam Iraj Ahmad &* Ors [First Appeal No. 1005/2019 (Civil Appellate Jurisdiction); 2022 LiveLaw (Bom) 11].
[28] *Gohar Mohammed v. Uttar Pradesh State Road Transport Corporation and* Ors Civil Appeal No.9322 Of 2022 [Arising Out of Special Leave Petition (C) No. 32448 of 2018].

dismissed the appeal, upholding the compensation awarded by the MACT. On December 15, 2022, the Supreme Court upheld the High Court's decision, affirming the compensation amount ordering that a scheme be prepared under the aegis of NALSA and an affidavit making suggestions on the implementation of the Act, Rules, and the directions be produced before this Court on or before the next date of listing.

## Broadening Access to Compensation for Road Accident Victims

Further evident from the case of *Pramod Sinha vs Suresh Singh Chauhan*[29], in which the Supreme Court held that "It is not mandatory for the claimants to lodge an application for compensation under Section 166 before the MACT having jurisdiction over the area where the accident occurred - Claimants can approach the MACT within the local limits of whose jurisdiction they reside or carry on business or the defendant resides".

## Preservation of Rights: Concurrent Compensation Claims under MV Act and Workmen's Compensation Act

In the case of *Narayan v Mrs. Sangita and Anr*[30], The Bombay High court held that the compensation granted under chapter X of the M.V. Act does not forfeit the right of the employee to claim the compensation under section 3 of the 1923 Act as provided under Section 167 of the M.V. Act. wherein a truck driver, who was the employee of the owner of the truck met with a vehicular accident. As he had initiated compensation proceedings under section 140 of the Motor Vehicles Act 1988 ("M.V. Act"), his claim for compensation under the Workmen's Compensation Act 1923 (now Employees Compensation Act 1923) ("W.C. Act") was not entertained by the commissioner.

These moves of the Supreme Court to incorporate the implementation of the rules of the motor vehicle acts gives the Human Rights angle based on the law of equity, justice, and good conscience to the cases of Road accidents where it is assumed to be the wrongdoer and insurance company to be on a higher pedestal. The intervention of Supreme Courts and High Courts to evaluate the efficacy of the Motor Accident Claims Tribunal (MACT) points out the harmonious and Power Compromise between the Judicial and quasi-judicial Body.

### Special Focus: Hit-And-Run Cases and The Cause of Protest

Hit-and-run in a legal term used to describe accidents where the responsible party fails to stop and fulfill their legal obligations. These obligations typically include providing assistance to injured parties, exchanging contact and insurance information, and reporting the accident to law enforcement.[31]

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[29] *Pramod Sinha vs Suresh Singh Chauhan* [Transfer Petition(s) (Civil) No.1792/2023 (Supreme Court)].
[30] *Narayan v Mrs. Sangita and* Anr 2022 LiveLaw (Bom) 214].
[31] Noel T. Dowling, Department of Current Legislation: Motor Vehicle Statutes: "Hit and Run"; Service of Process on Non-Residents, American Bar Association Journal, Vol. 17, No. 12 (December, 1931), pp. 796-798, 814 (4 pages) <https://www.jstor.org/stable/25708428> last visited on 9th March 2024.

The concept of compensating victims of 'Hit and Run' accidents was first introduced in 1982 as an amendment to the Motor Vehicles Act, 1939. Subsequently, the Motor Vehicles Act 1988 incorporated the Solatium Scheme, in 1989. This initial compensation framework was last revised in 1994. The Solatium Fund Scheme of 1989 was replaced by the "Compensation to Victims of Hit and Run Motor Accidents Scheme, 2022," as per GSR 163 (E) on February 25th, 2022.[32]

The current scheme was launched following the provisions of the Motor Vehicles (Amendment) Act 2019. Compensation under the scheme has been revised to Rs. 2 lakhs and Rs. 50,000 for death and grievous hurt, exclusively for victims of road accidents involving unidentified vehicles that flee the scene. If the offending vehicle is identified, the victim can only claim under this scheme for grievous injuries as defined in the Indian Penal Code (1960). Otherwise, claims should be made through the Motor Accident Claims Tribunal (MACT). A dedicated Hit and Run Compensation Account was established in 2022 under the Motor Vehicle Accident Fund. The General Insurance Council is responsible for fund administration, overseen by the Trust. Previously, New India Assurance managed HIT & RUN cases. From April 1, 2022, this responsibility transitioned to the GI Council. The Compensation to Victims of Hit and Run Motor Accidents Scheme, 2022 entails the establishment of Standing Committees and District Level Committees for its implementation.[33]

The case of the *State of Maharashtra v. Salman Khan*[34] shed light on the loopholes in the existing legal framework concerning hit-and-run incidents. Initially found guilty by the trial court, Salman Khan was later acquitted by the Bombay High Court despite his actions resulting in the death of one individual and causing serious injuries to several others. This case, along with numerous similar incidents, emphasized the pressing need for robust legal measures to ensure justice for victims and deter future offenses.[35]

The deficiencies in the Indian Penal Code (IPC) allowed individuals involved in hit-and-run accidents to evade accountability by fleeing the scene and easily obtaining pre-arrest anticipatory bail. Meanwhile, victims were left to suffer without police intervention or access to medical assistance. Particularly in cases occurring at night or in sparsely populated areas, victims endured harrowing circumstances, deprived of crucial medical support during the critical 'golden hour' following the incident when timely intervention can save lives.

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[32] Motor Vehicle Accident Fund & Compensation to Victims of Hit and Run Motor Accidents Scheme, 2022, Annual Report (FY 2022-23) prepared by Motor Vehicle Accident Fund Trust General Insurance Council, < https://morth.nic.in/sites/default/files/Annual-Report-FY-2022-23-MVL.pdf> last visited 9th March 2024.
[33] *Ibid.*
[34] *State of Maharashtra v. Salman Khan* [2004 SCC(CRI) 337]
[35] Upholding justice and safety: The controversy surrounding the new hit-and-run law, <https://www.barandbench.com/columns/upholding-justice-and-safety-controversy-surrounding-the-new-hit-and-run-law> last visited on 10th March 2024.

Transporters and commercial drivers are demanding the withdrawal or amendment of Section 106(2) of the Bharatiya Nyaya Sanhita, 2023.[36] They argue that while strict action in hit-and-run cases is necessary, the new law has several flaws that need reconsideration, introduces enhanced punishment for death due to negligence, emphasizing accountability and prevention. The law proposes penalties of up to 7 to 10 years imprisonment for causing death by negligence, promoting responsibility across various sectors and underscoring the value of every life. According to the IPC, the maximum sentence for unintentionally killing someone in a car accident was two years in prison, in the S. 304A.[37]

**Concerns, Analysis and Suggestions**

In the realm of tort law, the rationale behind penal laws regarding road accidents carries dual objectives. Firstly, there exists a stringent punitive stance aimed at deterring drivers from reckless and negligent behaviors that could result in fatalities. This aspect underscores the expressive function of the law, signaling a societal intolerance towards such conduct. Conversely, there lies a parallel intent to penalize offenders who attempt to evade legal repercussions after causing death due to reckless driving. The law imposes a positive obligation on the offender to promptly report such incidents to the authorities, with provisions criminalizing any omission in fulfilling this duty. This imposition of legal obligation stems from legislative intent to enforce moral responsibility towards accident victims. This conversion of moral accountability into a legal duty is not unprecedented in motor vehicle accident cases. For instance, Section 134[38] of the Motor Vehicles Act, 1988 mandates drivers to take reasonable steps to secure medical aid for the injured unless hindered by circumstances beyond their control. Similarly, the significance of whether the offender fled the accident scene was highlighted in the motor accidents claim framework established by the Delhi High Court in *Rajesh Tyagi versus Jaibir Singh (2021)*[39]. Such legal intricacies reflect tort law's endeavor to balance punitive measures with moral and legal responsibilities in the aftermath of road accidents.

The reason for the protest is concerned with the contested provisions of the newly enacted criminal laws related to compensation in Hit and Run incidents unlikely the subject matter statute, the Motor Vehicles (Amendment) Act, 2019, in which the Section 161[40] offers compensation to victims involved in hit-and-run accidents, amounts to ₹2 lakh for fatalities and ₹50,000 for severe injuries. Unlikely, the most contested, Section 106(2)[41] of the BNS has the scope to be revisited. This section does not differentiate between rash and negligent

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[36] What is India’s new hit-and-run law? Why has it led to nationwide protests? – Firstpost <https://www.firstpost.com/explainers/what-is-indias-new-hit-and-run-law-why-has-it-led-to-nationwide-protests-13567222.html> last visited on 9th March 2024.

[37] G.S.Bajpai <https://www.thehindu.com/news/national/debating-indias-new-hit-and-run-law explained/ article 67720776.ece > last visited on 9th March 2024.

[38] Motor Vehicle Act, 1988 Section 134.

[39] *Rajesh Tyagi versus Jaibir Singh (2021)*, FAO No. -842/2203, Delhi High Court Judgement <https://judicialacademy.nic.in/sites/default/files/5rajeshtyagi.pdf> last visited on 9th March 2024.

[40] Motor Vehicle Act, 2019 Section 161

[41] Bhartiya Nyaya Sanhita, 2024 Section 106(2).

driving as two separate types. Further according to Section 106(1)[42] of the BNS says it applies to rash or negligent driving where if the driver reports the matter to the police, they shall incur a punishment of up to five years with a fine.

Arguably, to establish a fair and balanced approach to liability and punishment, it's crucial to differentiate between rash driving and negligent driving, assigning them distinct levels of culpability.[43] Treating all incidents uniformly could unjustly prejudice the individuals involved. Assessing liability should account for various contributing factors in negligent behavior, such as commuter conduct, road conditions, lighting, and similar variables. Implementing a one-size-fits-all clause without considering these diverse circumstances may unfairly discriminate against drivers facing varying situations.

Instead of imposing a uniform 10-year imprisonment term for all cases, it's advisable to categorize them based on varying degrees of liability. This approach would alleviate drivers' concerns and address ambiguities surrounding the clause[44]. Specifically, it should be clarified that different levels of liability will apply in cases of accidents resulting in severe or minor injuries, with Section 106(2) invoked solely in instances of fatal accidents. Equating road accidents resulting in minor injuries with criminal acts is unwarranted.

**Conclusion**

The landscape of road accidents and compensation laws in India presents a complex interplay of legal, moral, and societal considerations. As the country marches towards its envisioned Golden Era, the alarming statistics of road fatalities and injuries paint a stark contrast to the aspirations of progress and development. The evolving legal framework, rooted in principles of tort law, criminal justice, and consumer protection, seeks to address these challenges while balancing the interests of victims, offenders, and society at large.

The foundation of compensation in tort law rests on the fundamental principle that every harm should have a remedy. In the context of road accidents, compensation serves as a means of redress for individuals who have suffered loss or injury due to the wrongful acts of others. Through legislative enactments and judicial interpretations, the legal system aims to uphold principles of justice, equity, and good conscience while providing avenues for victims to seek restitution.

Recent legislative developments, such as the Motor Vehicles (Amendment) Act, 2019, and the Bharatiya Nyaya Sanhita, 2023, reflect a growing recognition of the importance of compensation within the criminal justice system. These laws not only impose punitive measures on offenders but also emphasize the moral and legal obligations of individuals

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[42] *Supra* Section 106 (1).

[43] Tarun Sridharan, *"What is the Difference Between Negligent Driving and Recklessness?"* <https://www.1800thelaw2.com/resources/vehicle-accident/negligent-vs-reckless-driving/> last visited at 10th March 2024.

[44] On the Truckers' Protests | Economic and Political Weekly (epw.in) <https://www.epw.in /journal/ 2024/2/ editorials/truckers%E2%80%99-protests.html> last visited at 10th March 2024.

towards accident victims. The provision of compensation underscores the state's commitment to addressing the needs of victims and ensuring accountability for wrongful conduct.

However, the implementation of these laws has encountered challenges and controversies. The introduction of stricter penalties for hit-and-run incidents, as exemplified by Section 161 of the Motor Vehicles (Amendment) Act, 2019, has sparked debates and protests among transporters and commercial drivers. The blanket application of punitive measures without differentiation between rash and negligent driving has raised concerns about fairness and equity in liability determination.

To address these issues, a nuanced and balanced approach to liability and punishment is imperative. Instead of imposing uniform penalties, the law should differentiate between different degrees of culpability based on the circumstances of each case. This approach would ensure that individuals are held accountable for their actions while mitigating the risk of unjust outcomes and unintended consequences.

The evolving legal landscape, influenced by principles of equity, justice, and good conscience, underscores the importance of a holistic approach to compensation for road accident victims. As India progresses towards its goal of becoming a developed nation, it is imperative to create a legal framework that not only deters negligent behavior but also ensures just and equitable compensation for victims. By addressing the complexities and challenges of compensation laws, this paper aims to contribute to the ongoing discourse on enhancing road safety and justice for accident victims in India.

In conclusion, the quest for justice and accountability in cases of road accidents requires a multifaceted approach that integrates legal, ethical, and pragmatic considerations. As India strives towards its goals of progress and development, it must prioritize the safety and well-being of its citizens on the roads. By fostering a legal framework that balances the rights of victims and offenders, upholds principles of fairness and equity, and promotes responsible behavior, India can pave the way for a safer and more just society for all. It is through sustained dialogue, collaboration, and innovation that the country can navigate the complexities of compensation laws and chart a course towards a brighter future for its citizens.

# A Critical Analysis of Digital Personal Data Protection Act, 2023: An Emerging Trend in the Era of Privacy Reforms

***Ananya Jain***[1]

## Abstract

*In a time of astounding technical advancement and growing societal digitization, the critical need of data privacy rights has become clear. Concerns over the security and confidentiality of personal data have been highlighted by the almost complete migration of human interactions and commercial activity to online platforms. As a result, several nations across the world have started taking steps to implement thorough data protection laws, or are actively considering doing so. India has also started the process of creating a strong framework for data security. This initiative is the result of realizing how urgently legislation in this area is needed, six years after the Supreme Court of India made history by recognizing privacy as a fundamental right guaranteed by the Indian Constitution.[2] Ultimately, the "Digital Personal Data Protection Act, 2023" marks a critical turning point in the field of data protection in India. It emphasizes how dedicated the country is to protecting its people's privacy in an increasingly digital age.*

*The goal of the Act is to provide a comprehensive legal framework while maintaining personal data protection and encouraging economic development and innovation.[3] With its rapidly advancing data protection laws, India is sending a clear statement about the value of data security and privacy in the twenty-first century. This legislation is a significant step forward since it creates a new legal framework in India and is the first privacy Act in the country designed to protect individuals' personal information. In addition to highlighting the establishment of the Data Protection Board of India, the Act outlines its main features and outlines the rights and obligations of both people and businesses with regard to the protection of personal data.[4] This paper examines the scope, applicability and key provisions of the Digital Personal Data Protection Act, 2023 along with the comparative analysis with the EU Regulations. Further, the paper accesses the challenges and ambiguities that may stand in the direction of adoption of the Act and the measures and recommendations that can be proposed for addressing them.*

***Keywords:*** Data Protection, Data Principal, Data Fiduciary, Personal Data, Data Protection Board, Personal Data.

## Introduction

The Indian Parliament enacted the Digital Personal Data Protection (DPDP) Act, 2023 early in August of this year.[5] After more than five years of careful deliberation, this new legislation is India's first comprehensive law pertaining to the protection of personal data.[6]

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[1] ***5th Year Student, BBA LLB (H.), UPES Dehradun, Uttarakhand, Email Id: ananyaj008@gmail.com***

[2] (2017) 10 SCC 1.

[3] *The Digital Personal Data Protection Act, 2023*, Deloitte (Nov. 01, 2023), https://www2. deloitte.com/in/en/pages/risk/articles/the-digital-personal-data-protection-act-2023.html.

[4] Karthik Nachiappan, *Passage: India's Digital Personal Data Protection Act 2023*, ISAS NUS (Aug. 14, 2023), https://www.isas.nus.edu.sg/papers/the-final-passage-indias-digital-personal-data-protection-act-2023/.

[5] *The Digital Personal Data Protection Act, 2023 (No. 22 of 2023)*, Gazette of India (Aug. 11, 2023), https://www.meity .gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf.

The 2023 Act is the fourth version of the bill overall and the second iteration that was introduced in Parliament. The 2023 Act is the fourth version of the bill overall and the second iteration that was introduced in Parliament. In 2018, a group of specialists created the first draft, which was then distributed for public feedback.[7] The Personal Data Protection Bill, 2019 is the name of the bill that the government subsequently presented in Parliament in 2019. A legislative committee examined this version and released its findings in December 2021.[8] Nevertheless, the government retracted this bill and, in November 2022, the Digital Personal Data Protection Bill, 2022, a new draft, was made available for public comment. This draft was quite different from earlier iterations, and the 2023 legislation mostly borrows from it with some additional clauses that are relevant to the issues this article seeks to answer.[9]

A significant decision rendered by the Indian Supreme Court in the 2017 case of *Justice K.S. Puttaswamy and Anr. v. Union of India and Ors*.[10] preceded these four drafts. This decision proved that the right to privacy, which includes the right to informational privacy, is an integral part of India's basic right to life. The ruling, however, did not specify the exact parameters of informational privacy or provide certain safeguards for this right. The government's November 2022 draft, which departs from the prior approach to data protection law, serves as the foundation for the DPDP Act.[11]

Nearly 700 million people in India are active internet users, and 467 million of them use social media, which generates enormous amounts of digital data. India is now the second-largest internet market as a consequence. Digital data production, ownership, sharing, data security, and the upkeep of mutual trust among data transmitters have increased relevance now that it has become a ubiquitous business enabler.[12]

The primary objective of the DPDP Act is to enhance the accountability and responsibility of entities that operate in India. These entities include internet companies, mobile app developers, and businesses that collect, store, and process the data of citizens. The legislation places significant emphasis on the "Right to Privacy," which aims to guarantee that these

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[6] Starting with the Supreme Court's judgment declaring privacy to be a fundamental right in *Justice K.S. Puttaswamy and Anr. v. Union of India and Ors.* (10 SCC 1, Supreme Court of India, 2017).

[7] *The Personal Data Protection Bill, 2018*, (Nov. 1, 2023), https://www.thehinducentre.com /resources /article 24561526.ece/binary/Personal_Data_Protection_Bill,2018_0.

[8] *Report of the Joint Committee on the Personal Data Protection Bill, 2019*, 17TH Lok Sabha Secretariat (Dec. 16, 2021), https://eparlib.nic.in/bitstream /123456789/835465/1/17 _Joint_ Committee_ on_ the _ Personal_ Data_ Protection_\Bill_2019_1.pdf.

[9] *The Digital Personal Data Protection Bill, 2022*, Ministry Of Electronics & Information Technology, Government of India (Nov. 1, 2023), https://www.meity.gov.in/writereaddata/ files/The%20Digital%20 Personal %20Data%20Potection%20Bill%2C%202022_0.pdf.

[10] (2017) 10 SCC 1.

[11] The Digital Personal Data Protection Bill, 2022.

[12] Dr. Kembai Srinivasa Rao, *Digital Personal Data Protection Act 2023 – A game changer*, THE TIMES OF INDIA (Aug. 21, 2023), https://timesofindia.indiatimes.com/blogs/kembai-speaks/digital-personal-data-protection-act-2023-a-game-changer/.

entities prioritize the privacy and data protection rights of Indian citizens by operating transparently and holding them accountable for their handling of personal data.

The DPDPA establishes a number of compliance standards for the gathering and use of personal information. Since these clauses are vague, the Central Government will likely need to prescribe a lot of them. A memo about delegated legislation that lists the topics that the Central Government has yet to prescribe via rules is included in the DPDPA. According to the memorandum, as these are specific issues, it is impractical to include them in the DPDA itself.

This was probably added in response to complaints that the previous 2022 version, sometimes known as the "2022 Bill," left a lot of ground to be covered by regulations passed under the main legislation. Notice requirements, the role of the consent manager, the notification process for data breaches, parental permission for children's data, grievances, exemptions from processing personal data, and redressal processes are only a few of the topics covered by the delegated law. In contrast to the 2022 Bill, the DPDPA also adds a number of new illustrations to further clarify its contents.

**Application & Key Provisions of The Digital Personal Data Protection Act, 2023**
**Scope and Application**
*Applies Only to Digital Personal Data*: The DPDP Act, 2023 is only applicable to personal data that is later converted from non-digital to digital form, regardless of how it was first gathered.[13]

*Overseas Applicability*: The DPDP Act only covers digital personal data processed outside of India if it is linked to an activity involving the provision of goods or services to data subjects (or data principals) in India.[14]

*Exclusions*: (i) Personal data processed by an individual for any personal or domestic purpose; (ii) Personal data made publicly accessible by the data principal or any other person in accordance with a legal duty are not covered by the DPDP Act.[15]

**Data Fiduciary, Data Principal and Data Processor**
A "*data fiduciary*" is someone who, either by themselves or in collaboration with others, chooses the cause and procedure for handling personal data processing.[16] The person to whom the personal data belongs is known as the "*Data Principal*".[17] In cases when the person in question is a minor, the phrase encompasses the child's parent or legal guardian. If the person in question has a disability, it also includes their legal guardian who is acting on their behalf.

[13] Ishwar Ahuja and Sakina Kapadia, *Digital Personal Data Protection Act, 2023 – A Brief Analysis*, BAR AND BENCH (Aug. 22, 2023), https://www.barandbench.com/law-firms/view-point/digital-personal-data-protection-act-2023-a-brief-analysis.
[14] Digital Personal Data Protection Act 2023 § 3(b).
[15] Digital Personal Data Protection Act 2023 § 4, cl. 2.
[16] Digital Personal Data Protection Act 2023 § 2(i).
[17] Digital Personal Data Protection Act 2023 § 2(j).

It is evident from this that the DPDPA only applies to data pertaining to individuals. Any individual who handles personal data on behalf of a data fiduciary is referred to as a "*data processor*".[18]

**Notice and Consent**

*Affirmative Consent*: Consent must be free, explicit, informed, unconditional, and clear. It is the fundamental legal foundation for processing personal data. Such permission must be given in the form of a definite affirmative action and indicate the data principal's acceptance of the processing of her personal information for the intended use.[19]

*Consent Withdrawal*: The data principle is entitled to withdraw her permission at any moment and with the same simplicity as she provided it.[20] The lawfulness of processing personal data based on permission prior to its withdrawal will be unaffected by this kind of withdrawal of consent.

*Notice*: Prior to or in addition to any request for consent, a notice must be given to the data principal explaining the nature of the personal data being processed, its intended purpose, and how the data principal can exercise her rights to withdraw consent, use the grievance redressal process, and file a complaint with the Data Protection Board ('DPB').[21] If the data principal provided consent for the data fiduciary to process her personal data prior to the law's enactment, then the data fiduciary may continue processing the data principal's data until the data principal withdraws her consent in response to the notice, and a similar notice must be given to her as soon as it is reasonably practicable.

The DPDP Act amended the concept of "*deemed consent*," which was intended to be used for processing personal data for specific special use cases without the consent of the data principal but was originally envisioned in the draft Bill released in 2022.

**Consent Manager**

A person who is registered with the Board and serves as a single point of contact for data principals to grant, manage, evaluate, and revoke permission via an easily accessible, transparent, and interoperable platform is known as a consent manager.[22] Consent managers will answer to the data principle and will be required to act in the data principal's best interest and fulfill any duties that may be stipulated.[23]

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[18] Digital Personal Data Protection Act 2023 § 2(k).
[19] Digital Personal Data Protection Act 2023 § 6.
[20] Digital Personal Data Protection Act 2023 § 6, cl. 4.
[21] Digital Personal Data Protection Act 2023 § 5.
[22] Digital Personal Data Protection Act 2023 § 2(g).
[23] Rajdeep & Joyeeta Banerjee, *Decoding the 'Digital Personal Data Protection Act, 2023'*, FORBES INDIA (Oct. 06, 2023), https://www.forbesindia.com/blog/legalese/decoding-the-digital-personal-data-protection-act-2023/.

**Processing for Legitimate Purposes**

A data fiduciary is permitted to process a data principal's personal data for the following legitimate purposes without the data principal's consent: processing for employment purposes, medical emergency response, performing legal functions, providing services or benefits to the data principal on behalf of the State, complying with court orders or judgments, etc.; these are just a few examples of the situations in which a data principal has voluntarily shared personal information and has not objected to such processing.

**Obligations of Data Fiduciary**

Compliance with the DPDP Act is the responsibility of data fiduciaries, and this includes any processing of personal data carried out on their behalf by a data processor. Data fiduciaries must guarantee the integrity and completeness of any personal data they handle if it will be shared with another data fiduciary or used to make decisions that might impact the data principal. If the data principle withdraws her permission or if it is reasonable to believe that the intended purpose is no longer being met, data fiduciaries are also expected to delete the personal data, unless such retention is essential for legal compliance.[24]

**Significant Data Fiduciaries**:

Depending on a number of variables, including the amount and sensitivity of processed personal data, the danger to the data principal's rights, state security, etc., the Central Government may designate any or all data fiduciaries as major data fiduciaries.[25] Additional requirements for significant data fiduciaries include appointing a person to serve as a data protection officer with a base in India, appointing an independent data auditor to assess compliance with the DPDP Act, conducting periodic audits and data protection impact assessments, and taking other actions.[26]

**Notification of Personal Data Breach**

In accordance with any applicable regulations, the data fiduciary must notify the DPB and any impacted data principal of any personal data breaches.[27]

**Data Principal Rights and Duties**

The DPDPA grants data principals the following rights: the ability to access information about personal data[28], including a summary of the data being processed, the underlying processing activities, and any other information as prescribed; the ability to correct and erase personal data[29]; the ability to designate a representative to act on their behalf in the event of their

[24] Digital Personal Data Protection Act 2023 § 8.
[25] Digital Personal Data Protection Act 2023 § 2(z).
[26] Namita Viswanath, Shreya Suri, Naqeeb Ahmed Kazia, Nikhil Vijayanambi, Ruhi Kanakia, *The Digital Personal Data Protection Act, 2023 The End Of The Beginning?*, INDUS LAW (Aug. 2023), https://induslaw.com/publications/pdf/alerts-2023/personal-data-protection-bill-twenty-three.pdf.
[27] Digital Personal Data Protection Act 2023 § 2(u).
[28] Digital Personal Data Protection Act 2023 § 12.
[29] Digital Personal Data Protection Act 2023 § 12, cl. 1.

incapacitation or death[30]; and right to grevience redressal[31]. The DPDP Act mandates that data fiduciaries provide data principals with easily accessible grievance redressal methods. In this sense, before contacting the DPB, the data principal must have exhausted all available grievance redressal channels.

**Cross-border Transfer of Personal Data**

Unless the Central Government prohibits such transfer to any notified nations, a data fiduciary may transmit personal data to any other nation or territory for processing.[32] The DPDP Act employs a blacklisting strategy that suggests that personal data may be transferred freely unless it is intended to be sent to a region or nation that the Central Government has designated as "blacklisted." Having said that, the DPDP Act makes it clear that any other sector-specific legislation or regulation that limits the transfer of personal data outside of India or offers a higher level of protection for certain types of personal data or a class of data fiduciaries will take precedence.[33]

**Data of Children and Individuals with Disability**

Processing personal data pertaining to children and people with disabilities requires the verifiable permission of their parents or legal guardians.[34] The DPDP Act forbids tracking or behavioral monitoring of children, as well as targeted advertising aimed at them and the processing of children's data that might have a negative impact on their wellbeing. Notably, the DPDP Act gives the Central Government the ability to waive the need to get parental approval and the ban on behavioral monitoring for certain groups of data fiduciaries and processing. Additionally, it gives the Central Government the authority to exempt data fiduciaries from some requirements when processing children's data, even when the children are older than 18 but still under a specified age.[35]

**Data Protection Board of India**

It is an enforcement body, which will have the authority to order any immediate corrective or mitigating measures upon receiving notification of a breach involving personal data, investigate the breach, levy penalties for non-compliance, inspect any document, summon and require attendance of any individual, etc.[36] Under the Telecom Regulatory Authority of India Act, 1997, the *Telecom Disputes Settlement and Appellate Tribunal (TDSAT)* was formed.[37] Within the designated timeframe and in the required way, an appeal against a DPB ruling may be filed. The Supreme Court of India may hear an appeal against the TDSAT's decision.

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[30] Digital Personal Data Protection Act 2023 § 14.
[31] Digital Personal Data Protection Act 2023 § 13.
[32] Digital Personal Data Protection Act 2023 § 16, cl. 1.
[33] Digital Personal Data Protection Act 2023 § 16, cl. 2.
[34] Digital Personal Data Protection Act 2023 § 9, cl. 1.
[35] Digital Personal Data Protection Act 2023 § 2(f).
[36] Digital Personal Data Protection Act 2023 § 18.
[37] The Telecom Regulatory Authority of India Act 1997 § 14.

**Voluntary Undertaking**

The DPB may also accept a voluntary undertaking from a person who is going to be prosecuted for breaking the law. This voluntary undertaking may include an assurance to: (a) take action within a time frame set by the DPB; (b) refrain from taking specific action; and/or (c) publicize the voluntary undertaking. Insofar as the contents of the voluntary undertaking are concerned, legal procedures will be barred if such an undertaking is approved by the DPB.

**Penalties**

*Monetary Penalties for Breach*: At the completion of an investigation, the DPB may impose financial penalties up to INR 250 crores, depending on the kind of violation.[38] The amount of fines may depend on a number of variables, such as the kind, severity, and length of the breach, the type of personal data compromised, the repeatability of the breach, and if the defaulting party has profited or averted loss as a consequence of the breach, among other things.

***No Compensation***

Data principals whose personal data has been compromised are not entitled to compensation under the DPDP Act. This is different from the Information Technology Act of 2000, which permits impacted data principals to sue a data fiduciary for damages if the latter neglected to put appropriate security measures in place, leading to unjust loss or gain.

Having said that, the DPDP Act imposes certain obligations on the data principals, including the need to provide only verifiably authentic information, refrain from pretending to be someone else while supplying personal data for a particular purpose, and refrain from filing baseless or fraudulent grievances or complaints with the DPB or a data fiduciary. If the data principals fail to fulfill their obligations, they might face penalties of up to INR 10,000.

**Exemptions**

The DPDP Act excludes from application: (a) all of its provisions when processed by specific notified State instrumentalities for purposes such as maintaining public order, India's sovereignty and integrity, etc.; and (b) some of its provisions when processing is required for purposes such as enforcing a legal right or claim, merging or amalgamating, investigating or prosecuting an offence, etc.[39] Additionally, the DPDP Act gives the Central Government the ability to notify some data fiduciaries, including startups, that they are excluded from certain responsibilities, such notice and retention requirements, those that apply to substantial data fiduciaries, etc.[40]

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[38] Digital Personal Data Protection Act 2023 § 33.
[39] Digital Personal Data Protection Act 2023 § 17.
[40] Ashima Obhan and Vrinda Patodia, *India: A Study On The Digital Personal Data Protection Bill, 2023,* Mondaq (Aug.10,2023), https://www.mondaq.com /india/data- protection/1353488/a -study-on-the- digital-personal-data-protection -bill-2023-.

**Conflict with already-existing Laws**

The DPDP Act's provisions will be added to existing laws, not replace them. Nevertheless, to the extent that a provision of this Act conflicts with a provision of any other legislation that is now in force, the provisions of this Act must have priority.[41]

**Comparison of DPDP Act with EU's GDPR**

The *General Data Protection Regulation (GDPR)* is an EU and EEA data protection legislation that attempts to simplify international business rules by standardizing laws across the EU. Replacing the 1995 data privacy regulation and giving people control over their personal data are its two main goals. It has been in effect since May 25, 2018, and its main goal is to protect individual rights while supervising data transmission outside of the EU.[42]

On the other hand, approved by both chambers of Parliament in August 2023, the *Digital Personal Data Protection Act 2023 (DPDPA)* is the first comprehensive data protection legislation in India. Protecting the privacy of personal information belonging to Indian citizens is its main goal. This act, which introduces extensive provisions for data privacy, represents a major turning point in India's data protection environment.

**Goals and Scope of the GDPR and India's DPDPA**

The GDPR's primary goals are as follows:

- giving residents and people back control over their personal data
- streamlining the regulatory environment for multinational corporations by bringing all EU regulations into uniformity
- preventing unauthorized use, disclosure, or destruction of personal data

Regardless of the organization's location, all companies managing personal data of persons inside the EU are subject to the GDPR.[43]

In relation to the PDPDA, its goals consist of:

- preserving the confidentiality of Indian individuals' personal information
- promoting the appropriate management of personal data
- allowing people to have control over their personal information
- Encouraging innovation and financial progress

Regardless of an individual's actual location, all entities processing personal data of persons inside India are subject to the PDPDA.[44]

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[41] Digital Personal Data Protection Act 2023 § 38, cl. 2.

[42] *GDPR vs. India's DPDPA: Analyzing the Data Protection Bill and Indian Data Protection Landscape*, Secure Privacy (Sep. 30, 2023), https://secureprivacy.ai/blog/comparing-gdpr-dpdpa-data-protection-laws-eu-india#:~:text = However%2C%20there%20are%20also%20some,and%20DPDPA%20to%20ensure%20compliance.

[43] General Data Protection Regulation, 2018, https://gdpr-info.eu/.

[44] Digital Personal Data Protection Act, 2023.

### *The Similarities*

The GDPR is a significant piece of legislation that serves as a model for privacy regulations throughout the globe and highlights the significance of protecting peoples' privacy in a connected society. There are notable parallels between the GDPR and the Indian DPDPA.

**Anonymized data excluded**

The DPDPA and the GDPR both stress the value of data security and exclude anonymized data from their purview since it does not jeopardize the rights or privacy of persons. Nevertheless, the DPDPA raises concerns about the difficulties of data anonymization and the need for advanced methods of privacy protection by implying that anonymised data may still be governed if re-identification is feasible.

**Processing of data without consent allowed in certain cases**

The GDPR and the DPDPA both authorize processing of data without express consent in some instances, such as managing medical crises or meeting legal requirements. By offering guidance for appropriate data processing, these exceptions seek to strike a balance between the need for data protection and essential or legally mandated acts.

**Consent standardization**

In accordance with the GDPR and DPDPA, permission for the processing of personal data must be freely provided, explicit, informed, and show the subject's knowledge and willingness. The DPDPA adds a need for multilingual accessibility in permission forms to encourage inclusiveness, while both rules require specific goals for data collection and a legal basis for processing.

**Significant Data Fiduciary**

According to the DPDPA, an organization that manages a sizable quantity of sensitive data is considered a "Significant Data Fiduciary" and is thus liable to a greater number of responsibilities. This reflects a worldwide trend towards strengthening data protection procedures and boosting accountability and is similar to GDPR in that it involves designating data protection officers to guarantee compliance with data protection laws and regulations.

### *The Differences*

**Personal Data Categorization**

*GDPR:* Based on sensitivity and kind, it identifies groups of personal data that have different compliance obligations.[45]

*DPDPA:* Does not create distinct categories; compliance requirements are the same regardless of the kind of data.

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[45] Covington & Burling LLP, *Comparison: Indian Personal Data Protection Bill 2019 vs. GDPR*, Privacy Security Academy (Nov. 01, 2023), *https://www.privacysecurityacademy.com/wp-content/uploads/2020/05/Comparison-Chart-GDPR-vs.-India*-PDPB-2019-Jan.-16-2020.pdf.

**Application to Offline Data**
*GDPR:* Applies to offline information kept in cabinets of documents.
*DPDPA:* Does not apply to traditional paper records; it only covers digital or digitized data.

**Mandatory Notice Requirement**
*GDPR:* Regardless of permission, notice during data acquisition is required.[46]
*DPDPA:* Only in cases where data processing depends on permission is notification required.
**Notice Content**
*GDPR:* Demands substantial information even in cases where consent is not needed.
*DPDPA:* Provides strict content criteria and focuses on educating persons for consent.

**Children's Data**
*GDPR:* Unlike DPDPA, it does not specifically address safeguarding children's data.
*DPDPA:* forbids handling dangerous data without getting valid parental approval.

**Grievance Redressal**
*GDPR:* Enables people to contact authorities directly instead of going via controllers.
*DPDPA:* Requires people to first try to resolve issues with the controller.

**Data Transmission Across Borders**
*GDPR:* Different degrees of transfer permission are provided under the GDPR.
*DPDPA:* Enables the national government to limit the flow of data to certain countries.

**Notification of Data Breach:**
*GDPR:* Notification is only necessary where there is a significant danger.
*DPDPA:* Demands that authorities and impacted parties be notified of any violations.

**Consent Managers**
*GDPR:* Does not include this clause.
*DPDPA:* Provides Consent Managers to help people manage their consents.

**Voluntary Undertaking**
*GDPR:* There is no such clause in GDPR.
*DPDPA:* Permits voluntary agreements in order to avoid legal action.

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[46] Kurt Wimmer, CIPP/E, CIPP/US, Gabe Maldoff and Diana Lee, *COMPARISON: Indian Personal Data Protection Bill 2019 vs. GDPR*, I APP (Nov. 1, 2023), https://iapp.org /media/pdf /resource_ center/ india_ pdpb 2019 _vs_gdpr_iapp_chart.pdf.

The DPDPA approaches data protection differently from its international counterparts, such as the GDPR, by emphasizing trust and the ethical obligation between data controllers and the subjects.

## Key Concerns & Ambiguities in The Act

### *Ambiguities in Definitions*

Any law's efficacy depends on how clear it is, and when it comes to data protection, this is especially true. Interpretation and use of the Act are complicated by ambiguities in important terminology, such as "personal data". This sentence is somewhat abstract in addition to being ambiguous in its meaning.

Will sensitive information fall within the scope of personal data, including images, audio, video, metadata, analytics, and so on? Is it possible to create different rules for public, private, sensitive, and personally identifiable information (PII) data? The precise definition of a negative impact on a child's wellbeing resulting from the processing of their personal data is not entirely apparent. The Act's capacity to completely shield people from possible privacy intrusions is hampered by this uncertainty.[47]

### *Difficulties with Enforcement*

Although the Act specifies fines for noncompliance, there are real difficulties with its enforcement procedures. If data fiduciaries don't follow the rules, they risk fines of up to INR 250 crores. A thorough awareness of the latest developments in cyber risks and data security procedures is necessary for both investigating and prosecuting organizations for data breaches or violations.[48] Increasing the capacity of regulatory agencies, encouraging cooperation with cybersecurity specialists, and putting preventative measures in place to stop data breaches are all part of strengthening the enforcement framework. Furthermore, tackling cross-border issues necessitates international collaboration and the coordination of enforcement measures across countries.

### *Finding the Correct Balance Between Privacy Protection and Innovation*

One of the Act's main challenges is finding the ideal balance between protecting privacy and promoting innovation. Although rigorous laws are necessary to protect personal information, an overly onerous system might impede technological progress and prevent the creation of data-driven solutions.[49] To make sure that the Act changes in step with technological advancement, policymakers must have ongoing conversations with industry players, digital

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[47] *The Digital Personal Data Protection Bill, 2023*, PRS India (Nov. 01, 2023), https://prsindia.org /billtrack/ digital-personal-data-protection-bill-2023.

[48] Ananya Chaudhary, *The Impact of the Digital Personal Data Protection Act 2023 on Privacy Rights in India*, Prime Legal (Nov. 1, 2023), https://primelegal.in/2023/09/24/the-impact-of-the- digital-personal- data-protection - act-2023-on-privacy-rights-in-india/.

[49] Ananya Chaudhary, *The Impact of the Digital Personal Data Protection Act 2023 on Privacy Rights in India*, Prime Legal (Nov. 1, 2023), https://primelegal.in/2023/09/24/ the-impact-of-the-digital - personal-data-protection - act-2023-on-privacy-rights-in-india/.

innovators, and privacy advocates. Enforcing the fundamentals of data security while addressing the dynamic environment of digital innovation requires the implementation of systems for frequent inspections and upgrades.

***Exemptions for National Security***

The Act gives wide exemptions for the gathering of data for national security purposes, which might undermine individual rights and open the door to unauthorized monitoring. There is cause for worry over the possible exploitation and abuse of personal data by state actors due to the absence of clear control procedures and established bounds for these exemptions. This mismatch between personal privacy and national security requires additional thought and creative strategy.[50]

***Inadequate Enforcement Mechanisms***

The Data Protection Board of India, the Act's newly established regulatory agency, is unable to implement the law. There are questions about the efficiency of the system in holding offenders responsible due to its limited investigation capabilities, budget limitations, and ambiguous grievance redressal processes. This flaw might give data corporations the confidence to flout the Act's rules, endangering user data and undermining public confidence in the legal system.[51]

***The Act's Silence on Emerging Technologies***

There is a glaring gap that might lead to possible abuses and privacy breaches due to the Act's omission to cover cutting-edge fields like AI, Generative AI, GPT-based models, ML, biometric data, etc.[52] There are special concerns associated with identity theft and abuse with these new technologies. The Act's lack of discussion on these matters exposes people's personal information to these new dangers.

***Definition of child different from other jurisdictions***

The definition of a child under the Act is different from that in other jurisdictions with regard to the processing of kid data. The Act establishes a consent age below 18, but it is above 13 in the USA and the UK.[53] This difference raises questions about verifiable parental permission since it might make it less anonymous to use the internet if each user's age is verified.

**Conclusion and Recommendations**

With India's sizable internet user population, data creation, and involvement in international commerce and investment, the DPDPA marks a major leap in personal data protection that has been long needed. Previous data protection regulations were not entirely comprehensive or

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[50] *Id.*
[51] *Id.*
[52] *Supra* Note 44.
[53] Children's Online Privacy Protection Rule ("COPPA"), Federal Trade Commission, USA (accessed on Nov. 01, 2023), https://www.ftc.gov/legal-library/browse/rules/childrens-online-privacy-protection-rule-coppa.

precise, even if they placed requirements on data processors and offered some protection for data subjects. The DPDPA prioritizes individual privacy and gives people greater control over their personal data, overhauling the present framework by replacing and deleting the existing rules. It seeks to strengthen the enforcement of peoples' data rights and stop the improper use of personal information.

The DPDP Act has been criticized, nevertheless. Some contend that it may stifle innovation and is too restrictive. The Central Government has a great deal of influence over how personal data is processed, raising concerns about the effectiveness of privacy protection for individuals. Given the importance of these regulations' function and influence on privacy rights, the DPDP Act's frequent use of the term "as may be prescribed" raises questions regarding the restrictions that the Central Government may enact via delegated legislation. Similar to what the Ministry of Electronics and Information Technology (MeitY) did for online gaming regulations in 2023, it is advised that the Central Government establish a consistent process for issuing these regulations, including involving stakeholders from various industries in regular consultations.

Finally, it is critical to include a transition period that gives companies ample time to modify their operations and comply with the provisions of the DPDP Act. Data fiduciaries could need to make major modifications as a result of the new, more stringent requirements. If there is no transition time, there may be widespread non-compliance with the DPDP Act. Providing a long enough transition period will guarantee that companies can easily implement the required changes and comply with the Act's requirements.

Furthermore, it is worth noting that the Ministry of Electronics and Information Technology (MeitY) states that the Digital India Act (DIA), which will displace the current IT Rules, would soon complement by the DPDPA.[54] Further, there are some ***recommendations*** with the aim to fill the gaps in the current legislation:[55]

- *Government Accountability*: Governments that are acknowledged as major data fiduciaries are required to closely follow the exemptions for legitimate government data storage. This highlights how important it is to include this component in the DIA for thorough and responsible data management.

- *Clarity in Definitions and Consent*: The law must provide exact definitions for phrases like "sensitive data," "consent," and "lawful purposes," especially when it comes to biometric data. For the purpose of avoiding abuse and enabling people to make knowledgeable choices about their personal data, precise definitions are essential.

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[54] Ministry of Electronics and Information Technology, Government of India, *Digital India Act*, Press Information Bureau (accessed on Nov. 01, 2023), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1948357.
[55] Shravishtha, Ajaykumaramoha and Basrurvaishnavi Sharma, *The Digital Personal Data Protection Act, 2023: Recommendations for Inclusion in the Digital India Act*, Observer Research Foundation Onlne (Oct. 30, 2023), https://www.orfonline.org/research/the-digital-personal-data-protection-act-2023/.

- *Industry Alignment and Emerging Technologies*: The DIA need to bring data processors and fiduciaries from different industries into compliance with the laws already in place. To maximize the potential for data security, precise policies pertaining to developing technologies—especially artificial intelligence—should be included.

- *Legislation Dedicated to Healthcare Data*: The DIA need to give priority to enacting legislation specifically controlling health data, since there is currently no particular healthcare statute. Beyond breach management, this legislation must include robust cybersecurity safeguards, unify healthcare regulations, and protect people.

- *Boosting the Data Regulation Regime*: In order to combat fragmentation in data regulation, recommendations emphasize the necessity for precise definitions, the incorporation of developing technologies, and the development of extensive policy frameworks. By taking these steps, the regulatory system will be strengthened and made more adaptable to the changing digital world.

To sum up, it is crucial that these ideas be implemented successfully in the subsequent DIA. In order to secure data protection and privacy rights in India and to handle the problems provided by the fast expansion of technology, it is imperative that they be integrated into a strong, flexible, and all-encompassing legal framework.

# Parliamentary Privileges: Balancing Legislative Immunities with Public Interest

***Hitika Agrawal***[1]

## Abstract

*Parliamentary privileges are the privileges that are enjoyed by the members of the parliament and the state assembly under Articles 105 and 194 respectively. These privileges have a long history in India and have not been available to the parliamentarians and now with their effort, we have these privileges that are important for the smooth functioning of the democracy. These privileges have increased and now there are various types of privileges like freedom of speech, freedom to conduct the proceedings of the house, freedom to publish the proceedings of the house, right to exclude strangers, etc. These privileges are important but the power to make these privileges and to punish for their violation is with the parliament which has caused problems the power of the parliament is absolute and as the saying goes power corrupts and absolute power corrupts absolutely so there is a need to set limitation to these privileges. The judiciary also has a different stance on this topic and there is a tussle between the judiciary and the parliament on this topic as there is a responsibility on the law to protect the rights of the people also. There are various loopholes regarding these privileges and there is a need to put a limitation and codify these privileges so that there is no misuse of these privileges. With the Sita Soren judgment, it is again highlighted why there is a need to place a bar on these privileges and now the parliament should work on these privileges and should make a way so that these privileges can be questioned in the court also when there is a violation of the rights of the people.*

***Keywords:*** *Parliamentary privileges, Article 105 and 194, History of parliamentary privileges, Fundamental rights, judiciary's stance, loopholes, codification, Sita Soren Judgment.*

## Introduction

Parliamentary privileges are crucial instruments that enable the legislature to carry out its mandate without fear or favor in a variety of situations and meet the public's reasonable expectations. A member of the parliament or a state legislature may use these particular rights to carry out certain actions that they would not be able to carry out outside of the legislature. "Parliamentary privilege is the sum of certain rights enjoyed by each House collectively and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals," was stated by the eminent constitutional theorist Sir Thomas Erskine May. In laymen's language Despite being outlined in a constitutional clause or lex loci, the privilege is essentially an exception from general or ordinary law that is open to all people, regardless of their history or rank. These privileges apply not just to individual members but also to the houses.

Every time there is an allegation of a breach of parliamentary privilege, the legislature or one of its committees discusses the issue, and the motion is typically denied. The story ends there

[1] ***National Law Institute University, Bhopal, India, Email Id: hitikaagrawal2004@gmail.com.***

when a brief press article appears. Although Mrs. Indira Gandhi's case involving the purported breach of privilege garnered a lot of interest and press coverage in late 1979, it was unable to produce a thorough and persuasive consideration of the points brought up. Sometimes it makes one wonder if even legislators, or the members of them, are fully aware of the rights and benefits guaranteed by the constitution that they actually enjoy. Parliamentarians have the option to raise a "question of privilege" in the event that any privilege is violated or they are found in contempt of the House. But the people lack the authority to take action against those who misuse their privilege.

The power privileges and immunities of the state legislature and its members, as well as the Indian parliament and its members, are dealt with in articles 105 and 194 of the Indian constitution, respectively. The rights of Indian parliamentarians are not listed in full in this constitution. Since the House of Commons' privilege at the outset of the constitution is specifically mentioned in Section 3 of each of these provisions. Therefore, it essentially addresses every privilege that was in place in the House of Commons on January 26, 1950. These articles served the objective of demonstrating that legislators and their members should have certain privileges in order to carry out their duties and functions without interruption or hindrance, given their high and honorable position and the significance of their job. However, the lack of a definition of the privileges in both articles made the position unclear.

**History of Parliamentary Privileges in India**

The country's legislative privileges were originally established by the Government of India Act, 1919, while the Bengal Civil Witnesses Act of 1860 gave legislatures the authority to call witnesses. The Act granted Indian parliamentarians certain restricted privileges. It guaranteed the Central Legislative members' freedom of speech, stating that no member could be held legally accountable for anything they said or voted on in the House. However, there were so many restrictions on this freedom that members thought it was preferable to voice their opinions outside of the House. The Act of 1935 did not significantly alter the situation. During the interim time between the two Acts (1919 and 1935), lawmakers from both the Central Assembly and the Provincial Councils loudly and constantly objected that they did not have any rights worth the name.

The Indian legislators believed that unless the House of Commons was granted to them and their legislatures, and the presiding officers in India were given the punitive powers, they would not be able to defend themselves against unjustified, motivated, malicious, and unwarranted criticism from the public and media. When it was brought to the Chair's attention that certain members of the House were being unfairly influenced when casting their votes, the Chair was limited to issuing a few rebukes.

Over the years, Indian legislators have persistently attempted to achieve parity in matters pertaining to privileges and other matters. For example, in 1929, member Ishwar Singh's move in the Assembly was met with opposition from the Government; The House agreed to Sardar Saran Singh's 1937 request that a privilege motion be heard right away and given

priority over the day's activity; and in the Council of State, Muhammad Suhrawardy's move could only result in the Government assuring him that his resolution had been noted.[2]

Although the Government of India Act, 1919 gave Indian lawmakers the right to free speech, it forbade freedom of arrest during legislative sessions. Any member who the government deemed inconvenient may be arrested at any time on the basis of a real, fictitious, or imagined civil or criminal complaint. Thus, during the detention of such member, contentious procedures that are likely to arouse the inconvenient member's involvement, support, or eloquence could be implemented.

Up until 1925, there was no protection against arrest for members of Indian legislatures in both criminal and civil actions. The matter was deemed unworthy of even a consideration by the Conference of Presidents and Deputy Presidents of Legislatures, which convened in 1923 under the direction of Sir Fredrick Whyte.[3] However, the Reforms Enquiry Committee, which was established in the early 1920s to investigate the actual operation of the 1919 Act, suggested that members of Indian legislative bodies established under the Act be barred from acting as jurors or assessors and that they be arrested or imprisoned for a week prior to and following the legislature's sessions. However, even this limited immunity from arrest could not be regarded as a privilege because it was not included in the Government of India Act of 1919, the current constitution. It is important to note that British Parliament members are exempt from arrest in civil proceedings forty days before to or following House or Committee meetings. There didn't seem to be any good reason for limiting the time frame for Indian lawmakers to only 14 days in this regard.

The Conference of Presiding Officers, which was occasionally held to discuss the issues the various presiding officers faced while carrying out their duties, was a crucial forum in addition to the legislature's houses. This was especially true when these honorable people were completely helpless to take any action, not even in cases of contempt for the house they presided over. In many respects, these conferences play a pivotal role in the development of parliamentary privilege in India. By pretending to represent the Indian people, the conferences made a mockery of the parliamentary democratic system by focusing on the helplessness and limits that the legislators in charge of India had to operate under.[4]

Both the 1925 Conference of the Presiding Officers and the Reforms Enquiry Committee ("Mudiman Committee") believed that the courts should refrain from interfering too soon in legislative matters. The occurrence of this kind of meddling even disturbed the Indian government, which advised the Secretary of State for India to revise the 1919 Act by adding a new clause that would make courts ineligible to meddle in legislative matters. Rather from taking immediate action, the Secretary of State recommended that the Government postpone

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[2] Indian Legislative Assembly Debates, vol. IV, 23 Aug 1937, pp. 368-85, 24 Aug 1937, pp. 446-53: Government of India, Reform Office, F. no. 53/57 Fed, 193.
[3] Govt of India, Legislative Deptt, Deposit Proceedings, April 1924, File no. 15 A&C.
[4] Hans Raj, *Evolution of Parliamentary Privileges in India*, JSTOR, Vol. 41, No. 2 (June 1980).

the idea until the Government of India Act was adopted, a suggestion that the Government duly accepted.

During their battle, which ultimately proved to be fruitless in terms of material achievements, Indian lawmakers endured abuse from people, the media, and the government. However, the fight was worthwhile as the justification for the privileges had been established, and it was clear that they should be included in the independent India's Constitution from the start.

**Parliamentary Privileges in India**

The unique rights that an individual or group of individuals have that are not subject to ordinary law and that no one can use against the individual or group are known as privileges. The three types of Parliamentary privileges are as follows: (i) those that apply to each House of Parliament collectively and against each citizen as well as to individual members; (ii) those that apply to both Houses jointly; and (iii) those that apply to each House individually against the citizen. Some of the important privileges that are provided to the members of the parliament and the state legislatures are:

**Immunity from court proceedings and freedom of speech:**

In the parliament, open, honest, and fearless debate is fundamental to the parliamentary system of government. Freedom of speech is crucial for a body like the parliament because it allows its members to voice their opinions without worrying about facing consequences for transgressions like insinuation or defamation. In the 17th century, the case of Sir John Elito solidified the principle of free speech in parliament. Article 105 (1) and 194(1) deals with this privilege. In actuality, members of the House need their freedom of speech in order to carry out their legislative duties effectively. Without it, people might not feel safe enough to express their thoughts and opinions in the House. The fact that members of Parliament are immune from civil or criminal lawsuits for any remarks or disclosures they have made, votes they have cast in the House or one of its committees, or other actions, emphasizes how important this protection is.

In *Tej Kiran Jain v. Sanjeeva Reddy*[5], the Supreme Court ruled that "anything said during the course of that business was immune from proceeding in any court once it is proven that parliament was sitting and its business was being transacted." As clause (2) expressly states, the protection is not restricted to just words; it also includes any vote he casts in parliament or on any committee within it. The freedom of speech would apply to other activities as well, such as notifications of motions, questions, committee reports, or resolutions, even if they are not specifically mentioned in the proceedings of each House. It should be emphasized that Article 105(1) is subjected to the rules and standing orders that regulate the procedure of the parliament and also to the requirements of the Constitution.

[5] *Tej Kiran Jain v. Sanjeeva Reddy*, (1970) 2 S.C.C. 272.

In the highly publicized case of *P.V. Narsimha Rao v. State*[6], the Court ruled that Article 105(2) which provides immunity from court proceedings is extended to even the MPs who have taken bribes with the intention of influencing their votes. The case involved the former Prime Minister, multiple ministers, MPs, and others.

**Right of Publication of Proceedings**

The Constitution states that anyone publishing a House of Parliament proceeding is completely immune from legal action in any court, so long as the publication is done by the House or with its consent. According to the Constitution, anyone who publishes a substantially factual account of the proceedings of either House of Parliament in a newspaper is shielded from civil or criminal legal action unless it can be shown that the publication was done maliciously. Such publications have also been granted statutory protection. However, when debates or activities of the House or its committees are reported mala fide—that is, when there is intentional misrepresentation or concealment of remarks made by specific members—or when there are confused, twisted, and perverted reports of debates, it is a breach of privilege and a sign of disrespect for the House. The public has a keen interest in knowing what happens in Parliament, hence it is vital for the public and the country that parliamentary proceedings be made public, as noted by Cockburn, C.J. in the case of *Wason v. Walter*[7]. However, protection will not be granted for reports that are incomplete or that are divorced from proceedings and released with the intention of harming people. The Indian law is the same.

**Right to regulate its proceedings**

The only authority to control its own internal processes is the House. The power to call a special session of State Legislative Assembly is vested with the governor. He is not, however, authorized by the Constitution to provide the Speaker of an Assembly instructions for the conduct of the House's business. The process is outlined in the House Rules of Business. Regarding how its procedures are conducted, nobody has more authority than the House and its Presiding Officer. As a result, each House of Parliament is able to establish rules governing how it will operate and conduct business in accordance with Article 118. The Constitution's Article 122 ensures that no court of law will be able to rule that the legitimacy of parliamentary proceedings is invalid due to any "alleged irregularity of procedure." The House's procedures cannot be contested in court on the grounds that they were not conducted in compliance with the procedural norms or that the House improperly departed from the rules established in line with Article 118. The Presiding Officer and, in the end, the House itself have the exclusive authority to interpret the rules. However, immunity from judicial intervention is limited to cases involving "alleged irregularity of procedure," as opposed to "illegality of procedure."[8]

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[6] *P.V. Narsimha Rao v. State***,** (1998) 4 S.C.C 626.
[7] *Wason v. Walter*, LR 4 QB (1868-69) 85.
[8] *State v. R. Sudarsan Babu & Others, I.L.R. (Kerala)* 1983, pp. 661-700.

**Freedom from Arrest**

This privilege prohibits any state legislator or member of parliament from being detained or arrested in a civil case for 40 days prior to or 40 days following a house session. In order to allow them to attend the session, those who are arrested within this time frame will be freed. Arrests, incarceration for a criminal offense, contempt of court, or preventative custody are not covered by this privilege. However, in the event that a member is arrested in this fashion, the detaining authority is required by Rule 261 of the Lok Sabha to notify the member's residence of the reasons behind the arrest or detention, the location of the arrest, the time of the arrest, the location of the detention or imprisonment, and the duration of the detention or arrest. In the case of *K. Anandan Nambiar v. Chief Secretary, Governor of Madras*[9], it was decided that when it comes to legitimate detention orders, members of Parliament have no more status than regular citizens.

**Right to Prohibit Publication of Proceedings**

The House of People's Rules of Procedure give the Chair the authority to strike any section of the proceedings. The *Pandit M.S.M. Sharma v. Shri Krishna Sinha (Searchlight case),* [10]involved a newspaper editor who was accused of violating a member's privilege by publishing parts of a speech that the speaker of the Bihar legislative assembly had ordered removed from the proceedings. It was contended in a writ suit brought under Article 32 by the editor that the House of Commons did not have the right to prohibit publication of portions of the proceedings that had been ordered to be deleted or of the publicly viewed and heard processes occurring in the House. As of June 20, 1979, Article 361-A, which was added by the 44th Amendment Act, 1978, states that unless it can be demonstrated that the reporting was done maliciously, a person who reports the actions of the House of Parliament or a State Legislature is not subject to civil or criminal proceedings. Reports on the proceedings of the Houses' secret sessions are exempt from this clause.

**Right to exclude strangers**

The primary purpose of the right throughout the eighteenth century was to stop reports of remarks given in the house from being made to outsiders, particularly the monarch. These days, it is only used in extraordinary circumstances. For example, in 1920 and 1922, the House debated the Irish Home Rule, and as a result, the strangers' and ladies' galleries were closed for several months due to fear of disruption.[11] It has previously been used to exclude outsiders and non-members and to hold private meetings. The goal is to eliminate any chance that members may be intimidated. Strangers may try to sway the discussion from the galleries. According to Rule 248 of the Lok Sabha, the Chair may, at any time, request that strangers leave any area of the House. Additionally, during secret sessions of the House, no strangers are allowed in the chamber, foyer, or galleries. The Speaker's approved individuals and Council of States members are the sole exceptions.

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[9] *K. Anandan Nambiar v. Chief Secretary, Governor of Madras,* (1966) 2 S.C.R 406.
[10] *Pandit M.S.M. Sharma v. Shri Krishna Sinha*, A.I.R 1959 S.C. 395.
[11] V.N. Shukla, Constitution of India (13th edition 2017; EBC).

These are some of the privileges that are available to the members of the legislature and apart from there are other privileges also that like the right to punish for contempt of the house, the right to exclude strangers, questioning the member for his disclosure in the house, etc.

**Judiciary on Parliamentary Privileges**

The issue of the interaction between the legislators and the courts has presented extremely challenging and sensitive issues in contemporary democratic democracies. The tasks of the one imposing laws for a better social order and the other guiding their application within the parameters of natural justice principles that forbid capricious behavior often seem to be inherently at odds with one another. The three categories which can be adopted to understand the interaction of courts and legislatures are:

1. **Privileges claimed by the legislature and recognized by the courts:** It is unnecessary to go into detail about the benefits that members enjoy, such as the freedom of speech in the legislature, protection from arrest in civil proceedings, and protection from being called as witnesses. The House's main rights are the freedom to set its own rules, the right to make debates and processes public, and the power to stop other people's publications of its content. Article 212(2) and Article 122(1) of the Indian Constitution have the same effect. Nonetheless, only situations involving procedural flaws are immune from judicial involvement. There would be no immunity if the House used powers that the legislature is not permitted to utilize or if the procedures were carried out against the requirements of the Constitution.

2. **Privileges claimed by the legislature but not accepted by the courts:** On all issues pertaining to privileges, the legislators and the courts have not been able to come to an agreement. Certain privileges, which the legislatures say are rightfully theirs, have been rejected by the courts. One term for the authority of a House to penalize for contempt is "the keystone of parliamentary privileges." Although the Indian Constitution makes no specific mention of it, the legislature has the authority to convict members of contempt. The term "contempt of court" is mentioned, but "contempt of a legislature" is not. Articles 105(3) and 194(3) grant the Indian legislature the authority to penalize for contempt. It remains to be discussed whether the House of Commons' power to punish for contempt stems from its status as a higher court or from its status as a privilege of Parliament.

3. **Privileges claimed by the legislature which have not yet been brought before the courts:** The ability to ensure the correct composition of the body it comprises, by enforcing disqualifications for sitting in Parliament and issuing writs when vacancies arise throughout a Parliament, is a significant privilege of the House of Commons. The House of Commons itself must decide whether a candidate who has been elected is still eligible to vote in the event that it is asserted that he is disqualified. Unlike English norm, Articles 103(1) and 192(1) specify that acting upon the recommendation of the Election Commissioner the President or the Governor, will

decide whether to disqualify a member.[12] Based on the House of Commons precedent, a legislature may in the future contend that the courts lack jurisdiction to interfere and that they possess the power to impose disqualifications for serving in the legislature.

The Searchlight case ruling by the Supreme Court has created a barrier to the codification of privileges. The Court held that as long as Parliament does not codify its privileges using its legislative power the British privilege that are granted by the House of Commons will remain available. the privilege will be available regardless of the restrictions that are imposed by the fundamental rights because of the operation of the latter portion of clause (3) of article 105 and 194. However, as soon as Parliament attempts to legislate, all of the fundamental rights will function as limitations on the legislative power due to article 13(2). The Court did hold, however, that the courts could examine the Commons' privileges to determine whether or not a certain privilege asserted by the legislature actually existed. Furthermore, the courts were not allowed to get involved in the exercise of the claimed privilege or the punishment for violating it, even if it did exist.[13]

**Privileges And Fundamental Rights**

In the case of *Pandit M.S.M. Sharma v. Shri Krishna Sinha*[14], the petitioner argued that the provisions of Part III of the Constitution apply to the House's rights under Article 194 (3). *In Gunupati Keshavram Reddi v. Nafisul Hasan and the State of U.P,*[15] the petitioner referenced the court's ruling, wherein on a warrant for contempt of court issued by the Speaker of the U.P. Legislative Assembly a man called Homi Mistry was arrested at his Bombay residence. After that, he was brought to Lucknow and stayed in a hotel while being watched over by the Speaker. After filing of a writ petition by him the SC reversed his imprisonment and ordered his release as he had argued that there was a violation of article 22(2) as he had not appeared before the court within 24 hours following his arrest. This ruling suggested that Article 194 (or Article 105) was governed by the fundamental freedom protected by Article 22(2) of Part III of the Constitution.

The majority ruling in the Sharma case stated that the privileges under Article 194(3) would not be subject to the fundamental rights outlined in Part III of the Constitution, defying the Gunpati case's ruling. The court determined that where there is a disagreement between article 19(1)(a) and a privilege, the latter will take precedence. In *powers, privileges, and immunities of the state legislature, re*[16], the ruling in the Sharma case was clarified to not imply that privileges always take precedence over fundamental rights. These all cases point to the fact the judiciary has taken a different stance on whether there can be a violation of fundamental rights when the privileges under articles 105 and 194 of the constitution are used. Therefore,

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[12] D.C. Jain, *Judicial review of parliamentary privileges: functional relationship of courts and legislatures in India*, Journal of the Indian Law Institute, Vol. 9, No. 2 (APRIL-JUNE 1967).

[13] Shivprasad Swaminathan, *The Conflict Between Freedom of the Press and Parliamentary Privileges: An Unfamiliar Twist in a Familiar Tale*, NLSI Review, Vol 22 Issue 1 (2022).

[14] *Pandit M.S.M. Sharma v. Shri Krishna Sinha* A.I.R. 1959 S.C. 395.

[15] *Gunupati Keshavram Reddi v. Nafisul Hasan and the State of U.P,* A.I.R. 1954 S.C. 636.

[16] powers, privileges, and immunities of the state legislature, re A.I.R. 1965 S.C. 745.

there is a need to codify these privileges so that there cannot be misuse of these privileges at the expense of violation of fundamental rights of the people.

**Loopholes Regarding Parliamentary Privileges**

The purpose of parliamentary privileges was to enable members to boldly debate issues and respond to public concerns. These advantages did, however, have certain shortcomings. The primary vulnerability was the lack of codification of privileges and there are other loopholes that need to be looked into to understand the misuse of these privileges.

1. **Non-codification of laws:** It has been said that the parliamentarians' powers are absolute and overbearing. These benefits are out of proportion to the citizens' fundamental rights. There is always the question of whether or not parliamentary privileges are governed by fundamental rights. The lack of codification grants the members unrestricted authority, enabling them to govern and oversee their own processes and sit as judges in their own cases. [17]Because of the prejudice and tendency for members to favor themselves, this is obviously against the core principles of natural justice. Members are immune from civil arrest 40 days prior to and following a house session, as well as while the session is in progress. A decision taken by the parliament cannot be challenged in a court of law, even if it is arbitrary, because the non-codification has prevented any judicial review of the decisions made by the legislature. The judiciary's authority is limited to determining the existence of specific privileges and immunity. It is not permitted to intervene in matters pertaining to legislative privileges unless it is evident to them that doing so would violate the Constitution or be undermined by fundamental illegality. The idea of democracy is hampered by this because, while the judiciary upholds constitutional norms, member conduct is exempt from judicial review. This is one of the main gaps in the parliamentary privileges that have been found, and nothing has been done to close it as of yet.

2. **Parliamentary privileges preferred over the right to speech:** Parliamentary privilege is often exploited to silence democratic voices; there is no balance between this right and free speech. The freedom of speech will frequently be abused, removing the protection provided by article 105 of the constitution, because there is no control over the privileges. Elected officials try to silence the nation's democratic voices and waste their privileges on pointless arguments. As SC has held in the Searchlight case that Article 194(3) which is part of the Constitution cannot be impugned by using its powers of judicial review of legislation which is available in the case of ordinary law. Employing the harmonious construction theory, which involved a conflict between two equally placed parts of the Constitution, the Court arrived at the conclusion that the Privileges under Art. 194(3) would not be subservient and would yield over the freedom of the press under Art. 19(1)(a). While the proportions between privileges and Art. 19(1)(a) as outlined in Searchlight was not changed by the Supreme Court, a more turbulent sequel in the *Keshav*

[17] Kang Lama, Richin Jacob, and Kanishka Shankar, *Analysing article 105 of the constitution of India*, Journal on Contemporary Issues of Law, Vol 7 Issue 3.

*Singh case* [18]made the Searchlight case seem like a vicar's tea party. On the basis of harmonious construction theory, the Court determined that, in the event of a conflict between the two, Article 21 should take precedence over Arts. 105(3) and 194(3). In summary, the current legal position puts a heavy weight on privileges as against Article 19(1)(a) of the Constitution. While the courts have acknowledged that there exists conflict between Art. 19(1)(a) that talks about freedom of speech and Articles 105(3) and 194(3), the courts were not able to resolve the conflict in favor of Article 19(1)(a) because Articles 105(3) and 194(3) cannot be challenged as they are constitutional provisions. This position has been found extremely unsettling by the press which is quite understandable. One demand that the press raises frequently is that the legislatures codify their privileges. A reasonable demand that is frequently raised by the press is that the legislatures should work in the direction to codify these privileges.

3. **The freedom from arrest and appearing as a witness:** Lawmakers are immune from both civil and, in certain circumstances, criminal arrest. They are free to exercise this right forty days prior to and following the house's adjournment, as well as during the session. Frequently, the members use this as a justification to avoid being arrested or facing a trial. The members are also permitted to abstain from testifying in court while the house is in session. Because the privileges aren't codified, the court cannot impose a writ on them to appear in court or as witnesses, and they are granted a great deal of freedom to operate while living in the house.

4. **No set of procedures to handle breach of privilege:** Regarding the process that the Indian Parliament uses in situations where a privilege is violated, there is also significant debate. A set of procedures for handling cases of privilege breach has not yet been established by the Parliament. Examples of this type of dispute include whether the accused must have a hearing or the right to legal representation, among other things. To this day, the Indian Parliament has adopted a policy of adopting a distinct procedure for every case. Every matter involving a breach of privilege that is brought before the Parliament is determined only by the current circumstances and the general public's view of that specific situation.

All these loopholes have caused problems and given leeway to the parliamentarians to have these privileges like they want and not take into account the rights of the people that are getting affected by the sheer use of these privileges without putting a limitation to these privileges. The Sita Soren judgment that came not too long ago is a step forward in the direction of putting a limitation on these privileges and is a case that overturned the P.V. *Narashima Rao v. State* case where the bribe takers were protected under the privilege which was a really uncanny move as the bribe givers were not protected. This case is important as it makes an important point that there is a need to put limitations on these privileges so that the

[18] Re Presidential Reference under Article 143 of the Constitution, A.I.R. 1965 S.C. 750 (Supreme Court of India) [hereinafter "*Keshav Singh*"].

parliament cannot do everything that it wants in the pretense of being protected by these privileges.

## Conclusion

The Indian Parliament reflects the thoughts and ambitions of the country's citizens and speaks for them. Legislators on opposing benches frequently launch pointed criticisms at the working government when examining its work, and this is especially common in the modern era. It is therefore crucial that lawmakers have all the privileges necessary to enable them to carry out their duties in an efficient manner. In the past, privilege in Britain was based on hostility and mistrust. However, this has not been the trajectory of India's quest for rights. It is therefore illogical to base the privileges, powers, and immunities of Indian legislatures on those of the British House of Commons.

The privileges of Parliament are universally respected, since they are deemed essential for the lawmaker's dignified and appropriate performance of their duties. However, it is, to put it mildly, completely unjustified, undemocratic, and against the intentions of the Indian Constitution's framers to leave them in an ambiguous state on the grounds that codification would be difficult or out of concern that legislation would crystallize the privileges, removing the opportunity for the presiding officers to broaden them through interpretation. It would be unwise to interfere with the courts' delicate balance by denying them jurisdiction. The primary justification for the need for the codification of privileges is Article 105, Clause (3), which occasionally leaves the stated privileges ambiguous and confusing. The Parliament has remained silent on this matter because they believe that many of their privileges will be lost if the rights are legislated. It is high time that regardless of their political background, legislators must genuinely understand their responsibilities to the public and to the House, and they must behave themselves in a way that presents a positive image both inside and outside the House.

The Sita Soren judgment is a step forward in this direction as it provides a limitation that is to be put on these privileges and now with the judiciary also highlighting the need for codification and making these privileges to an extent concrete it is the duty of the parliament to take a step towards codification and balance these privileges with the rights of the people. Therefore, it can be argued that members can uphold the foundations of parliamentary privilege only by imposing self-discipline, caution, and prudence in the exercise of those privileges, rather than by expanding the scope of the privileges, making them arbitrary, or attempting to restrict the rights of regular citizens to seek remedy in a court of law.

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# The Evolution of Indian Privacy Laws in the Era of Social Media: A Comprehensive Legal Analysis

***Rijuka Roy Barman***[1]

## Abstract

*The development of Indian privacy laws in the context of social media presents a dynamic and complex landscape shaped by rapid technological advancements and changing societal norms. This essay discusses earlier privacy safeguards that were mostly included in broad statutes like the Indian Contract Act and the IPC. It wasn't until the enactment of the IT Act, 2000 and the 2017 historic Supreme Court ruling in "Justice K.S. Puttaswamy (Retd.) v. U.O.I." that Indian privacy was recognized explicitly as a fundamental right by the Constitution that gave status to the concept of intervention to one's private life. Significant legal reforms fit for the digital era were spurred by this decision. The rise of social media has brought about enormous data exchanges and raised concerns about user privacy breaches which has profoundly altered the privacy landscape. Social media platforms usually collect a great deal of personal information about their users making them vulnerable to illegal data use and privacy violations. India has begun to create more robust legal frameworks in response such as the Personal Data Protection Bill which is modeled after global regulations like the GDPR and attempts to enhance user privacy and data protection. An additional example of how enforcement mechanisms have evolved is the proposal by lawmakers to establish new authorities to oversee compliance and address infractions. But as technology advances so quickly the legal system finds it difficult to keep up leading to important court cases and decisions that constantly alter expectations regarding privacy. More responsibility for social media companies stricter data localization laws and a greater emphasis on user consent and data transparency are all indicators of recent developments in privacy law. Legislative reform should involve creating a more comprehensive legal framework that addresses the particular problems posed by digital technologies and social media. As a result Indias privacy laws reflect a persistent effort to protect individual freedoms in the face of global digital changes. Since social media is continuing to transform both public and private spaces India needs to update its privacy laws to offer robust protections that balance technological advancement with fundamental rights.*

***Keywords:*** *Privacy Laws, Fundamental Rights, Technology, Social Media, Enforcement Mechanisms, Framework, Regulations, Emerging Trends.*

## Introduction

In an increasingly digital world, the way privacy is viewed and safeguarded has changed significantly as evidenced by the way privacy laws have evolved in India during the social media era. India's approach to privacy was first fragmented and oblique with no clear constitutional recognition of privacy as a fundamental right. When social media and the internet started to permeate daily life this gap became more and more obvious creating previously unheard-of difficulties in handling personal data.

The proliferation of social media platforms has led to exponential growth in the sharing and analysis of personal data. The shortcomings of the current legal system which was ill-prepared to handle the complexity of digital privacy and data protection were brought to light by this

[1] ***Student, Amity Law School, Amity University, Kolkata, E-mail: rijuka.roybarman@gmail.com***

upsurge.[2] India's privacy laws have undergone a thorough review in response to the public's growing concerns about data misuse and privacy breaches. India started to reconsider its privacy laws to bring them more in line with the modern digital era realizing the need for an updated legal framework.

A larger worldwide trend towards stricter data protection regulations which reflected evolving views of privacy as an essential component of personal freedom and online security as well as a legal issue was the driving force behind this change. As India works to create a more thorough framework for privacy that takes into account the complexities of digital data exchange consumer rights and the obligations of organizations that handle personal data the evolution is still ongoing today. This continuous process highlights the delicate balance that must be struck between embracing technological advancements and defending individual privacy rights. It also highlights the vital role that changing legal standards play in forming a society that in the social media age values both innovation and personal privacy.

**Historical overview**

India’s cultural diversity impacts how privacy is perceived and valued across different segments of society. Traditionally, Indian society has a collective orientation, where community and familial ties often take precedence over individual privacy. However, as urbanization and modernization increase, there's a shifting attitude towards individualism, which in turn raises the awareness and expectation of privacy rights.

The concept of privacy in India has evolved significantly, particularly in the era of digital transformation and the burgeoning influence of social media. Traditionally, privacy in India was not explicitly recognized as a fundamental right under the Constitution. The legal landscape began to change as societal norms shifted and digital technology, including social media, became more pervasive.

The rapid adoption of mobile technology and internet services has dramatically transformed the social fabric of India. As millions of Indians came online, social media became a new public square where personal information is openly shared. This shift has created unique challenges as the existing legal frameworks were not initially designed to handle such a massive and intricate exchange of data.[3] The technological push forced a reconsideration of what constitutes private space in the digital age.

The global conversation on privacy, particularly after incidents like the Facebook-Cambridge Analytical scandal, has influenced Indian perspectives on personal data protection. Exposure to international debates on privacy and observing regulations like the GDPR have pressed

[2] “The Evolution of India's Data Privacy Regime in 2021”, IAPP, available at: “https://iapp.org/news/a/the-evolution-of-indias-data-privacy-regime-in-2021/” (accessed 25.04.2024).

[3] “Data Protection Law in India,” ResearchGate, available at: “https://www.researchgate.net/publication/370944754 _Data_Protection_Law_in_India” (accessed 25.04.2024).

India to rethink its approach to privacy, especially concerning data protection on social media platforms.

The Indian judiciary has played a critical role in advancing privacy norms. Courts have been pivotal in interpreting the Constitution in ways that expand and affirm privacy rights, especially as new technologies challenge traditional boundaries. The judiciary's proactive stance, as seen in the *Puttaswamy case*, has been central in emphasizing privacy as intrinsic to personal liberty and dignity.

The trajectory of privacy law in India illustrates a dynamic interplay between traditional values and modern imperatives. As Indian society continues to navigate its complex relationship with technology, the legal system's adaptability to these changes remains crucial. Privacy, in the digital era, is no longer just about legal compliance but about sustaining the trust and confidence of the vast number of users engaged in digital spaces.

**Impact of social media on Private Life**

Technology has advanced to the point where people in India are sharing their daily life updates on social media with people all over the world whether explicitly or implicitly and with the consent of those users. However, some information that wasn't meant to be publicized gets disclosed.[4] In this era of social media where everyone is connected to technology and indirectly to social media, this could happen to anybody.

Social media has had a significant and diverse impact on people's private lives changing how Indian law views and protects privacy.[5] Traditional barriers to private life are disintegrating as a result of social media platforms' revolutionary impact on communication and information sharing. Similar to how a coin has two sides or faces as some wise men have said social media's impact on private life can have both positive and negative effects.

**Positive Effects**

**1. Better Interaction**

Regardless of geographic distance social media platforms offer a potent tool for maintaining relationships with loved ones. This has proven especially helpful in times of crisis such as the COVID-19 pandemic allowing for connection and communication in situations where in-person meetings were not feasible.

**2. Understanding and Activation**

The use of social media has been crucial in raising awareness of legal rights and protections. Giving a voice to voices that might otherwise go unheard has made it possible for large-scale

[4] DataGuidance, “India Data Protection Overview”, available at: “https://www.dataguidance.com/notes/india-data-protection-overview” (accessed 26.04.2024).
[5] Chakraborty, D. (2018). “Data Privacy in India: Evolution and Challenges”, *Journal of Information Technology Management*, 11(2), 1-8.

mobilizations for social causes like campaigns against gender violence or environmental awareness.

**3. Financial Prospects**
Platforms for social media have created new opportunities for entrepreneurship and financial involvement. These platforms help freelancers and small businesses reach a larger audience which has changed the economic landscape for many Indians.

**4. Learning and Cultural Exchange**
These platforms promote a more inclusive society by enabling an unparalleled exchange of cultural ideas and educational opportunities. Users can increase their knowledge and awareness by accessing content about privacy rights legal education and other topics.

**Negative Effects**
**1. Risks to Privacy[6]**
The possibility of privacy violations on social media is the main cause for concern. Businesses and cybercriminals alike have the ability to misuse personal information. The risk exists even with legal safeguards provided by laws like the Information Technology Act and proposed frameworks like the Personal Data Protection Bill.

**2. Disinformation and Deception**
Misinformation can travel quickly across social media platforms influencing public opinion and potentially sparking social instability. When people's data is utilized to target them with particular content without getting their permission it can violate their privacy.

**3. The act of Cyberbullying and Harassment**
Cyberbullying and harassment can be made easier by social media and victims frequently find it difficult to get away from their attackers. Although Indian law offers channels for recourse there may be variations in the implementation and timely resolution of these cases.

**4. Anonymity is Lost**
One's anonymity may be compromised by the digital traces that users leave behind on social media. This can have an impact on one's personal and professional life particularly if private information is disclosed unintentionally or on purpose.

Social media which highlights the advantages and disadvantages of living in the digital age has had a detrimental influence on India's private lives.[7] As the legal system evolves particularly in light of the impending passing of the Personal Data Protection Bill discussions

[6] National Center for Biotechnology Information (ncbi.nlm.nih.gov), "Privacy and Security in Digital India: An Overview of the Current Legal Landscape", available at: "https://www.ncbi.nlm.nih. gov/pmc/ articles/ PMC5741784/", (accessed 26.04.2024).
[7] Srinivasan, S. (2021). "Privacy and Security in Digital India: An Overview of the Current Legal Landscape", *National Center for Biotechnology Information*, available at: "https://www.ncbi.nlm.nih.gov /pmc/articles /PMC5741784/", (accessed 27.04.2024).

on privacy and personal rights in India will continue to focus on finding a balance between maximizing the advantages and minimizing the disadvantages of social media.

**Legal framework and regulations**

As was previously mentioned a complex interaction between legal frameworks cultural shifts technological advancements and global influences is reflected in the evolution of privacy laws particularly in the context of social media. At first, the Indian Constitution did not expressly acknowledge privacy as a basic right. The Indian Penal Code and the Indian Contract Act which place more emphasis on confidentiality than on privacy per se are two examples of the laws that contain the fragmented privacy protections.

Although its primary goal was to regulate cyber activities the IT Act, 2000 was India's first meaningful step towards addressing privacy in the digital age. The exponential rise in internet usage coupled with the ubiquitous impact of social media platforms brought to light the shortcomings of current privacy laws.

Public spaces where personal data is shared and analyzed extensively have changed due to technological advancements and the widespread usage of social media. Given how frequently conventional ideas of privacy are redefined this has presented particular difficulties. Consequently, India's legal response also reflects an awareness of the cultural dynamics at play where norms surrounding privacy are shifting from being focused on the community to being individual-centric.

**The Digital Personal Data Protection Act, 2023 (DPDP Act, 2023)[8]**

The DPDP Act of 2023 is the main legislation governing the processing of personal data in India. When it comes to providing people with goods or services personal data is processed both inside and outside of India. Protecting the rights of data principals and ensuring that the Act is adhered to are among the responsibilities of the “Data Protection Board of India” which was established by the Act. The Act approaches the processing of personal data from a consent-centric perspective. Permission is typically required for the processing of personal data. Two legitimate purposes for handling personal data are to comply with legal requirements or to meet official obligations. According to the Act personal data is any information that can be used to identify a specific person. However sensitive data and biometric data are not defined in it.

There are responsibilities under the Act for data fiduciaries who decide how and why to process personal data. Additionally, data processors who handle data on behalf of data fiduciaries are subject to obligations under the Act. One of the main data rights mentioned in the Act is the ability to access amend and remove personal information. In order to protect personal data data fiduciaries must also implement the appropriate security measures. Under the Act cross-border transfers are restricted and personal data must be processed and stored in

[8] “The Digital Personal Data Protection Act of India Explained,” Future of Privacy Forum, available at: “https://fpf.org/blog/the-digital-personal-data-protection-act-of-india-explained/” (accessed 26.04.2024).

India unless certain conditions are met. Public order and national security-related processing is exempt from the Acts provisions on cross-border transfer requirements data principal rights and data fiduciary obligations. Data principals are empowered by the Act to oversee review and revoke their consent through an accessible transparent and open platform. Appointing consent managers is also required by law.

Additionally, intermediaries including social media intermediaries are required by the IT Act of 2000 to remove unlawful content and appoint grievance officers to handle user complaints. These are outlined in the "*Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021*".[9] [10]

Moreover, *The Indian Penal Code 1860*, which is a criminal code, includes provisions on invasions of privacy like Section 509 which penalizes any act statement, or gesture meant to belittle a woman's modesty.[11]

Besides, "sensitive personal data" or "information including passwords financial information, and health information" is processed under the "*Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011*" which were introduced under the Information Technology Act 2000.

Additionally, *"the Right to Information Act 2005"*[12], affects the privacy of people whose personal information is held by public authorities and allows for the disclosure of information held by those authorities subject to specific exemptions.

Likewise, "*the Aadhaar (Targeted Delivery of Financial and Other Subsidies Benefits and Services) Act 2016"*[13], includes guidelines for the gathering storing, and utilization of biometric and demographic data in addition to establishing a distinct identification system for Indian citizens.

Further, the recommendations regarding data privacy security and ownership in the telecom industry and also recommendations regarding a number of data protection issues such as data privacy data security and data ownership in the telecom industry are made by the "*Telecom Regulatory Authority of India (TRAI)*".[14]

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[9] Sharma, R. (2017). "Privacy Laws and Social Media: A Critical Analysis", *Journal of Cyber Policy*, 2(3), 315-328.
[10] "Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021", Section 3(i), "Ministry of Electronics and Information Technology", dated February 25, 2021.
[11] Das, S. (2020), "The Legal Framework for Data Protection and Privacy in India", "*International Journal of Law and Legal Jurisprudence Studies*", 7(2), 55-62.
[12] Right to Information Act, 2005, No. 22, Acts of Parliament, 2005 (India).
[13] Aadhaar (Targeted Delivery of Financial and Other Subsidies Benefits and Services) Act, 2016 (India).
[14] TRAI Act, 1997 (India).

Correspondingly, *the Data Protection Bill 2018*[15] drafted by the "Ministry of Electronics and Information Technology (MeitY)"[16] was made available for public comment. Its main goals were to create a framework for the protection of personal data and include details on data minimization data localization and data protection authorities.

**Enforcement Mechanisms**

India doesn't have a dedicated body for data protection. In cases where a claim for injury or damages does not exceed 50 million rupees, the IT Act provides for the appointment of an adjudicating officer to decide whether a person has violated the Act or its regulations. The civil court would be the arbiting body in cases where the claim totaled more than 50 million rupees. The person designated as the adjudicating officer is the Secretary of Information Technology for each state government. The adjudicating officer is endowed with all civil court authority. These include obtaining testimony on affidavits requiring the production of documents and other electronic records summoning people in person and questioning them under oath and issuing commissions for the questioning of witnesses or documents.[17]

Section 72[18] and section 72A[19] of the IT Act grants the police the authority to look into offenses. The relevant sectoral regulator has authority under specific statutes pertaining to banking telecommunications and the medical industry.

An investigation into an act or offense must involve a computer system or computer network situated in India according to Section 75[20] of the Information Technology Act. The legislation's jurisdiction is extended to foreign jurisdictions subject to the conditions stated in subsection (2). The ban on mobile applications that may have originated in other nations is one example of how authority is used against businesses established in other jurisdictions. [21]

Enforcers are either the appropriate government agency or a third party. Following receipt of a blocking request the Designated Officer is required by the IT Act and the Blocking Rules to make every effort to identify the person or intermediary hosting the contested material on the internet. After that, they have to be informed so they can come before the Committee and present their case against the suggested blocking. Therefore Rule 8(1) requires prior notice to be given to the intermediary or the content originator. Next in accordance with IT Act Section 69A(1)[22] the Committee must examine the blocking request to determine whether it

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[15] Data Protection Bill, 2018 (India).
[16] "Ministry of Electronics and Information Technology (MeitY)", Government of India, available at: "https://www.meity.gov.in/" (last visited 27.04.2024).
[17] Reddy, S. (2017). "Regulating Social Media: Legal Challenges and Regulatory Responses in India", *Journal of Communication Law and Policy*, 5(2), 177-192.
[18] IT Act, 2000, S.72, 2000 (India).
[19] IT Act, 2000, S.72 A, 2000 (India).
[20] IT Act, 2000, S.75, 2000 (India).
[21] "Data Protection Laws and Regulations – India", International Comparative Legal Guides, available at: "https://iclg.com/practice-areas/data-protection-laws-and-regulations/india" (accessed 1.05.2024).
[22] IT Act, 2000, S.69A (1), No. 21, Acts of Parliament, 2000 (India).

qualifies.[23] After being sent by the Designated Officer the Committee's recommendations are received by the Secretary of the Department of Information Technology who then decides whether to block them. Once approved the Designated Officer notifies the appropriate government agency or intermediary to block the offensive content. In an emergency Rule 9 deals with content blocking without notifying the content creator beforehand and having said that the action must be validated within 48 hours.[24]

Furthermore, the DPDP Act creates a regulatory body such as a "Data Protection Authority (DPA)"[25] whose job it is to supervise how the law is implemented and enforced. This body has the power to interpret the law provide guidelines look into complaints and prosecute infringers.

Analogously the Information Technology Act of 2000 established the Cyber Appellate Tribunal to adjudicate cases pertaining to the provisions of the Act encompassing fraud and data theft. Nonetheless, subsequent modifications have placed its responsibilities under the jurisdiction of the TDSAT (Telecom Disputes Settlement and Appellate Tribunal).[26] In addition, the "CERT-In (Indian Computer Emergency Response Team)"[27] [28] serves as the country's primary cybersecurity agency handling matters pertaining to cybersecurity threats and policy enforcement including security procedures that impact the safety of user data on social media and other platforms.

The "CCPA (Central Consumer Protection Authority)"[29] which was founded under the Consumer Protection Act of 2019[30]. One of the enforcement agencies that also handles data breaches is responsible for overseeing issues pertaining to unfair trade practices deceptive advertising and violations of consumer rights. The authority has the power to investigate and prosecute violators in class action lawsuits. Maintaining consumer protection laws is made possible in large part by this organization especially when it comes to instances in which businesses like social networks and other digital service providers may neglect or abuse consumer information.

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[23] Rajan, K. (2021). "Enforcement of Data Protection Laws in India: Challenges and Opportunities", *Indian Journal of Law and Technology*, 10(2), 145-160.
[24] Desai, M. (2020). "Regulatory Oversight and Enforcement of Privacy Laws: Lessons from India", *Journal of Information Privacy & Security*, 8(1), 73-88.
[25] Data Protection Authority (DPA), Government of India, available at: "https://www.meity.gov.in/data-protection-framework" (accessed 03.05.2024 ).
[26] TDSAT, available at: "www.tdsat@nic.in" (accessed 03.05.2024).
[27] Patel, N. (2019). "The Role of Regulatory Authorities in Data Protection: A Comparative Study of India and the European Union", *Journal of Privacy and Data Protection*, 6(3), 215-230.
[28] CERT-In, available at: "https://cert-in.org.in/" (accessed 04.05.2024).
[29] Central Consumer Protection Authority (CCPA), available at: https://consumeraffairs.nic.in/ (accessed 04.05.2024).
[30] Consumer Protection Act, 2019 (India).

Finally, the "TRAI (Telecom Regulatory Authority of India)"[31] oversees the regulation of telecommunications services in India encompassing matters concerning user privacy and data security in telecom networks and services including privacy concerns regarding unsolicited communications and mobile data.

**Legal challenges & outcomes in privacy-related cases with the nexus of Social Media**

Technology is progressing in two different ways as a result of its advancement. The term positive face highlights all of the advantages that technology has provided including enhanced communication higher levels of productivity and easier access to information. In contrast, the negative face stands for the negative aspects of technology such as addiction cyberbullying, and invasions of privacy. The following are the legal difficulties that this social media era presents.[32]

1. **Consent and Information Gathering:**
   In particular, when user agreements and privacy policies are long and complicated to navigate it can be difficult to ensure that consent for data collection is voluntary and educated. It is common for users to be unaware of the full scope and consequences of their consent.

2. **International Data Flows:**
   Social media networks function globally transferring data between different legal jurisdictions. This raises questions regarding how data is protected when processed or stored in nations with various privacy laws.

3. **Information Safety:**
   Given the sophistication of cyber threats protecting personal data against unauthorized access breaches and leaks is a significant challenge.

4. **Education and User Awareness:**
   The rights of users to privacy regarding their data and the consequences of sharing their data on social media platforms are not well understood.

5. **Keeping Other Rights and Privacy in Check:**
   Respecting user privacy has always been at odds with other rights like the freedom of speech and the state's interest in maintaining order and enforcing the law.

6. **Enforcement in addition to Compliance:**
   It is difficult to enforce privacy laws against large social media companies that can afford to fight protracted legal battles.

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[31] TRAI, available at: "https://www.trai.gov.in/" (accessed 04.05.2024).
[32] Kumar, A. (2019). "Privacy Concerns in the Age of Social Media: A Legal Perspective", *Indian Journal of Cyber Law & Cyber Security*, 3(1), 28-36.

Some of the cases that frequently address the mishandling of data in the digital sphere or examine the harmony between privacy rights and other freedoms like speech and expression[33], like in the case of "*Justice K.S. Puttaswamy (Retd.) vs Union of India (2017)"****Error! Bookmark not defined.***, the Supreme Court case mainly concerned the Indian Constitution's right to privacy in relation to the Aadhaar program but its ramifications apply to all facets of privacy including social media. The Court decided that in accordance with the Indian Constitution privacy is a fundamental right. This ruling will significantly alter how social media companies handle user consent and data protection procedures.

Similarly in the case of "*Union of India v. Shreya Singhal (2015)"*[34], this lawsuit challenged the legality of Section 66A[35] of the IT Act, 2000 which severely curtailed the use of social media by making it unlawful to transmit offensive messages via communication services. The Supreme Court ruled that Section 66A was unconstitutional citing a violation of the right to free speech. This decision contributed significantly to the process of defining the legal bounds for speech on social media platforms.

Likewise, the case of "*Karmanya Singh Sareen and others v. Union of India (2021)"*[36] concerns the privacy policy of WhatsApp. The main issue was, that this lawsuit concerned WhatsApps revised privacy policies and its plans to share information with Facebook. The petitioners claimed that users' right to privacy was violated. This case has raised a lot of awareness about the data-sharing policies of social media companies and their parent businesses highlighting the importance of user consent and transparency.

The precedent case of "*Facebook Inc. vs Surinder Malik (2019)*", this case highlighted concerns about social media content management and platform culpability as it involved the improper use of social media platforms for defamation. The Delhi High Court ruled that social media companies such as Facebook must remove defamatory content from their platforms worldwide if it can be accessed from India. This decision highlights the role that social media companies play in content regulation.

Prior to the Facebook case, the case of "*Prajwala vs Union of India (2018)"* showed up with the challenge of the problem of videos showing sexual assault being shared on social media platforms, brought up in a letter petition to the Supreme Court. To allow the public to report abuse directly, the Court ordered the Ministry of Home Affairs to create an online portal. It also highlighted how social media companies need to be more proactive in quickly identifying and eliminating such content.

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[33] Singh, R. (2020). "Data Protection Laws in India: Challenges and Prospects", *Journal of Legal Studies*, 15(2), 189-204.
[34] *Union of India v. Shreya Singhal*, (2015) 5 SCC 1.
[35] IT Act, 2000, S.66A, 2000 (India).
[36] "*Karmanya Singh Sareen and others v. Union of India"*, (2021) 4 SCC 1.

In addition to the above cases, one of the prominent cases is the case of the "*State of Uttar Pradesh v. Vishakha Singh (2016)*". The actress Vishakha Singh filed a petition against the State of Uttar Pradesh in the Allahabad High Court citing misuse of her photos on social media. She claimed that her images were being used to make fictitious profiles on social media sites harming her reputation and causing harassment. The legal concern is the misuse of private photos and information on social media sites which resulted in invasions of privacy and damage to one's reputation was the main legal issue in this case. According to the Allahabad High Court, the court decided that Protecting people's privacy and personal information is crucial, especially in the digital age. The court ordered social media companies to put strong safeguards in place to stop the potential for misuse of user data acknowledging the risk of such abuse. The court's ruling clarified the necessity of tougher laws and enforcement strategies to protect people's online privacy rights.

Together these cases highlight how India's privacy rights are changing especially in the digital domain.[37] They draw attention to the difficulties that arise when social media law enforcement and personal privacy collide. This shows how the judiciary emphasizes the need for stronger laws to protect people's privacy in the digital age by preventing the misuse of people's personal data and photos on social media platforms. This choice reflects a growing understanding of the harm that social media can do to people's privacy rights[38] and reputations. The aforementioned cases serve to further the ongoing discourse in India regarding privacy rights by emphasizing the necessity of all-encompassing legal frameworks that safeguard individual's fundamental freedoms and rights while addressing the intricacies of the digital landscape. They emphasize how crucial it is to find a balance between legitimate societal interests and privacy concerns, especially in light of social media and law enforcement operations.

**Emerging trends & Future Implications**

A number of new developments and their potential future effects are expected to influence the digital environment given the constantly changing context of social media privacy rights and Indian laws. The forthcoming Personal Data Protection Bill in India which is anticipated to bring in tougher rules controlling the gathering storing and use of personal data by social media platforms and other digital entities is one notable trend.[39] This legislation is a result of a growing awareness of the need to protect people's privacy in the face of an increase in data-driven practices and technologies. At the same time as machine learning and artificial intelligence (AI) grow in popularity privacy rights face both opportunities and challenges. These technologies could provide novel solutions but there are still worries about how they might be used to analyze the massive amounts of personal data that are gathered from social

[37] Gupta, A. (2019). "The Intersection of Social Media and Privacy Laws in India", *Indian Journal of Technology and Society*, 12(1), 45-58.
[38] Mishra, P. (2018). "Privacy Rights in the Digital Age: A Comparative Analysis of Indian and International Legal Frameworks", *Journal of Comparative Law*, 8(3), 321-336.
[39] Gupta, S. (2021). "Emerging Trends in Data Privacy Regulation: A Comparative Analysis of India, the EU, and the US", *Journal of Comparative Law*, 11(2), 189-204.

media platforms.[40] This raises issues with consent transparency and the security of sensitive data. To counter this the idea of privacy by design which promotes the inclusion of privacy safeguards from the beginning in the creation of digital platforms and systems is becoming more and more popular. Rather than being handled as an afterthought, this method guarantees that privacy concerns are woven into the very fabric of technology.

Additionally, there's a growing demand on social media platforms for increased user empowerment and control over personal data. Users want easier ways to access edit and remove their data as well as improved privacy settings and transparent data policies. The desire for greater agency over personal information and a broader societal awareness of privacy rights are reflected in this shift. In order to facilitate cross-border data flows and guarantee uniformity in data protection practices there is a push for international cooperation and harmonization of privacy standards. To adjust to this trend and promote international cooperation in privacy regulation India may harmonize its privacy laws with international frameworks like the General Data Protection Regulation (GDPR).

Furthermore, gaining popularity as instruments to improve privacy protections on social media platforms are privacy-enhancing technologies or PETs. Decentralized identity systems anonymization and encryption provide techniques to reduce privacy risks while enabling people to maintain control over their personal information.[41] Additionally, high-profile privacy breaches and scandals involving social media platforms are driving the rise in privacy advocacy and awareness which is reshaping the conversation around privacy rights. More people are advocating for stricter privacy laws and more transparency from digital companies as a result of this growing awareness.

Finally, the long-term effects of social media privacy rights and Indian privacy laws are complex and ever-changing. To ensure that privacy rights are maintained in a world that is becoming more and more digitalized legislators corporations civil society organizations and individuals must work together to adapt to these trends. Stakeholders can manage the challenges of the digital age while defending people's right to privacy by adopting cutting-edge technology putting strong legal frameworks in place and encouraging a culture of privacy awareness.

**Suggestions for Legal Reform**

Given the constantly changing landscape of social media privacy laws in India and privacy rights, a number of important legal reform suggestions can be made. First and foremost in order to guarantee that users retain real visibility and control over their personal data social media platforms must strengthen their transparency and consent mechanisms. To create accountability among non-compliant entities it is imperative to enhance enforcement

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[40] Kumar, V. (2020). "Future Implications of Artificial Intelligence on Privacy Laws in India", *Journal of Artificial Intelligence and Legal Affairs*, 5(1), 45-60.

[41] Sharma, A. (2019). "Blockchain Technology and Data Privacy: Implications for Indian Regulatory Framework", *Journal of Blockchain Law*, 3(2), 177-192.

mechanisms and penalties for privacy violations. Introducing mandatory privacy impact assessments (PIAs) for emerging technologies and data processing practices can proactively identify and address potential privacy risks thereby safeguarding individual's privacy rights.

Furthermore, strengthening privacy safeguards and reducing vulnerabilities in digital systems can be achieved by providing incentives for the adoption of privacy-enhancing technologies (PETs). Public awareness campaigns and capacity-building initiatives are essential tools for informing people and organizations about their privacy rights and responsibilities. To further facilitate cross-border data flows while maintaining privacy principles across jurisdictions it is imperative to promote international collaboration and harmonization of privacy standards.

Since user engagement on social media platforms is frequent and constant it can be difficult to ensure that clear and affirmative consent is obtained for data processing activities as required by law. In actuality adherence to bilateral agreements and international data protection standards is essential. The enforcement of regional data protection laws against organizations that operate primarily outside of its territorial jurisdiction presents a challenge to the Indian legal system.

Indian law mandates that social media companies establish reasonable security practices and procedures failure to do so may result in legal ramifications. Moreover, legal frameworks have the authority to require specific disclosures and user education however the user's comprehension and engagement with these provisions frequently limits their efficacy. Regulatory and enforcement challenges are great when it comes to drafting laws that protect anonymity while maintaining accountability for online behavior. Strong enforcement mechanisms are necessary to monitor and control these platforms which may call for greater regulatory agencies and international collaboration. Finally, in order to ensure that privacy continues to be a fundamental right in the digital age and to strengthen confidence in the digital ecosystem it is imperative that the legal framework be reviewed and updated on a regular basis to accommodate new privacy challenges and evolving technological advancements.

## Conclusion

In the age of social media, the development of Indian privacy laws is a dynamic and complex process marked by important historical turning points new problems, and ongoing framework modification. Due to social media's widespread influence, people's perceptions of privacy communication and information sharing have all changed significantly making it harder to distinguish between the public and private domains. In response to these challenges, India has introduced comprehensive legislation such as the DPDP Act 2023 aimed at “regulating the collection processing, and transfer of personal data” with specific provisions addressing the unique complexities posed by social media platforms. Strong systems are needed to monitor compliance look into infractions and penalize non-compliant organizations because the efficient enforcement of these regulations is still a major concern. Furthermore, cases involving privacy and social media have produced a range of results underscoring the difficult

balancing act that must be struck between privacy rights, freedom of speech, and national security concerns.

Future implications of developing trends like decentralized technologies and artificial intelligence present both new opportunities and challenges for privacy regulation. Therefore it is necessary to take proactive measures to enhance data protection standards support enforcement procedures promote digital literacy and foster international cooperation. By adopting a comprehensive strategy that places preserving citizens privacy rights first and embracing technological innovation India can successfully navigate the challenges of the digital age without compromising the privacy or dignity of its people.

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# Discussing the *Jallikattu* Case through the Lens of Animal Rights

***Saarthak Samadder***[1]
**&**
***Kinjal Das***[2]

**Abstract**

*Jallikattu is a sport played in Tamil Nadu during Pongal, where the participants try to tame bulls by taking them by their horns and hanging on to them. It is an Indian version of the bullfight. The Tamil Nadu government passed the Tamil Nadu Regulation of Jallikattu (TNRJ) Act in 2009 to regulate the sport. Concerns were raised to bar the sport due to its violent nature. The Supreme Court permitted Jalikattu to be practised only five months a year.*[3] *However, the Ministry of Environment and Forests banned the sport in 2011. Despite that, the tradition continued as per the rules of the state Act. In 2017, the Tamil Nadu government passed the Prevention of Cruelty to Animals (Tamil Nadu) Amendment Act 2017, permitting the sport. Petitions challenging the law were filed, and finally, last year, a constitutional bench of the Supreme Court allowed the practice of such practices. The main issue in the case was whether Jallikattu could be protected as a cultural right. The paper will delve into who should be considered 'minorities', how much privilege they should be given, the rights of animals and whether the privilege overrides any statute passed by the Parliament.*

***Keywords:*** *Jallikattu, Animal Rights, AWBI, performing animals, Rekla Race.*

## Critiquing the Constitutional Bench Judgement

On 18th May 2023, a constitutional bench of the Supreme Court unanimously upheld the practice of Jallikattu, following the rules mentioned in the amendments of the TNRJ Act. They found that the amendments minimised the cruelty towards the bull to a huge extent. However, they abstained from answering if the practice was essential to the culture.[4] That aspect was left up to the legislation, and they accepted the view of the Tamil Nadu Legislative Assembly.

The court held that the animals do not have any rights. The court refused to fill the void of including animals under the right to life. It preferred not to give statutory rights to animals and left the onus of the legislature to do so. Although the court has agreed that if a tradition goes against the law, it can strike it down, it refrained from doing so. The court also refused to give animals the status of a "person" under Article 14 despite several High Courts doing so.[5]

[1] ***Student, B.A. LL.B. 2nd Year, The West Bengal National University of Juridical Sciences, Kolkata Email Id: saarthak222106@nujs.edu.***
[2] ***Student, B.A. LL.B. 1st Year, The West Bengal National University of Juridical Sciences, Kolkata Email Id: llb223026@nujs.edu.***
[3] Press Trust of India, *1 killed 30 injured in Jallikattu*, Sify News (Jan. 16, 2011, 5:58 PM) 1 killed, 30 injured in Jallikattu (archive.org).
[4] Advay Vora, *Challenge to Jallikattu: Judgement in Plain English*, Supreme Court Observer (Feb 25, 2024, 5:45 PM) Challenge to Jallikattu: Judgement in Plain English - Supreme Court Observer (scobserver.in).
[5] Animal Welfare Board of India v Union of India, 2023 SCC OnLine SC 661.

This is ironic as the Supreme Court has done so previously in numerous instances, as in triple talaq and adultery. However, a differential treatment can be seen just because the victim is not human. The judiciary could have been a voice for the voiceless in this case. The judgement begs the question regarding the extent of upholding this right. Should a tradition be allowed even if it causes harm to another creature? If so, then practice like Sati should also be permissible. Even while giving the right to uphold traditions, the Constituent Assembly ended evil practices like untouchability. This shows that not everything was meant to be kept as it is, but we should look forward.[6]

While the previous judgement was a step towards eradicating torture inflicted towards animals, the recent pronouncement was meant to reduce the pain inflicted. The court held that the pain in this case was necessary to uphold the tradition. The problem with this step can be seen in the report of the People for the Ethical Treatment of Animals (PETA). It stated that the method of inflicting pain remained the same in the form of beating, tackling and poking with nails. The rules laid down by the state also do not lay down any punishment if the guidelines are not followed.[7]

The court held that the amended rights align with the division bench judgement. It held that since the President gave his assent, the court should meddle with it. The main reason behind referring this case from the division bench to a constitution bench was to address the standing of Jallikattu as a cultural right. However, the purpose stands defeated since it does not delve into the aspect to a great extent. The reasoning given by the honourable court was that it was accepted since the state government thought it right to do so.[8]

**Analysing the 2014 SC Judgement on Jallikattu**

The Animal Welfare Board of India (hereafter "AWBI") challenged the tradition because it caused harm to the participating bulls. The petitions also argued that the provisions of the Tamil Nadu Regulation of Jallikattu (TNRJ) Act of 2009 were repugnant to the Prevention of Cruelty to Animals Act (PCA) of 1960. They argued that the sport is against the laws mentioned in the PCA Act. The bulls were a kind of "performing animals", and thus banning the sport was logical.[9]

The defendants countered by saying that during the sport, no cruelty is meted out, and since no tickets are sold, the bulls cannot be considered "performing animals". However, the division bench decided to ban the sport.[10] It felt necessary to protect the animals according to

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[6] Neha Vinod, *Jallikattu and animal rights*, DECCAN HERALD (Feb 25, 2024, 10:40 PM) Jallikattu and animal rights (deccanherald.com).

[7] Neha Vinod, *Jallikattu: The Doom of Animal Rights in India?*, JURIST (Feb 25, 2024, 9:33 PM) Jallikattu: The Doom of Animal Rights in India? - Jurist - Commentary - Legal News & Commentary.

[8] Sohini Chowdhury, *Supreme Court Upholds Laws Allowing Jallikattu, Kambala and & Bull-Cart Racing in Tamil Nadu, Karnataka & Maharashtra*, LIVELAW (Feb 27, 2024, 7:32 PM) Supreme Court Upholds Laws Allowing Jallikattu, Kambala & Bull-Cart Racing In Tamil Nadu, Karnataka & Maharashtra (remotlog.com) .

[9] Prevention of Cruelty Act, 1960, §11(m), No. 59, Acts of Parliament, 1960 (India).

[10] *Animal Welfare Board of India v A Nagaraja*, (2014) 7 SCC 547.

the doctrine of *parens patriae*. It reiterated that animals have the right to a dignified living. Thus, they should not be subjected to unnecessary pain and torture.[11] The necessity to develop a "scientific temper" and "humanism" was harped upon. It also urged the development of emotions like benevolence and compassion towards animals.[12] Following the judgement, the Delhi High Court held that humans cannot keep birds inside a cage but should be allowed to fly freely.[13]

On review, the Constitution Bench overturned the decision of the smaller bench because it felt that it was important to uphold the cultures of the minorities. It further held that the amended Act reduced the amendments that reduced the cruelty inflicted on the animals. The court felt it was not the right adjudicatory body to decide if the event was intrinsic to the Tamil culture.[14]

According to the World Organisation of Animal Health (WOAH), some internationally accepted animal freedoms include freedom from fear, pain, injury, and physical discomfort.[15] In an order by the Madras High Court in 2016 banning the Rekla Race, the court raised the issue of protecting the rights of "dumb animals" as well. The court further criticised the practice of Jallikattu since it tormented the bulls. It condemned the practice of such forms of cruelty in the name of religion and urged the citizens to follow their duties.[16] Similarly, the Supreme Court prevented cattle trade to Nepal for sacrificial purposes to celebrate the Gadhimai festival. It held that non-human beings cannot be subjected to pain or suffering to satisfy the desires of humans.[17]

**Aftermath of the Judgement**

The judgement led to a statewide protest. Although Jallikattu was practised among certain communities, the protest was joined by people from all over the region. The protest was based on the idea that the sport was a form of embracing the bull instead of overpowering the animal. The ban was seen as an attack on the Tamil pride. The judgement was viewed as another form of corporatisation. A conception was created that Jallikattu was a way of segregating the strong bulls from the weak ones. The cows bred from the bulls produce the best milk. Thus, banning the sport would reduce the self-sufficiency in milk production. The protest was also coupled with the ongoing Kaveri water dispute. This increased the hatred of the Tamils towards the centre.[18]

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[11] Prevention of Cruelty to Animals Act, 1960, §3 No. 59 of 1960, Acts of Parliament, 1960 (India).
[12] Indian Consti., art 51(A)(h).
[13] *People for Animals v Md Mohazzin*, 2015 SCC OnLine Del 9508.
[14] Gauri Kashyap, *Supreme Court Upholds Jallikattu in Tamil Nadu*, SUPREME COURT OBSERVER (Feb 21, 2024, 10:50 PM) SCO Daily: Supreme Court Upholds Jallikattu in Tamil Nadu - Supreme Court Observer (scobserver.in)
[15] Territorial Health Code, 2023, art. 7.1.2.
[16] *K Muniasamythevar v Dy. Superintendent of Police*, AIR 2006 Mad 255.
[17] *Gauri Maulekhi v Union of India*, W.P. (PIL) No. 77 of 2010.
[18] A Kalaiyasaran, *Politics of Jallikattu*, LII EPW 6, 10-13 (2017).

**Laws on Protecting Animals**

In his book *The Case for Animal Rights*, Tom Regan states that no animal wants to suffer pain. Unlike the common notion of a raging bull, the animal does not enjoy participating in the sport. As portrayed in Ferdinand, the protagonist remarks that the "bull never wins", and their final destination is the slaughterhouse.[19] Although Emmanuel Kant was against giving animals their rights, he emphasized showing compassion towards animals and should not be subjected to "unnecessary pain". Bentham advocated that the pain on animals should be inflicted to the extent they can take.

Applying the Principle of Equal Consideration of Interests towards animals, equal recognition and consideration should be shown towards all living beings. Peter Singer draws a parallel between animals and "marginal humans", like infants and disabled ones. Just like these sections of people lack a sense of consciousness and rationality yet have certain rights, animals also should possess rights.[20]

For the first time, the animals got their status as 'legal persons' in 2018, courtesy of the Uttarakhand High Court. It said that legal rights should extend beyond humans, thereby demolishing the wall between humans and animals.[21] The next year, the Haryana and Punjab High Court passed a judgement on similar lines, declaring all animals as legal entities having rights, liabilities and duties.[22] Before this, only statutory provisions were present. This increased the onus of protecting animals. However, such recognition has yet to be received from the Apex Court.

**Constitutional Rights**

Sir Isaiah Berlin gave the concept of negative liberty. It restricts enjoying one's liberty to the extent that it does not affect another's liberty. The Constitution grants one the right to live with dignity.[23] This right can only be deprived by a procedure established by law which is fair, just and reasonable and cannot be arbitrary.[24] The Kerala High Court extended this right to include animals when it held that they are entitled to dignified and humane treatment. It brought to light the importance of animals in improving our health. [25]

The Constitution further mentions specific duties to uphold the country's ideals for every citizen. People should protect the natural environment, including wildlife.[26] The court has emphasised that citizens must "show compassion to living creatures". Through the forty-second amendment, the Parliament tried to bring to attention the need to protect wildlife by

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[19] Rajlakshmi Kanjilal, *Jallikattu*, LVII EPW 26 & 27, 89 – 90.
[20] Tarunya S, *Jurisprudence of Animal Rights: Present Day Relevance and Application in India*, 5 Indian J.L. & Legal Research 1 (2023).
[21] *Narayan Dutt Bhatt v Union of India*, 2018 SCC OnLine Utt 645.
[22] *Karnail Singh v State of Haryana*, 2019 SCC OnLine P&H 704.
[23] India Const., art 21.
[24] *Francis Coralie Mullin v Administrator, UT of Delhi*, (1981) 1 SCC 608.
[25] *N. R. Nair v Union of India*, AIR 2000 Ker 340.
[26] India Consti, art 51A(g).

including the duty.[27] The state must protect the wildlife of the country as well.[28] These fundamental duties are essential and are considered equivalent to fundamental rights. The legislatures should not violate these ideals while framing laws. Courts can also use it to give relief if an act drifts away from constitutional moralities.[29]

**Other Statutes**

The Constitution allows the Parliament to make laws on subjects, including the prevention of cruelty to animals and wildlife.[30] The Parliament has drafted numerous laws to protect animal life using this power. The parliament has taken measures to punish anyone who subjects animals to unnecessary pain.[31] The criminal laws also took punitive measures to punish offenders who maim a bull.[32]

**Conclusion**

Justice Douglas once mentioned that inanimate objects may also be considered invisible legal entities in environmental litigation.[33] Over numerous M C Mehta, the courts have developed a method of judicial activism towards environmental issues. In the sludge case, the court spoke on behalf of the village, soil irrigation canals and other environmental objects.[34] The courts have applied the concept of quality of life to various environmental issues. They mainly relied on Article 21 for this issue and other fundamental rights. Turning a blind eye towards animals is inhumane. Animals also share the planet with us.

They have emotions similar to us. Just like actions are taken to protect the rights of the marginal sections of society, so should be the case for animals. The judgements of several constitutional courts have raised the scope of animal rights and brought it to a level similar to that of humans. The Supreme Court called for an ‘eco-centric’ approach instead of an ‘anthropocentric’ one where humans consider animals to be intrinsic and have obligations towards others.[35] The protection of animals depends on the society and its willingness to keep them alive and healthy. Bentham’s ethics has raised an important question of whether the acceptable usage of animals depends on their pleasure or the creature's autonomy. As long as the cruelty to animals serves human utility, the wrongdoing is often overlooked.[36]


[27] *State of Gujarat v Mirzapur Moti Kuresh Kasab Jamat*, MANU/SC/1352/2005.
[28] India Consti, art 48A.
[29] AIIMS Students’ Union v AIIMS, (2002) 1 SCC 428.
[30] India Consti., Seventh Schedule, Concurrent List (List III), entry 17B.
[31] *Id.* At 1.
[32] Indian Penal Code, 1860, § 429, No. 45, Acts of Parliament, 1860 (India).
[33] *Sierra Club v Morton*, 405 US 727 (1972).
[34] *Indian Council for Enviro-Legal Action v UOI*, AIR 1996 SC 1446.
[35] Centre for Environment Law, WWF India v Union of India, (2013) 8 SCC 234.
[36] Vikram Krishna C S, *The Recognition of Animal Rights and Its Implication on Animal Protection Laws*, 4 Indian J.L. & Legal Research 1 (2022).

# Unraveling the Dynamics of Cross-Border Merger & Acquisition: A Comprehensive Analysis

***Adarsh Kashyap***[1]
***&***
***Pranjal Kashyap***[2]

## Introduction

Cross-merger and acquisition, or cross-merger for short, refers to merging two companies in different geographic regions to form a new company. As per the Companies Rules announced under the Company Act 2013, it is defined as a cross-border merger as an amalgamation or agreement between a foreign and Indian company. An Indian firm combining with a foreign firm or a foreign firm merging with an Indian firm are examples of cross-border mergers. The group can be a corporate enterprise, a government agency, or a public nonprofit. When two companies combine across international borders, they naturally become one or when two organizations, one from each country, merge their assets & liabilities to form a new business.

When a firm is acquired by one based overseas, its assets and liabilities change hands, yet the local employer may remain associated with the acquired company. The Home Country refers to the country of origin of the companies involved in an acquisition. The opposite is true for Host Countries, which are home to the target organization.[3]

It's important to distinguish between inbound and outbound mergers. When a company based outside India acquires a company which is in India, this is known as an inbound merger. After a merger, the combined business will distribute its securities to the surviving company's shareholders. In an inbound merger, the Indian firm transfers its shares to the foreign firm's non-resident shareholder of, the acquiring firm. When a company based outside India merges with one based in India, it is called an outbound merger. The foreign company will offer securities to an Indian resident shareholder in an outbound merger.[4]

## Reason of Cross Border Merger & Acquisition

Here are several factors that drive enterprises to participate in cross-border mergers and acquisitions:

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[1]***5th year student, Gujarat National Law University, Gujarat, Email Id- adarshkashyap285@gmail.com.***
[2] ***5th year student, Kalinga Institute of Industrial Technology (KIIT), Bhubaneswar, Odisha.***
[3] Krishnamurti and Vishvanath S.R., Mergers, Acquisitions and Corporate Restructuring, (Sage Publications Pvt. Ltd, 1st ed., 2007).
[4] "Cross-Border Mergers and Acquisition," Educba, available at: https://www.educba.com/cross-border merger-and-acquisitions.

**Taking Control**

A change in the target company control is the prime result of an M&A. When two companies merge, their assets and operations become a part of the new entity and when this entity joins forces with two other entities, it starts gaining control as a single entity and then the target company transfers its control to the buyer or a foreign entity when it is acquired.[5]

**Entering Foreign Markets**

This outbound influx into international marketplaces has aided globalization. As cross-border m & a have a substantial impact on globalization, they have a lower domestic impact than comparable transactions. This led to the enterprise get a chance to enter foreign markets for an opportunity & get hold to the market.[6]

i. **Access to intangible assets-** When a company acquires a target business, it gains access to intangible assets like goodwill, new technology, expertise, trademarks, patents, management techniques, and more. It becomes essential to assess the valuation of these intangible assets.

ii. **Market diversification and expansion:** When a company ventures into foreign markets, the potential for increased profitability arises through market diversification and expansion. To maximize the entity's benefits, the company can diversify its operations and product lines. A company's products must suit the needs of its target market if a company grows into these international markets. If these considerations are not taken into account, legal concerns in cross-border mergers and acquisitions may arise.

**India's Cross Border Merger and Acquisitions Law**

Section 234 of the Companies Act, 2013 was officially introduced by the MCA in 2017, titled as 'Merger or Amalgamation of Company with Foreign Company.' This section serves as the foundation for cross-border mergers. The Corporations (Compromises, Arrangements, & Amalgamations) Rules, 2016, underwent an update that incorporated Rule 25A, enabling the merger or amalgamation of Indian companies with international enterprises.[7]

To address certain gaps in the aforementioned act and rule, the Reserve Bank of India (RBI) intervened by enacting the Foreign Exchange Management (Cross Border Merger) Regulations, 2018. These regulations mandate that any cross-border merger or amalgamation in India must receive prior approval from the RBI. Furthermore, such transactions can only involve foreign companies incorporated in specific limited jurisdictions.

The process involving Sections 230–232 of the Companies Act and the corresponding rules dictates that companies seeking to merge must apply to the National Company Law Tribunal

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[5] Vijay Paradkar, "Key Challenges in Cross-Border M&A," Dec. 18, 2015, available at: https://www.assocham.org/upload/event/recent/event_1205/Vijay_Paradkar.pdf.

[6] Anna Olsson Fladby and Andrea Urban, "The Rationale Behind Cross-border Mergers & Acquisitions," 2014, available at: https://core.ac.uk/download/pdf/43556613.pdf.

[7] Dr. Rabi Narayan Kar and Dr. Minakshi, Mergers and Acquisitions & Corporate Restructuring, (Taxmann Publications (P) Ltd., New Delhi, 3 rd ed., 2017).

(NCLT). In the case of mergers involving companies from countries sharing land borders with India, the Ministry of Corporate Affairs (MCA) introduced amendments to Rule 25A of the Companies Merger Rules on May 30, 2022. This amendment introduced a new requirement: filing Form No. CAA-16 along with an application to the NCLT to obtain government approval. Valuation of each participating entity as per Rule 25A of the Companies Merger Rules is also mandatory.[8]

Cross-border takeovers are subject to regulations outlined in the Foreign Exchange Management Act. Transfers of securities to foreign investors after an inbound merger must adhere to the conditions specified in The Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017. Formerly, compliance with the TIFS Regulations (Foreign Exchange Management, Transfer or Issue of Any Foreign Security) was necessary. However, starting from the year 2022, the Foreign Investment (Overseas Investment) Rules, 2022 ('Overseas Investment Rules') have superseded the TIFS Regulations." If the merger is external, an individual resident may acquire or hold securities in the resulting firm per the Foreign Exchange Management Act of 1992's Liberalized Remittance Scheme. The resulting company will comply with FEMA when purchasing, maintaining, and transferring assets within and outside India. If the NCLT approves the plan, the new company has two years to dispose of any assets or securities violating FEMA and send the proceeds of those sales either outside of India or into India, as appropriate. The newly formed company can pay off any outstanding obligations in India or elsewhere with the selling proceeds.[9]

If any combining or purchasing parties are located outside the country, the transaction must adhere to foreign exchange law. Guidelines for pricing, sector-related restrictions, declarations, and reporting are all provided under the foreign exchange regulations.

The laws for overseeing investment make it easier for Indian businesses to take advantage of opportunities outside India, such as mergers & acquisitions. By "merger, demerger, amalgamation, or any scheme of arrangement as per the applicable laws in India," for example, an Indian business can make an ODI per Rule 11 of the OI Rules. Furthermore, regulation 13 says that foreign portfolio investments and direct investments made by Indian persons are allowed in the event of a "swap of securities on account of a merger, demerger, amalgamation, or liquidation."

When an Indian corporation is the transferring entity, the provisions of the Income-tax Act, 1961 (referred to as "the IT Act") come into play, stipulating requirements for tax-neutral mergers. However, these exemptions cannot be exploited in the case of a merger involving both an Indian and a foreign corporation. This scenario potentially subjects both entities to taxation upon merging. Section 72A of the IT Act permits the carryforward and offsetting of

[8] Priyam Sen, “Cross-Border Merger and Acquisition,” Oct. 8, 2018, available at: http://racolblegal.com/cross-border-merger-and-acquisition.
[9] Bhumesh Verma, Mergers and Acquisitions, (Bloomsbury Publishing Pvt. Ltd. New Delhi, 2019).

cumulative tax losses and unabsorbed depreciation, provided the merger meets specific criteria. Notably, Section 72A excludes foreign acquisitions from its scope.

Moreover, in the context of an inbound merger, the foreign company's tax losses might not qualify as 'accumulated losses' within the limits set by the IT Act. A merger qualifies as a 'combination' under Section 5 of the Competition Act when it meets the threshold criteria. Irrespective of any other legal procedures, if a proposed merger scheme or any agreement/document related to acquisition is approved by the respective companies' Board of Directors, they are required to notify the Competition Commission of India (CCI) within 30 days. Following the notification, a 210-day waiting period ensues for the CCI to investigate whether the merger's impact on competition, as outlined in Sections 29 and 30 of the Competition Act, is likely to be significantly adverse.[10]

**Analysis**

Cross border merger in India is still growing and becoming larger but there is still ambiguity and loopholes in respect of the legal position held in India. The law provide for rules, guideline and regulation but there is exist room for the betterment as it doesn't deal with a crucial issue that needs fixing if the country is going to see any growth in cross-border mergers. The biggest area of uncertainty is whether or not the idea of demerger applies to cross border mergers. While section 234 solely covers cross border mergers & amalgamations, section 394 includes demerger provisions. In addition, demerger is addressed in the proposed regulations have been disseminated by the Reserve Bank of India. Therefore, it is unclear whether or not the provisions apply to demerger. In addition, the MCA published changes to the CARA rules in 2017 under section 234. When all the evidence is considered, cross border mergers are supported. However, even with these protections in place, merging an Indian company with a foreign corporation is still difficult task. Another problem is that the applicable law include demerger in the definition of compromise and arrangement but in case of outbound merger, it deals with merger but does not provide any reference to demerger. This put us in the position of doubt with regard to the integration of demerger.

Another legal issue is with regards to the fast-track process. For disposal of the dispute there is no fast-track process. This provision has been limited to the foregoing since company law regulations expressly provide for such process for the merging of wholly-owned subsidiaries into holding companies. Such laws need to be amended to cover cross border mergers as well.

Obtaining prior approval from the RBI is a prerequisite for engaging in a merger or acquisition agreement, in accordance with Section 234(2) of the Companies Act, 2013. It is essential that the authorities overseeing compliance with FEMA and its associated regulations are entrusted with the discretion to grant authorization for cross-border transactions. A prior legal obligation for approval must give way to Regulation 7. In addition, a cross-border

[10] Cyril Shroff, Dhananjay Kumar, Ramgovind Kuruppath, Acquisition Finance in India: Overview, available at https://uk.practicallaw.thomsonreuters.com/5-628 8328?transition Type=Default & context Data =(sc.Default) & first Page=true.

merger requires clearance, although Indian law is complicated in this regard. While obtaining approval from both the Reserve Bank of India and the Foreign Exchange Management Act is essential for such agreements, additional regulatory entities like the Securities and Exchange Board of India and the Telecom Regulatory Authority of India must also provide their consent. To ensure a smooth process, it is beneficial to explicitly identify the specific authorities that need to grant their approval in order to facilitate a seamless arrangement between the entities

In addition, the RBI & ODI regulations were quiet until very recently on the subject of automatic route guidelines. When it comes to India's exchange control legislation, more action is needed to give suitable guidance. Lastly the exemption related to the capital gain and issue of shares given in section 47(vi) and 47 (ii) of the income tax act is available for an outbound merger only. It would thus be correct to assert that the Indian legal system still lacks stability in regards to the legal ambiguity and loopholes associated with cross border mergers.

**Issues In Cross-Border Merger & Acquisition**

Cross-border merger & acquisitions take place globally and it is very appealing for taking control over the target company & entering foreign markets. But at the same time, there are lot of challenges faced by the cross-border transaction such as cultural variations, variances in customer tastes and preferences and legal repercussions. The author examines the challenges of cross border M&A in India and discuss about the same in the details as follows: -

1. **Regulatory Compliance Lacking Reforms**- India’s corporate governance played a difficult role in cross border M&A transactions as due to liberalizations, India did not make a comprehensive corporate governance reforms rather than focuses on making several compliances. The role of these policies in facilitating overseas M&A is largely unknown. The law is silent on the concept of cross-border demerger, compromise, or arrangement that may enable access to an additional way of business transaction restructuring.
2. **Stamp Duty -** The most crucial factor is to consider in cross border M&A is stamp duty. Stamp duty is applied to all of documents including transfer of assets and brings in money. The stamp duty vary from state to state but stamp law is ambiguous related to this matter. For a better comprehension, it should be reviewed again.
3. **Due Diligence**- Due Diligence is considered to be the main component and it help the parties to close the deal as the due diligence is the process that aids in the confirmation, investigation, & acquisition of all relevant facts and information. The structure and terms of an agreement could undergo alterations due to the due diligence process, involving a comprehensive analysis that presents a detailed record of potential risks and opportunities linked to the transaction. The purchaser should utilize this approach to meticulously examine the target company and execute crucial acquisition-related protocols. Conducting due diligence is imperative to navigate the challenges inherent in cross-border mergers and acquisitions successfully.[11]

[11] Lawrence Pines, “Mergers and Acquisitions,” Nov. 15, 2019, available at: https://www.investopedia.com /articles/ insights/061816/4-cases-when-ma-strategy-failed-acquirer-ebay bac.asp.

4. **Tax considerations**- Tax considerations are the fundamental structure for the cross-border M&A. Overview of ITA, 1961 is crucial for the process of the M&A. The most important factors played by the Double Taxation Avoidance Agreement (DTAA). The tax will be assessed using either the Act provisions or the DTAA, whichever is more favourable for enterprises when there is transfer of assets to the transferee company from the transferor company.[12]

**Case Study**

**Challenges in Daiichi Sankyo's Acquisition of Ranbaxy**

In 2005, the merger of two Japanese pharmaceutical giants, 'Daiichi Pharmaceutical' and 'Sankyo Co,' led to the establishment of Daiichi Sankyo Co Ltd (DIS). Subsequently, in 2008, DIS acquired a 63.4% stake in India's Ranbaxy Laboratories, marking one of the most significant acquisitions in the Indian pharmaceutical sector. The two entities were later integrated to create the 15th-largest global pharmaceutical company. However, this transaction gave rise to several issues.

Among the challenges faced were DIS's struggles to address quality-related problems within Ranbaxy's facilities and to sustain the growth of the Indian unit. Cultural disparities and deficiencies in manufacturing quality compounded the difficulties when DIS attempted to restructure Ranbaxy's operational framework. Despite concerted efforts, DIS found it arduous to effect change in the behavior of Ranbaxy's workforce. Discrepancies and conflicts arose between DIS and Ranbaxy due to differences in their systems and regulatory practices.

DIS undertook rigorous efforts to rectify the quality concerns and salvage the situation, yet it encountered obstacles in reshaping Ranbaxy's organizational ethos. The divergence in corporate culture and authority between the two companies prompted DIS to divest a major portion of its stake in Ranbaxy to another Indian pharmaceutical entity, Sun Pharmaceutical Industries, in 2014. The unraveling of the DIS and Ranbaxy acquisition serves as a lesson that corporations may confront substantial challenges rooted in the management practices of the target company, as well as the profound impact of cultural disparities in cross-border M&A.[13] Consequently, a comprehensive analysis and assessment of culture, company history, management approaches, collaboration dynamics, and core values should be conducted before engaging in any agreement with a foreign entity

**Promising Merger & Acquisition**

There is always promising despite drawback and one of such is ZEEL and SPNI merger which is considered to be one of biggest merger of the media house in India. This merger will create the two media a multibillion-dollar company. In 2021, the board of directors at Zee Entertainment Enterprises Limited (ZEEL) endorsed the merger scheme and concurrently

[12] Anjali Dhingra, Valuations of Mergers and Acquisitions, *available* at, https://blog.ipleaders.in/ma/.

[13] Closure in Daiichi Sankyo's (Dis) Acquisition of Ranbaxy, 2015, https://www.daiichisankyo.com/ media_ investors / media_ relations/press_releases/detail/006262.html.

entered into a non-compete agreement with Sony Pictures Network India (SPNI). Subsequently, both entities arrived at an accord to integrate their respective businesses. Recently after so much hurdle by the SEBI who restrain the merger of the two companies, NCLT finally approved the proposed merger of the Sony India with Zee Entertainment. It is be considered to be major breakthrough for the companies as the combine entity will have 75 channels, 2 studios and 2 OTT platforms and strong presence in the market of entertainment and sports.[14]

Another merger of the two biggest telephone company i.e Vodafone and Idea for limiting the access of Jio in the market, was considered to second larger profitable merger in India. The united firm has a value of $23 billion. The merger of Idea and Vodafone India was a success, with Vodafone controlling 45.1 percent of the merged firm and Aditya Birla owning 26%. The remainder of the company is owned by Vodafone India.[15]

**Recommendation for Sustainable Merger**

A successful and long-term cross-border transaction involves careful planning, thorough due diligence, and attentive pre- and post-deal implementation by executives. In order for cross-border M&A to be effective, companies considering mergers must examine the following points:

Ascertain the objective of the whole M&A process and the deal thesis. The companies should modify the negotiation strategy and playbook as appropriate so that the global challenges can be avoided. The most necessary step is pre-deal due diligence with pre-closing activity in order to prevent handoff misses. The background of the companies must be thoroughly check so that target company's business and work pattern is understand. The legal and tax system should be also properly done as the process of the due diligence conducted by the parties.

In most of the cases, the agreement is not properly structured because of this the objective are missed. Hence the agreement arrangement should be structured and strategies should be built which is in the favour of the both the companies so no problem occur when the deal is executed. The parties should openly discuss the whole integration scope, method, and plan for achieving both from the start and end-state objectives so that their own objective is met when the deal is struck. The parties should pay particular attention to detail-oriented pre- and post-close integration planning, including clearly specified dependencies and important paths.

One of the issues we have seen in the case Daiichi Sankyo's (Dis) Acquisition of Ranbaxy is the challenged faced due to the business culture and other significant factors which was not considered by the both the parties. Properly identifying and evaluating these issues can contribute to the success of an M&A. Conversely, neglecting these challenges can lead to the failure of the transaction. Effective communication between parties is crucial, along with

[14] Sabrina, 5 Biggest Mergers and Acquisitions in India available at https://tradebrains.in/biggest-mergers-acquisition-india/.
[15] *Supra Note* 12.

involving employees from the outset to facilitate proactive adjustments. Companies that take extra steps to transparently share their operations with the target firm foster a strong sense of trust. Therefore, collaborative efforts and coordination with the target firm are imperative for accomplishing a fruitful transaction. Hence, organizations need a flexible working and operational framework that accommodates not only cultural differences but also the varying social dynamics across markets.

**Conclusion**

Cross border merger & acquisitions are generally carried out to expand the business and to enter into the foreign market and capture the market of the same. While doing so, It is important to remember about the competition law and there is no breach of the same. The concept of the cross-border M&A is becoming more popular as many firms, companies of various different sector like technologies, tele-companies, pharmaceutical are entering into the agreement. While there are benefits of the one side but there are many risks attached to the same. To ensure the effectiveness of the cross-border M&A, there should be proper due diligences conducted by the parties before entering into the agreement. The companies should do proper investment such as communications, negotiation. By following these steps this risk can be eliminated by the parties. Therefore, even with the inherent risks associated with cross-border M&A, adherence to efficient and expedient procedures can lead to a successful deal, effectively mitigating the challenges that may arise during the process.

There been also growth of the Indian companies going to the foreign market in the recent times. There is no such difference between the such transaction and it is same as foreign companies entering into the Indian market. Furthermore, as a result of the continuous pandemic issues, corporate mergers and acquisitions have undergone a remarkable transition in COVID times, opening the floodgates for strategic partnerships – whether mainstream, cross-border, or cross-sector. Mergers and acquisitions are, by definition, exploratory activities seeking new company opportunities. M&A opportunities have transformed in the post-COVID world, thanks to good government action, a notable buyout stock market, and a largely solid banking sector.[16]

[16] Umakanth Varottil, "The Impact of Globalization and Cross-Border Mergers & Acquisitions on the Legal Profession in India," Jan. 2012, available at: https://www.researchgate.net/ publication /272243810_ The_ Impact_ of_ Globalization_ and_ Cross Border_ Mergers_ Acquisitions_ on _the_ Legal_ Profession_ in_ India #full Text File Content .