Vol. VIII Apr-Jun, 2023 Issue II

NUJS Journal of Regulatory Studies

(A Multidisciplinary Blind Peer Review Journal)

ISSN: 2456-4605(O)

CENTRE FOR REGULATORY STUDIES, GOVERNANCE AND PUBLIC POLICY

WBNUJS

(A Multidisciplinary Blind Peer Review Journal)

CONTENTS

SAFEGUARDING JUVENILE RIGHTS: EVALUATING BANGLADESH'S JOURNEY TOWARDS JUSTICE FOR STREET CHILDREN IN DHAKA CITY AREA

S. M. Saiful Haque[1], Prof. (Dr.) Tripti Chakrabarti[2], Dr. Debashree Chakraborty[3] and Shrabana Chattopadhyay[4]

[1]*Ph.D. Researcher in Law at Techno India University, West Bengal and Assistant Professor in Law, Faculty of Humanities and Social Sciences, Daffodil International University, email: shyful@daffodilvarsity.edu.bd, ORCID: 0000-0003-4499-4492*

[2]*Dean of Research (Law), Techno India University, West Bengal, email: triptichakrabarti@gmail.com, ORCID: 0009-0000-4535-3107*

[3]*Professor and Head, Department of Legal Science, Techno India University, WB, email: debashree.c@technoindiaeducation.com, ORCID ID: 0009-0000-4535-3107*

[4]*Assistant Professor, Department of Law, University of Engineering and Management, Kolkata, email: shrabana.Chattopadhyay@uem.edu.in, ORCID: 0000-0001-7648-6535*

Abstract

Ensuring the protection of child rights and support towards improving their life and safeguarding them from abusive treatment affirmed means protecting children in a welfare society. Legal safeguards are a crucial aspect of modern society for ensuring the welfare and protection of children`s rights. This paper examines the progress made by Bangladesh in safeguarding children's rights in conflict with the law, with a specific focus on the juvenile justice system (JJS) and particularly analysing the existing legal framework nationally and globally. Based on a consolidated Qualitative Data Analysis (QDA) approach of Thematic Analysis (TA) and case-built Content Analysis (CA) of secondary sources, the study attempted to explore the paradigms of the existing legal framework for juvenile justice, Bangladesh's progress in implementation of CRC, and stakeholder's role when found juveniles in conflict with the laws in parallel. This research efforts to place logical arguments that there is a need for a comprehensive reform of the juvenile justice system (JJS) in Bangladesh. It emphasises ensuring justice for juveniles and safeguarding their rights when in conflict with the law because of the coordination and harmonisation gaps among the stakeholders. Finally, by proposing a model of balanced coordination among stakeholders, the study concluded that an innovative, well-equipped e-technological adaptation could bring an effective JJS, and that would urgently need to be introduced to safeguard children's rights aligned with the SDGs in Bangladesh.

Keywords: Juvenile Justice, Children in Conflicts, Safeguards, Justice System, Bangladesh.

Introduction

Children are one of the most vulnerable clusters in society and require special protection to ensure their rights are shielded. They have been facing various encounters and risks, including ruining their rights, deficient access to justice, and exposure to violence and exploitation. In recent years after covid19 pandemic, there has been an increasing concern about treating "children in conflict with the laws (CCL)". Bangladesh has been in a leading position since the beginning of a historic initiative of the UN on the protection of children and juvenile justice. Bangladesh has been one of the pioneer promotors parties of the UNCRC[1] , likely as it found its involvement in many international human rights agreements to safeguard children's rights. In line with "Article 28(4) of the Constitution of the People's Republic of Bangladesh, 1972[2] provides children's positive activity and judicially enforceable fundamental rights". Based on the same provisions, "the safeguards are established state policy ideas that guide national human rights policies and their mandate under the Constitution[3], the juvenile justice system has undergone several reforms over the years, but there are challenges in protecting children's rights when in a skirmish with the law."[4] Children are often arbitrarily detained, tortured, mistreated while in detention, and deprived of their freedom for minor, nonviolent offences or without engaging in any offences.[5] To address these issues, the government of Bangladesh has recently taken several initiatives. In 2009, a high-level Juvenile Justice Task Force was secured to identify priority areas for action[6]. The Children Act 2013(CA-13)[7] was an important step forward and was introduced to ensure children's rights in contact with the law. However, its efficacy has been called into question.

Furthermore, CCLs are often subjected to suppression and mistreatment by law enforcement officials, which violates their rights and undermines the integrity of the juvenile justice

[1] United Nation, *United Nations Convention on the Rights of the Child (UNCRC)*, 10 SAGE ENCYCL. CHILD. CHILD. STUD. (2020).
[2] Bangladesh Constitution, *The Constitution of the People's Republic of Bangladesh Government of the People's Republic of Bangladesh* (1972).
[3] *Id.*
[4] Kudrat E Khuda, *Juvenile Delinquency, Its Causes and Justice System in Bangladesh: A Critical Analysis*, 7 J. SOUTH ASIAN STUD. 111 (2019).
[5] MURRAY POLNER & JIM O'GRADY, THE REST OF THEIR LIVES (2018).
[6] Jason Adam Wasserman, *At home on the street: people, poverty, and a hidden culture of homelessness*, 48 CHOICE REV. ONLINE 48 (2010).
[7] Government of the People's Republic of Bangladesh, *The Children Act 2013*, www. bdlaws.gov.org (2016).

system(JJS).[8] UNICEF Bangladesh addressed that "despite these challenges, some recent initiatives have been taken by the Bangladesh government to reform the juvenile justice system and improve the protection of children's rights."[9] The government has established specialised courts and trained judges and lawyers to handle juvenile cases[10]. The government has also censured child-friendly spaces within detention centres and developed rehabilitation programs to support CCL. This evaluation is necessary to identify gaps in the legal framework and the policies and programs that support its implementation. By reviewing the relevant literature and analysing the current state of juvenile justice in Bangladesh, this paper looks into the insights of strengths and weaknesses of the legal measures to support the implementation of juvenile justice in Bangladesh. This study examined Bangladesh's (CA-13) legislation and regulations to determine how effectively they protect children who breach the law and how well juvenile justice works[11]. To assess "the effectiveness of the juvenile justice system in Bangladesh in safeguarding the rights of children in conflict with the law and to identify the challenges Bangladesh faces in ensuring justice for juveniles and protecting their rights for the assessment of underlying progress". On the other hand, "it needs to evaluate the initiatives taken by the government of Bangladesh to reform the juvenile justice system and improve the protection of children's rights to determine the extent to which Bangladesh has implemented the Convention on the Rights of the Child-1989(CRC) concerning juvenile justice."[12] This study addressed the benefit of the policymakers, practitioners, and academics in strengthening the (CA-13) and safeguarding children in confrontation with the law.[13]

Definitions and Terms

Justice is the fair and equitable treatment of individuals under the law without discrimination or prejudice.[14] *Juveniles* are individuals who are under the age of 18 and are considered minors under the laws[15] on *Children's rights.* The UN-CRC defines "children's rights as universal human rights that apply to all children under the age of eighteen."[16] *Juvenile Offender* means

[8] UNICEF, EVERY CHILD COUNTS : REVEALING DISPARITIES, ADVANCING CHILDREN'S RIGHTS. (2014), https://eric.ed.gov/?id=ED560009.
[9] BLAST-BANGLADESH LEGAL AID SERVICE TRUST & REFORM INTERNATIONAL)-PRI, *The Children Act 2013: A Commentary by Justice Imman Ali Bangladesh Legal Aid and Services Trust Penal Reform International*, (2013), www.penalreform.org/keep-informed.
[10] Evaluation Division, *Street-connect Children in Dhaka and Politics of Violence*.
[11]Bangladesh Legal BLAST-BANGLADESH LEGAL AID SERVICE TRUST AND INTERNATIONAL)-PRI, *supra* note 9.
[12] Nation, *supra* note 1.
[13] UNICEF, *supra* note 8.
[14] Convention on the Rights of the Child | UNICEF, https://www.unicef.org/child-rights-convention (last visited Aug 15, 2021).
[15] *Id.*
[16] United Nation, *supra* note 1.

included a "child", and "youthful offender" is also found in section 2 of the CA-13[17]. "A child is defined as a person under the age of 18 years, and a youthful offender means any child who has been found to have committed an offence."[18] *Conflict with the law* refers "to situations where a juvenile has committed or is suspected of committing an offence and is brought before a court or other judicial body"[19]. The "*Juvenile Justice System* is the legal system that deals with juvenile offenders and their rehabilitation and aims to provide fair and equitable treatment of juveniles under the law."[20] It includes laws, customs and practices, methods, strategies, provisions, and agencies designed to deal with juvenile offenders[21]. Juvenile justice encompasses resolving legal issues involving minors and investigating and treating "the underlying causes of criminal behaviour and the development and implementation of strategies to deter it."[22] Under this overarching framework, three primary areas of inquiry are fundamental to restorative justice: To keep young men and women out of trouble with the law and the formalised criminal justice process, it is essential to take preventative measures. The goal of diversion is to keep young people out of prison by directing them to society and restorative programs that may help them understand and change the dynamics that led to their offending actions. Human rights preservation for juvenile offenders, to prevent future criminal behaviour, encouraging positive behaviour change and easing the readjustment process back into the social structure[23]. The *CRC* is a well-accepted treaty that outlines "the fundamental rights of all children, including the right to protection, education, health, and contribution to decision-making."[24]

Conceptual Framework

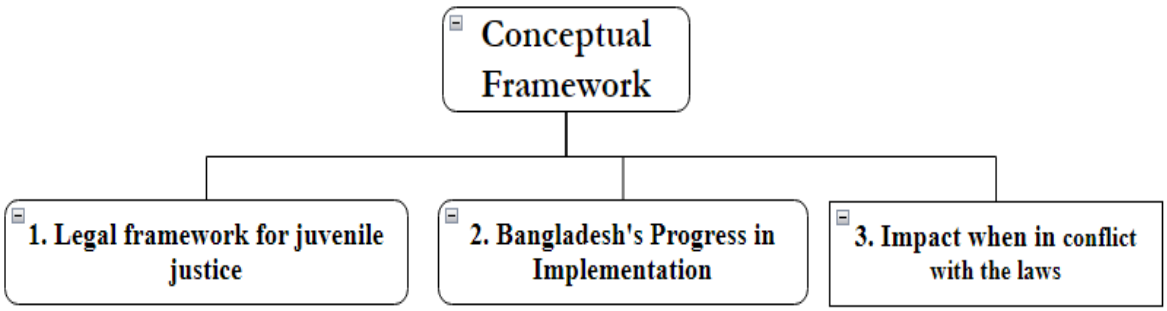
The conceptual framework is grounded on "the Human Rights Approach and the Child-friendly Justice Approach."[25] The justice Approach emphasises "the importance of guaranteeing that the justice scheme is accessible, child-sensitive, and respects children's rights in contact with

[17] Government of the People's Republic of Bangladesh, *supra* note 7.
[18] *Id.*Sec 4.
[19] *Id.*Sec, 2.
[20] *Id.*
[21] UN, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, PREVENTION OF AND RESPONSES TO VIOLENCE AGAINST CHILDREN WITHIN THE JUVENILE JUSTICE SYSTEM 25 (2021).
[22] UNGA, *UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, A/RES/45/112 1 (1990).
[23] General Assembly et al., *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, PREVENTION OF AND RESPONSES TO VIOLENCE AGAINST CHILDREN WITHIN THE JUVENILE JUSTICE SYSTEM 45 (2021).
[24] United Nation, *United Nations Convention on the Rights of the Child (UNCRC)*, 1989
[25] EVA BREMS, ELLEN DESMET & WOUTER VANDENHOLE, CHILDREN'S RIGHTS LAW IN THE GLOBAL HUMAN RIGHTS LANDSCAPE: ISOLATION, INSPIRATION, INTEGRATION? (2017).

the law". The Human Rights approach emphasises "the importance of protecting the fundamental rights of children, including their right to life, education, health, and protection from violence and exploitation."[26] Conceptual framework for this study is organised around **three** primary constructs-

Legal framework for juvenile justice

This construct examines "the legal framework for protecting children's rights" in Bangladesh,



specifically focusing on the Children Act of 2013[27]. This framework will investigate how well the legal system conforms to the Agreement on the Rights of the Child and other global norms such as the Beijing Guidelines, Ryadh Guideline and Havan Conventions aligning with the CRC.

Bangladesh's Progress in Implementation

This construct examines the implementation of the legal framework in practice, specifically looking at the extent to which laws and policies are being followed and the factors that may hinder or facilitate implementation.

Impact when in conflict with the laws

This construct examines the impact of laws and policies on "children's rights in conflict and contacts with the law and the state of juvenile justice". This construct will use a mixed methods approach in analysing quantitative data from secondary sources, such as official government statistics, reports, and surveys, as well as qualitative data from interviews with key stakeholders. The relationship between these constructs is illustrated in the conceptual framework above.

Literature Review and problem statement

[26] SONJA C. GROVER, CHILDREN DEFENDING THEIR HUMAN RIGHTS UNDER THE CRC COMMUNICATIONS PROCEDURE (2015).
[27] Government of the People's Republic of Bangladesh, *supra* note 7.

A PhD research study highlighted the challenges and prospects of the JJS in Bangladesh[28]. He argued that the existing JJS has numerous shortcomings in ensuring children's rights in conflict with the law. Another study by[29] critically evaluated the CA-13 in Bangladesh and identified various shortcomings in its implementation[30]. The author emphasised, "the need for reforms to ensure the protection of children's rights". A study discussed the challenges and opportunities in promoting child rights in Bangladesh. The author decorated the need for "the government to take a more proactive role in protecting children's rights." Another study identified the "challenges children face in conflict with the law in Bangladesh and emphasised the need for a comprehensive reform of the juvenile justice system."[31] Another study discussed "the challenges in protecting children's rights in conflict with the law in Bangladesh."[32]. The authors "highlighted the need for a comprehensive legal framework to protect children's rights. Another study critically reviewed the juvenile justice system in Bangladesh and identified various shortcomings in its implementation."[33] It discussed the issues and challenges in promoting child justice in Bangladesh[34]. The author "emphasised the need for the government to take a more proactive role in promoting child rights."[35] Another provided "an overview of the juvenile justice system in Bangladesh and highlighted the need for a comprehensive legal framework to protect children's rights in conflict with the law."[36] A study discussed "the judiciary's role in protecting children's rights in Bangladesh."[37] The authors emphasised "the need for the judiciary to play an active role in promoting child rights. The study provided an overview of the juvenile justice system in Bangladesh and highlighted the need for reforms to ensure the protection of children's rights".

[28] Ahmed, M.M.A.H., 2015. Towards a child-centered juvenile justice system in Egypt: A situation analysis of law and practice.
[29] Haradhan Kumar Mohajan, *Child Rights in Bangladesh*, 2 J. SOC. WELF. HUM. RIGHTS 207 (2014).
[30] Sultana, S., Pritha, S.T., Tasnim, R., Das, A., Akter, R., Hasan, S., Alam, S.R., Kabir, M.A. and Ahmed, S.I., 2022, April. 'shishushurokkha': A transformative justice approach for combating child sexual abuse in bangladesh. In Proceedings of the 2022 CHI Conference on Human Factors in Computing Systems (pp. 1-23).
[31] Leonardsen, D. and Andrews, T., 2022. Youth Justice Reforms in Norway: Professional Support for the Panopticon Society?. Youth Justice, 22(1), pp.85-100.
[32] Khuda, *supra* note 4.
[33] Bashir Uddin & Khan Yanwen, *A Comparative Analysis between the Juvenile Justice Process of Bangladesh and China*, 66 17 (2018).
[34] *Id.*
[35] *Id.*
[36] Nahid Ferdousi, *Book Review on Juvenile Justice System in Bangladesh by* (2019).
[37] Md Emran Parvez Khan & Md Abdul Karim, *The Prevention of Women & Children Repression Act 2000: A study of implementation process from 2003 to 2013*, 22 IOSR J. HUMANIT. SOC. SCI. 34 (2017).

Another study reviewed the CA-13 in Bangladesh and "identified various shortcomings in its implementation".[38] The author emphasised the need for reforms to ensure the protection of children's rights[39]. It discussed "the legal aid system's role in protecting children's rights in conflict with the law in Bangladesh."[40] The authors "emphasised the need for a more comprehensive legal aid system to ensure the protection of children's rights."[41] Another study "critically reviewed the CA-13 in Bangladesh and identified various shortcomings in its implementation."[42] The author emphasised "the need for a more comprehensive legal framework to ensure the protection of children's rights. Similarly, another study analysed the legal framework and implementation of the juvenile justice system in Bangladesh and identified various shortcomings. The author emphasised the need for a comprehensive legal framework to protect children's rights in conflict with the law."[43]

It critically appraised Bangladesh's "CA-13" and identified shortcomings[44]. The authors "emphasised the need for reforms to protect children's rights. It critically appraised the CA-13 in Bangladesh and identified various shortcomings."[45] The authors emphasised "the need for reforms to ensure the protection of children's rights. It discussed the challenges children face in conflict with the law in Bangladesh." It emphasised "the need for a more comprehensive legal framework to ensure the protection of children's rights."[46] it provided "an overview of the juvenile justice system in Bangladesh and highlighted the need for reforms to ensure the protection of children's rights."[47] Another study analysed "the legal framework and implementation of the juvenile justice system in Bangladesh and identified various shortcomings. The authors emphasised the need for a comprehensive legal framework to protect juveniles."[48]

[38] Sumaiya Khair, *Street children in conflict with the law: The Bangladesh experience*, 2 ASIA PACIFIC JOURNAL ON HUMAN RIGHTS AND THE LAW 55 (2001).
[39] ID. AND, *supra* note 25.
[40] *Id.*
[41] Nahid Ferdousi, *Juvenile justice system in Bangladesh*, 9 (2012).
[42] BULA BHADRA, CRIME, CRIMINAL JUSTICE, AND THE EVOLVING SCIENCE OF CRIMINOLOGY IN SOUTH ASIA (2017).
[43] Muhammad Mahbubur Rahman, *Protection of Children in Conflict with the Law in Bangladesh*, 12 379 (2019).
[44] *Id.*
[45] Md Abul Kalam et al., *Use of designing for behaviour change framework in identifying and addressing barriers to and enablers of animal source feeding to children ages 8–23 months in Bandarban Hill District in Bangladesh: Implications for a nutrition-sensitive agriculture progr*, MATERN. CHILD NUTR. (2023).
[46] Sally Atkinson-Sheppard, *Street Children and Dhaka's Gangs: Using a Case Study to Explore Bangladeshi Organized Crime*, STR. CHILD. DHAKA'S GANGS USING A CASE STUDY TO EXPLOR. BANGLADESHI ORGAN. CRIME (2018).
[47] Uddin and Yanwen, *supra* note 35.
[48] Mohajan, *supra* note 30.

In most of Asian countries, implementing laws and policies aimed at protecting CCL is inadequate. For example, in Bangladesh, the implementation of the CA-13 has been "criticised for its failure to adequately protect the rights of children in conflict with the law" (Ahmed & Uddin, 2018; Akter & Hoque, 2021; Alam & Hasan, 2019; Biswas & Alim, 2020; Islam & Talukder, 2019; Kabir, 2021). Similarly, in India, "the Juvenile Justice (Care and Protection of Children) Act 2015 has been criticised for failing to address issues such as the high number of children in detention and the lack of access to legal representation."[49] In contrast, some countries have successfully "implemented laws and policies that effectively protect children's rights in conflict with the law. For example, in Norway, the Juvenile Justice System is highly effective, focusing on rehabilitation rather than punishment." The system has been praised for its low recidivism rates and "the use of alternative measures to detention.[50] Similarly, in South Africa, the Child Justice Act 2008 provides a framework for protecting children in conflict with the law, focusing on diversion and restorative justice."[51]

After the above dialogue, the literature gap and problem statement are underlying to explore the issues regarding justice accessibility and its progress scheme. So, the effectiveness of "the juvenile justice system in Bangladesh in ensuring justice for juveniles and protecting their rights when in conflict with the law is vague, whereas the significant challenges Bangladesh faces in safeguarding CCL are also ambiguous." Besides these, what initiatives have been taken by the government of Bangladesh to reform the juvenile justice system and improve the protection of JJS and their rights thereof are also unclear with the efficiency measurements and to what extent Bangladesh has implemented the Convention on the Rights of the Child concerning the juvenile justice system and the implications of the current state of the juvenile justice system in Bangladesh for the well-being of juveniles in conflict with the law and the overall development of the country is also required to explore.

Methodology

This interpretive research uses qualitative primarily and a few quantitative methods and judicial action studies based on secondary sources. However, qualitative approaches help study complex topics or understudied regions by focusing on how individuals interpret and make sense of their experiences to gain insight into social reality.[52] Secondary sources, such as books,

[49] Shailesh Kumar, *Shifting Epistemology of Juvenile Justice in India*, 41 CONTEXT. INT. 113 (2019).
[50] Uddin, Chowdhury, and Ullah, *supra* note 32.
[51] LEWIS APTEKAR & DANIEL STOECKLIN, CHILDREN AND HOMELESS YOUTH.
[52] Mohajan, *supra* note 30.

articles, case laws, and legislation, have been analysed to elucidate the fundamental idea of juvenile justice and generate an evaluation of Bangladesh's performance in protecting children's rights when confronted with the law. In-depth descriptions of contexts, people, interactions, acts, events, views, ideas, and convictions; and first-hand accounts from those who have witnessed the phenomenon. To better understand the present gaps in the JJS and the effects of the current state of operational initiatives, a consolidated qualitative data analysis (QDA) approach is being used". Analysing qualitative data seeks to synthesise and explain "what" and "how" random events occur, while efficiency analysis synthesises effectiveness.[53]

The qualitative portion of data analysis uses theme analysis (TA) to identify the precise crossroads and content analysis (CA) to explore potential domains where the juvenile justice system exists and is being functioned. Because TA is a user-friendly, malleable, and well-liked method for analysing qualitative data that finds, organises, and provides context for overarching meaning groups (themes) in a dataset. Besides this, stakeholder analysis is also employed for mapping the role of different layers in exercising power execution of the juvenile justice structure to outlay the inter-relational effects and bridging the gap among people, judges, lawyers and even victims as well as the protective agencies.

Analysis and Discussion on National and International Legal Frameworks

The primary goals of juvenile justice are to safeguard children and youth against repeat offences, assure their rehabilitation, and facilitate a seamless transition back into society. Furthermore, a thorough juvenile justice development program is essential to nurture the youth as deserving citizens of the nation. Instead, shielding them from shame and stopping delinquency is crucial because they are the country's future leaders. Article 28(4) of Bangladesh's Constitution[54] guarantees several fundamental rights to minors. In Bangladesh, "there is no comprehensive juvenile justice system." Instead, several laws have clauses addressing kids who break the law, sometimes making it unclear which law should be implemented. The execution of "laws and policies to protect the rights of children who come into contact with the law differs significantly from country to country." Some nations have been able to effectively defend the rights of children via laws and policies, while others have

[53] Rohfritsch, A. & Sattar, N.K. (1995). A Critical Review of Judicial Institutions in Relation to the Rights of the Child [Child Study Series]. Rädda Barnen.
[54] Constitution, *supra* note 2.

struggled to do so. If we care about protecting children's rights in legal trouble worldwide, we must keep assessing how well these laws and policies work.

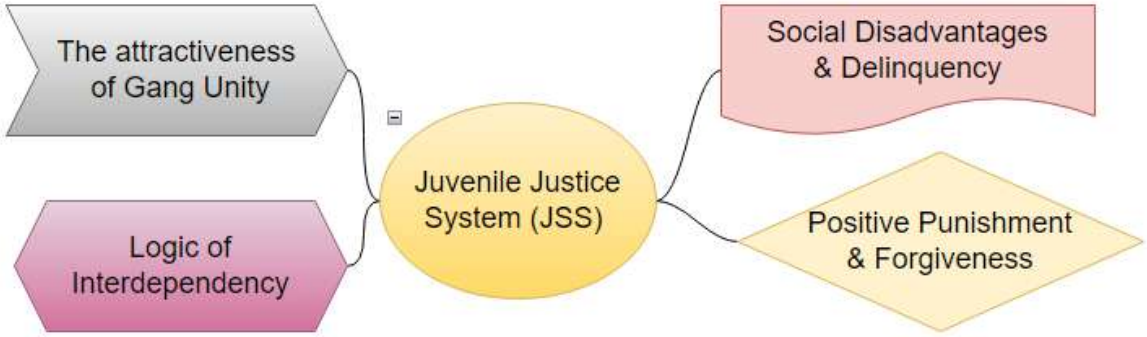


Figure-1: Normative foundation of JSS

It is observed that "due consideration must be given to the fact that children come into conflict with the law due to the failure of their parents/guardians or the State to provide adequate facilities for their proper upbringing. The court must play an active role in ensuring children's rights conflict with the law."

Discussions and Findings on Legal Expositions

For a variety of reasons, the problem of juvenile justice is not given the level of attention and significance that it deserves to be evaluated and maintained in Bangladesh. It is strongly recommended that, while using the JJ method, the global standards and norms and the preexisting laws and norms of the country in question not be adhered to in any instance. Here the legal frameworks and accounts are analysed based on contextual paradigms and focused on the specific cases below.

"Convention on the Rights of the Child (CRC) (United Nations, 1989)"

The CRC[55] is a "United Nations-mandated treaty that protects children's civil, political, economic, social, and cultural rights." It creates specific "obligations for the member state to develop and reform its legal system per its provisions. It recognises that children have the right to be protected from all forms of violence, exploitation, and abuse and that they have the right to participate in decisions that affect their lives." Bangladesh is a signatory to the CRC and "must protect and promote children's rights. The CA-13[56] in Bangladesh aims to promote and

[55] Convention on the Rights of the Child | UNICEF, *supra* note 15.
[56] Government of the People's Republic of Bangladesh, *supra* note 7.

protect children's rights as recognised in the CRC. The Act includes provisions for protecting children from violence, exploitation, and abuse and their participation in decisions that affect their lives."

The UNCRC[57] is a global instrument that outlines the fundamental "rights of children, including those in conflict with the law. Article 40 of the UNCRC emphasises the importance of protecting children's rights in conflict with the law, including the right to legal representation, the right to be heard and to participate in the legal process, and the right to be treated with dignity and respect." Most countries have ratified the UNCRC, and "its principles are reflected in many national laws and policies. One of the critical issues in protecting children in conflict with the law is the need for specialised justice systems that consider children's unique needs and vulnerabilities. The Juvenile Justice System is a specialised system designed to provide a more rehabilitative approach to juvenile offenders." However, "implementing these systems is often challenging, and there are concerns about the effectiveness of such systems in protecting children's rights."

The "**Riyadh Guidelines on Justice for Juveniles**"[58] is a set of international guidelines that provide recommendations for protecting and promoting juvenile justice systems worldwide. These guidelines "were adopted by the United Nations Economic and Social Council in 1990 and are based on international standards and principles, such as the United Nations Convention on the Rights of the Child."

The Riyadh Guidelines[59] emphasise "the importance of recognising children's distinct needs and vulnerabilities in conflict with the law and highlight the necessity of adopting measures that focus on rehabilitation and reintegration into society." The guidelines cover various aspects of juvenile justice, including legal and procedural safeguards, alternative measures to detention, access to justice, and post-release support.

In a critical analysis of the Riyadh Guidelines[60], it is essential to acknowledge their positive contributions to juvenile justice. The guidelines provide a comprehensive framework for countries to develop and implement juvenile justice systems that adhere to international standards. They emphasise the principles of proportionality, individualisation, and diversion, which are crucial for ensuring the child's best interests and preventing further harm.

[57] Nation, *supra* note 1.
[58] UNGA, *supra* note 23.
[59] *Id.*
[60] *Id.*

However, it is also essential to recognise the limitations and challenges in implementing the Riyadh Guidelines[61]. One key challenge is countries' varying degrees of commitment and capacity to align their juvenile justice systems with the guidelines thoroughly. Many countries still face significant legal frameworks, resources, and infrastructure gaps to implement the recommended measures effectively.

Additionally, "cultural and contextual factors may influence the interpretation and application" of the Riyadh Guidelines[62] in different jurisdictions. Local customs, traditions, and socio-economic conditions can impact how juvenile justice is understood and implemented. Ensuring that the guidelines are adapted to each country's specific needs and realities is crucial while maintaining the core principles and standards they embody.

Furthermore, "monitoring and evaluation mechanisms are essential to assess the effectiveness of the Riyadh Guidelines[63] in achieving their intended outcomes." Regular review and reporting on the implementation of the guidelines can help identify areas of improvement and inform policy and practice reforms.

The Riyadh Guidelines[64] on Justice for Juveniles provide a valuable framework for protecting CCL. They promote internationally recognised principles and standards for juvenile justice systems. However, their practical implementation requires ongoing commitment, resources, and adaptation to local contexts. Continuous evaluation and improvement are necessary "to ensure that the rights and needs of juvenile offenders are effectively addressed and that they have access to fair and rehabilitative justice processes."

The Havana Rules[65], officially known as the "United Nations Rules for the Protection of Juveniles Deprived of their Liberty, were adopted by the United Nations General Assembly in 1990. These rules aim to safeguard the rights and well-being of juveniles deprived of their liberty, whether in detention, correctional facilities, or other institutional settings." While the Havana Rules[66] represent an essential step in promoting juvenile rights, a critical examination reveals certain limitations and areas for improvement.

[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] United Nation, *supra* note 1.
[66] *Id.*

One of the key criticisms of the Havana Rules[67] is the lack of binding legal force. Unlike international treaties, the rules are non-binding and do not impose legal obligations on member states. Consequently, their implementation and enforcement depend on the willingness of individual states to incorporate them into their national legal frameworks. This voluntary nature may lead to inconsistencies in their application and result in varying standards of juvenile protection across different jurisdictions.

Another critique pertains to the age definition of a juvenile. The Havana Rules[68] "define a juvenile as any person under the age of 18 years. While this aligns with the UN-CRC, argue that it fails to consider variations in the age of criminal responsibility in different legal systems. In some jurisdictions, the age of criminal responsibility is lower than 18, leading to potential conflicts in the treatment of juveniles following national laws."

Additionally, the Havana Rules[69] emphasise "the importance of the rehabilitation and reintegration of juveniles into society. While this objective is commendable, critics argue that the rules do not provide clear guidelines on effective rehabilitation programs and services." The lack of specific provisions and standards for educational, vocational, and social support programs may hinder the successful reintegration of juveniles into their communities, perpetuating the cycle of recidivism.

Furthermore, the rules emphasise "the use of non-custodial measures and alternatives to detention." While this approach aligns with modern principles of juvenile justice, it may not fully account for cases where deprivation of liberty is deemed necessary for public safety or in response to severe offences. Striking a balance between the rights of the juvenile and the protection of society remains a challenge that the Havana Rules[70] do not explicitly address.

The Havana Rules[71] represent "a significant effort to protect the rights of juveniles deprived of their liberty, but critical analysis reveals several limitations. The non-binding nature of the rules, the age definition of juveniles, the lack of specific guidelines for rehabilitation, and the heavy emphasis on non-custodial measures warrant further consideration." To effectively safeguard the rights of juveniles, there is a need for continuous dialogue, research, and

[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

collaboration to address these shortcomings and ensure that international standards align with evolving principles of juvenile justice.

The **Beijing Rules**[72], also known as "the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, were adopted by the United Nations General Assembly in 1985. These rules aim to provide guidelines for treating juveniles in the criminal justice system, focusing on promoting their rights, rehabilitation, and reintegration into society." While the Beijing Rules[73] have influenced juvenile justice policies worldwide, specific critical points must be considered.

Firstly, the Beijing Rules[74] emphasise "the child's best interests principle, a fundamental principle in international child rights instruments. However, critics argue that implementing this principle in practice is often subjective and can vary significantly across jurisdictions. The interpretation of the child's best interests may be influenced by cultural, social, and economic factors, which can lead to inconsistencies and disparities in the treatment of juveniles."

Secondly, the Beijing Rules[75] advocate for diversion and non-custodial measures as alternatives to detention. While this "approach is commendable, its effectiveness relies heavily on the availability and accessibility of community-based programs and support systems." In many countries, there is a lack of resources and infrastructure to implement such measures effectively. As a result, custodial sentences continue to be prevalent, leading to issues of over-incarceration and the potential for negative impacts on the development and well-being of juveniles.

Another critical aspect is the focus on rehabilitation and reintegration. The Beijing Rules[76] emphasise the importance of providing educational, vocational, and psychological support to juveniles during their incarceration and after their release. However, in practice, many countries face challenges in providing adequate resources and specialised services for the rehabilitation and reintegration of juveniles. Limited access "to quality education, vocational training, and employment opportunities can hinder their successful reintegration into society, leading to a higher risk of recidivism."

[72] UN UN, *supra* note 22.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

The Beijing Rules[77] recommend "the separation of juveniles from adults in detention facilities to protect them from harm and negative influences." However, in many countries, due to resource constraints or inadequate infrastructure, juveniles are still close to adult offenders, increasing their vulnerability and exposing them to potential abuse, exploitation, and negative influences.

Overall, while the Beijing Rules[78] provide "a comprehensive framework for the administration of juvenile justice, their practical implementation requires substantial commitment and resources from governments." There is a need for continuous monitoring, evaluation, and reform to address the challenges and gaps in the system. Efforts should be made "to ensure that the rights and well-being of juveniles are protected, and their rehabilitation and reintegration into society are prioritised."

"**Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict"**[79], adopted by the United Nations in 2000, "sets the minimum age of 18 for recruiting and using children in armed conflict. It obligates states to take preventive measures to deter such recruitment and to provide rehabilitation and reintegration support for child soldiers." Bangladesh ratified this protocol in 2000[80]. However, despite this commitment, critical concerns exist regarding its implementation and effectiveness.

While the protocol establishes 18 as the minimum age, there have been reports and allegations of child recruitment and use in armed conflicts in some areas of Bangladesh. Insufficient monitoring and enforcement mechanisms raise questions about the country's compliance with the protocol's provisions. Additionally, "the rehabilitation and reintegration programs for former child soldiers in Bangladesh have faced challenges regarding accessibility, adequacy, and sustainability." Limited resources and coordination gaps among relevant stakeholders further hinder the successful reintegration of these children into society.

[77] *Id.*
[78] *Id.*
[79] J. Todres, M.E. Wojcik & C.R. Revaz, *Appendix II. Optional Protocol To The Convention On The Rights Of The Child On The Involvement Of Children In Armed Conflict*, 2173 UNITED NATIONS CONV. RIGHTS CHILD AN ANAL. TREATY PROVISIONS IMPLIC. U.S. RATIF. 333 (2009).
[80] *Id.*

"Optional Protocol to the Convention on the Rights of the Child on the Sale of children, child prostitution, and child pornography"[81], also adopted in 2000, calls for criminalising these heinous acts. It requires states to protect child victims and prevent these exploitative practices. Bangladesh ratified this protocol in 2000, reflecting its commitment to combating child exploitation. However, implementing and enforcing laws and policies to address these issues remain a concern.

Despite legislative measures such as the CA-13[82], which encompasses provisions for "protecting children from all forms of exploitation and abuse, including sexual abuse and exploitation, there are gaps in the enforcement and effectiveness of these laws." Insufficient resources, lack of specialised training for law enforcement personnel, and societal challenges in addressing these sensitive issues contribute to a situation where child victims often do not receive adequate support and justice.

Bangladesh has ratified the "Optional Protocols on the involvement of children in armed conflict and the Sale of children, child prostitution, and child pornography" Critical gaps and challenges persist in their implementation[83]. Effectively enforcing these protocols requires robust monitoring mechanisms, increased resource allocation, and comprehensive efforts to address the root causes of child exploitation and abuse. Further attention and action are needed to protect children's rights fully in Bangladesh[84].

"The **International Covenant on Civil and Political Rights (ICCPR)"**[85], adopted by "the United Nations in 1966, is a treaty that acknowledges the civil and political rights of individuals, including children." It emphasises the right to a fair trial and protection against arbitrary detention. While Bangladesh is a signatory to the ICCPR[86], ensuring the protection of these rights remains an obligation. The CA-13[87] in Bangladesh incorporates provisions to guarantee the fair treatment of children in conflict with the law, including their entitlement to a fair trial.

---

[81] J. Todres, M.E. Wojcik & C.R. Revaz, *Appendix III. Optional Protocol To The Convention On The Rights Of The Child On The Sale Of Children, Child Prostitution And Child Pornography*, 2171 UNITED NATIONS CONV. RIGHTS CHILD AN ANAL. TREATY PROVISIONS IMPLIC. U.S. RATIF. 339 (2009).
[82] Government of the People's Republic of Bangladesh, *supra* note 7.
[83] Todres, Wojcik, and Revaz, *supra* note 84.
[84] *Id.*
[85] UN & Resolution 2200A (XXI) of 16 December 1966, *International Covenant on Civil and Political Rights*, UNITED NATIONS 259 (1976).
[86] *Id.*
[87] Government of the People's Republic of Bangladesh, *supra* note 7.

UN Charter: "The United Nations Charter serves as the foundational treaty of the United Nations, outlining its purposes, principles, and structure. While it does not explicitly address children's rights in conflict with the law, it establishes the fundamental principles of respect for human rights, equality, and non-discrimination, which form the basis for protecting the rights of all individuals, including children."

UDHR "(Universal Declaration of Human Rights): The Universal Declaration of Human Rights is a landmark document adopted by the United Nations General Assembly in 1948." It proclaims the inalienable rights to which every person is entitled, regardless of age. Several provisions of "the UDHR are relevant to children's rights in conflict with the laws. In Article 3: Everyone has the right to life, liberty, and security of person; Article 5: No one shall be subjected to torture, cruel, inhuman, or degrading treatment or punishment; Article 6: Everyone has the right to recognition everywhere as a person before the law; Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law; Article 9: No one shall be subjected to arbitrary arrest, detention, or exile; Article 10: Everyone is entitled to a fair and public hearing by an independent and impartial tribunal; Article 25: Everyone has the right to a standard of living adequate for the health and well-being of themselves and their family, including medical care and necessary social services."

"International Declaration of Child Rights: The International Declaration of Child Rights is a non-binding document for children's rights. It was adopted by the United Nations General Assembly in 1959." The key provisions of the International Declaration of Child Rights include "Article 1: Every child shall enjoy all the rights outlined in this Declaration without any discrimination; Article 2: The child shall enjoy special protection and shall be given opportunities and facilities by law and other means to enable them to develop physically, mentally, morally, spiritually, and socially; Article 3: The best interests of the child shall be the primary consideration in all actions concerning children; Article 9: The child shall not be separated from their parents against their will unless it is in their best interests;" Article 14: The child has the right to freedom of thought, conscience, and religion; Article 20: The child who is deprived of their family environment shall have the right to special protection and assistance from the state; Article 40: The child accused of a crime shall be guaranteed the right to a fair and impartial trial.

In addition to the "ICCPR[88], the International Covenant on Economic, Social and Cultural Rights (ICESCR)[89] is another treaty adopted in 1966 that recognises individuals' economic, social, and cultural rights, including children. It acknowledges the right to education, health, and an adequate standard of living. As a signatory to the ICESCR[90], Bangladesh is responsible for safeguarding the rights established in the treaty. Bangladesh also encompasses provisions for protecting the right to education and children's right to health in conflict under the CA-13."[91]

Although Bangladesh is not a direct concern, even not a signatory to the African Charter on the Rights and Welfare of the Child[92], adopted by "the African Union in 1990, its principles remain relevant when evaluating the laws and policies under international and national safeguards surrounding the CA-13 in Bangladesh. The African Charter emphasises protecting children from abuse, neglect, exploitation, and discrimination." These principles align with those recognised in the CRC[93], which Bangladesh has ratified.

In brief, while Bangladesh has obligations under international treaties such as the ICCPR[94] and ICESCR[95] to protect children's rights, including those in conflict with the law, it is essential to consider the principles outlined in other relevant charters and conventions. By evaluating and aligning national laws and policies with international standards, Bangladesh can strive for a more comprehensive and effective protection of children's rights.

"The **EU Charter of Fundamental Rights**[96], along with other related instruments, plays a significant role in protecting the rights of juveniles within the European Union." However, a critical examination reveals certain areas warrant attention and improvement in ensuring comprehensive and effective juvenile rights protection.

One notable aspect of the EU Charter[97] is its recognition of "children's rights and specific needs. Article 24 of the Charter[98] emphasises the child's rights, including protection and care.

[88] UN & Resolution 2200A (XXI) of 16 December 1966, *supra* note 88.
[89] UN, *The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights*, THE UNITED NATIONS SYSTEM FOR PROTECTING HUMAN RIGHTS: VOLUME IV 377 (2016).
[90] *Id.*
[91] Government of the People's Republic of Bangladesh, *supra* note 7.
[92] Editors Human Rights Law in Africa, *African Charter on the Rights and Welfare of the Child*, 1 HUM. RIGHTS LAW AFRICA ONLINE 143 (2012).
[93] Nation, *supra* note 1.
[94] UN & Resolution 2200A (XXI) of 16 December 1966, *supra* note 88.
[95] UN, *supra* note 92.
[96] EU, *The Charter of Fundamental Rights of the European Union*, 5 BIOMEDICAL ETHICS 51 (2000).
[97] *Id.*
[98] *Id.*

Moreover, the Charter acknowledges the child's best interests principle, which should be a primary consideration in all actions concerning children."

Another relevant instrument is the UN-CRC(UNCRC)[99], which is widely ratified by EU member states. The UNCRC provides a comprehensive framework for protecting and promoting children's rights, including those of juvenile offenders. The EU Charter[100] and member states' adherence to the UNCRC demonstrate a commitment to safeguarding the rights of juveniles.

However, despite these positive steps, specific critical issues persist. One concern is the inconsistency in implementing juvenile justice measures across EU member states. While the EU Charter[101] establishes common standards, the interpretation and application of these standards can vary. This inconsistency can lead to unequal treatment and varying levels of protection for juveniles depending on the country in which they reside.

Furthermore, the detention and rehabilitation of juvenile offenders remain areas of concern. While the EU Charter[102] promotes "the principle of using detention as a measure of last resort, there are instances where juvenile offenders are still subjected to custodial sentences. The emphasis should be exploring alternative measures, such as diversion programs and restorative justice practices, which can provide better outcomes for juveniles and society."

Providing adequate legal assistance for CCL is crucial. "Access to legal representation and support is essential for ensuring fair and just proceedings. However, there are disparities in the availability and quality of legal aid services across EU member states, which can hinder the effective exercise of juveniles' rights."

Moreover, the EU Charter should provide more straightforward guidelines on protecting vulnerable groups of juveniles, such as those with disabilities, migrants, or those belonging to minority communities. These groups may face additional barriers and challenges within the JJS, and specific measures should be in place to address their unique needs and ensure equal confirmation of their rights.

In short, "while the EU Charter of Fundamental Rights and related instruments demonstrate a commitment to protecting the rights of juveniles, some areas require further attention and improvement." Consistency in implementation, alternatives to detention, access to legal

[99] Convention on the Rights of the Child | UNICEF, *supra* note 15.
[100] EU, *supra* note 99.
[101] *Id.*
[102] *Id.*

representation, and the protection of vulnerable groups are critical aspects that must be addressed to ensure comprehensive and effective juvenile rights protection across the European Union.

American Convention on Human Rights (Organization of American States, 1969): "The American Convention on Human Rights(ACHR) recognises individuals' civil and political rights in the Americas."[103] Although Bangladesh is not a signatory to the American Convention, it is still relevant to evaluate the laws and policies in Bangladesh regarding the CA-13[104]. The principles recognised in the American Convention align with those in the ICCPR[105], which Bangladesh has ratified CRC, and similarly, ACHR is recognised as the fountain of ACHR and ensuring the right to due process and a fair trial, also recognised in the ICCPR[106] and applies to treating CCL.

SAARC Charter: "The South Asian Association for Regional Cooperation (SAARC) Charter is a regional treaty among South Asian countries. While it does not explicitly address the rights of children in conflict with the law, it emphasises cooperation among member states to promote social progress and the well-being of the people of South Asia." The SAARC Social Charter[107] sets the foundation "for member states to develop policies and frameworks to protect children's rights, including those in conflict with the law, in line with international standards and regional cooperation." SAARC member states have recognised the importance of addressing issues related to trafficking and juvenile justice through regional cooperation. SAARC member countries have been actively combating trafficking in persons, including children, and have adopted several regional initiatives to enhance cooperation[108].

"The Children Act 2013(CA-13)": Bangladesh adheres to these laws and promotes children's rights. However, there may be gaps in the law's implementation, necessitating an evaluation of laws and policies concerning the CA-13[109] to ensure "the protection and promotion of children's rights following international standards. This legislation governs the justice system for children in conflict with the law and children needing protection."

---

[103] OAS, *American Convention on Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, 22 November 1969*, 24 REFUGEE SURVEY QUARTERLY 158 (2005).
[104] Government of the People's Republic of Bangladesh, *supra* note 7.
[105] UN & Resolution 2200A (XXI) of 16 December 1966, *supra* note 88.
[106] *Id.*
[107] Member states of the South Asian Association for Regional Cooperation, *SAARC Social Charter*, SOUTH ASIAN ASSOSCIATION FOR REGIONAL COOPERATION 1 (2004), http://saarc-sec.org/uploads/digital_library_document/10_Social_Charter.pdf.
[108] *Id.*
[109] Government of the People's Republic of Bangladesh, *supra* note 7.

The Act establishes juvenile courts and appoints a juvenile court judge in each district of Bangladesh. It also "prohibits the imposition of the death penalty and life imprisonment for offences committed by individuals under 18 years of age. However, the institutions responsible for rehabilitating and reintegrating children, now known as Child Development Centers, such as those in Tongi, Jessore, and Konabari, often lack the necessary staff and resources to achieve their objectives effectively. Consequently, many children in these centres remain at risk of torture, ill-treatment, and other forms of abuse."

Concerning bail and pre-trial detention, Section 44 of the Act[110] grants police officers "the authority to grant bail to a child, even for non-bailable offences. However, this provision is rarely utilised in practice. Section 49 empowers the court to grant bail and release an arrested child or order their detention in a remand home or place of safety[111]. Nonetheless, children frequently end up in detention without any arrest record due to their parent's failure to fulfil bail requirements. Additionally, there are no limitations on the duration of pre-trial detention, resulting in children remaining in detention for years awaiting court resolution."

Section 82 of the CA-13 of Bangladesh acknowledges that "the treatment of children in conflict with the law should adhere to international standards, including the UN-CRC[112] and the Beijing Rules(BR)[113]. This section emphasises the need to consider children's age, maturity, and specific needs in conflict with the law. Moreover, it states that detention should only be used as a last resort and for the shortest possible period."

Section 83 of the Act underscores the "importance of diversion measures for children in conflict with the law. It stipulates that diversion measures should be employed whenever possible, with the child's best interests as the primary consideration. This section provides a range of diversion measures, including warnings, apologies, counselling, and community service."

Section 84 emphasises the necessity of a child-friendly justice system[114]. It mandates "the provision of legal assistance to children in conflict with the law and requires legal proceedings to be conducted appropriately for the child's age, maturity, and understanding." Furthermore, Section 84 highlights the importance of confidentiality in legal proceedings involving children and the need to protect them from stigmatisation and discrimination[115].

[110] *Id.*
[111] *Id.*
[112] Convention on the Rights of the Child | UNICEF, *supra* note 15.
[113] UN, *supra* note 22.
[114] Government of the People's Republic of Bangladesh, *supra* note 7.
[115] *Id.*

While the CA-13[116] of Bangladesh incorporates several provisions "to safeguard children's rights in conflict with the law, their effectiveness in practice remains a matter of concern. Further research is needed to assess Bangladesh's progress in protecting children's rights in this context."

"The **Penal Code 18**60[117], the **Code of Criminal Procedure 1898**[118], and The **Suppression of Violence against Women and Children Act 2000"**[119] also contain provisions regarding CCL. In addition to the UN-CRC(UNCRC)[120], Bangladesh has "ratified several other relevant global norms, including the United Nations Guidelines for the Prevention of Delinquent Behavior (the "Riyadh Guidelines")[121], the United Nations Standard Minimum Rules for the Management of Juvenile Justice (the "Beijing Rules")[122], and the United Nations Rules for the Safeguard of Juveniles Disadvantaged of Their Liberty (the "UN Rules")."[123] Hence, the state must implement laws, regulations, and procedures consistent with the conventions and work toward their stated objectives. Therefore, children needing protection are treated differently from CCL under the CA-13[124]. Bangladesh raised "the minimum age of criminal responsibility from 7 to 9 years in 2004[125], but the criminal liability of children aged 9 to 12 is still subject to the judicial assessment of their capacity to understand the nature and consequences of their actions[126]. However, the Committee on the Rights of the Child has repeatedly observed that the minimum age of criminal responsibility in Bangladesh is too low and that children between 16 and 18 are treated as adults under section 2 of the CA-13 (Committee on the Rights of the Child). The CA-13 of Bangladesh addresses various issues concerning children in conflict with the law. One such issue is the age of criminal responsibility, which should not be fixed at too low an age level" considering emotional, mental, and intellectual maturity (CA-13).

Moreover, in Bangladesh, birth registration is low, and police "often fail to record or deliberately note an incorrect age to avoid complying with procedural protection, which hampers juvenile justice (Committee on the Rights of the Child). Article 37 of the UN-

[116] *Id.*
[117] Bangladesh, *The penal code*, 65 MINERVA MED. 3255 (1974).
[118] Government of the People's Republic of Bangladesh et al., *The code of criminal procedure, 1898*,
[119] The Prevention of Oppression against Women and Children Act, *The Prevention of Oppression against Women and Children Act*, 2000 PARLIAM. BANGLADESH (2000), https://www.iknowpolitics.org/en/2009/03/bangladesh-prevention-oppression-against-women-and-children-act-2000.
[120] Convention on the Rights of the Child | UNICEF, *supra* note 15.
[121] UNGA, *supra* note 23.
[122] UN, *supra* note 22.
[123] General Assembly et al., *supra* note 24.
[124] Government of the People's Republic of Bangladesh, *supra* note 7.
[125] Goverment of Bangladesh, *supra* note 121.
[126] *Id.*

CRC(UNCRC)[127] prohibits the unlawful or arbitrary deprivation of a child's liberty and mandates that arrest, detention, or imprisonment be used only as a last resort and for the shortest appropriate period (UNCRC)."[128] Furthermore, children deprived of "liberty must be separated from adults and treated with humanity and in a manner that considers their age (UNCRC)[129]. Although Bangladesh has three specialised institutions renamed as Child Development Centers for the detention of child offenders, they lack adequate staff and resources for effective rehabilitation and reintegration, which puts the children at serious risk of abuse, torture, and ill-treatment if sent to ordinary prisons, where they are imprisoned with adults (Committee on the Rights of the Child). This situation hampers the provision of age-appropriate protections to these children. Article 37 of the UNCRC provides that a child's arrest, detention, or imprisonment should be used only as a measure of last resort and for the shortest appropriate period[130]. However, in Bangladesh, many children are sent to ordinary prisons where they are imprisoned with adults, despite the existence of three specialised institutions for the detention of child offenders."

Leading Cases and Judicial Interventions

One significant case is the Public Interest Litigation (PIL) filed in 2009 by "**the Bangladesh Legal Aid and Services Trust (BLAST) and the Ain o Salish Kendra (ASK)** in the High Court Division of the Supreme Court of Bangladesh. The PIL challenged the constitutionality of the Juvenile Justice Act of 2000, which was the precursor to the CA-13." The court ultimately declared "several sections of the Children Act 1974 is unconstitutional, including the provision allowing the detention of children in police custody for up to ten days without judicial oversight. This decision paved the way for the development of the CA-13 and provided an important precedent for the protection of the rights of children in conflict with the law."

Another critical case is the decision in the case of "**Ain o Salish Kendra v. Government of Bangladesh and Others**, which was decided by the High Court Division of the Supreme Court of Bangladesh in 2014." The case challenged "the legality of the detention of children in correctional institutions that were not explicitly designed for children." The court ultimately declared that the detention of children in such facilities was illegal and ordered the government to transfer all children held in adult correctional facilities to juvenile rehabilitation centres.

[127] Convention on the Rights of the Child | UNICEF, *supra* note 15.
[128] *Id.*
[129] *Id.*
[130] *Id.*

In addition to these cases, several other judicial decisions in Bangladesh related to "children's rights conflict with the law. These decisions have emphasised the importance of ensuring that children are treated following international standards and have provided guidance on interpreting and implementing the CA-13."[131]

In the case of "Legal Aid and Services Trust (BLAST) and the Ain o Salish Kendra (ASK) in the High Court Division of the Supreme Court of Bangladesh." The PIL "challenged the constitutionality of the Children Act of 1974, which was the precursor to the CA-13. The court ultimately declared several sections of the CA-13 as unconstitutional, including the provision allowing the detention of children in police custody for up to ten days without judicial oversight. This decision paved the way for the development of the CA-13 and provided an important precedent for the protection of the rights of children in conflict with the law."

Another critical case is the decision in the case of "**Ain o Salish Kendra v. Government of Bangladesh and Others**, which was decided by the High Court Division of the Supreme Court of Bangladesh in 2014." The case challenged "the legality of the detention of children in correctional institutions that were not explicitly designed for children. The court ultimately declared that the detention of children in such facilities was illegal and ordered the government to transfer all children held in adult prisons to juvenile rehabilitation centres."

Overall, these "judicial decisions highlight the critical role that the courts play in protecting the rights of children in Bangladesh. They demonstrate the importance of upholding the principles of due process and fair trial, as well as the need for the effective implementation of laws and policies aimed at promoting the rights of children in conflict with the law." Several critical "judicial decisions in Bangladesh relate to the CA-13 and children's rights in conflict with the law.

In addition to these cases, several other judicial decisions in Bangladesh related to children's rights conflict with the law. These decisions have emphasised the importance of ensuring that children are treated following international standards and have provided guidance on interpreting and implementing the CA-13."

"Bangladesh Legal Aid and Services Trust (BLAST) v. Bangladesh, Writ Petition No. 3139 of 2004," High Court Division of the Supreme Court of Bangladesh. "this case concerned handcuffs and other restraints on children in police custody. The court declared that using

[131] Government of the People's Republic of Bangladesh, *supra* note 7.

restraints on children in such circumstances was illegal and ordered the government to take steps to prevent such practices."

"Ain o Salish Kendra v. Government of Bangladesh and Others, Writ Petition No. 916 of 2009, High Court Division of the Supreme Court of Bangladesh. This case challenged the use of corporal punishment in schools and other institutions. The court declared that such practices were illegal and ordered the government to take steps to prevent corporal punishment of children."

"Secretary, Ministry of Women and Children Affairs v. Bangladesh Legal Aid and Services Trust (BLAST), Writ Petition No. 2976 of 2013, High Court Division of the Supreme Court of Bangladesh. This case concerned the appointment of officers to monitor the implementation of the CA-13. The court ordered the government to ensure the timely appointment of such officers and provide them with the necessary resources to carry out their duties."

"Bangladesh Environmental Lawyers Association v. Bangladesh and Others, Writ Petition No.7643 of 2010, High Court Division of the Supreme Court of Bangladesh. While this case does not directly relate to children's rights, it is an important judicial decision in Bangladesh. The case challenged the construction of a coal-fired power plant that was expected to impact public health and the environment negatively. The court declared that the power plant construction was illegal and ordered the government to take steps to prevent its construction."

"Stakeholder analysis and mapping nexus with power and impact:

'Stakeholder Mapping' has inherent constraints in addressing complex and interdependent relationships in stakeholder management.[132] Influence, attitude, power, interest, support, and legitimacy are used to map the stakeholder community.[133] Mapping aids decision-making: matrixes, grids, and maps map stakeholders. Influence, mindset, authority, interest, excitement, and legitimacy are employed, which requires gathering data on numerous stakeholders and stakeholder groups, including their interests, impact, position, interrelationships, and priorities."

Because of their crucial role as decision-makers and influencers, the legal system is a part of every intervention strategy, thanks to their authority and interests. In this article, "we categorise

[132] Mohan, V.R. and Paila, A.R., 2013. Stakeholder Management in Infrastructure/Construction Projects: The Role Of Stakeholder Mapping And Social Network Analysis (SNA). Aweshkar Research Journal, 15(1).
[133] Marie Slabá, *Stakeholder profile and stakeholder mapping of SMEs*, 1 LITTERA SCR. 124 (2016).

the many stakeholders involved in the juvenile justice system in Bangladesh based on their relative strength and influence inside the system."

Power	**LH** ● Public institutions. ● Press and media. ● Marginal class of the community. ● Local determining *(Shalis-Ponchayet)* groups.	**HH** ● Law enforcement agencies. ● Local law enforcement agencies. ● Resident political patrons. ● Child Courts ● Religious clergyman and *IMAM.*
High	**LL** ● Dept. of Social Affairs ● Lawyer and JJS actioners ● Criminal and gangs. ● Research community.	**LH** ● Victim and manipulated clusters. ● Secondary investigators. ● INGO and NGO.
	Interest	Low

Table: 01. Power and Interest-based stakeholders.

It is necessary to "take a multidisciplinary approach on the part of all the interested parties in the juvenile justice system because the procedure of children's restorative justice" and their reunification into society is strategic that cannot be accomplished by a single organisation. When taking a multidisciplinary method, the two most important approaches to keep in mind are "coordination" and "collaboration." NGOs and other forms of civil society organisation are

essential to the Judicial System. There, relational harmony and dependency are vis-versa. The following Model illustrates the

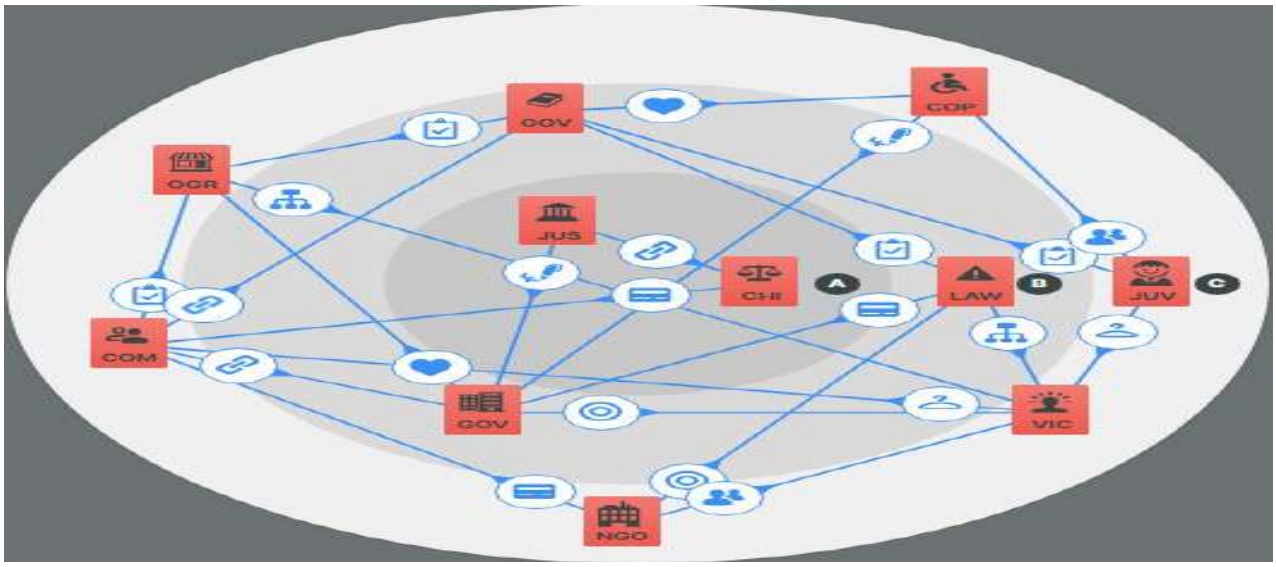


Figure 02. Authority and coordination model among stakeholders

Reforming the "Juvenile Justice System provides a strategy for implementing the identified methods and policies to change the juvenile justice system." Prevent juvenile offenders, particularly juvenile offenders, from being sent outside their homes by putting procedures, policies, and programs into place. It was stated that stakeholders partnered with juvenile justice agencies more often than with community groups, kids, and families. Stakeholders regularly ranked family involvement as a top concern, whereas youth involvement was seldom addressed. Successful cooperation works together with executing more significant reform initiatives. Therefore sites with greater collaboration tend to have better implementation. Building inclusive coalitions to tackle juvenile justice reform is a laudable objective that may help move the cause forward.

Recommendations:

1. Strengthening Legal Framework: Bangladesh should prioritise the comprehensive reform of its juvenile justice system by amending and updating relevant laws, including the CA-13. The legal framework should "explicitly incorporate international standards and principles for the protection and rights of children in conflict with the law."
2. Enhancing Implementation and Capacity Building: Appropriate resources should be allocated to ensure juvenile justice laws and policies are effectively implemented. This includes providing "training programs for judges, lawyers, law enforcement officials,

and social workers involved in the juvenile justice system. Capacity-building efforts should promote a child-centred approach, ensure due process, and implement diversionary measures."

3. Establishing Specialized Juvenile Courts: Dedicated juvenile courts should be established in every district of Bangladesh to handle cases involving children in conflict with the law. These courts should have specialised judges with child rights and juvenile justice expertise. The courts should prioritise alternatives to detention, such as diversion programs and rehabilitation while ensuring fair and impartial proceedings.
4. Strengthening Rehabilitation and Reintegration Programs: Bangladesh should invest in comprehensive rehabilitation and reintegration programs for children in conflict with the law. These programs should address the specific needs of juvenile offenders, including education, skills training, and psychosocial support. Collaboration with relevant stakeholders, including NGOs and community-based organisations, ensures successful reintegration.
5. Improving Conditions of Detention Centers: Efforts should be made to improve the conditions of Bangladesh's detention centres and Child Development Centers. Adequate resources, trained staff, and monitoring mechanisms should be in place to protect children from abuse, torture, and other forms of mistreatment. Rehabilitation-focused services should be prioritised over punitive measures.
6. Empowerment through Education and Skills Training: Prioritise access to quality education and vocational skills training for children in conflict with the law. We can equip them with the tools they need to successfully reintegrate into society by providing opportunities to develop their knowledge and skills.
7. Community-Based Rehabilitation Programs: Establish community-based rehabilitation programs involving local communities, families, and relevant stakeholders. These programs can provide a supportive environment for juvenile offenders, offering counselling, mentorship, and community service opportunities to facilitate their reintegration.
8. Restorative Justice Practices: Explore the implementation of restorative justice practices that focus on repairing the harm caused by juvenile offenders while also addressing the underlying issues that led to their involvement in criminal activities.

Restorative justice approaches can promote accountability, empathy, and reconciliation, fostering a more inclusive and harmonious society.

9. Multi-Agency Collaboration: Strengthen "collaboration among government agencies, non-governmental organisations, and community-based organisations to ensure a comprehensive and coordinated approach to juvenile justice." By working together, these stakeholders can pool their resources, expertise, and knowledge to provide holistic support for children in conflict with the law.
10. "Awareness and Sensitization Programs": Conduct awareness and sensitisation programs targeting key stakeholders, including law enforcement officials, judicial personnel, social workers, and the general public. These programs can help dispel misconceptions, reduce stigma, and increase understanding of juvenile offenders' needs and rights.
11. "Monitoring and Evaluation: Establish robust monitoring and evaluation mechanisms to assess the effectiveness of juvenile justice policies and programs." Regular assessments can identify gaps, measure progress, and inform evidence-based decision-making, leading to continuous improvements in safeguarding juvenile rights.

Conclusion:

Bangladesh's journey towards justice for CCL requires concerted efforts and innovative approaches. By implementing these attractive recommendations, we can create a more inclusive and supportive environment for juvenile offenders, offering them opportunities for rehabilitation, education, and skills development. We can empower these young individuals to reintegrate into society as responsible citizens through collaboration, community involvement, and promoting restorative justice practices.

It is crucial for "all stakeholders, including the government, civil society organisations, and the international community, to prioritise the protection and well-being of juvenile offenders. Together, we can ensure that no child is left behind and that every child in conflict with the law is given a chance for a brighter future filled with opportunities and positive transformation." Bangladesh has made significant strides in safeguarding CCL, as reflected in the CA-13 and other related instruments. However, challenges remain in translating these legal provisions into practical implementation. This evaluation highlights the need for ongoing efforts to strengthen the JJS, enhance capacity building, establish specialised courts, improve rehabilitation programs, and ensure proper detention centre conditions.

By adopting the recommended measures, Bangladesh can advance its journey towards justice for CCL. The government, civil society organisations, and international partners must collaborate to prioritise these vulnerable juveniles' rights and well-being. Protecting and empowering children in conflict with the law are integral to building a just and inclusive society where every child has the opportunity for rehabilitation, reintegration, and a brighter future.

The UNCRC protects children's rights worldwide, and specialist court systems like the JJS may help safeguard children in dispute with the law globally, although execution varies by country. Some nations have protected children's rights well, while others have struggled. In Bangladesh, these laws, regulations, and operational activities must be evaluated to safeguard children, namely CCL. Notwithstanding these efforts, Bangladesh still needs a separate system for children confronting the law. A comprehensive juvenile justice system overhaul to defend children's rights and eradicate abuse. A new, innovative, efficient juvenile justice system is required to protect children and reduce lawbreaking. On the other hand, judicial, legal, and safeguarding processes should be examined and improved to ensure children's rights to fair trials and legal representation. Supervision and restorative justice may replace jail, and Judicial professionals, especially rehabilitation and reintegration youth, need more formal training.

INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021- A REASSESSMENT OF THE CONTOURS AND LIMITS

Sumeet Guha[1] and Dr. Shreya Matilal[2]

[1]Research Scholar, Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology Kharagpur, email: - sumeetguha@kgpian.iitkgp.ac.in, sumeetguha27@gmail.com, ORCID ID: 0009-0002-3814-1389

[2]Assistant Professor, Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology Kharagpur, email: - Shreya.matilal@gmail.com, ORCID ID: 0009-0000-1971-989X

Abstract

Information and Communication Technology (ICT) is currently playing a very crucial role around the globe. The intermediary is one of the most essential stakeholders in the ICT environment. Different countries framed legislations on ICT that include provisions on liability and safe harbour protection of intermediaries. India implemented the Information Technology Act in 2000 as well which primarily deals with the legal framework concerning the liability and exemption of intermediaries from certain liability. This paper will emphasize the intermediary liability and exemption under the Indian statutes with special reference to the Information Technology Act, 2000, and the Copyright Act, 1957 on one hand and the other hand, the paper will critically analyze the current Information Technology (Intermediary Guidelines and Digital Ethics Codes) Rules, 2021(IT Rules, 2021) framed by the Central Government in regulating the intermediary including the social media platform. The author adopted a descriptive and analytical approach while conducting the study. IT Rules, 2021 has created a lot of debates. It has been found that some provisions of the recently framed IT Rule, 2021 violate Article 21 of the Indian Constitution.IT Rules, 2021 is a subordinate piece of legislation. It has been observed that some rules of the IT Rules, 2021 ultra-vires the parent Act i.e. The Information Technology Act, 2000.

Keywords: Information and Communication Technology, Intermediary, Information Technology Act, Copyright Act.

Introduction

Information and Communication Technology (ICT) is currently playing a very crucial role around the globe. Without the Internet, it is hardly feasible to accomplish any work. Life revolves around it. The intermediary is one of the most essential stakeholders in the ICT

environment. Different countries developed legislation involving ICT that includes provisions on intermediaries. In the United States of America, Section 230 of the Communication Decency Act, 1996, and Section 512 of the U.S. Copyright Act, 1976 (the provision was inserted by the Digital Millennium Act,1998 [DMCA]) deal with the safe harbour provisions that protect an intermediary from certain liability. In the European Union, Articles 12, 13, 14 and 15 of the E-Commerce Directive (Directive 2000/31/EC) also deal with the provision of safe harbour. Recently, Article 17 of the newly adopted EU Directive on copyright and related rights in the Digital Single Market includes a new obligation of the intermediary (online content service provider) whereby it has put down the provision of the licensing agreement between the content owner and the online content service provider[1]. India also adopted the Information Technology Act in the year 2000, which likewise covers intermediaries' liability and safe harbour protection. The Central Government also created rules under the Information Technology Act, 2000 governing the intermediary.

There is no single and universally accepted meaning and definition of the term intermediary. The dictionary meaning of the term "intermediary" contemplates that an intermediary is a person who connects two persons to do an agreement.[2] In its inception, the Internet was a static medium that did not enable users to converse with one another. The information could only be read and viewed by users. That Internet environment was referred to as Web 1.0.[3] But now interactivity and collaboration are two important characteristics of the Internet.[4] The current Internet is referred to as Web 2.0[5]. Here, users can interact and post their comments. Web 2.0 consists of applications that facilitate sharing of information and collaboration.[6] Due to Web 2.0's collaborative features, real-world business is shifting towards the digital platform.[7] Organizations and individuals can access, host, and send information from third parties through the Web 2.0 environment, which also makes transactions easier. Intermediaries act as the medium for facilitating interaction in the virtual world.[8]

This paper will focus on the intermediary liability and exemption under the Indian statutes with special reference to the Information Technology Act, 2000, the Copyright Act, 1957, and the

[1] Council Directive 2019/790, art 17,2019 O.J. (L 130) 119
[2] *Intermediaries*, OXFORD ENGLISH DICTIONARY (2022)
[3] Rajendra Kumar, et al, *Information Technology Act, 2000 and the Copyright Act, 1957: Searching for the Safest Harbor* 5 NUJS L. REV. 555 (2012).
[4] *Id.*
[5] *Id*
[6] *Id*
[7] *Id*
[8] *Id.*

current Information Technology (Intermediary Guidelines and Digital Ethics Codes) Rules, 2021(IT Rules, 2021) framed by the Central Government in regulating the intermediary including the social media platform.

Intermediaries' Liability and Exemption under the Information Technology Act, 2000, and the Copyright Act, 1957

Before proceeding with a detailed analysis of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rule,2021 it is necessary to address briefly the statutory provisions on intermediaries under both Information Technology Act, 2000 and the Copyright Act, 1957. Concerning the definition of the intermediaries, section 2(1)(w) of the Information Technology Act, 2000 states that

> *"[i]ntermediary, concerning any particular electronic records, means any person who on behalf of another person receives, stores, or transmits that record or provides any service concerning that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places, and cyber cafes;"*[9]

The definition has broadly mentioned the list of intermediaries. After the 2008 Amendment of the Information Technology Act, 2000, the definition has undergone a drastic change. The definition was very much narrower when the Act came into force compared to the existing one which currently encompasses different types of intermediaries like telecom service providers, network service providers, internet service providers, search engines, e-commerce, etc. The intermediaries are the pathways through which the relationship between the customer and the retailer is established as well as it entails the exchange of different goods and services.[10] Section 79 of the Information Technology deals with the provision of safe harbour for intermediaries. It states that the intermediary shall not be liable for any third-party content put on or made accessible by it through its platform.[11] Its function is limited to providing access only[12]. The intermediary will not participate in the initiation of any transmission, or in selecting the receiver of the same and in modification or selection of the content contained in the transmission[13].

[9] The Information Technology Act, 2000, s 2(1)(w)
[10] Karnika Seth, *Liability of Intermediaries in India,* Seth Associates (June 19, 2022), https://www.sethassociates.com/wp-content/uploads/2019/11/Liability-of-Intermediaries.pdf
[11] The Information Technology Act, 2000, s. 79
[12] *Id.*
[13] *Id.*

Section 79(2)(c) also highlights the aspect of due diligence that shall be followed by the intermediary while discharging its duties. Section 79 also states the circumstances under which the safe harbour provisions will not apply to the intermediaries. This purports the intermediary not to participate in certain activities like conspiracy, abetment, etc in the commission of any unlawful act[14]. The section also mentions the aspect of takedown notice whereby the intermediary shall immediately remove or disable access to that content after receiving any complaint from the appropriate Government or its agencies regarding any communication link being used to commit any unlawful act[15]. Section 81 of the Information Technology Act, 2000, empowers the Act to have overriding effect over any other laws despite anything inconsistent is mentioned in other laws for the time being in force. However, the proviso specifies that the Information Technology Act shall not hinder the exercise of any rights under the Indian Copyright or Patent laws[16].

While discussing the Intermediary liability of the Indian regime, it is very pertinent to state one of the landmark case laws i.e. *Avnish Bajaj vs. State*[17]. It had an immense impact on changing the liability regime of the intermediary after the 2008 amendment of the Information Technology Act, 2000. Avnish Bajaj, the Managing Director of Bazee.com was held responsible in the case as the deemed criminal culpability of directors is formally recognized by law (Vide section 67 read with section 85 of the Information Technology Act, 2000)[18]. Even Article 12 of the European Convention on Cyber Crime stipulates the imposition of criminal liability on the legal person that possesses the power of representation, the capacity to take decisions, and the competence to exercise control.[19] In the case of *Shreya Singhal v. Union of India*[20], it has been stated that the intermediary will remove any inappropriate content if there is a court order or a notification from the Government or its agencies.

In Indian Copyright Act, Section 52(1)(b) and Section 52(1)(c) state the provisions that safeguard the intermediary in case of online copyright infringement. In case of copyright infringement, the copyright holder can bring up the issue in the form of a complaint to the concerned intermediary, the intermediary shall stop giving access to the content[21]. After

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] (2005) 3 CompLJ 364 Del
[18]Vivek Kumar Verma*, Avnish Bajaj vs. State (DPS MMS Scandal Case),* Indian Case Law (June 22, 2022), https://indiancaselaw.in/avnish-bajaj-vs-state-dps-mms-scandal-case/
[19] *Id.*
[20] AIR 2015 SC 1523
[21] The Copyright Act 1957, s 52

stopping access to the particular content based on the complaint, the complainant or the copyright holder needs to bring a court order within 21 days.[22] If he fails to bring the same, the intermediary will again allow the content on their website. Rule 75 of the Copyright Rules, 2013 deals with the procedural framework concerning the "Storage of Transient and Incidental Copies of Works". It has mentioned in great detail the procedure of filing the complaint by the copyright holder and the duty of the intermediary after receiving the complaint[23].

One case law is to be noted while discussing online copyright infringement *i.e. Super Cassettes Industries Ltd vs. My Space Inc.*[24] The case is of immense importance because for the first time the issue relating to the interplay of both the Information Technology Act, 200 and the Copyright Act, 1957 came into the picture. The single bench of the Delhi High Court stated that Information Technology Act, 2000 and Copyright Act, 1957 are standalone legislations. In the single bench, Justice Manmohan Singh stated that Information Technology Act, 2000 is not applicable in case of copyright infringement. The case was appealed to the Division Bench of Delhi High Court which consisted of Justice Ravindra Bhat and Justice Deepa Sharma. Justice Ravindra Bhat made a harmonious construction of the two statutes- The Information Technology Act, 2000 and the Copyright Act, 1957, whereby it has been stated that the Information Technology Act, 2000 is applicable in case of copyright infringement[25].

While discussing the copyright infringement aspect, it is also indispensable to mention a recent case of intermediary liability concerning trademark infringement. *Christian Louboutin v. Nakul Bajaj & Ors*[26] is one of the crucial cases concerning the sale of counterfeited products on a website (that means through an intermediary). Here, the court highlighted the importance of due diligence. The Court stated that performing due diligence is required before hosting a sale by an intermediary.

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rule, 2021- An overview

Before beginning the discussion on Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rule, 2021, it is necessary to discuss the backdrop of the origin of the IT Rule, 2021.The government felt the need for robust legislation concerning the regulation

[22] The Copyright Rules, 2013, Rule 75
[23] *Supra note* 20
[24] (2011) 47 PTC 49 (Del.)
[25] My Space Inc. v. Super Cassettes Industries Ltd. Delhi (DB), (2017) 69 PTC 1 (DEL)
[26] CS(COMM) 344/2018.

of intermediaries including the social media intermediary. In this 21st century, the usage of social media platforms has proliferated. With the advent of Facebook, WhatsApp, Instagram, and other social media platforms, people are getting more involved with the virtual world in sharing their content with the outside world in the form of written posts, photos, videos, and audio. These social media platforms have now become messaging platforms that not only help in connecting with dear ones but also in the dissemination of various important information. Despite all these merits, these social media is also facilitating the unlawful acts of the users in the form of circulating fake news, harassing women, spreading communalism, disrespecting national and religious sentiments, etc.[27] The Supreme Court of India in *Tehseen S. Poonawalla v. Union of India*[28] instructed the Government to take action so that the spreading of fake messages can be stopped. In the year 2018, the Supreme Court of India in the case of *Prajjawala v. Union of India and Others*[29] stated that "the Government of India may frame necessary guidelines to eliminate child pornography, rape, and gangrape imageries, videos and sites in content hosting platforms and other applications". To make it possible to identify the original originator of pornographic content, the Ad-hoc Committee of the Rajya Sabha presented its recommendation on 03.02.2020.[30] The Information Technology (Intermediary Guidelines and Digital Ethics Code) Rules, 2021 was notified on the 25th of February, 2021.[31] This is a secondary piece of legislation that was framed under section 87 of the Information Technology Act,2000 in which the Central Government has been empowered to make rules concerning the Intermediaries and the IT Rules, 2021 superseded the Information Technology (Intermediaries Guidelines) Rules, 2011.[32]The guidelines are not only concerned with the intermediary but also encompass other entities like the News aggregator, Publisher of news and current affairs content, Publisher of online curated content, Significant social media intermediary, and social media intermediary.[33] The Guideline is divided into three parts Part I- Deals with the definitional aspect, Part II- Due Diligence requirements that are to be followed by the intermediary as well as the Grievance Redressal Mechanism, Part III- Deals with the code of ethics and procedure and safeguards about digital media (OTT platforms and online

[27] Pooja Gautam, *Critical Analysis of Intermediary Guidelines and Digital Media Ethics Code, 2021*, Pen Acclaims (June 21, 2023) http://www.penacclaims.com/wp-content/uploads/2022/12/Pooja-Gautam.pdf
[28] (2018) 9 SCC 501
[29] Writ Petition (C) No. 56 of 2004
[30] Ministry of Electronics & IT*, Government notifies Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021* PIB, Govt. of India (June 22, 2023) https://pib.gov.in/PressReleseDetailm.aspx?PRID=1700749
[31] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021
[32] *Id.*
[33] *Id.*

news portal).[34]Rule 2 of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rule, 2021 deal with definitional aspect. Notably, some of the definitions are of immense significance. The Rule mentioned the definition of the social media intermediary and significant social media intermediary which have been distinguished in terms of the number of users which will be notified by the Central Government[35]. On one hand, in the case of a significant social media intermediary, the number of users is more than 50 lacs and on the other hand, in the case of social media intermediaries, the number of users is less than 50 lacs.[36] In Rule 3 certain due diligence requirements are mentioned which are to be observed by the intermediary. As per the rule, it is the duty of the intermediary to publish rules and regulations, privacy policy and user agreement for the users.[37] Rule 3 has elaborately discussed the contents that should be informed by the intermediaries through the regulation, policy and user agreement. The rule states that if the user does not abide by the regulation and clauses of the agreement, then the intermediary will stop giving access to that particular user. Rule 3(1)(d) mentions the Content takedown matter. It states that the intermediary will remove any information which is prohibited by law about the interest of the sovereignty and integrity of India, security of the State, etc. within thirty-six hours through a Court order or being notified by a government agency. This rule is in consonance with the *Shreya Singhal v. Union of India*[38]. The guidelines mention the Grievance Redressal Mechanism, where the grievance officer has to take action within twenty-four hours of the problem and dispose of the problems within fifteen days. The intermediary has to make necessary arrangements for receipt of this complaint and also where the complainant can give the details of the complaint or communication link.[39] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 in the Due Diligence provisions, mention the appointment of Chief Compliance Officer, Nodal Contact Person, and Resident Grievance Officer[40]. The IT Rules, 2021 contain the requirement of the Compliance Report every month where the intermediary will publish the details of the actions they have taken after receiving any complaint[41]. Even there is a requirement to identify the first originator of any message in the case of Significant social media, which provides messaging services[42]. Even the provision of automated filtering is also

[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Supra* note 19.
[39] *Supra* note 30
[40] *Id.*
[41] *Id.*
[42] *Id.*

there[43]. Other important provisions mentioned in the guidelines are the verification of the users, and an obligation to publish a notice on its website about the requirement of furnishing user account details by the publishers of news and online current affairs content to the Ministry[44]. If the intermediary fails to comply with all of these, it will not get a safe harbour defence under Section 79 of the Information Technology Act, 2000[45]. The IT Rules,2021 contain the Digital Media Ethics Code, Part III of the IT Rules, 2021 classifies its subject into Publisher of news and current content affairs and Publisher of online curated content. It mentions the Grievance Redressal Mechanism (Rule 10), Disclosure of information by the publisher (Rule 19), and provision of Compliance report (Rule 18). As per Rule 10 of IT Rules, 2021, If anyone wants to file a grievance under the Grievance Redressal Mechanism, they must first go to the grievance platform set up by the Publisher. If the complainant is not pleased with the publisher's grievance cell's decision. He has a right of appeal with the publishers' self-regulating bodies (governed by Rules 11 and 12 of IT Rules, 2021). Finally, if the individual is dissatisfied with the self-regulating bodies' decision, he or she may file an appeal with the Inter-Departmental Committee established by the Ministry of Information and Broadcasting as per rule 14 of the IT Rules, 2021 and after that, the matter will be presented to the Secretary of the Ministry of Information and Broadcasting by the chairperson of the committee (the authorised person) for taking the decision. The Code of Ethics and Guidelines that are to be followed by the OTT are mentioned in the Appendix and schedule of IT Rule, 2021.

Thus, it is seen that the IT Rule, 2021 is a comprehensive piece of secondary piece of legislation dealing with the intermediary including the social media platforms. Also, the Rule has provided detailed guidelines concerning OTT platforms and online news portals. The merits and demerits of the IT Rules, 2021 will be analysed later in the paper.

Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023

Recently, the IT Rules, 2021 has been amended [Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023] to accommodate the regulations concerning online gaming and online real money games. The primary purpose of the amendment is to increase online gaming innovation and to safeguard citizens from illicit online betting and wagering.[46] Now the Due-diligence requirements that are followed by an online intermediary have to be

[43] *Id*
[44] *Id.*
[45] *Id.*
[46] Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023

observed by the online gaming intermediary.[47] Certain rules like 4A, 4B, and 4C were added that deal with the "verification of online real money games", "the Applicability of certain obligations after an initial period", and "Obligations about online games other than online real money games".

Critical analysis of Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rule, 2021

After studying the rules, it can be said that some provisions like removal of non-consensual content, taking down any content within thirty-six hours following an order by a government agency or the Court, taking action within twenty-four and disposing the matter within fifteen days are the affirmative steps that have been taken through the IT Rules, 2021. [48]One of the most important positive features of the IT Rules, 2021 is that it has elaborately mentioned the code of ethics and guidelines that need to be followed by the OTT platform. The most commendable aspect is the distinction of the viewer's age in relation to the content so that the children are prevented from watching inappropriate adult content. But there are certain provisions like identifying the first originator of any message would violate the end-to-end encryption protocol, which would ultimately lead to an invasion of privacy.[49] The right to Privacy is considered as one of the Fundamental Rights under the Constitution of India after *Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors*. [50]In *WhatsApp LLC v. Union of India*, the petitioner has highlighted the point in the petition that Rule 4(2) of IT Rules, 2021 is violating the Fundamental Right which includes both the right to privacy as well as the right to free speech and education. Also, the petitioner mentioned in its petition that rule 4(2) of the IT Act, 2021 ultra vires the Parent Act i.e. the Information Technology Act, 2000. The automated filtering measure sometimes does not work well.[51] Though it is not possible to track every communication made by any third party. Even there are chances that legal content may be deleted by these automated filtering[52]. For instance, if the word "rape" has been used in any content, the content will be immediately filtered out from the website. There could be videos depicting acts of rape, or there could be videos explaining the legal framework of the offence

[47] *Id.*
[48]Analysis of The Information Technology (Intermediary Guidelines And Digital Media Ethics Code) Rules, 2021(June 22, 2023), https://sflc.in/analysis-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021/
[49] *Id.*
[50] (2017) 10 SCC 1
[51] WP(C) 7284/2021
[52] *Supra* note 47

of rape in India. It's possible that automated filtering will remove both videos. When using automated filtering, it is impossible to have any understanding of the differences between content that is lawful and content that is prohibited. Even there is a provision on copyright and patent infringement. Though *My Space Inc. v. Super Cassettes Industries Ltd.*[53] made a harmonious construction between the Copyright Act and the Information Technology Act, 2000 stating that the Information Technology Act is applicable in case of copyright infringement. Still, the proviso to section 81 of the Information Technology Act contains "nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act 1957 or the Patents Act 1970." So, being a subordinate legislation whether IT Rules,2021 ultra vires the Parent Act i.e.Information Technology Act, 2000 is a serious question. Another doubt that arises here is that in the case of copyright infringement, a copyright holder can directly file a complaint as per rule 75 of the Copyright Rules, 2013 but in the case of IT Rule, 2021, it is stated that the order will come from court or notification from government or its agencies. Therefore, here also confusion arises on the part of the right holder over the legal action they would pursue if their works get infringed.

Many petitions were filed challenging the IT rule, 2021 in different High Courts of India. Some of them are as follows: -

A writ petition was filed against the Ministry of Electronics and Information Technology in *News Broadcasters Association v. Ministry of Electronics and Information Technology*[54] because the Part III of the IT Rules, 2021 violates Articles 14 and 19(1)(g) of the Indian Constitution and frequently go beyond the bounds of the Information Technology Act, 2000, which they are intended to replace. In the event that Part III of the IT Rule, 2021 is not followed, the Kerala High Court has advised the government to desist from taking any coercive action against the petitioner.

The Bombay High Court in *The Leaflet (Nineteenone Media Private Limited) & Anr v. Union of India* and *Nikhil Wagle vs Union of India*[55] gave interim order staying the operation of Rule 9(1) and Rule 9(3) of the IT Rules, 2021.

[53] *Supra* note 23
[54] WP(C) 13675/2021
[55] WPL/14172/2021

The Madras High Court ruled in the case of *Indian Broadcasting & Digital Foundation v. Ministry of Electronics and Information Technology & Ors*[56] that any coercive action against the respondent under Part III of the IT Rules requires the court's approval.

Thus, it can be seen that the IT Rules, 2021 have been challenged in various High Courts concerning the constitutionality of the different provisions framed under it. Also, it is seen that some of the provisions ultra vires the Parent Act i.e. the Information Technology Act,2000.

Conclusion

The Information Technology (Intermediary Guidelines and Digital Media Ethics) Code, 2021 plays a very important role in addressing the regulation of the social media platform so that the dissemination of fake news, and illegal content can be stopped. But many rules prescribed under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 have been challenged in the court of law on the grounds of violating the Fundamental Rights prescribed under the Constitution of India. Also, the most crucial observation that has been made in many petitions is whether the IT Rules, 2021being subordinate legislation ultra vires the parent Act i.e. the Information Technology Act, 2000. Even, it has been observed that the IT Rules, 2021 has given excessive power to the hands of the government in regulating the OTT platform and online news publisher in the form of an oversight mechanism constituted by the Ministry. The provision of intellectual property law concerning patents and copyright only (excluding trademarks) in the IT Rules, 2021 is highly doubtful. Since, the Information Technology Act, 2000 does not include patent or copyright violations as per the proviso to section 81. Then, how IT Rules, 2021 made rules concerning patent and copyright infringement is highly questionable. Though *My Space Inc. v. Super Cassettes Industries Ltd.*[57]. made a harmonious construction between the two statutes (The Information Technology Act, 2000 and the Copyright Act, 1957), still it is a Delhi High Court case limited to the jurisdiction of Delhi only. The Apex Court has not made any observation concerning the interplay of the two statutes. Thus, there is a need for the amendment of the IT Rules,2021 to remove the ambiguity. Also, the importance of intermediaries including social media is increasing day by day, so there should be standalone legislation concerning the same.

[56] WP/25619/2021
[57] *Supra* note 23

TRANSFORMING ACCESS TO JUSTICE IN THE DIGITAL AGE: THE ROLE OF E-COURTS

Waseem[1], Anupam Sharma[2] and Dr. Akhil Kumar[3]

[1]*Ph.D., Research Scholar, Faculty of Law, University of Delhi, Delhi- India, email: waseemlaw2016@gmail.com, ORCID ID: 0009-0005-3995-5423*

[2]*LLM, Faculty of Law, University of Delhi, Delhi- India, email: anupamsharma1994@gmail.com, ORCID ID: 0009-0001-6877-469X*

[3]*Director, Five Year Law College, University of Rajasthan, Jaipur, email: akhil.r.kaler@gmail.com, ORCID ID: 0000-0002-3887-7989*

Abstract

The digital age has revolutionized various aspects of society, including the justice system, and India is no exception. E-courts, utilizing digital technology, have the potential to make legal proceedings more efficient, accessible, and user-friendly. By overcoming geographical barriers, e-courts enable individuals, regardless of their physical location, to participate in legal processes remotely. This is particularly beneficial for individuals residing in rural or remote areas in India. Digital literacy is emphasized as a crucial factor in effectively utilizing e-court systems, requiring educational initiatives to ensure equal access to justice. The research paper highlights the significance of robust technological infrastructure and policies to protect privacy and confidentiality. Admissibility of electronic evidence and safeguarding fundamental rights are discussed as legal and ethical challenges. Collaborative efforts among policymakers, legal professionals, and technology experts are advocated for leveraging the benefits of e-courts while upholding principles of justice in India's digital age.

Keywords: Access to justice, E-courts, Digital, efficiency, accessibility, digital literacy, equitable access.

Introduction

Ensuring access to justice is an essential element within any legal system, guaranteeing individuals the opportunity to pursue and receive justice regardless of their socio-economic status or personal characteristics. It is a fundamental principle that underpins equality, fairness, and the very essence of the rule of law.[1]

Access to justice can manifest itself through diverse means, such as the provision of legal aid, the availability of low-cost or free legal services, and the effective functioning of the court

[1] Galanter, Marc S. and Krishnan, Jayanth K, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L.J. 789, (2004)

system. However, numerous countries face challenges in achieving comprehensive access to justice due to various factors, including deficiencies in the judicial infrastructure, inadequate allocation of resources, and a lack of public awareness regarding their legal entitlements.

The international community has widely recognized the significance of ensuring access to justice, evident in various international instruments such as the International Covenant on Civil and Political Rights[2] and the Universal Declaration of Human Rights[3]. These documents serve as testament to the value placed on granting individuals the opportunity to seek and obtain justice on equal terms, irrespective of their personal circumstances.

Access to justice is a fundamental right[4] enshrined in the Constitution of India, specifically under articles 14 and 21. It serves as a cornerstone of a fair and equitable society, ensuring that individuals can seek and obtain remedies when their rights are infringed upon, regardless of their socioeconomic status, race, or gender. In addition to safeguarding individual rights, access to justice also plays a vital role in promoting transparency, accountability, and upholding the rule of law within governance. By providing individuals with access to legal resources and mechanisms, they are empowered to defend their rights, peacefully resolve disputes, and seek redress for any harm they have experienced. [5] Hence, ensuring widespread access to justice is of utmost importance for protecting human rights, advancing social justice, and fostering a harmonious and stable society.

The Rise of E-Courts

Multiple barriers impede access to justice, encompassing financial limitations, limited legal knowledge and literacy, geographical constraints, language and cultural complexities, and biases and discrimination prevalent within the legal system. [6] Overcoming these obstacles is crucial for establishing a fair and inclusive justice system.

As a response to the digital transformation of the judicial system, the concept of e-courts, also known as digital courts or online courts, has gained prominence. E-courts facilitate the efficient management and processing of cases, offering litigants an avenue for seeking justice through

[2] The International Convention on Civil and Political Rights, 1966, art. 9(4).
[3] The Universal Declaration of Human Rights, 1948, art. 10.
[4] Anita Kushwaha v Pushap Sudan, (2016) 8 S.C.C. 509 (India).
[5] *Access to Justice*, UNITED NATIONS, https://www.un.org/ruleoflaw/thematic-areas/justice-2/.
[6] Hurter, E., *Access to justice: to dream the impossible dream?* 44.CILSA 408–427, (2011).

electronic means. This technological development aims to enhance the organization of court proceedings and provide accessible justice for all parties involved. [7]

E-courts have emerged as an integral component of legal systems across numerous nations. Particularly in economically disadvantaged countries facing challenges related to limited judicial resources and infrastructure, e-courts have showcased their potential. Moreover, during the COVID-19 pandemic, e-courts have played a vital role by providing a means to sustain judicial proceedings while mitigating the risk of virus transmission.

Nevertheless, the implementation of e-courts presents several challenges. One of the primary concerns revolves around safeguarding the security and privacy of court data, constituting a significant issue. [8] Additionally, ensuring universal accessibility to the e-court system, particularly for individuals without internet access or technological devices, poses another obstacle that must be addressed.

E-Court Initiatives around the World

E-Court initiatives have emerged as a critical component of justice systems worldwide, allowing courts to streamline processes and reduce delays. E-Court initiatives utilize technology to enhance court operations, from filing cases online to conducting virtual hearings. Here are some examples of E-Court initiatives from around the world:

1. United States: In the United States, E-Court initiatives vary from state to state, but they often include electronic filing, e-signatures, and electronic payment options. The federal court system also has an electronic case filing system, which allows attorneys to file court documents electronically.[9]

2. India: India's E-Court initiative aims to provide efficient and transparent services to litigants. The system allows for electronic filing, case management, and online access to case information. The initiative has also introduced virtual court hearings and video conferencing, which have helped to reduce delays caused by physical distance.[10]

[7] 29 RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 692-696 (2009).
[8] KINHAL, D. and JAUHAR, *A. VIRTUAL COURTS IN INDIA: A STRATEGY PAPER*. VIDHI (2020).
[9] *Case Management / Electronic Case Files* (CM/ECF), United States Courts, https://www.uscourts.gov/court-records/electronic-filing-cmecf/faqs-case-management-electronic-case-files-cmecf (last visited on May 27, 2023).
[10] *E-Courts Mission Mode Project*, E-Committee, Supreme Court of India, https://ecommitteesci.gov.in/project/brief-overview-of-e-courts-project/ (last visited on April 25, 2023).

3. United Kingdom: In the United Kingdom, the E-Court initiative is focused on digitizing court processes to make them more efficient. The initiative includes electronic filing, electronic payment options, and an online system for tracking case progress. The UK government has also introduced virtual hearings for some types of cases.[11]

4. Australia: The Australian government has launched an E-Court initiative to improve access to justice in rural and remote areas. The initiative includes virtual court hearings, online dispute resolution, and electronic filing. The system has helped to reduce the cost and time associated with traveling to court.[12]

5. Canada: Canada's E-Court initiative includes electronic filing, online access to case information, and virtual court hearings. The initiative aims to improve access to justice, particularly for those in remote areas, and to reduce delays caused by traditional court processes.[13]

E-Court initiatives hold immense potential to revolutionize the operations of judicial systems. By leveraging technology and digital tools, e-courts can expedite legal procedures, enhance access to justice, and reduce delays. As technological advancements continue to unfold, we can anticipate further advancements in e-court initiatives worldwide.

Challenges and Critiques Surrounding E-Courts

E-courts, also referred to as electronic courts, utilize technology and digital instruments to streamline court proceedings. While e-courts have the potential to improve the efficiency and accessibility of the judicial system, it is crucial to acknowledge and address various obstacles and criticisms that arise.

1. Unequal Access to Technology: A primary concern regarding e-courts is the unequal access to the necessary technology for individuals to participate in online court proceedings. This disparity may lead to a "digital divide," effectively denying certain individuals access to the legal system.

[11] *Ecourt the online justice system*, http://www.ecourt.co.uk/faq.php (last visited on April 26, 2023).
[12] MARTÍNEZ A AND FABRA ABAT PERE, E-JUSTICE: INFORMATION AND COMMUNICATION TECHNOLOGIES IN THE COURT SYSTEM (2008).
[13] *British Columbia*, https://justice.gov.bc.ca/cso/about/index.do;jsessionid=cio8vrXxHzCv59WxK4b3GWsZ.0e1ba411-53d7-3b0d-8e0a-d5b7d8cafbab (last visited on May 26, 2023).

2. Security Concerns: Security risks pose a significant challenge for e-courts as they heavily rely on technology and electronic communication. Potential vulnerabilities and hacking incidents could compromise the integrity of the legal system, putting confidential data at risk.
3. Technical Challenges: Technical issues present another obstacle to the effective operation of e-courts. Dependable and functional technology is essential for seamless court processes. However, technical problems such as server outages, network issues, and software glitches can impede or delay court proceedings, causing frustration and inconvenience for all parties involved.
4. Privacy Concerns in E-Courts: The utilization of e-courts gives rise to concerns regarding privacy due to the digital exchange and storage of personal information. Moreover, there is a risk of unauthorized access to private data, which further exacerbates these privacy issues.
5. Reduced Human Engagement in E-Courts: E-courts primarily rely on digital communication. This lack of face-to-face engagement can negatively impact the emotional well-being of participants and pose challenges for judges in assessing the credibility of witnesses.
6. Digital Literacy Challenges in E-Courts: The requirement for digital literacy poses a significant hurdle for individuals when navigating e-courts. Insufficient proficiency in using technology can make it more difficult for people to effectively participate in the legal system, exacerbating the marginalization experienced by already vulnerable groups in society.
7. Cost Considerations in E-Courts: The establishment and maintenance of e-courts can incur significant expenses, which may deter certain jurisdictions from adopting them due to financial constraints.

Overall Assessment of E-Courts: While e-courts hold the potential to enhance the effectiveness and accessibility of the legal system, their implementation should be approached cautiously, taking into account the aforementioned challenges and criticisms.

Comparison of E-Courts with Traditional Courts in terms of Access to Justice

Access to justice is a fundamental right, and it is crucial for the proper functioning of a democratic society. Courts play a significant role in ensuring access to justice by resolving

disputes and providing legal remedies to aggrieved parties. With the advent of technology, electronic courts (e-courts) have emerged as a new alternative to traditional courts.

Traditional Courts

For generations, seeking justice has predominantly involved resorting to court proceedings. In the conventional court system, disputing parties present themselves before a judge who listens to their arguments and delivers a verdict. In traditional courts, litigants are required to physically attend court sessions and these courts are typically housed within a courthouse.

However, traditional courts are not always conveniently accessible. This poses a significant barrier, especially for those who cannot afford the costs associated with traveling to court. Additionally, traditional courts can be intimidating, particularly for individuals unfamiliar with the legal system. Consequently, this may discourage individuals from asserting their legal rights, leading to potential injustices.

E-Courts

E-courts represent a developing alternative to conventional courts, utilizing technology to facilitate legal proceedings. [14] Operating entirely online, e-courts enable litigants and judges to communicate through electronic platforms. They offer various services, including online dispute resolution, electronic document filing, and virtual hearings.

One of the primary benefits of e-courts is their accessibility from any location with an internet connection. This allows individuals residing in remote areas or those unable to physically attend court to still avail themselves of legal services. Moreover, e-courts provide a less intimidating environment compared to traditional courts, potentially motivating individuals to actively pursue their legal rights.

Legal Framework and Policy Environment[15]:

The usability and accessibility of e-courts are significantly influenced by the legal framework and policy environment in which they operate. The development of the legislative framework for e-courts has been influenced by various factors, such as technological advancements, political determination, and the need for justice system reforms. Many countries have embraced

[14] *Ecourtsservices*, "ECourts", https://services.ecourts.gov.in/ecourtindia_v6/ (last visited on May 23, 2023).
[15] Law Commission of India, *Reform of Judicial Administration* Report No.14, (September 1958).

e-courts with the aim of improving access to justice, reducing case backlogs, and enhancing the efficiency of the judicial system.

One crucial legal consideration in the establishment of e-courts is the protection of individual rights and freedoms, particularly with regards to privacy and data security. E-courts must adhere to national laws and regulations to ensure the safeguarding of data privacy and security. Authenticity and admissibility of electronic evidence in court are important legal considerations, requiring e-courts to establish policies and guidelines for its collection, storage, and presentation. These measures ensure the reliability and credibility of electronic evidence. Furthermore, the legal framework must guarantee that the utilization of electronic evidence respects the rights of parties involved and upholds fair trial procedures.

Validity and admissibility of electronic evidence in court pose additional legal concerns that e-courts must address. To ensure the credibility and acceptance of electronic evidence, e-court systems need to establish regulations and protocols for its collection, storage, and presentation. Moreover, it is essential for the legal framework to safeguard against unfair trial proceedings and protect the rights of all parties involved.

Infrastructure and Technology

The introduction of e-courts, commonly referred to as electronic courts, is completely altering the way that judicial procedures are conducted. E-courts streamline the judicial process by enhancing efficiency and accessibility via the use of digital technology. Technology and the underlying infrastructure are key factors in this transition.

E-Court Infrastructure: [16] To enable flawless court operations, the infrastructure for e-courts consists of a complex network of hardware and software components. The following are crucial components of the e-court infrastructure:

1. Court Management System (CMS): The CMS is a web-based system that oversees the whole court process, from the registration of cases to the delivery of judgements. Since it is a cohesive system, information may move between many departments and stakeholders with ease.

2. Video Conferencing System (VCS): The VCS enables remote hearings, allowing judges, attorneys, and other parties to participate from any location in the world. This is especially

[16] *Nyaya Bandhu*, Pro Bono Legal Services, http://probono-doj.in/home/index (last visited on June 05, 2023).

helpful when it is impossible for someone to physically attend due to travel limitations or health issues.

3. Document Management System (DMS): Using the DMS, court records may be digitally preserved and shared by authorized individuals at any time, from any location. Physical paperwork is no longer required, which saves time as well.

4. Electronic Display System (EDS): The EDS is a system that shows court proceedings on electronic screens in the court complex, including case status, case lists, and cause lists. This prevents the need for unnecessary physical travel inside the court complex and guarantees that interested parties are kept informed about the proceedings in real-time.

5. The Court Recording and Transcription System (CRTS) records and transcribes court proceedings so that they can be utilized as references or as evidence. As a result, there is no longer a need for manual note-taking, and records are accurate and comprehensive.

E-court technology

The technology behind e-court is always developing to improve the speed, effectiveness, and accessibility of the legal system. Among the important technologies employed in e-courts are:

1. Artificial intelligence (AI): AI is utilized in e-court to automate tedious operations like scheduling, managing documents, and submitting cases. This not only saves time but also lowers the possibility of mistakes and increases productivity.

2. Blockchain Technology: In order to guarantee the security and legitimacy of court records, blockchain technology is being deployed in e-court. It offers a decentralized, impenetrable system that guarantees the accuracy of court records.

3. Cloud Computing: To store and handle court papers and data, cloud computing is employed in e-court. It offers a scalable and affordable data management and storage solution that is accessible from any location in the world.

4. Biometric Authentication: To protect the security of court proceedings and to prevent unauthorized access, biometric authentication is employed in e-courts. Stakeholder identities are being confirmed through biometric identification techniques like fingerprint and face recognition.

Capacity Building and Training[17]

The use of e-courts has transformed how justice is administered on a global scale. E-courts use technology to improve the effectiveness, accessibility, and transparency of the judicial system. The staff must be sufficiently trained and equipped with the essential abilities to manage the technology and procedures involved for the e-court system to operate at its best. Capacity building and training are crucial for a successful e-court adoption.

In e-courts, a range of technologies, including case management systems, digital courtrooms, video conferencing, and e-filing platforms, are employed. The operation, maintenance, and resolution of technical issues related to these technologies require specific expertise and skills. Therefore, it is essential to prioritize capacity-building and training initiatives to equip court personnel, judges, solicitors, and other stakeholders with the necessary proficiency and knowledge to effectively utilize these new technologies.

The provision of capacity building and training not only contributes to the efficacy and efficiency of court procedures but also aids in reducing case backlogs and simplifying case management for court personnel through appropriate training. Moreover, judges can make more informed decisions by accessing case information.

Training also brings about increased accountability and transparency within the judicial system. By educating judges, court employees, and other stakeholders in the utilization of technology, information availability can be improved while mitigating the potential for corruption or misconduct. Furthermore, by enabling online access to court hearings, the general public can follow proceedings and hold the legal system accountable.

Challenges of Capacity Building and Training in E-Court

Resistance to change poses a significant barrier to the implementation of capacity building and training in e-court. The adoption of e-court has brought about significant changes in court operations, which may be met with reluctance from judges, attorneys, and court employees to adapt to new procedures and tools. To address this challenge, it is crucial to involve all relevant parties in the design and implementation stages of e-court systems, ensuring they are well-informed about the benefits it offers.

[17] *E-Committee, Supreme Court of India,* Draft Vision Document for e-Courts Project Phase III, http://www.mit.gov.in/itbill.asp (last visited on June 2, 2023).

Additionally, the scarcity of resources presents another obstacle. Training and capacity building require substantial financial and human resources. In many courts, particularly those in developing nations, limited financial means may hinder the provision of comprehensive training to their staff members.

Best Practices to Address Challenges[18]

It is of utmost importance to incorporate best practices for capacity building and training in e-court to effectively tackle these challenges. These include:

1. Conducting assessment: Before implementing e-court, it is essential to conduct an evaluation of the skills and competencies necessary for court employees, judges, and solicitors to effectively utilize the system. This assessment enables the customization of training programs to cater to the specific needs and requirements of each group.

2. Involving all stakeholders: It is crucial to engage all stakeholders involved in the planning and implementation of the e-court system through comprehensive consultation. This approach enhances the likelihood of their awareness regarding the system's benefits and fosters their commitment to its successful implementation.

3. Providing incentives: In order to address resistance to change, a potential strategy for effectively encouraging judges and court employees to adopt e-court technologies could involve providing incentives such as promotions and bonuses. By offering rewards for their successful integration of these technologies, opposition to change may be overcome.

4. Collaborating with training institutions: Collaboration with educational institutions such as universities and technical colleges can facilitate the provision of specialized training to court personnel, judges, and lawyers, simplifying the process.

5. Providing ongoing training: It is essential to provide ongoing training for court employees, judges, and lawyers to guarantee their knowledge and proficiency with new procedures and technologies.

For the successful implementation of e-court, capacity building and training play a pivotal role. By ensuring that court employees, judges, and lawyers possess the necessary knowledge and

[18] Law Commission of India, *Need for Speedy Justice* Report No.221 (April, 2009).

skills to utilize e-court technologies, the judicial system can be enhanced in terms of effectiveness, transparency, and accessibility. Addressing challenges such as resistance to change and resource limitations requires the adoption of best practices, including conducting comprehensive needs assessments, involving all stakeholders, offering incentives, collaborating with training institutions, and providing continuous training. These measures are crucial in establishing a robust foundation for e-court adoption.

Cyber security and Data Protection:[19]

As technology advances, electronic courts, commonly referred to as E-courts, are gaining popularity. E-courts utilize technology to enhance the efficiency, convenience, and effectiveness of the judicial system. Nevertheless, the implementation of E-courts faces several challenges, one of which is the issue of data security and cyber security. Cyber security involves safeguarding computer systems, networks, and other devices against unauthorized access, theft, and damage. Given that E-courts handle sensitive information such as personal data, financial records, and legal documents, maintaining strong cyber security measures is crucial. Protecting this data from potential theft requires the implementation of robust cyber security protocols within E-courts.

Implementing access control is a crucial cyber security measure that should be employed by E-courts. Access control involves restricting unauthorized individuals from accessing E-court systems, networks, and databases. This can be achieved through encryption, multi-factor authentication, and the use of strong passwords. Additionally, E-courts should have mechanisms in place to monitor user privileges, ensuring that only authorized personnel can access sensitive information. Network security plays a vital role in cyber security. E-courts should have a secure network infrastructure equipped with firewalls, intrusion detection systems, and anti-virus software. Regular security audits and penetration tests should be conducted to identify and address any network vulnerabilities.

Data protection is another critical aspect of E-courts implementation.[20] Safeguarding personal data is essential, and it is crucial to adhere to data protection regulations and guidelines when collecting, processing, and storing such data. In the context of E-courts, personal data includes information such as names, addresses, dates of birth, and financial details. To ensure data

[19] SEETHARAM, S AND CHANDRASHEKARAN, S, *ECOURTS IN INDIA FROM POLICY FORMULATION TO IMPLEMENTATION*. VIDHI (2016).
[20] Apoorva, *Digitisation of courts brings privacy concerns. But India lacks right to be forgotten*, THE PRINT, November 22, 2021.

protection in E-courts, it is necessary to establish comprehensive data protection policies and procedures. These policies should outline who has authorized access to personal data and define how it is collected, managed, and retained. Prioritizing the accuracy, integrity, and security of personal data is also essential, guarding against unauthorized access, theft, or loss within the E-court environment.

Encryption is a critical data protection technique that should be employed by E-courts. Through encryption, data is transformed into a coded format, ensuring that only authorized personnel can access and decipher it. This helps safeguard personal data from unauthorized access or theft by cybercriminals. E-courts must adhere to data privacy regulations and laws to ensure compliance. In many countries, organizations are required to obtain explicit consent from individuals before collecting and utilizing their personal information. Therefore, e-courts should obtain the explicit consent of litigants before collecting and processing any of their personal data.

The implementation of e-courts necessitates careful consideration of cyber security and data protection. Strong cyber security protocols should be established by e-courts to protect sensitive data from hackers. Additionally, e-courts should develop data protection policies and processes to safeguard personal information and ensure compliance with data protection regulations. By implementing these measures, e-courts can provide a secure, efficient, and reliable platform for the administration of justice.

Successful E-Court Models

E-courts, also known as electronic courts, are systems for managing and administering courts that utilize information technology. These systems offer various advantages, such as expedited case processing, reduced costs and waiting times, and improved accessibility to justice.[21]

Singapore[22]

Singapore took the lead in implementing an E-Court system through its Integrated Criminal Case Filing and Management System (ICMS). This system enables lawyers and litigants to electronically submit and access case materials, reducing the reliance on paper-based filings and enhancing the efficiency of the court system.

[21] *The Pew Charitable Trusts,* How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations (December 1, 2021).
[22] *Singapore International Commercial Court*, Electronic Filing Service, https://www.sicc.gov.sg/forms-and-services/electronic-filing-service (last visited on April 23, 2023).

Moreover, the ICMS incorporates video conferencing features, enabling witnesses and solicitors to participate in court proceedings remotely, eliminating the need for physical presence. Additionally, Singapore's e-Justice platform allows the public to access case information and submit applications online, further enhancing accessibility and convenience.

United States[23]

Extensive testing of E-Court systems has been underway in the United States, with notable success seen in the Courtroom of the Future initiative in Michigan. This initiative has introduced state-of-the-art courtroom equipment, including touchscreens, digital projectors, and video conferencing capabilities. By adopting these advancements, the program has reduced the reliance on paper-based filings and enhanced the efficiency of judicial proceedings.

Furthermore, Utah has implemented an online system for resolving disputes, allowing parties to settle minor claims cases without the need for physical courtroom appearances. This approach has resulted in a decrease in the number of trials and improved the effectiveness of the dispute settlement process.

India[24]

India has emerged as a leader in the implementation of E-Court systems, exemplified by the introduction of the National Judicial Data Grid (NJDG). This centralized database consolidates case data from courts across the country, allowing litigants and solicitors to access case information online and submit applications. The implementation of NJDG has resulted in faster judicial processes, reducing the time and costs associated with obtaining case materials.

Additionally, India has implemented e-filing systems, enabling litigants and solicitors to digitally submit court documents. This approach has significantly reduced the reliance on paper-based filings and enhanced the efficiency of the court system.

Canada[25]

[23] MARTÍNEZ A AND FABRA ABAT PERE, E-JUSTICE: INFORMATION AND COMMUNICATION TECHNOLOGIES IN THE COURT SYSTEM (2008).

[24] *E-committee Supreme Court of India*, "Policy and Action Plan Document Phase II of the ECourts Project" https://sci.gov.in/pdf/ecommittee/PolicyActionPlanDocument-PhaseII-approved-08012014-indexed_Sign.pdf (last visited on May 26, 2023).

[25] *British Columbia*, https://justice.gov.bc.ca/cso/about/index.do;jsessionid=cio8vrXxHzCv59WxK4b3GWsZ.0e1ba411-53d7-3b0d-8e0a-d5b7d8cafbab (last visited on June 6, 2023).

The E-Court system has been implemented in the Canadian province of Ontario, allowing parties to digitally submit and access case records. This system incorporates videoconferencing features, enabling remote appearances by witnesses and lawyers, thereby reducing the need for physical presence in court.

The E-Court system also incorporates online dispute resolution features, enabling parties to resolve disputes without the need for physical courtroom appearances. This technology has accelerated access to case information, reduced costs, and enhanced the efficiency of the legal system.

The increasing popularity of e-court systems worldwide can be attributed to their numerous benefits. Effective models of e-courts have been implemented in countries such as Canada, the United States, India, and Singapore. These models have significantly decreased reliance on paper-based submissions, improved the efficiency of court processes, and expanded access to justice. The success of these models illustrates the transformative potential of E-Court systems in revolutionizing the legal system and providing a more effective and accessible service to the general public.

Conclusion

To achieve a more efficient, accessible, and cost-effective justice system for all, it is necessary to revolutionize access to justice in the digital era. E-courts have emerged as a promising avenue for bringing about this transformation. By promoting alternative methods of dispute resolution such as online mediation and arbitration, e-courts can alleviate the backlog of cases. Moreover, by enhancing the efficiency, accessibility, transparency, accountability, and overall effectiveness of the legal system, e-courts have the potential to reshape access to justice in the digital age.

The digital age has brought about substantial changes to the justice system, and e-courts represent a significant advancement in expanding access to justice for all. By enhancing efficiency, transparency, and fairness, e-courts have the potential to revolutionize the administration of justice. Particularly for underserved and marginalized communities facing barriers to traditional court systems, e-courts can greatly improve access to justice. The benefits extend to all parties involved, as e-courts can reduce costs and expedite case resolution. Moreover, by increasing transparency, e-courts enable a better understanding and trust in the legal system by a wider population.

Despite the progress made in implementing e-courts, there are remaining challenges to overcome. Ensuring universal access to e-courts regardless of digital literacy or technology availability is a significant challenge. Furthermore, concerns regarding privacy and data protection may arise as e-courts become more prevalent, necessitating their careful consideration and resolution. The transformation of access to justice in the digital age relies on the successful integration of e-courts. To ensure genuine accessibility for all and maintain public trust in the legal system, it is essential to address the issues associated with e-courts.

Many individuals face challenges in accessing justice due to various obstacles such as financial constraints, geographical distance, and lack of information. However, there is an opportunity to modernize and enhance access to justice in the digital age. E-courts have emerged as a promising solution in the digital era to enhance access to justice. By leveraging e-courts, the legal system can become more efficient and reduce case backlogs.

To fully unlock the potential of e-courts, it is essential to take action and ensure their accessibility to everyone, especially those who may face digital barriers. Collaboration between governments, civil society organizations, and the corporate sector is necessary to create user-friendly, secure, and transparent e-court systems. Additionally, investing in training and capacity building is crucial to equip legal professionals and court personnel with the necessary skills to effectively utilize digital platforms.

The revolution of access to justice through e-courts requires a concerted effort from all stakeholders. By taking measures to improve access to e-courts, justice can become more accessible and effective for all.

RATIONALISING THE LAW AND PRACTICE RELATING TO PORTS IN INDIA-THE SAGARMALA PROGRAMME AND MAJOR PORTS AUTHORITIES ACT, 2021

Dr. Bhupinder Kaur

Assistant Professor of Law, Army Institute of Law, Mohali, email: dr.bhupinderkaur19@gmail.com, ORCID ID: 0009-0006-2231-4678

Abstract

If a country has a robust system of modern multimodal ports, its participation in international trade will be enhanced leading to progress in establishment of manufacturing hubs in the country, growth in domestic trade and enhancement of innovation in the country. Nearly 70 percent of the world trade is moved through maritime transport. India moves around 95 percent of her trade by volume and 68 percent by value through maritime transport. Multifarious connectivity, the urban planning around the port, adequate storage facilities, rail-road transportation aids and skilled labour force are necessary prerequisites for an efficient and developed port in a coastal area. Apart from the economic value, ports are very significant for defence preparedness too. Conventionally, Indian Ports Act, 1908, Coasting Vessels Act, 1838, Seamen's Provident Fund Act, 1966, Dock Workers (Regulation of Employment) Act, 1948 and Multimodal Transportation of Goods Act, 1993 are the prominent legislations regulating the ports and shipping system in India. Now with the new developments such as Sagarmala Programme and The Major Ports Authorities Act, 2021, a new epoch of awarding autonomy and more flexibility to ports has commenced. Under Sagarmala Programme, the Ministry of Ports, Shipping and Waterways has undertaken to complete 802 projects by 2035 involving Rs. 5.52 lakh crore investment. The Major Ports Authorities Act, 2021 would help to transform the Major Ports from 'service model' to 'landlord model'. It will enable ports to freely decide upon tariffs and port asset management. In this context, this research paper endeavors to analyze the scope of these latest regulatory and policy developments in maritime transport and their impact upon the future of ports. A brief discussion on relevant conventional law will enable the readers to assess the performance gaps of existing legislations and dwell upon the required reform agenda for overhauling ports in India.

Keywords- Major Port, Maritime Transport, Landlord model, Board, Multimodal Transport, Tariff Authority

Introduction

Distribution is very important factor of production which makes the goods and services reach to their intended consumers. Transportation is the means to achieve the end of optimal distribution. For transportation across seas, ports play a major role. Ports connect land and air transportation with the sea. Sea transport is safe and the cheapest method of transportation. Therefore, it is vital to create a robust port infrastructure in any country. Nearly 70 percent of the world trade is moved through maritime transport. India moves around 95 percent of her trade by volume and 68 percent by value through maritime transport[1]. All kind of connectivity, the urban planning around the port, adequate storage facilities at and around the port, all kinds of transportation aids and skilled labour force are necessary for an efficient and developed port in a coastal area. Apart from the economic value, ports are very significant for defence preparedness too. The safety and security of ports and the cargo must be ensured. Central Government's Ministry of Ports, Shipping and Waterways has been entrusted with the responsibility to formulate policies and programs on shipping and ports sector and their implementation. Conventionally, Indian Ports Act, 1908, Coasting Vessels Act, 1838, Seamen's Provident Fund Act, 1966, Dock Workers (Regulation of Employment) Act, 1948 and Multimodal Transportation of Goods Act, 1993 are the prominent legislations regulating the ports and shipping system in India, the working of which has been criticized by some stakeholders to be archaic and deficient in terms of requirement of modern multimodal port systems which India needs to build to achieve the goals of trillion dollar economy. Now with the new developments such as Sagarmala Programme and The Major Ports Authorities Act, 2021, a new era of awarding autonomy and flexibility to major ports has taken a flight. Government of India has regarded them to be new beginning in the process of rationalization of law and policy relating to maritime transport in India.

Sagarmala Programme

This programme was launched by the Government of India at the Maritime India Summit on 14th April, 2016 held in Mumbai. Sagarmala Programme aims to promote port-led development in the country[2]. The Ministry of Ports, Shipping and Waterways has undertaken to complete 802 projects by 2035 involving Rs. 5.52 lakh crore investment[3]. Port modernization,

[1] RAJYA SABHA STANDING COMMITTEE ON TRANSPORT, TOURISM AND CULTURE, REPORT ON PROMOTION OF INFRASTRUCTURE IN INDIA'S MARITIME SECTOR 20 (2021), 300_2021_8_13.pdf (rajyasabha.nic.in).
[2] *Ibid.*
[3] *Ibid*.

connectivity enhancement, port led industrialization and coastal community development are the major goals of this programme. The vision includes efforts to be made to reduce the logistic cost for EXIM and domestic trade by building industrial clusters, SEZ and smart port cities in places around the ports. The coastal community and fishermen skill development programmes shall be organized around ports. Private sector or PPP model projects are being given priority though the Central Government, State Governments, ports and other related agencies are actively engaged in resources management and utilization. Indian Port Rail Corporation Limited has been set up in 2015 to create efficient rail connectivity to ports. However, it is found that Sagarmala programme, particularly after covid-19, needs to be ramped up with greater fund utilization, better planning and fiscal discipline.

Major Ports Authorities Act, 2021- The highlights and the Major Changes Introduced

Enacted in February, 2021, The Major Port Authorities Act, 2021 is the latest regulatory development made applicable to major ports in India. The statement of objects and reasons making clear difference between the old Major Port Trusts Act, 1963 (which 2021 Act sought to replace) and the new Act, provides that it is an Act not only to constitute the port authority for routine port administration, but to regulate the planning, operation, and adjudication at the port level. The Major Port Trusts Act established the Board of Trustees for port management and Tariff Authority for tariff regulation. The 2021 Act establishes the Board of Major Port Authority for port management and the Adjudication Board as the tariff regulator and dispute resolution authority. Indian ports are old ports having less draft, old berths and incapacity to handle large ships and huge cargo. It is acclaimed that the new legislation would help to transform the Major Ports from 'service model' to 'landlord model' and provide them greater operational autonomy including decisions of tariff /SoR for services and usage of port assets, thereby ushering in more competitiveness and attracting investments for modernization. Modernization of institutional structure of Major Ports would help improve project execution capacity. Landlord Port model establishes a neutral public sector regulatory authority for owning the port and protecting the interests of port community which are general and involve public interest (such as bye laws relating to port, management planning, dispute resolution, port environment, port safety, basic infrastructure, and competition issues) and leaves the terminal operations, customized infrastructure development and capacity building to private

sector[4]. Additionally, major ports must follow Policy Guidelines for Land Management (PGLM), 2014 for better utilization of lands of and around the ports. The policy guidelines relating to Model Concession Agreement, 2018 (dealing with international terminal concession) are also in revision process to make it conducive to the goals of Major Port Authorities Act, 2021.

The 2021 Act purports to replace the large Board constituted under the Major Port Trusts Act, 1963 by a newly constituted compact Board of Major Port Authority to administer Major Ports in the country[5]. The Board under the new Act is more authoritative and directly accountable for its activities to the Central Government. Government retains the whole sole control on constitution of the Board and the provision for election of members (trustees under the old Act) has been omitted. The Chairman and Vice Chairman of the Board shall be appointed by the Central Government based on recommendations of a selection committee[6]. Apart from the port stakeholders, the Board shall have one representative from State Government, railway, defence, customs and two from employees of the port. There has been a lot of labour unrest at ports. The new Act does away the requirement of consultation with outside trade unions. The employee's representatives should be serving employees and trade union should be registered and consist of serving employees only[7].

The Board is a permanent body having legal personality of its own. The Board under the old Act was to be constituted as per the pleasure of the Government and trustees were elected after every two years which weakened the resolute of the institution. The Chairperson and the Deputy Chairperson can now be appointed for five years term and other members can be appointed for three years term (subject to maximum two terms); however, the Board continues as a permanent body. The Board must dispose of all the questions which came up before any meeting within sixty days[8] making the decision-making process time bound which was missing under the old Act leading to inefficiency and resultant leadership gaps at ports. The Board shall have greater autonomy to make decisions as to port lands, property, and assets management. The transaction shall be regulated by the prescribed port rules overriding the jurisdiction of municipal, local or Government regulations. No State Government approval or licence is

[4] CHRISTIAAN VAN CRIMPEN, REGULATION OF THE INDIAN PORT, WORLD BANK 38 (2011), https://openknowledge.worldbank.org/server/api/core/bitstreams/21a71db8-a81d-5cee-8acd-1ef738860bff/content.
[5] Major Ports Authorities Act, 2021, No.1of 2021§3.
[6] Major Ports Authorities Act, 2021, No.1of 2021§4.
[7] Major Ports Authorities Act, 2021, No.1of 2021§4(3).
[8] Major Ports Authorities Act, 2021, No.1of 2021§13.

required for constructing buildings or other structures at the major port. The master plan of the Board shall be executed even if there is a conflict with the state Government or local authorities[9]. Board has power to make exemptions or remissions from charges and development of port infrastructure. It can raise loans from banks more freely and make PPP model contracts for Major Ports. The Act abolishes Tariff Authority (tariff regulator) under the Major Port Trusts Act, 1963 which used to fix tariff rates at ports. The Authority had to publish all the tariff rates in official gazette. The Central Government had ample powers to modify the decisions of the Authority. There was lack of flexibility in tariff regulation. Now under the new regime, Ports will be free to fix tariffs and other charges as per the market conditions. It will increase competition amongst ports. An Adjudicatory Board will now investigate and decide upon the matters of tariff regulation, complaints against Port Authority Board and other port service renders and disputes arising out of PPP agreements and concession clauses[10]. The jurisdiction of courts is barred which was partially allowed in the earlier Act. The Adjudicatory Board does have the necessary powers of civil court and its proceedings shall be deemed to judicial proceedings, the appeal against which shall lie only in the supreme Court. The Presiding Officer of the Adjudicatory Board will now be the either the retired judge of the Supreme Court or the retired Chief Justice of a High Court. Presiding Officer can be suspended or removed only under the supervision of the Supreme Court. This position in the old Act was held by a senior bureaucrat. This new development empowers the judicial strength of the body and enforces certainty of law at the port level barring jurisdiction of lower courts. Parties are free to settle contractual disputes through arbitration also[11]. For offences, fines have been significantly increased and to punish for them, power of civil court has been retained as it was there under the old Act. If applicable, the Board shall discharge its responsibilities for corporate social responsibility undertaking certain works related to ports having socio-economic significance within the broader framework of section 135 of the Companies Act, 2013.

The new law and policies of the Ministry aim to make the Boards of Major Port Authority the owner of the port where private companies can build their own port related business structures independently and can use the port in return of sharing revenues with the Authority. The owner of port shall remain the Port authority but the infrastructure of the port shall be leased out to

[9] Major Ports Authorities Act, 2021, No.1of 2021§25.
[10] Major Ports Authorities Act, 2021, No.1of 2021§58.
[11] Major Ports Authorities Act, 2021, No.1of 2021§59.

private firms. They shall have power to install their own technical capabilities at the port whereas the scheme under the old Act lays all responsibilities on the Board itself.

The Mechanism of Ports in India and Challenges Faced by Them

Before going into further discussion about law and policies, it is important to know the existing system and mechanism of working of ports and the problems faced by port community. Shipping and ports have been into existence across the globe from centuries. Wadi Al Jarf was a very famous port in red sea in ancient civilization. Guangzhou in China, Lothal port in India in Gujrat, Athens' port of Piraeus, Zanzibar in Africa, Dejima port in Japan are a few examples of famous ancient ports[12]. Rye and East Sussex have been important English ports in medieval period. Tengier Med and Port Said in Africa, Port of Shanghai and Singapore in Asia, Port of New York and New Jersey and LA in America and Port of Rotterdam and Hamburg in EU are the major ports of the present times. Ports in India handle around 95 percent of EXIM cargo by volume and 68 percent by value. There are 13 major ports and 200 non-major ports (minor ports) in the country. Chennai Port Trust, Cochin Port Trust, Deendayal Port Trust, Jawaharlal Nehru Port Trust, Paradip Port Trust, Kolkata Port Trust, Mormugao Port Trust, Mumbai Port Trust, New Mangalore Port Trust, Visakhapatnam Port Trust and V.O. Chidambarnar Port trust are the Major Port Trusts in India

Kinds of Ports

Different ports have different and specialized areas of operation and therefore their needs are to be separately addressed. Usually, the ports are classified into following categories: -

1. Cargo Ports- Cargo ports are used for transporting cargo only. They may be dealing in one or more than one type of cargo such as food grains, vehicles, chemicals, wood etc. These ports may be handling large number of containers and in such cases, they are named as container ports also.
2. Cruise Ports- Ports which are used for cruise ships used for passenger transport are called cruise ports. Passengers as well as supplies are board on the cruise.
3. Inland Port- The port situated in the lake or river connecting to sea is called inland port.
4. Warm Water Port- Ports where ice is not freeze in wintertime are called warm water ports.

[12] Wikipedia, *Historical Ports*, WIKIPEDIA (Mar. 27, 2018) https://en.wikipedia.org/wiki/Historical_ports#:~:text=Guangzhou%20was%20an%20important%20port%20during%20the%20ancient,Salamis%20against%20the%20Achae.

5. Major and Minor Ports- usually ports are classified into major or minor port on the basis of volume of trade or economic value, however in India this classification is more administrative in nature. According to the Ministry of Ports, Shipping and Waterways, "While the major ports are under the administrative control of Ministry of Ports, Shipping and Waterways, the minor ports are under the jurisdiction of respective State Maritime Boards/ State Governments. All the 13 major ports are functional. Out of 200 minor ports, around 65 ports are handling cargo and the others are 'Port Limits' where no cargo is handled and these are used by fishing vessels and by small ferries to carry passengers across the creeks"[13].

Problems Faced by Ports

1. Ports are facing ecological challenges these days. Dredging and spills lead to pollution. India has faced 8 marine oil spill incidents in last five years. Rising sea level, cyclones and flooding in coastlines is making the port infrastructure building companies to rethink on construction models and coastal management. The quality of air and water in port area have been found to be deteriorated due to transport vehicles and loading and unloading practices.
2. Invasive species brought by ships sometimes, endanger the native species in sea life.
3. Due to change in transportation methods and economic slowdown, some ports loose importance and it becomes uneconomical to operate them. Large investments in port infrastructure are wasted.
4. Modern ports are super multimodal hubs. They need a large-scale multimodal infrastructure investment. It becomes difficult for public bodies to establish or maintain such ports and due to this, they lose a large amount of trade.
5. Attracting huge private investment in ports is a problem in India. Modern ports need a high-tech ICT system making them smart ports. The investment in such ventures, skilled workforce and infrastructure building becomes an additional challenge for port management authorities[14].
6. The underutilization of other modes of transport which become linking chain for ports leads to underutilisation of ports too. It becomes imperative to make and properly implement a robust transport policy in the country.

[13] MINISTRY OF PORTS, SHIPPING AND WATERWAYS, MAJOR PORTS AND NON-MAJOR PORTS, 12 (2022), Ports Wing | MINISTRY OF MINISTRY OF PORTS||SHIPPING AND WATERWAYS (shipmin.gov.in).
[14] India Infrastructure Research, *Ports in India 2021*, INDIA INFRASTRUCTURE BLOG, (Feb. 21, 2021) https://indiainfrastructure.com/wp/content/uploads/2021/03.

7. Legal and policy barriers also exist.

Conventional Regulation of Ports

Ministry of Ports, Shipping and Waterways is the administrative department to establish the functional and regulatory framework for maritime transport in India. Indian Ports Act, 1908, Coasting Vessels Act, 1838, Seamen's Provident Fund Act, 1966, Dock Workers (Regulation of Employment) Act, 1948 and Multimodal Transportation of Goods Act, 1993 are the protuberant legislations regulating the ports and shipping system in India. However, The Indian Ports Act, 1908 and the Major Port Trusts Act, 1963 are the prominent legislation regulating the structure and functioning of ports and therefore they have been discussed hereunder.

Salient Features of the Indian Ports Act, 1908

1. Central Government, for major ports and State Government for minor ports, can regulate the working of ports including making rules relating to entry, exit, work hours, berths, stations, anchorages, striking the yards and top mast and for rigging in the booms and yards of vessels, taking in or discharging passengers and cargo, free passages, oil and fuel vessels, licencing, rates of equipment such as mooring etc[15].
2. Government regulates the use of piers, jetties, landing places, wharves, quays, warehouses and sheds. Government makes rules for the fee charged for services, use of signals, crew, information to be suppled from vessels, medical inspection, inspections, provisions relating to safety, sanitation, disease control etc.
3. Port Conservators are appointed to implement the regulation on the port. They have the powers to issue directions relating to various matters such as to cut warps and ropes in specific cases, remove obstruction and recovery of expanses, raising or removal of wreck impeding navigation, board vessels and enter buildings, crew obligations etc.
4. The Act provides for indemnity by or against the Government for injury or losses to equipment or vessels etc.
5. The Act lays down the manners of discharge of responsibilities in relation to use of port infrastructure and emergency management. It provides for penalties for not observing the duties provided under the Act.
6. The Act also regulates the manner of receipt, expenditure and account of port charges.

[15] Indian Ports Act, 1908, No.15 of 1908.

7. Magistrate has been given powers to enforce the orders relating to payment of compensation or fines under the Act.

Major Port Trusts Act, 1963

The Act purports to constitute port authorities for major ports in India. Board of Trustees is constituted which is responsible for administration of major ports, looking after the issues arising out of and connected with port and implementation of the regulations. Board of Trustees comprises of representatives of various stakeholders such as Government, labour of the port, Mercantile Marine Department, Customs Department, State Government, Defence Services, Railways, sailing vessels and ship owners. Terrif Authority fixes the tariff rates and conditionalities of rates on major ports. Terrif guidelines are issued by the Ministry of Shipping. The Act is based on agency approach and complete state regulation over establishment, operation and functioning of ports. It has not been successful in attracting private investment in the maritime sector. The Major Port Authorities Act, 2021 has been passed to do away the performance gaps created by the mechanism of this Act.

Multimodal Transport Contract and Multimodal Transport Operator

Ports have now turned from simple unimodal harbours to the multimodal hubs. Multimodal ports use all means of transport for cargo movement such as land, rail, air and waterway transport systems. There are world class warehousing facilities in and around the port. Super container handlers, large ship movement facilities, shelter from wind and wave, regional distribution centers, freight forwarders, canneries, repair and maintenance services, smart port traffic management system, specialized cargo handling equipment and skilled workforce are important features of a modern multimodal port. The innovation and efficiency of multimodal logistics is the key for success of modern ports.

According to Vishvas, "Multimodal Logistics can be defined as the chain that interconnects different links or modes of transport – air, sea, and land into one complete process that ensures an efficient and cost-effective door-to-door movement of goods under the responsibility of a single transport operator, known as a Multimodal Transport Operator (MTO), on one transport document"[16]. There is one MTO and therefore goods can be properly tracked and traced and benefits of specialization accrue to traders. Traders do not need to have multiple legal

[16] Badvar Dnyandev Vishvas, *Multimodal Transport in India- Issues and Opportunities*, RESEARCHERS ASIA (Sept. 2, 2022) https://www.theresearchers.asia/papers/vol-i-,issueii/multimodaltransportinindia.pdf.

documentation. It is time and cost effective[17]. Ports need to have such networks. Speaking internationally, United Nations Convention on International Multimodal Transport of Goods 1980 defines International Multimodal Transport as "the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery in a different country. The operations of pick-up and delivery of goods carried out in the performance of a Unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport"[18]. Indian major ports need a modern system of such multimodal ports.

The Multimodal Transportation of Goods Act, 1993

India has enacted this Act to create multimodal transport network in India. The Act provides for registration of MTO (Multimodal Transport Operator) for providing more than one type of transport service. There is a need of single multimodal transport contract for availing such services. It imparts great benefit to exporters by reducing cost of goods making them more competitive in the international market. Goods can be sent from any place of India to any place in the world. The Multimodal Transport Document (MTD) is a negotiable instrument, a document of title having terms and conditions as to the bankers, insurance covers and liability of MTO for loss or damage. It is very important step for growth of international trade and consequently the progress of ports.

Conclusion and Recommendations

If a country has a robust system of modern multimodal ports, its increased participation in international trade will lead to progress of the economy, growth of employment, increase in revenue of the Government and enhancement of innovation in the country. There will be progress in transport infrastructure too. Allied industries will get a boost. The economy of local people will thrive. Ports are very significant for safety and security of the country too and should be a subject matter of strategic planning too. Unfortunately, ports are facing certain challenges these days. Natural calamities, air and water pollution created by port operations, soil erosion, intrusion of foreign species in inland waters and rising sea level are posing threats to ports. The stakeholders will have to think about environment friendly infrastructure and

[17] *Ibid.*

[18] ASEAN, MULTIMODAL TRANSPORT LAW AND OPERATIONS, 6 (2022) https://www.asean.org/storage/images/2015/september/transport-facilitation/batch-2/multimodal-transport-law-and-operations/chapter1_asean disclaimer.pdf.

operations of ports. Here there is a need of long-term policies and guidelines for port establishment and reconstruction. Ports need a long-term planning in which due importance should be given to development of other forms of transports too which will serve as a network for multimodal transport. The port infrastructure needs to be upgraded as per the change in circumstances as some famous ports have lost their significance in the world trade due to their inability to provide facilities for large ships and large containers. Port revenue needs to be increased making ports a partner in trade revenues. PPP models are already operating well in the port systems, however there is a need to attract more private sector investment and exchange of global capital should also be encouraged.

The existing framework of laws, particularly the Major Port Trusts Act is restrictive in nature. Indian ports are not efficient enough to operate in highly competitive market. The unduly large Board of Trustees led to delays and deadlocks in decision making. Commercial interests were sometimes ignored in its decisions. Ports have remained to be inefficient despite of giving broad powers to the Board[19]. Tariff Authority has been very slow in working and has been seen as a hurdle by PPP model port community. It is expected that the new Major Port Authorities Act, 2021 will professionalize Indian ports. They will be enjoying more autonomy and flexibility leading to increased efficiency in ports. The private players have been given liberty to establish terminal infrastructure and capacity building. However, the new Act also does not leave the tariff decision completely on market forces. It takes the middle way. There is no provision as to the role of state government, state rules and platform for conflict resolution with state Government for major ports. This aspect needs to be reexamined. There should be more trust on environment management at and around the ports.

The Transfer of Technology agreements should be made with global handlers for placement of modern technology at the ports. There should be deployment of Geographical Information System (GIS) and remote sensing technology to monitor the proper implementation of legislations at the coastal areas. Skill development and manpower capacity building should be enhanced by establishing new training and development centers across the coastal areas as well as in technical institutes such as IITs/NITs and IIMs. With these submissions, it can be precisely concluded that efficient implementation of the Sagarmala Programme and Major Ports Authorities Act, 2021along with reforms in conventional legal and administrative framework

[19] MINISTRY OF PORTS, SHIPPING AND WATERWAYS, MAJOR PORTS AND NON-MAJOR PORTS, MINISTRY'S WEBSITE PORT WING 1 (Aug. 5, 2022) https://shipmin.gov.in/division/ports-wing.

will certainly enable India to successfully achieve the goals set in the recently announced Maritime India Vision, 2030.

BALANCING THE SCALES OF GOVERNANCE: MAN VS STRAYS

Sneha Jaiswal[1], Aman Kumar[2] and Sourav Chakraborty[3]

Students of Christ (Deemed to be University) Delhi NCR, email:

[1]snehajaiswalsj11@gmail.com, [2]amanjha.240226@gmail.com, [3]worksourav123@gmail.com,

ORCID ID: [1]0009-0003-2386-8881, [2]0009-0007-8053-1811, [3]0009-0000-0752-7639

Abstract

A government is not just some democratic body selected by the people to take major decisions and frame laws on their behalf. Looking after each big and small issue which concerns the public is what forms the core of "good governance. An issue which at the start looked too minor to be concerned about but has spread across the country under the bliss of ignorance is the "havoc of street dogs." Even now when we start to talk about this issue its gravity wouldn't be understood unless we analyze the subject matter in detail. In this paper, the Authors have made an attempt to address the issue of the huge population of stray dogs and how they are affecting the livelihood of the people. The most known and prevalent side of this menace is the disease of 'rabies' which is caused due to dog bites and has a mortality rate of nearly 100% because of the reason that they are not being properly regulated by the authorities concerned even though laws and policies are in place for the same. Also, highlighted are the cases and reports associated with the problem of stray dog attacks and measures taken by the State and Central governments for addressing the same. Additionally, scrutinized the issue from the perspective of victims and dog lovers by reflecting a balanced view. Furthermore, is the role of judicial activism in this sufficient to address the grievances associated with it. It also serves as an analysis of how this issue is being dealt with and how properly are the policies and guidelines being implemented in India and how other countries are serving the same purpose without affecting the people.

Keywords: Animal Welfare, Health Concern, Welfare of People, Stray Dogs, Good Governance

Introduction

"Man's best friend" is a common phrase used to describe domestic dogs, referring to their millennia-long 23,000 years long history of close relations, loyalty, friendship, and

companionship with humans. The History of domestication of dogs was first started with the gray wolf in Siberia. As per published data and theories, back then humans were hunters and used to hunt for their survival and slowly these gray wolves started invading in the territory, which slowly built a relation. Some scientists linked this relationship with the utilitarian theory, which means that these wolves in search of food and shelter entered the human-occupied areas and these humans tried to help them and in return, these wolves use to assist them in their hunting thus building a relationship of trust and intermingling between the humans and the dogs. Uncertainty exists over the timing and reasons of dog domestication[1]. The oldest known dog burial is from 14,200 years ago, suggesting dogs were firmly installed as pets by then. One scenario has wolves scavenging human garbage dumps and becoming acclimated to people, while the other has people domesticating dogs to assist them with hunting[2].

Over the years humans observed that some dogs are better suited for some particular traits. Some are good hunters like the “Jack Russell Terriers", and “Dachshunds”. Some are good herders like the “Sheepdogs", or the “Collies”, and some are good guards like the “Doberman”. So, the humans started selectively breeding the dogs, according to their traits, and that was how dog breeds came to existence. But the biggest question is how the concept of stray dogs came into picture? But first we have to understand the definition of stray dogs. There can be mainly three types of stray animals or stray dogs. Firstly, those who freely roam around are partially dependent on humans. Where the people living around them feed and help them to survive, but they have the right to unrestricted movement. Secondly, those who are unrestricted, and not dependent on humans. Even if humans don’t feed them, they would survive, because of the garbage dumps near them, or stealing food from dustbins, they can survive on their own. Lastly, the pets who have been abandoned by their owners. There is a huge difference between the second and last categories, because the stray dogs of the second category are habituated to survive on their own, ever since they are grown, they learn skills such as drinking water from puddles, looking for food in a garbage dump, navigating the roads, but the pets who have been abandoned, the third category, they are not trained of these habits. They are often killed in road accidents, and get diseases from drinking unclean water. The increasing number of stray dogs are a big concern for human welfare as the World Health Organisation (WHO) estimated that

[1] Robin Mckie, The Guardian, How hunting with wolves helped humans outsmart the Neanderthals, https://www.theguardian.com/science/2015/mar/01/hunting-with-wolves-humans-conquered-the-world-neanderthal-evolution, last updated on: 01/03/2015.

[2]Liz Langley, National Geographic, Stray dogs have the natural ability to understand human gestures, https://www.nationalgeographic.com/animals/article/stray-dogs-communication-rabies-health, last updated on: 17/01/2020.

there are around 30 million stray dogs and around 20,000 people a year die of rabies in India[3]. Through this paper we are trying to address the issues associated with stray dogs in India, the role of the judiciary and states in eliminating the issue and the approach of other countries who successfully curbed the problems with regard to stray dogs. Lastly, the paper provides effective and practically enforceable suggestions to eliminate the issues from the grassroots level.

Problems Associated with Stray Dog at Grassroots Level

According to a survey conducted by an independent NGO in 10 Indian metro cities found a strong link between human population and the amount of municipal and food waste generated, overall and per capita, with the number of stray dogs in the cities. This problem takes a more aggressive facet in cities which are seeing a rapid growth in real estate and construction business as dogs often are looked after the daily wage workers who are working in these sites, but those families eventually move out when their employment ends. "In this period, the dogs settled and got easy food from labourers. They get aggressive if that source of food is threatened in any way". Garbage breeds stray animals, vermin and vectors. Kerala, the Indian state which has been severely affected by the menace of street dogs, also held "street dumped food" a major cause for this menace. Another major issue which we are facing is caused due to 'holding capacity' of dogs as a particular area can only accommodate a fixed number of dogs as this number reaches its end it automatically gives rise to the problem of food accessibility for all the dogs residing in the vicinity. As the shortage of food grows the dogs get more and more violent and this leads to attacks and such incidents.

Another cause which gives rise to this issue is the problem of non-sterilization of dogs whether pet or stray, as dogs remain unsterilized they multiply their number. If a female dog remains unsterilized, she can give birth to 78000 puppies. When these puppies grow in size, they create another problem for the localities they are residing in and thus creating a never-ending problem.

The last of the problems but which is of the most major concern is that of the disease "Rabies' ' which is caused due to animal bites. In India, dogs are responsible for about 97 percent of human rabies, followed by cats (2 percent), jackals, mongooses and others (1 percent). The disease is endemic throughout the country. It infects the central nervous system, ultimately affecting the brain and resulting in death. The time lag between the bite to rabies and onset of

[3] Neetu Chandra, India Today, Rabies stalks India with its 30 million stray dogs, https://www.indiatoday.in/india/north/story/rabies-stalks-india-stray-dogs-who-animal-welfare-board-of-india-187811-2014-04-05, last updated on: 06/04/2014.

symptoms of the disease, is usually about a few days to few months in humans, depending on the site and severity of exposure. Once the disease reaches the brain there is no going back and the mortality rate is 100%.

The last issue which has evolved in recent years and is gruesome by any standard is that of the recent killings which have occurred. Since 2019, India has recorded over 1.5 crore dog bite cases. Uttar Pradesh, which has the most number of strays, has witnessed the most incidents with 27.52 lakh cases, followed by Tamil Nadu (20.7 lakhs) and Maharashtra (15.75 lakhs). Data collected shows that 9000 people have lost life due to dog bites and attacks. Victims range from young toddlers to middle-aged people to old age men and women.

The government has not mandated dog care centres for the same and even the existing shelters are not in proper condition. If the roadmap is not revisited this problem will not be solved easily and the problem will keep multiplying and the consequences will be severe and catastrophic.

Stand of States for Addressing the Issue

Since the 12-year-old's death, newspapers and TV stations in Kerala have covered dog attacks nonstop; some have even inserted daily portions specifically for cases from each district in the state. Similar to what occurred in 2015–16 when an increase in dog attacks led to strays being publicly killed, the events have sparked concern in Kerala. National anger resulted from certain people, including a well-known businessman, offering bounties for such killings[4]. An online boycott campaign was started in the state, which draws millions of tourists each year, as horrifying images of dead dogs—some of which turned out to be fake—began to spread on social media. Local activists who attempted to defend stray dogs claimed they encountered popular resentment.

The Patna Municipal Corporation (PMC) has planned to establish the city's first animal birth control centre, following the lead of places like Jaipur and Dehradun, where canines are sterilised and subsequently released, in response to complaints about the rising population of stray dogs in the state capital[5]. 32% claimed to have abandoned a cat and 34% admitted to having left a dog on the streets. India had the greatest rate of pet homelessness among the nine

[4]Meryl Sebastia, BBC News Cochin, https://www.bbc.com/news/world-asia-india-62949005, last updated on: 28 September 2021.

[5] Shuchismita Chakraborty, PMC bid to muzzle dog menace, The telegraph, https://www.telegraphindia.com/bihar/pmc-bid-to-muzzle-dog-menace/cid/1380302, last updated on: 19 July, 2017.

nations surveyed, scoring 2.4 on a scale of 10 (a lower score indicates a worse situation), followed by Mexico at 3.9 and South Africa at 4[6].

An organisation in the south-central Kottayam district offered to provide financial aid to people purchasing air rifles to fend off aggressive dogs. An illustrious college's alumni association in Pala, a town and a municipality in the Kottayam district of Kerala has provided a 10% subsidy to individuals who purchase air rifles for the first time and a further 25% subsidy to those who are charged by the police with killing stray dogs. An air gun can be purchased without a licence and normally costs approximately 4000[7].

Many local government agencies never even contemplate using the legal and scientific method required for population management of stray dogs—an animal birth control (ABC) program—because killing stray dogs is an easy way out for them[8]. Following a high-level meeting with representatives of the Local Self-Government, Health, and Animal Husbandry ministries, Kerala's Minister for Local Self Governments Excise Department M.B. Rajesh unveiled an action plan to solve the problem amid the rising number of stray dog attacks[9]. An extensive vaccination campaign for stray dogs, the construction of dog shelters in every panchayat and block, and the removal of trash piles from public areas are all part of the multifaceted strategy.

Despite the fact that there has been no study of the city's stray dog population, which is home to multiple dog bite incidents every day, municipal corporation authorities in Ludhiana are incredibly pleased with the ongoing animal birth control programme. Locals who deal with the problem on a daily basis, however, are not happy. Despite the sterilising drive, they claim the dog threat is far from finished. Residents suggested setting a deadline for sterilisation and finding a long-term remedy for dog bite incidents. Sterilization, according t o the officials, is a never-ending procedure. Even while it might occasionally slow down, it would still go on. The number of canines getting sterilised increased from June through November 2021, but then it

[6] Mohua Das, The times of India,
Pet regret: Many abandoned dog or cat after lockdown, says survey in Mumbai, last updated on: 06 December 2021.

[7] Kerala: As street dog menace returns, livemint, https://www.livemint.com/news/india/kerala-as-street-dog-menace-returns-so-does-air-guns-in-kasargod-kochi-read-here-11663324260299.html, last updated on: 16 September 2022.

[8] Dr Kishorekumar K J, Dr Sonika Sathish & Dr Jackin Jayaram, The Times of India, Unlawful execution, http://timesofindia.indiatimes.com/articleshow/84912303.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, last updated on: 31 July 2021.

[9] Minister announces action plan to address stray dog menace, The Hindu, https://www.thehindu.com/news/national/kerala/minister-announces-action-plan-to-address-stray-dog-menace/article65882763.ece, last updated on: 13 September, 2022.

began to decline. The quantity of dogs sterilised increased from June to November 2021, but then it began to decline. There were 1,475 dog operations in March 2022. Dog catchers are having a hard time finding stray canines these days that haven't been sterilised[10].

In order to start efforts for the state government's stray dog birth prevention, the Maharashtra government has set aside a fund of Rs 17 crore. The Mumbai municipal corporation's furnished kennels are the site of a mass sterilising effort. performed about 250 sterilisations a month on average. More than 33,500 stray dogs were neutered[11]. In its largest-ever effort to regulate the canine population and ensure that they do not spread rabies, the Karnataka Municipal Corporation (KMC) plans to vaccine and sterilise 84,000 stray dogs over the course of six months. The Animal Welfare Board of Ministry of Environment and Forestry is contributing to the funding of project[12].

Since the beginning of the animal birth control programme in 2015, approximately 45,000 stray dogs have been sterilised. In the absence of a survey, authorities still don't know how many dogs are left. As per officials, not a single Indian city has so far ever achieved 100% success in sterilising[13].

Role of the Judiciary in Addressing the Issues Related to Stray Dogs

The courts in India are always vigilant related to the rights and management of stray dogs all over India. Stray dogs are protected under the Prevention of Cruelty to Animals Act, 1960[14] and Rules enacted under Section 38 of the Act[15], particularly, the Animal Birth Control (Dogs) Rules, 2001 which makes it illegal for an individual, Resident Welfare Organization or estate management to remove or relocate dogs. A 2006 Office Memorandum of the Central government carried specific rules against government servants who indulge in acts of cruelty to animals[16]. The rules make the government servant liable for action under the Prevention of Cruelty to Animals Act. The High Court noted that despite the clear position of law in

[10] The times of India, Sterilization of stray dogs: Residents seek deadline, MC say it's never-ending process http://timesofindia.indiatimes.com/articleshow/90301070.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, last updated on: 18 March 2022.
[11] Welfare of stray dogs, WSD Activities, https://www.wsdindia.org/sterilization.htm.
[12]Saikat Ray, The Times of India, Kolkata: 84,000 stray dogs to be sterilized in six months, https://timesofindia.indiatimes.com/city/kolkata/84000-stray-dogs-to-be-sterilized-in-six-months/articleshow/90111188.cms, last updated on: 10 March 2022.
[13] Ibid.
[14] The Prevention of Cruelty to Animals Act, 1960, No. 59, Acts of Parliament, 1960 (India).
[15] The Prevention of Cruelty to Animals Act, 1960, § 38, No. 59, Acts of Parliament, 1960 (India).
[16]Soibam Rocky Singh, The Hindu, Delhi HC issues directions on feeding, managing stray dogs, https://www.thehindu.com/news/national/delhi-hc-issues-directions-on-feeding-managing-stray-dogs/article35081095.ece, last updated on: 01/06/2021.

prohibiting cruelty to animals, including stray dogs, there is an increasing tendency among citizens to defy it.

Recently the Delhi High Court in the year 2021 also stated that "Street dogs are sometimes subjected to abusive treatment by some residents of the community because of "widespread wrong or misplaced beliefs that all street dogs carry the rabies virus", the court said, adding, "It is the responsibility of the community residents to get their dogs vaccinated against rabies every year to prevent the spread of rabies." Feeding stray dogs is legal both within and outside any society, and what is prohibited is threatening dog feeders from carrying out their essential obligation under Article 51A (g) of the Constitution of India.

The Animal Welfare Board of India has issued extensive guidelines on feeding stray dogs, and there have been numerous judicial decisions protecting dog feeders and caretakers who face the wrath of ill-informed neighbors. Stray dogs are protected under the *Prevention of Cruelty to Animals Act (PCA), 1960*, and rules enacted under Section 38 of the act, particularly, the *Animal Birth Control (Dogs) Rules, 2001*; *Indian Penal Code*, sections 428 & 429 and Article 51A (g) of the *Constitution of India*. Street dogs cannot be beaten, killed or driven away or displaced, or dislocated, they can only be sterilized in the manner envisaged in The *Animal Birth Control (Dogs) Rules, 2001*, vaccinated, and then returned to their original locations. The stray dogs can be sterilized only when they've attained the age of at least 4 months and not before that. Killing, maiming, poisoning, or rendering useless any animal is punishable by imprisonment for up to two years or with a fine or with both, under Section 428 of the *Indian Penal Code, 1860*.

The Delhi High Court in March 2022 had opined that there is a need to spread awareness that even animals have a right to live with respect and dignity and said that "street dogs have the right to food and citizens have the right to feed community dogs but in exercising this right, care and caution should be taken to ensure that it does not impinge upon the rights of others or cause any harm."

Status of Efforts for Stray Dogs Issue Vis-A-Vis International Perspective

Although the serial killing of humans is widely acknowledged on a global scale, this kind of crime against animals is rarely discussed. Animal cruelty is a known behaviour of psychopaths. Thirty-seven dogs and cats found dead in plastic bags in Sao Paulo, Brazil, were examined at

the necropsy, and toxicological results were reported[17]. The World Health Organization (WHO) and the World Society for the Protection of Animals (now called as World Animal Protection) produced Guidelines for Dog Population Management, which advocated a long-term plan for the management of stray-dog populations by a methodical sterilisation programme, approximately thirty years back[18].

The World Health Organization estimates that there are over 200 million stray dogs in the world. The Netherlands is impressively excluded from this statistic. The absence of stray dogs has made it the top nation in the world. The Collect, Neuter, Vaccinate, and Return (CNVR) programme, a national, publicly financed sterilisation campaign, helped the Dutch to do it. The World Animal Protection Agency considers it to be the most successful strategy for reducing the number of stray dogs[19].

In the city of Cali, owned pets make up about 85% of the overall companion animal population. An initiative operated by WSPA and member organisation Paraiso de la Mascota offers humane education workshops on responsible pet management for kids and adults, as well as a mobile clinic where owners can bring their animals. Before the groups got engaged in 2003, the Cali government was capturing dogs at night and electrocuting them to death. Now, the government collaborates with Paraiso de la Mascota to give dog owners in low-income communities educational materials and affordable sterilisation[20].

The canines of Sierra Leone endure terrible suffering from disease and famine as a result of the country's pervasive and catastrophic poverty. One of the greatest populations of stray dogs in all of Africa may be found in Freetown, the nation's capital, where there are about 100,000 of them. Together with the Sierra Leone Animal Welfare Society (SLAWS), WSPA offers vaccinations and neutering services to dogs whose owners have no alternative access to veterinary care, as well as education on ethical pet ownership. Additionally, they are collaborating with agencies of local government to support their efforts to manage rabies and dogs[21].

---

[17] Salvagni FA, de Siqueira A, Fukushima AR, Landi MFA, Ponge-Ferreira H, Maiorka PC. Animal serial killing: The first criminal conviction for animal cruelty in Brazil. Forensic Sci Int, last seen on: 27 July 2022.
[18] Manilal Valliyate, A case for India's stray dogs, https://www.downtoearth.org.in/blog/governance/a-case-for-india-s-stray-dogs-65166, last updated on:19 June 2019.
[19] Freya Sawbridge, Dutch Review, How did the Netherlands become the first country without stray dogs?, https://dutchreview.com/culture/how-did-the-netherlands-become-the-first-country-to-have-no-stray-dogs/, last updated on: 27 July 2022.
[20] Suffering in Slums: The global stray dog problem, http://support.michiganhumane.org/site/News2?id=11701.
[21] Ibid.

In Romania, the government implemented a euthanasia programme that killed about 80,000 animals between 2001 and 2003 as a response to growing media attention regarding stray dog attacks[22].

The stray dog's number in Pakistan is increasing at an unprecedented rate, and every other day, news stories about dog bites, animal mistreatment, and rabies are published. Although the exact number is unknown, it is estimated that there are at least 3 million stray dogs in the country. Every year, more than one million dog bite incidents are reported throughout Pakistan, and between 2,000 and 5,000 people pass away from rabies[23].

Despite being a relatively wealthy country, Dubai's streets are crowded with abandoned, ill, injured, and pregnant stray cats. Instead of assisting them, the town hires pest control companies to get rid of them. These animals are viewed as a problem to be solved rather than as live beings deserving of respect and a decent life. Animals like cats and dogs are frequently ruthlessly put to death; some are poisoned, while others are captured and left to starve to death in the desert without access to food or water or in excruciating pain. Numerous family pets and stray animals with licence plates have already vanished, and no one has been able to locate them or determine whether they are still alive.

In Dubai, it is prohibited for locals and visitors to feed the stray animals, even if they urgently require medical attention. Several residential areas have posted circulars informing residents that feeding and watering stray animals is completely forbidden and that violators face harsh fines and perhaps jail time. Local animal rescue organizations and animal rights organisations are also prohibited from assisting and caring for street animals as a result of the suspension of their permissions[24].

For instance, the German Animal Welfare Act forbids feeding any animals on the streets. Dogs are not permitted to roam the streets in Switzerland or Austria due to public nuisance regulations. Both the United Kingdom and the United States have similar laws[25]. These are the

[22] Stray dogs problem, DW, https://www.dw.com/en/not-just-for-the-dogs-strays-problem-is-also-human-rights-issue/a-15275219, last updated on 08/01/11.

[23] Fatima Farooq Murawat, Countering the stray dog crisis in Pakistan, The bulletin, https://thebulletin.brandtschool.de/countering-the-stray-dog-crisis-in-pakistan, last updated on: 05 August 2022.

[24] Fawaz, DUBAI, THE CITY OF LUXURY AND OSTENTATION IS INSTEAD A TERRIBLE HELL FOR STRAYS. RAISE YOUR VOICE AND HELP US STOP THE MASSACRE, Inserito da oipainternational, https://www.oipa.org/international/dubai-hell-for-strays/, last updated on: 22 March 2022.

[25] Rohin Dubey, Bar and Bench, Should feeding stray dogs be banned?, https://www.barandbench.com/columns/should-feeding-stray-dogs-be-banned, last updated on: 09 November 2022.

specific actions or initiatives being made on a global scale to solve the issues associated with stray dogs.

Conclusion & Suggestions

The issue of stray dog populations in India, is the main concern we addressed through this article. It emphasizes the necessity for the government to intervene to manage the expanding issue while also taking into account the right of the animals to live. However, the majority of Indian municipalities have failed to implement efficient dog population control laws and policies, frequently only acting when a problem manifests itself. Quick remedies could make things worse, therefore comprehensive strategies and long-term investment are needed.

According to the Food and Agriculture Organization (2014), eradicating rabies needs collaboration between regions and sectors, yet many local governments are underfunded and disinterested in using an integrated strategy. It is crucial to inform regional authorities and other interested parties about ABC programmes and SOPs established by the Animal Welfare Board of India. To stop the spread of illnesses like rabies, experts advise educating the public about disease risks and supporting health-protective behaviors including hand washing, canine vaccinations, and deworming. It is important to establish educational programmes that instruct the general population, and in particular youngsters, on how to deal with animals and what to do if a dog approaches while displaying indications of fear or hostility. However, the majority of Indian cities currently lack such programmes.

To stop the mass slaughter of stray dogs, vaccination and sterilization programmes are crucial. However, a typical hindrance in India is a lack of funding. To address this, the government must create visionary policies that promote dog population management with qualified employees and sufficient funding. Innovative legislative measures, such as the implementation of a dog tax that entails registration and licensing fees for pet dogs, might make ABC programmes self-sustaining. For instance, only 4,455 dogs were registered with the Municipal Corporation in Chandigarh in 2016, despite the city's estimated pet dog population of around 15,000 dogs. The same story goes around for the whole of India with the condition worsening in Tier2 and 3 cities where the local authorities are underfunded and the officers are also not trained enough to handle such situations. Implementing these aforementioned regulations might lead to more revenues as well as more responsible dog ownership.

COMPARATIVE ANALYSIS OF THE EFFECT OF MERGERS AND ACQUISITION ON STAKEHOLDERS: INDIA & USA

Sanya Singhal[1], Prajal Joshi[2] and Shruthi Reddy L.[3]

Symbiosis Law School, Hyderabad, email- [1]sanya.singhal@student.slsh.edu.in, [2]prajal.joshi@student.slsh.edu.in, [3]shruthi.reddy@student.slsh.edu.in, ORCID ID- [1]0009-0006-5012-8442, [2]0009-0002-8034-2379, [3]0009-0009-3497-4640

Abstract

Mergers and Acquisition is the consolidation of companies or their major assets which is done to facilitate the growth of the company through market and product extension. This helps the company in reducing the competition and take benefits of economies of scale. Though these transactions can prove to be a great opportunity but at the same time they can have negative impacts on the stakeholders of the company. Many micro and macro factors are responsible for the effect of Mergers and Acquisitions on the stakeholders of the company which includes the take of the market when such news is first released, terms and conditions of such deal, the post and pre-integration formalities. This paper focuses on such impacts of Mergers and Acquisition transactions which can lead to losses for shareholders, employees, and government. This impact on shareholders varies depending upon the rules and regulations of a particular area guiding such transactions. It also varies as per the demand patterns of consumers, corporate governance policies as prescribed by the law, and the resource availability of companies in such areas. Hence, this article further compares the laws present in USA and India regarding Mergers and Acquisitions and the lacunas in their respective laws. It also covers suggestions for the introduction of certain USA provisions in the Indian statutes governing the rights of shareholders, employees, and government. USA being a developed country have mature laws on the subject of mergers and acquisition along with its anti-competitive laws present under the Sherman Act. This provides India a great opportunity to learn from such mature provisions and inculcate the required laws as per requirements which includes a more inclusive ownership structure by providing rights to minority shareholders. The article also mentions certain rules and regulations which provide a better stand to these shareholders in India than in the USA. Thus, praising the legislatures for forming such laws.

Keywords: Mergers, Acquisitions, Stakeholders Competition, SEBI, USA.

Introduction

With the coming up of new companies and the cutthroat competition, a company must strive hard for its survival, profits, and growth. A company should grow both externally and internally if it wants to gain profits. Where the internal growth of a company depends upon introducing new products and sales, the external growth is a result of various processes like merger, amalgamation, acquisition, takeovers, etc. It refers to the consolidation of companies or their assets through various financial transactions.[1]

A merger refers to a contract that combines two or more companies into one with profit as their motive. Whereas acquisition refers to the process through which one company acquires another. Desire to increase the market share, access new markets and technologies, achieve economies of scale, and reduce competition serves as major motivating factors leading to Mergers and Amalgamations.[2]

The impact of M&A on shareholders, employees, and government varies on several factors, including the terms and conditions of the deal, the take of the market on such merger or acquisition, the post-merger integration process, etc. The process of mergers and acquisitions can lead to both profits and losses it depends upon the due diligence exercised through a comprehensive review of the target company's finances, operations, and legal issues to calculate the potential risks and opportunities. The success of M&A activities depends on several factors, including the strategic fit of the companies, the ability to achieve synergies and cost savings, and the effective integration of operations and cultures.[3]

Mergers and acquisitions have different effects on the stakeholders of different countries because of the difference in their regulatory framework, and market conditions which include the market sizes and demands for the product or service of the company. This paper deals with a comparative analysis of mergers and acquisitions on the stakeholders in India and the USA. It mainly focuses on shareholders, employees, and the government. Its further deals with the lacunas in the Indian laws protecting the rights of shareholders, government, and employees.

Shareholders

Mergers and Acquisitions in a company can have both positive and negative impacts on the shareholders of the company.

[1] Richard A. Shick, *Mergers Benefit to Shareholders of Acquiring Firms,* 3 FIN MGMT., 45-50 (1974).
[2] Dennis C Mueller, *Mergers and Market Share,* 67 THE REV. OF ECON. & STAT., 256-267 (1985).
[3] Richard Rosecrance, *Mergers and Acquisitions,* 80 THE NAT'L INT'S, 65-73 (2005).

- **Stock price:** Since the profits of the shareholder depend mostly on the price of companies share. Such prices can either decrease or increase with the announcement of a Merger or acquisition taking place in a company. This price change depends upon how the market is perceiving the deal. If the market believes that such a merger will create value for the company then the stock price of the company goes up otherwise it might fall drastically leading to losses for the shareholders. [4]
- **Cash or stock consideration:** At the time of the merger or acquisition of a company the shareholders may receive cash, stock, or both as consideration for their shares in the company. The type of consideration they receive at the time of M&A describes their future with the company, if they receive the cash, they can opt for investing out of the company but if they receive stock their relationship with the company strengthens.[5]
- **Control of the company:** Depending on the type of Merger and Acquisition the control of the existing shareholders of the company may dilute. In case the acquiring company has a major stake then the stakeholders will lose their control which can be positive and negative both depending upon the goals and expectations of the stakeholders.[6]
- **Synergies:** Mergers and Acquisitions lead to synergies and cost savings which increases the companies. Combining two companies leads to economies of scale, which refers to the decrease in the cost per unit of output with the increase in the size of the operation. It also gives rise to cross-selling opportunities and a reduction in procurement costs. This ultimately increases the profits of the company.[7]
- **Integration Risk:** Mergers and acquisitions might lead to integration since they are complex in nature, this might lead to negative impacts on shareholders, and this might be due to increased costs and decreased performances.

Since Mergers and acquisitions impact shareholders who are the major stakeholders of the company since their hard-earned money is invested in the same, so stringent regulatory framework is needed for the same. In India, there are several rules and regulations in place to protect the interests of shareholders at the time of mergers and acquisitions (M&A). This includes the ***Companies Act, 2013***[8] which makes it mandatory for the company to take prior

[4] Samuel C, *Merger and Acquisition Valuation,* 20 FIN. MGMT., 85-96 (1991).
[5] Richard J Rosen, *Merger Momentum and Investor sentiment: The Stock Market Reaction to merger Announcements,* 79 J. OF BUS. 987, 1017 (2006).
[6] Josoph P. H, *On the Patterns and Wealth Effect of Vertical Mergers,* 79 J. OF BUS. 877, 902 (2006).
[7] Myles J., *A Paradox of Synergy: Contagion and Capacity Effects in Mergers and Acquisitions,* 31 THE ACAD. OF MGMT. REV. 962, 976 (2006).
[8] Companies Act, 2013, No. 18, Acts of Parliament, 2014 (India).

approval of the shareholders through a special resolution that requires a minimum of 75% of the votes cast by the shareholders. The company also needs to provide shareholders with information including the valuation report, the share exchange ratio, and the scheme of arrangements. Similarly, laws like the ***Securities Act of 1933***[9] in the US require the company to provide full and fair disclosure of all material information related to M&A transactions to their shareholders.

The Sarbanes-Oxley Act of 2002[10] was passed in response to corporate accounting scandals and includes provisions related to M&A transactions. The above act obligates the companies to maintain controls over their financial reporting and to provide shareholders with accurate and timely information about their financial condition.

Under the ***Securities and Exchange Board of India (SEBI) Regulations, 2011***[11] certain rules safeguarding the interests of minority shareholders have been provided which include a mandatory provision for acquirers to make an open offer to minority shareholders in case they acquire more than 20% of the shares of a listed company. ***The Securities Exchange Act of 1934***[12] in the US requires the company to disclose information about any material changes in their business or financial condition that may affect the value of the company's securities.

The Competition Act, of 2002[13] regulates M&A transactions to ensure that it does not lead to anticompetitive behavior or abuse of market dominance. Any Merger or Acquisition that will have a severe impact on the competition needs to go through the Competition Commission of India. ***The Hart-Scott-Rodino Antitrust Improvements Act of 1976***[14] requires companies to notify the Federal Trade Commission (FTC) and the Department of Justice (DOJ) before completing certain types of M&A transactions. This enables them to keep a check on antitrust transactions.

Under the ***Income Tax Act, of 1961***[15] the interest of the shareholder is protected by providing their company with tax exemptions and reductions for companies involved in M&A transactions, subject to certain conditions.

[9] Securities Act of 1933, (U.S.A).
[10] Sarbanes-Oxley Act of 2002, (U.S.A).
[11] Securities and Exchange Board of India (SEBI) Regulations, 2011, Act of Parliament (India).
[12] Securities Exchange Act, 1934, (U.S.A).
[13] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).
[14] The Hart-Scott-Rodino Antitrust Improvements Act, 1976 (U.S.A).
[15] Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 (India).

The Delaware General Corporation Law,[16] which is followed by many US states, provides a framework for the governance of corporations and includes provisions related to M&A transactions. The law requires that shareholders receive fair value for their shares in a transaction and provides them with appraisal rights if they disagree with the value offered by the company. Such a law does not exist in India.

In both India and the USA, shareholders can benefit from M&A if the deal creates value for the company. However, Indian companies tend to have a higher proportion of promoter ownership, which can lead to conflicts of interest and potential benefits to promoters at the expense of minority shareholders. US companies, on the other hand, have a more dispersed ownership structure, which can make them more vulnerable to shareholder activism.

Employees

To improve the effectiveness and efficiency of a company reorganizes its operations, management, and finances and that process is known as company restructuring. Examples of company restructuring are takeovers, buybacks of shares, mergers and acquisitions, spin-offs, etc. Mergers and acquisitions are known to be the most common type of company restructuring. One of the major stakeholders of a company is the employees. They are considered to be the backbone of the company. They are associated with an organization for commission. When a takeover or merger takes place, the employment contract gets invalidated. Job security is more dependent on presumptions, which Mergers and Acquisitions (M&A) tend to shatter[17]. Because of the role played by the employees, it becomes necessary to analyze the effect that employees have after M&A takes place. The effects are explained as follows –

- **High Workload**: When M&A takes place, the entire structure of the company changes. Owing to the changes, the employee has to work hard to adapt to the changes. He has to adhere as well as adapt to the new business strategies. Before M&A, the employee's attention will be focused only on one market but after M&A, they have to look after two to three markets. Due to the increase in the markets, the higher authorities of the company expect to derive more profit and hence they pressurize the employees. To achieve the goals of the company, the employees have to work more hard post the M&A.

[16] Delaware General Corporation Law, 1899 (U.S.A)
[17] Purbaja Sarmah, *Merger and Amalgamation of Companies in India: An Analysis of Its Impact on Various Stakeholders,* 1, AIJACLA, 320-330, (2021).

- **Job insecurity and uncertainty**: In the Companies Act, 2013[18] there is no legal provision that specifically deals with the protection of the employees when the merger and acquisition take place. During M&A, one company is acquired by the other. The company which acquires the other is in a safer position concerning the position of the employees. The acquired company's employees face job insecurity when compared with the acquirer company. Due to the uncertainty few employees might be relocated or can be assigned new jobs resulting in a change in their job profile and working conditions. According to research, the M&A activity in the business costs at least two hours of productive work for each employee due to confusion and multiple individuals.
- **Disagreement among the employees**: When the merger takes place, there is a merger of not only the shares, assets, etc. but a bunch of employees also. There are employees with different mentalities and backgrounds. The differences lead to conflict as a result of the difference of opinion. It becomes extremely important to maintain an amicable relationship among the employees if not it will not only have an effect on employees but even on the quality of the work in the long run.
- **Cultural differences**: According to the functions of a company, different cultures are adopted by a company. When the merger and acquisition take place, two companies come together which means, two different cultures come together. There will be a shift in the cultures and differences are bound to arise when employees from two different companies with different cultures come together. Employees may inherit the values and identities of their respective companies. Additionally, a quick move may cause cultural shock and the need to adjust to cultural differences. Employees' stress and anxiety can undoubtedly escalate if they are unable to adapt to a new culture.
- **Technological Changes**: Once M&A takes place, the company or firm tries to maximize their profit, and due to the advancement and the changes in technology, there is often fear for the employees about their replacement. If technology is adopted then the investment for human capital will eventually decrease leading to fear for the employees. There is already job insecurity prevalent among the employees and the technological changes that take place during the M&A can impact the employees.

A federal form of government is present in the United States (U.S.). When a potential acquirer chooses a company as an attractive acquisition or merger option, it is known as the target company. The target company which is incorporated falls under a dual jurisdiction in the state

[18] *Supra* note 8.

in which it is incorporated and under the federal government. When M&A takes place, there are both positive and negative effects on the shareholders resulting in organizational changes. The impact of the M&A differs based on the entity.[19] An economic impact is created upon the employees of a company when an M&A is attempted which might or might not be successful. The operation styles tend to get affected when a merger takes place as each company has its style of operation. The effects of M&A on employees are –

- **Retention Bonuses:** If the employees of the target company choose to remain with the company, then success is said to remain with the company when an acquisition takes place. For increasing the likelihood of the employees remaining with the company they are usually given retention bonuses or transactions that shall become payable to the employees. The bonuses shall become payable only upon the completion of the acquisition and not otherwise. Compensation agreements may also be entered by the acquiring company if the acquisition is closed.
- **Consideration of employees' interest by the target company**: When a potential merger or offer takes place, there is no necessity on the part of the target company to consult the employees. There is however an exception to this. In certain states excluding Delaware, there are certain statutes in the ***Securities Act of 1933***[20] and ***Securities Exchange Act of 1934***[21] that permit or require the target company to take into consideration the interests of employees while recommending an offer or approving a merger.
- **401(k) plan – Tax-free development of investment returns:** In the U.S., there is a qualifying profit-sharing plan's 401(k) element that entitles employees to set aside a percentage of their earnings for personal accounts. Except for Roth deferrals that are specifically specified, elective salary deferrals are not included in an employee's taxable income. Employers may make deposits into their employee's accounts. According to this, there would be tax-free development of their investment returns.

When any M&A takes place, there are ups and downs. The laws governing the M&A for India and U.S. are different and hence there are differences in the effect it has on employees too.

[19] Akansha Arora, *Post M&A - Effect on Employment*, 2 LAW Essentials J 411 (2021).
[20] *Supra* note 9.
[21] *Supra* note 12.

- In India, in the case of ***Sunil Kr. Ghosh & Ors. v. K. Ram Chandran & Ors***.[22], it was held by the Supreme Court that the consent of the employees has to be taken mandatorily before they are transferred to a new company even if there aren't any crucial changes in their working conditions. It should be done to establish healthy working conditions among the employees post-M&A. Whereas in the U.S., according to ***Delaware's General Corporation Statute (DGCL)***,[23] the acquiring companies are not mandated to consult the employees or take into consideration their interests.

- In India, retrenchment compensation is given to the employees when any disagreement takes place between the employees and the company. This was ordered by the Apex court to protect the employees from getting thrown from their jobs as per the company's fancies and whims. This is governed by ***Section 25FF of the Industrial Disputes Act, of 1947.***[24] In the U.S. employees are paid retention bonuses which are governed by the ***United States Constitution.***[25] But it is paid only after the acquisition is closed and no compensation is given to the employees if there is any disagreement unlike in India

Government

The government of every country is one of the major stakeholders in the company that operates within its boundaries. Any issue or activity of the company can have an impact on the government of the country. Such activities can have a negative as well as a positive impact, depending upon the activity. In the case of Mergers and Acquisitions, the effect can mostly be seen in the employment, tax, and competitive sector.

- **Employment and Economy:** When it comes to employment, merger and acquisitions can have a negative as well as a positive impact depending upon the job being created and diminishing from the mergers of two companies. This lack of employment can create a loop that can further lead to a situation of inflation in the country[26]. It can also have a positive impact by employing new people, which will further improve the economy of the country and contribute to the increase in the GDP of the country.

[22] Sunil Kr. Ghosh v. K. Ram Chandran (2011) 14 SCC 320.
[23] *Supra* note 16.
[24] Industrial Disputes Act, 1947, § 25FF, 1947 (U.S.A)
[25] U.S. CONST. § 5754.
[26] INVESTOPEDIA, https://www.investopedia.com/articles/markets/081515/how-inflation-and-unemployment-arerelated.asp#:~:text=In%20a%20scenario%20wherein%20monetary,to%20raise%20prices%20even%20faster. (last visited April. 18, 2023).

- **Tax Rates and Tax Collection:** Another problem faced by the government is that mergers and acquisitions have a significant impact on tax collection, and this problem further increases when the companies involved are multi-national companies. This, in many cases, can lead to a miscalculation of the correct tax rate for the company, which can have a negative impact on the government of the company.
- **Prevention of monopoly in the Market**: M&A is a powerful tool that can be used by companies to expand the business and to acquire assets that will help the company to gain more assets. However, it can be seen in many cases that it can also create a threat to the existing competition in the market as the more prominent companies acquire the smaller growing companies that will remove any kind of competition, they are facing in the current market[27]. It is the role of the government to make sure that the more prominent companies are not creating barriers for the smaller companies to grow and make the competition open for all. To perform the task successfully, laws have to be in place regarding the same. When it comes to India and the USA, both countries have separate laws that deal with anti-competitive behavior in the market and make sure that the market is not solely run by multinational corporations.

In India, the law that governs competition is called the **Competition Act of 2002**[28], which was passed by the Indian parliament to prevent the more significant firms from creating market barriers and prohibits any form of cartelization and agreement among companies that may lead to the exploitation of the market. The government must make sure that the companies are not undertaking any form of agreement that will create a market monopoly. In the case of a merger between the two telecom giants Vodafone and the Idea that took place in the year 2018, the main concern for the government was that after the merger, the two groups would be the largest telecom network in India with a Market capitalization of 35%[29]. This prompted the government to frame new guidelines regarding the merger of telecom companies and to make sure that no company has a monopoly in the market.

In the case of the USA, the law that governs competition is called the **Sherman Act of 1890,**[30] which was implemented to protect the free market and stop anti-competitive behavior in the

[27]THE WHITE HOUSE, https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy/ (last visited April. 18, 2023).
[28] *supra* note 13.
[29]VODAFONE, https://www.vodafone.com/news/corporate-and-financial/merger-vodafone-india-idea(last visited April. 18, 2023).
[30] Sherman Act, 1890 (U.S.A).

market. However, it is different in a way that it tries to get the same result while taking a different approach compared to the ***Indian competition act.***[31] Unlike the competition act[32] bans anti-competitive agreements, and abuse of dominance and combinations, ***the Sherman Act of 1890***[33] prohibits monopoly in the market and is broader in its approach compared to its Indian counterpart.

The government of the country faces many challenges when a company undergoes a Merger and Acquisition process. It has to deal with the various economic and social complications that are created in the market due to M&A and make sure that the rights of the stakeholders are not violated during such a merger.

Conclusion and Suggestions

After a company completes the process of M&A, the company must see that its ideas are combined as planned and expected. Stakeholders are considered to be the backbone of the company. The shareholders, employees, and the government are the topmost important stakeholders who majorly influence the company's success. It is the stakeholders who define the goals of a company and they expand the plans which shall help them in achieving the goals. If during the M&A, the interest of the stakeholders is not given importance then the company can be at stake due to the impact that the stakeholders will have, they might not be able to function at their full capacity. After analyzing the effect that the three main stakeholders will have when the company merges in both India and U.S., it can be concluded that their conditions can be bettered by covering the lacunas that are currently existing in their respective laws. Then the M&A can be said to have a positive and successful impact.

- Though there are laws in India where an open offer can be made to minority shareholders by the acquirers there is no law requiring prior approval of minority shareholders before the completion of a merger and acquisition. There are no clear laws on what and how much information a company has to disclose to the shareholders at the time of merger and acquisition which leaves the shareholders in the dark about the potential risks and benefits.
- There is a lack of clear guidelines regarding the formation of the valuation report which leaves room for manipulation and biases thus leading to disadvantages for minority shareholders. There should be a clear mechanism through which the shareholders can

[31] *Supra* note 13.
[32] *ibid.*
[33] *Supra* note 29.

enforce their rights or hold companies accountable for violating them. Thus, in India regulatory laws are required to make the process of M&A transactions a transparent and fair process.

- Appraisal rights should be provided to the shareholders in M&A transactions in India just like the USA, provided it should be guaranteed by a central act, unlike the US.
- In India, M&A can be led to job losses due to the redundancy of roles or the need to streamline operations. However, in the USA, there are often legal protections for employees, such as the ***Worker Adjustment and Retraining Notification (WARN) Act***[34] which obligates the company to provide notices of layoff in advance. Additionally, in the USA, M&A can be led to increased job opportunities due to the creation of new jobs in merged companies.

[34] Worker Adjustment and Retraining Notification (WARN) Act, 2019 (U.S.A).

THE EU DIGITAL MARKETS ACT AND THE WTO NON-DISCRIMINATION POLICY: AN IMPEDIMENT FOR DEVELOPING NATIONS

Amisha Mittal[1] and Shruti Jhanwar[2]

Final year student, Jindal Global Law School, Sonipat, Haryana, email: [1]19jgls-amisha.m@jgu.edu.in, [2]19jgls-shruti.j@jgu.edu.in, ORCID ID: [1]0009-0007-9628-8529, [2]0009-0006-1479-5520

Abstract

This paper examines the compatibility of the European Union's (EU) Digital Markets Act (DMA) with the non-discrimination principles under World Trade Organization (WTO) law and explores the potential implications of similar legislation for developing countries, with a focus on India. The aim is to provide insights into the regulation of Big Tech companies in an increasingly competitive global landscape from the perspectives of competition and trade law. The DMA imposes specific obligations on platform service providers to regulate the behaviour of digital platforms and ensure fair competition within the EU digital market. However, concerns have been raised regarding its compatibility with WTO rules on non-discrimination. This paper analyses the discrepancies between the DMA and WTO principles and investigates allegations of protectionism towards European companies to determine whether such concerns are substantiated. Furthermore, this paper considers whether an ex-ante regulatory approach, as exemplified by the DMA, is suitable for countries like India and other developing nations. To do so, it examines the current anti-trust regulation mechanism in India that heavily relies on ex-post actions for Big Tech regulation and explores the precedents set forth by the Competition Commission of India. Additionally, the paper assesses the potential implications of implementing similar legislation in developing countries, particularly on their economies. By critically evaluating the DMA's compatibility with WTO non-discrimination principles and its applicability to developing countries, this paper contributes to the ongoing discourse on the regulation of Big Tech and its global impact. EU is known for their timely legislative proposals, often setting the pace for other nations, as evidenced by influential regulations such as the General Data Protection Regulation (GDPR), these legislations often have a global impact and influence how many countries draft their own laws. Hence, it becomes imperative to analyse them to see if they fit one's own country's needs.

Keywords: Competition law, Digital markets Act, Gatekeeper, World Trade Organization, Big Tech, Indian Economy, India, Competition Commission of India.

Introduction

'Digitalization is transforming our economies and societies at breakneck speed. It is creating opportunities and challenges in equal measure and requires us to rethink everything from the way we work to the way we govern. This includes ensuring that our regulatory frameworks are fit for the digital age, so that we can harness the power of technology to drive progress and improve people's lives, while also guarding against its potential negative effects because while we may have new technology, but we don't have new values. Dignity, integrity, humanity, equality - that is the same'[1].

- Closing words by Margrethe Vestager, the Executive Vice President of the European Commission for A Europe Fit for the Digital Age at Lisbon Web Summit on November 5, 2019[2].

The aim of competition laws is to promote and protect competition in markets by preventing anti-competitive practices, such as monopolies, cartels, and abuses of market power. The goal is to make certain that customers have access to a multitude of goods and services at competitive rates and that businesses have an equal opportunity to stand out, grow and innovate. Through this, competition laws seek to balance the interests of consumers and businesses, and to promote economic efficiency, growth, and innovation.

Digitization has transformed markets and created new challenges for competition law. The rise of digital platforms, such as Google, Facebook, and Amazon, has fundamentally changed the way that businesses compete and interact with consumers. These platforms have vast amounts of data and network effects that allow them to dominate their markets and limit competition. Digitization has also enabled new forms of anti-competitive practices, such as price discrimination, data discrimination, and algorithmic collusion[3]. These practices can harm consumers and stifle innovation, and traditional competition laws may not be well-suited to address them. As a result, competition law authorities around the world are grappling with how to adapt their laws, introducing policy changes, writing reports and enforcement practices in the digital age. They are exploring new theories and enforcement tools, such as data portability,

[1] Anna O'Hare, *The highlights from Web Summit 2019*, WEB SUMMIT (Nov. 7, 2019), https://websummit.com/blog/highlights-web-summit-2019.
[2] Ibid.
[3] Geoffrey Parker et al., *Digital Platforms and Antitrust*, SSRN Electronic Journal, 9-10 (2020).

interoperability, and algorithmic auditing, to promote fair competition and protect consumers in digital markets. Diverse suggestions have been put forward on how to tackle these challenges, ranging from enforcing current competition rules with improved efficiency, modifying them to better suit the digital environment, or introducing new regulations that prohibit major digital platforms from engaging in certain activities. The EU's Digital Markets Act and sudden surge in ex-post regulations on big tech by the Competition Commission of India along with contemplation around framing of a legislation to tackle the challenges posed by Big Tech are just a few examples of this ongoing effort to update competition law for the digital age.

This piece concerns the European Commission's Digital Markets Act *(hereinafter called as the DMA)* which aims to classify certain platform service providers as 'gatekeepers' and impose specific obligations on them to regulate the behaviour of digital platforms and ensure fair competition in the EU digital market[4]. The DMA seeks to address issues such as platform dominance, unfair business practices, and lack of competition in the digital sector. This statute has come into application from May 2023 and has been met with various concerns about potential discrimination in terms of its compatibility with World Trade Organization *(hereinafter referred to as 'WTO')* rules on non-discrimination, as the majority of affected entities are estimated to be from the United States. This piece aims to address two primary research questions. It seeks to analyse the critical characteristics of the DMA that provoke concerns under trade laws and assess how they could be addressed within the scope of relevant WTO provisions on non-discrimination. Further, the piece also analyses whether such regulations could work for developing countries like India in light of the ongoing discussions surrounding the formation of a legislation. Considering new age regulations by EU generally act as precedents for the world to amend their laws, it is interesting to see what a similar strategy might imply for a developing country like India. To blend into the larger picture, the piece concludes with a brief discussion of how the United States might react to the proposed measure, considering that most of the firms impacted by the proposed legislation are based in the United States.

The History

Different jurisdictions are considering ex-ante regulations in order to combat different competition and anti-trust issues and to handle giant digital platforms' anti-competitive

[4] Digital Markets Act, 2022 (European Union).

practises that may not be sufficiently addressed by ex post competition law enforcement. The most cutting-edge of these regulation strategies is the DMA proposal, which was presented by the European Commission. The act went into effect on 1 November 2022 and has been applicable beginning from 2 May 2023 post which many tech giants have time till 3rd July 2023 to inform the government about their fulfilment of the 'gatekeeper criteria' as highlighted in the Act. Further, by September 6, 2023, the Commission assigns gatekeeper status to companies based on the information they provide and by March 6, 2024, gatekeepers are required to adhere to the corresponding obligations outlined in the DMA.

The Objectives of DMA

The DMA identifies technology driven platforms that provide core platform services like online intermediation services; online search engines; online social networking services; video-sharing platform services; number-independent interpersonal communication services; operating systems; cloud computing services; advertising services; web browsers; virtual assistant as gatekeepers based on three-fold criteria. Firstly, a company must achieve an annual turnover surpassing €7.5 billion within the European Economic Area (EEA) while providing a core platform service in at least three EU Member States. Secondly, the number of users plays a crucial role, with the requirement being that the company offers a core platform service to more than 45 million monthly active end users situated in the EU, along with over 10,000 yearly active business users established within the EU. Lastly, the company should demonstrate an entrenched and durable position by meeting the first and second criteria consistently over the past three years. These criteria collectively serve as the basis for determining whether a company qualifies as a gatekeeper.

The DMA has established regulations to prevent gatekeepers from engaging in unfair practices. These regulations comprise a set of requirements and restrictions, including ensuring interoperability among messaging services and prohibiting gatekeepers from promoting their own services among many other detailed regulations. This contrasts with past events, such as Google's promotion of its Google Shopping site, which resulted in accusations of favouritism[5]. The DMA aims to provide a level playing field for all entities on large platforms. Gatekeepers are subject to the obligations delineated in Article 5 and 6 of the DMA with regards to the

[5] Leo Kelion, *Google Hit with Record EU Fine over Shopping Service,* BBC NEWS (June, 2017), https://www.bbc.com/news/technology-40406542.

central platform services they provide[6]. On 6 September 2023, the EU plans to release a list[7] of gatekeepers, which may feature large tech companies such as Amazon, Apple, Google, Meta, and Microsoft. However, as some tech giants have lobbied against the DMA, the EU anticipates a legal fight. While some people believe that the DMA may hinder innovation, others suggest that dialogue and changes could mitigate these concerns.

Potential Usefulness

An ex-ante regulation like the DMA is deemed useful for a multitude of reasons. The primary reason could be the increasing concentration of digital markets with a few large multinational corporations dominating the discourse and enjoying overarching market power. This concentration of power has the potential to lead to anticompetitive behaviour and limit consumer choice, stifle innovation and harm small competitors consisting of Small and Medium Sized enterprises at large.

Secondly, these digital platforms have access to large amount of data about their users that could be used in multitude of ways. Data breaches, use and protection of data is paramount in the current digital ecosystem. Margrethe Vestager in the Lisbon Web Summit also highlighted that – when it comes to browsing the internet, it is not you searching google, it is google searching you[8]. Given the fact that, we leave traces of information on the internet whenever we access it, how this information is used and the regulations surrounding it become really relevant.

Regulations like the DMA Act can establish rules to ensure that user data is protected, and that companies are held accountable for any misuse of data and such regulation might enhance the transparency and accountability of gatekeeper platforms by requiring clear and accessible information about their practices, algorithms, and data use. Thirdly, digital markets are global, and regulations in one country or region can have spillover effects on other countries. By establishing common rules for digital markets, regulations like the DMA Act can help promote a level playing field for businesses across borders in the whole of European Union. However, there are also concerns about the potential unintended consequences of such regulations, particularly for smaller businesses. For example, compliance costs may disproportionately

[6] Supra note 4.
[7] Press release, *DMA: rules for digital gatekeepers to ensure open markets start to apply,* EUROPEAN COMMISSION (May 2, 2023), https://digital-markets-act.ec.europa.eu/dma-rules-digital-gatekeepers-ensure-open-markets-start-apply-2023-05-02_en.
[8] Anna O'Hare, *The highlights from Web Summit 2019*, WEB SUMMIT (Nov. 7, 2019), https://websummit.com/blog/highlights-web-summit-2019.

affect smaller companies, while regulations that favour domestic businesses could violate international trade rules.

Compatibility of DMA with Non-Discrimination Principles under WTO Law

The WTO's fundamental premise of non-discrimination requires member states to treat all other members equally. The General Agreement on Tariffs and Trade (GATT)[9] and the General Agreement on Trade in Services (GATS)[10] are two important WTO agreements that contain this principle. The GATT and GATS reflects non-discrimination in two ways: national treatment (NT) and most-favourable-nation (MFN) treatment. According to the MFN treatment concept, WTO members must provide all other members the same treatment when it comes to tariffs and other trade restrictions. The National Treatment principle requires WTO members to treat imported products and services equally with domestically produced goods and services. The GATS, which governs trade in services, also obliges WTO members to uphold the non-discrimination principle by giving MFN and national treatment to the services sector and by ensuring that any policies affecting the sector are implemented in a non-discriminatory manner.

The GATS Article XVII[11] elaborates on the idea of National Treatment and states that WTO members must treat services and service suppliers of any other Member with treatment no less favourable than it accords to its own like services and service suppliers for sectors it has made commitments for in its respective schedules. If a claim is made under Article XVII, it must be supported by evidence that the services in question are included in the member's schedule, that any restrictions apply, that the measure affects the supply of services, and that it treats the services or service providers less favourably than like domestic services or service providers. The DMA's requirements for gatekeepers could have an impact on the availability of essential platform services. These rules forbid specific commercial operations, prescribe guidelines for behaviour, and could raise the supply cost for these platforms. 'According to the Commission's impact assessment, each gatekeeper's annual compliance cost is estimated to be EUR 1.41 million. In the event of noncompliance and repeated non-compliance, the Commission has the power to levy fines ranging from 10-20% of total worldwide turnover'[12]. Thus, if an unfavourable treatment is accorded these services could be covered under the national treatment obligations prescribed under the GATS.

[9] General Agreement on Tariffs and Trade (GATT), 1947.
[10] General Agreement on Tariffs in Services (GATS), 1995.
[11] General Agreement on Tariffs in Services (GATS), 1995; art. XVII
[12] *The Digital Markets Act - New Regulation for Big Tech in Europe*, WILLKIE COMPLIANCE CONCOURSE (Oct. 24, 2022), https://complianceconcourse.willkie.com/articles/insights-2022-20221024-thedigitalmarketsact/.

In the end, as laid down under GATS Article XVII:3 it must be remembered that the treatment of services and service providers—whether they are formally same or distinct—must not change the terms of competition in a way that favours like domestic services or providers. The DMA does not distinguish between domestic and foreign service providers when determining which companies qualify as gatekeepers based on quantitative standards. However, while the quantitative assignment is fairly transparent, it is to be noted that, even if an entity does not meet the quantitative requirements they could be categorised as a gatekeeper based on a qualitative criterion which is completely subjective and often a closed-door decision. This lack of transparency raises concerns about potential protectionism and bias towards European companies over their American counterparts. Twelve businesses, of which 10 are based in the US, fit the **Internal Market and Consumer Protection Committee** gatekeeper requirements, according to recent research that looked at 22 businesses[13]. Yet, many US businesses will not fit the criteria of a gatekeeper. It is important to note that GATT Article III:4 has also exposed discrepancies in circumstances where just some imported items are subject to less favourable treatment than comparable local products in terms of regulations[14]. Thus, even if some companies are subject to discrimination, it is enough to hold the regulation incompatible.

From this context, it is also crucial to identify the scope of 'like services' under GATS Article XVII[15]. The question of whether services or service providers located above or below the threshold of a gatekeeper, should be viewed as 'like' services or service providers is crucial. According to the panel in China-Electronic Payment Services[16] 'like' services are those that are engaged in competitive behaviour with one another. If this justification is accepted, it would be important to find out whether end users of these tech firms view these platform services as interchangeable. Further cases such as United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services[17] and China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products[18] have highlighted that in determining the scope of 'like services' under GATS the factors considered are the nature, mode of supply, and end-use of the services to conclude that they

[13] Mario Mariniello & Catarina Martins, *Which Platforms Will Be Caught by the Digital Markets Act? The 'Gatekeeper' Dilemma*, BRUEGEL (Dec., 2021), https://www.bruegel.org/blog-post/which-platforms-will-be-caught-digital-markets-act-gatekeeper-dilemma.
[14] General Agreement on Tariffs and Trade (GATT), 1947; art. III:3
[15] General Agreement on Tariffs in Services (GATS), 1995; art. XVII
[16] China: Electronic Payment Services, (2013) WT/DS413/10 (WTO).
[17] United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, (2007) WT/DS285/RW (WTO).
[18] China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products, (2012) WT/DS363/19 (WTO).

were 'like services'. In addition to that, things like the extent to which services they fulfil the same needs or wants shall also be considered. Based on this analogy, same services by different platforms could fall under the category of 'like services' thus, satisfying the criteria for the national treatment principle to be applicable to them. Thus, EU shall have to treat like services for EU and outside EU companies in the same way to avoid allegations under WTO law.

The Appellate body in Argentina-Financial Services[19] and EC-Bananas III[20] have explained that a measure's 'objectives and consequences' are not relevant when assessing its compatibility with GATS Article XVII as we are not concerned with the goals of an objective unless they are for public morals and other policy objectives. If a measure provides discriminatory treatment, its objective is of no value of consideration. Leaving the commission's aim aside, the compatibility of DMA with these rules may be questioned if the gatekeeper criteria's end thresholds are chosen in a way that prevents international and non-US entities from being identified as gatekeepers and favours the local EU entities.

Additionally, GATS Article XIV[21] enables member states to take actions that are required to fulfil certain policy and security goals, such as upholding public morality or keeping order, as well as to ensure adherence to rules or laws that are not in conflict with the GATS. The EU must show that the DMA's goal of ensuring fairness and contestability in digital markets is consistent with the legal objectives outlined in Article XIV in order to claim this defence.

Along with the aforementioned, the measure must also clear the 'necessity test' to ensure that a measure is not applied in an arbitrary manner and whether any better alternatives existed. In order to ascertain the same, the structure of the operation, the statements by government officials and the statutory test must be scrutinised to understand the intention and the necessity behind this ex-ante regulation. If this point is considered, the statement made by various officials could make great sense. 'According to reports, a member of the European Parliament and the DMA's rapporteur, said that as the measure under DMA focused on the largest companies, there was no need to add a European gatekeeper solely to appease the US President'[22]. Such statements could be scrutinized to understand the explicit intention behind such a regulation in light of its non-compatibility with trade laws.

[19] Argentina-Financial Services, (2016) WT/DS453/12) (WTO).
[20] EC-Bananas III, (2008) WT/DS27/98 (WTO).
[21] General Agreement on Tariffs in Services (GATS), 1995; art. XIV
[22] Javier Espinoza & James Politi, *US warns EU against anti-American tech policy*, FINANCIAL TIMES (June, 2021), https://www.ft.com/content/2036d7e9-daa2-445d-8f88-6fcee745a259.

Further, the measure must also adhere to the guidelines of GATS Article XIV's Chapeau i.e., the introductory clause, which states that it cannot be a covert restriction under Article XIV on trade in services or an arbitrary or unreasonable form of discrimination between nations with similar conditions. In conclusion, the DMA must meet the requirements of necessity and non-discrimination, and the EU must demonstrate that it is consistent with the policy goals outlined in Article XIV of the GATS.

An Impediment for Developing Countries

The Competition Act of India and emerging Anti-trust issues.

In the Indian context, on February 6 a committee named **Committee on Digital Competition Law (CDCL)** was set up[23] on the instructions of the Ministry of Corporate Affairs, India after receiving recommendations from the Parliamentary Standing Committee on Finance's ('hereinafter called as the standing committee') 53rd Report on 'Anti-competitive Practices by Big Tech Companies' in December 2022[24]. This committee is now set up to examine the need for a separate legislation on competition in digital markets essentially an ex-antre regulation through a new 'Digital Competition Act'. This committee has been bestowed with the responsibility to check what other countries are doing and find the best international practices to regulate Big Tech and concerns associated with it, check whether ex-ante regulations are a good idea by reference to the Digital Markets Act and the Digital Services Act of the EU. However, many authorities like the Asia Internet Coalition (AIC)[25] have called an ex-ante regulation for India – regressive, absolutist and overly prescription and not fit for its needs. While there have been numerous arguments against the implementation of such an ex-ante regulation in India, two questions that need answering are whether the existing anti-trust adjudication process in India is sufficient to meet India's anti-trust requirement and whether the need and benefit derived from this ex-ante legislation in India is predicted to be outweighed by its costs. For the same, we will look at whether, a regulation like the DMA proposed by the European Union may be suitable for developing economies, like India.

---

[23] Soumyarendra Barik, *Centre sets up committee to prepare draft digital competition law,* INDIAN EXPRESS (Feb., 2023), https://indianexpress.com/article/technology/centre-sets-up-committee-to-prepare-draft-digital-competition-law-8428005/.

[24] *Standing Committee Report Summary Anti-Competitive Practices by Big Tech Companies*, PRS LEGISLATIVE RESEARCH (Dec. 29, 2022), https://prsindia.org/files/policy/policy_committee_reports/Report_Summary-Anti-Competitive_Practices_by_Big_Tech_Companies.pdf.

[25] *Asia Internet Coalition (AIC) Statement on 53rd Report on the Standing Committee on Finance on Anti-Competitive Practices by Big Tech Companies, India*, ASIAN INTERNET COALITION (Jan. 6, 2023), https://aicasia.org/policy-advocacy/india-asia-internet-coalition-aic-statement-on-53rd-report-on-the-standing-committee-on-finance-on-anti-competitive-practices-by-big-tech-companies.

If an in-depth inference to the Competition Act of India[26] is drawn it can be reasonable argued that the three basic provisions of the Act provided under Section 3 that covers anti-competitive agreements, Section 4 that covers abuse of dominant position and Section 5 that covers combinations can and have been sufficiently utilised by the Competition Commission of India *(hereinafter called as the CCI)* to deliver judgements pertaining to successful regulation of digital markets and variety of issues associated with them.

The Standing Committee[27] has identified several major issues with the current Competition Act regarding its ability to address concerns in digital markets. These issues include the lack of provisions addressing anti-steering practices, where platforms prevent business users from directing consumers to cheaper or more attractive alternatives outside the platform by providing better and cheaper alternative offers. Another concern is self-preferencing or platform neutrality, where platforms favour their own services or subsidiaries while also competing on the same platform. Bundling and tying practices, where app store operators bind developers to exclusive agreements, removing competition from the market, are also problematic. Data usage is another issue, with dominant platforms leveraging their position to exploit consumer preference data or collecting and storing large amounts of data for consumer profiling and gaining an unfair competitive advantage. Pricing and deep discounting tactics employed by platforms can result in service providers losing control over the pricing of their services. Exclusive tie-ups with brands restrict other market participants from selling certain products on the platform. Search and ranking preferencing can lead to biased search results favouring sponsored products or orders fulfilled by the marketplace itself. Platforms restricting the installation or operation of third-party applications limit competition and innovation. Finally, advertising policies that leverage consumer data through artificial intelligence and machine learning for targeted advertising raise concerns about privacy and fairness. The standing committee argues that addressing these issues in a separate legislation would promote fair competition, innovation, and consumer choice in digital markets, creating a level playing field for businesses.

However, if a thorough inspection of the Competition Act is made it can be argued that section 3, 4 and 5 which include in them provisions addressing vertical anti-competitive agreements, denial or market access, refusal to deal, limiting technical or scientific development relating to

[26] The Competition Act, Acts of Parliament, 2002 (India).
[27] *Supra* note 24.

goods or services, Tie-in arrangements, etc, conclusively cover all the regulations necessary to deal with digital markets. Further, Section 5 of the Competition Act mandates advance notification to the CCI for acquisitions crossing specified thresholds. The Competition (Amendment) Bill, 2022[28], introduces 'deal value' thresholds to scrutinize high-value digital deals and ensure that companies with less turnover do not escape the obligations.

A Precedential review

The CCI has been a proactive body that has investigated over 30 cases involving digital companies in the last decade dealing with cases involving big giants.

In the case of XYZ v. Alphabet Inc and Others[29], the CCI found that Google, as a dominant player in the market, abused its position by imposing unfair and discriminatory conditions on app developers. One such condition was the mandatory use of Google Play's Billing System (GPBS) for paid app downloads and in-app purchases. This forced app developers to exclusively use GPBS, excluding other payment gateways like PayPal and Razor Pay. The CCI determined that this mandatory imposition of GPBS restricted competition and hindered the use of other payment gateways. As a result, the CCI imposed a financial penalty on Google and directed it to cease such practices. Google appealed the CCI's decision, but the appeals were unsuccessful. Similarly, the CCI initiated an investigation into Apple[30] for engaging in similar conduct, including the prohibition of third-party app stores from being listed on its App Store. In another case, Umar Javeed and Others v. Google LLC and Another[31], the CCI found Google guilty of self-preferencing. This refers to Google pre-installing its own applications and giving them preferential placement on smart mobile devices. The CCI ruled that Google's actions limited the choices of Original Equipment Manufacturers (OEMs) by dictating which Google apps should be pre-installed and their placement on the devices. Additionally, Google prevented users from uninstalling these pre-installed apps. The CCI ordered Google to remove these restrictions and imposed a monetary penalty on the company. Google challenged the CCI's decision on the merits and requested a stay on the imposed remedies, but both the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court rejected Google's application for an interim stay. Consequently, Google announced significant changes to its Android OS business model in compliance with the CCI's directives. This case dealt with the

[28] The Competition (Amendment) Bill, 2022, Bill No. 185 of 2022 (India).
[29] *XYZ v. Alphabet Inc. and Others* CCI, (2022) Case No. 07 of 2020 (India).
[30] *Together We Fight Society v. Apple Inc.* CCI, (2021) Case No. 24 of 2021 (India).
[31] *Umar Javeed v. Google LLC and Others* CCI, (2022) Case No. 39 of 2018 (India).

strategy of self-preferencing. In a previous case, Matrimony.com Limited v. Google and Others[32], the CCI found Google's conduct to be in violation of Section 4 of the Competition Act. One aspect of the violation was searching bias, which involved prominently placing Google's Flights Unit on the search results page. As a remedy, the CCI directed Google to include a disclaimer indicating that the 'search flights' link led to Google's Flights page and not the results from other third-party service providers and imposed a fine.

Regarding bundling and tying, in Umar Javeed and Others v. Google LLC and Another[33], the CCI found Google to have abused its dominant position. One aspect of this abuse was the bundling of the Play Store with Google Search, Google Chrome, and YouTube. The CCI ordered Google to stop such tying practices. Similarly, the CCI initiated an investigation into Apple for allegedly tying its distribution service and payment processing service for in-app purchases, as well as tying its app store to the use of its in-app payment solution.

The CCI also initiated an investigation into WhatsApp and Meta (formerly Facebook) in the case of In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users. The investigation focused on alleged abuses of dominance related to data collection and utilising practices that is likely to harm competition[34].

In FHRAI and Others v. MakeMyTrip and Others[35], the CCI found that MakeMyTrip (MMT) and GoIbibo (collectively referred to as MMT-Go) violated the Competition Act through their wide price parity clauses, exclusivity conditions with hotel partners, and misrepresentation of information to users. Additionally, the CCI found an exclusionary agreement between MMT-Go and Oravel Stays (OYO) to have resulted in denial of market access to FabHotels and Treebo hotels through delisting. The CCI ordered MMT-Go to modify its agreements with hotels, remove parity obligations and exclusivity conditions, and provide fair and transparent access to its platform. Furthermore, the CCI imposed penalties on MMT-Go and OYO for violating the Competition Act.

Along with the aforementioned, the CCI also has the power to give interim orders while investigations are pending to address the concerns of those being affected by anti-competitive

[32] *Matrimony.com Limited v. Google LLC and Others* CCI, (2018) Case No. 07 and 30 of 2012 (India).
[33] *Umar Javeed v. Google LLC and Others* CCI, (2022) Case No. 39 of 2018 (India).
[34] *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users* CCI, (2021) Suo Moto Case No. 01 of 2021.
[35] *Federation of Hotel and Restaurant Associations of India and Another v. MakeMyTrip India Private Limited and Others* CCI, (2022) Case No. 14 of 2019 (India).

practices. Further Section 49 also gives it powers to be an advocate of competition law in India and thereby, conduct market studies and publish reports.

The CCI's actions and initiatives demonstrate its commitment to addressing anti-competitive conduct in digital markets, including anti-steering provisions, self-preferencing, deep discounting, exclusive tie-ups, and bundling and tying practices. By taking such measures, the CCI aims to promote competition and prevent market distortions, reducing the need for additional legislation specifically targeting competition issues in India's digital markets and through these instances, it can be conclusively concluded that an ex-ante regulation is not per-se necessary for India.

In addition to the Competition Act being sufficient to tackle competition law issues arising out of digital markets, there are several other reasons why an ex-ante regulation might not be fit for India and many other developing countries around the world. For instance, provisions like the DMA, which aim to regulate the behaviour of large tech companies, would not address the specific challenges faced by developing economies. These challenges include the need for investment in digital infrastructure, access to technology, and digital literacy. Thus, while dealing with competition regulation in developing countries it is paramount to note that rather than concentrating only on regulating tech businesses, developing economies need more assistance and investment in creating digital infrastructure and raising digital literacy. Secondly, it is important to be mindful about how such legislation may affect India's digital sector, which is mostly dominated by emerging start-ups and Small and Medium Enterprises. Many digital businesses in India are startups or small businesses that may not have the resources to comply with the regulatory requirements that come with such a regulation. This could stifle innovation and limit the growth of digital businesses in India. Instead, the policymakers should focus on supporting and promoting the growth of small and medium-sized enterprises (SMEs) in the digital sector in developing economies. Further, it is paramount to understand that the EU and developing economies have different priorities when it comes to digital regulation. While the EU is more focused on protecting competition and consumers, developing economies are more concerned with promoting growth and development. Therefore, digital regulation should be tailored to the specific challenges and opportunities facing each region.

The DMA is also highly criticised for its one-size-fits-all strict approach when it comes to discerning the ‘Gatekeeper criteria’ to different business models. Articles 5, 6, and 7 of the DMA contain a set of rules that ban certain behaviours without considering their specific

context. These rules are called 'per se' rules[36], and they do not require any proof of harmful effects to be outlawed. While this approach can make it easier to enforce the law, it also means that some conduct might be banned even if it is not actually harmful. Conversely, some harmful behaviours might not be recognized as such. This inflexible approach to regulation could be seen as unfair to gatekeepers with different business models especially for SME's which do not result in anti-competitive measures per se**.** Incorporating such similar stance for Inda might actually prove detrimental where conduct that does not have anti-competitive effects is wrongly labelled as anti-competitive. An ex-ante regime operates based on predefined rules rather than focusing on the actual impact of the conduct. Consequently, digital businesses may not be able to emphasize the positive effects their actions have on consumers or competition when being assessed. This becomes particularly relevant because there are instances where the CCI refrained from condemning allegedly abusive conduct that actually fostered competition in digital markets.

In the case of Harshita Chawla v. WhatsApp and Others[37], an informant accused WhatsApp of engaging in anti-competitive bundling by integrating WhatsApp Pay with its messaging services. However, after considering WhatsApp's arguments, the CCI concluded that WhatsApp Pay was an optional feature that required separate registration and could not be considered an imposition or coercion. The CCI also agreed with WhatsApp's stance that WhatsApp Pay faced competition from established players like Google and Amazon, and its entry would not harm competition. The CCI adopted a nuanced approach, allowing WhatsApp a hearing during the preliminary stage and considering the potential effects of the alleged conduct, ultimately determining that no investigation was necessary. In Baglekar Akash Kumar v. Google LLC and Others[38], the CCI dismissed allegations of abuse of dominance by Google concerning the integration of Google Meet with Gmail. The CCI considered Google's submissions, which highlighted that user had the choice to use either app with their full functionalities without being obliged to use the other. The CCI also noted that while the Meet tab was incorporated into the Gmail app, Gmail did not force users to exclusively use Meet, and consumers were free to use Meet or any other video conferencing app.

[36] Miguel Máximo dos Santos, *The Digital Markets Act will enter into force today: an overview*, SERVULO PUBLICATIONS (Nov., 2022), https://www.servulo.com/en/knowledge/The-Digital-Markets-Act-will-enter-into-force-today-an-overview/8097/.
[37] *Harshita Chawla v. WhatsApp Inc.* and Another CCI, (2020) Case No. 15 of 2020 (India).
[38] *Baglekar Akash Kumar v. Google LLC and Others* CCI, (2021) Case No. 39 of 2020 (India).

These cases demonstrate how digital markets have flourished when the CCI has examined potentially abusive conduct ex-post (after it has occurred) and allowed businesses to showcase the efficiencies arising from their actions, leading to decisions that intervention is unnecessary. An ex-ante framework may not provide this protection to businesses, making it difficult for them to defend their actions, provide objective justifications, and highlight the efficiencies resulting from their conduct. Consequently, there is a higher likelihood that an ex-ante approach could stifle innovation, competition, and consumer choice. Without such protection, digital players in India may hesitate to innovate and produce products that benefit consumers due to fear of violating the law.

Further, while the DMA may be suitable for European Union's unique circumstances and is enacted after decade of decisions by its judiciary that highlighted the need for such regulation in its context, replicating the same may not be the right approach for developing economies like India and an ex-post measure might provide more relevance here. Policymakers should consider the specific needs of developing economies when formulating digital regulation and focus on supporting digital infrastructure development and SME growth rather than solely on regulating large tech companies. Replicating a regulation like that of DMA could hinder India's or any other developing countries growth to a great extent and policy makers should not take inspiration from the act to build on India's competition and anti-trust regime.

Conclusion

The efficacy of the DMA regulation is contingent upon its implementation and ability to achieve its intended objectives. Policymakers must carefully balance the potential benefits of such regulations against their associated costs and unintended consequences under trade laws. The response of the US government to the DMA is of particular interest, given that the primary companies affected are from the US. The solution available to the US here would vary significantly to the case against the Digital Services Tax's (DST) discriminatory nature given the lack of intergovernmental and diplomatic negotiations to apprise competition rules, as was the case with income tax rules in DST[39] because negotiations in competition law measures involving various countries and organizations might prove detrimental as opposed to tax negotiations which are often bilateral and matters of national sovereignty. The US could also

[39] U.S. Department of the Treasury, *Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom, Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 is in Effect* (2021), https://home.treasury.gov/news/press-releases/jy0419.

seek measures under the WTO dispute settlement mechanism claiming a discrimination against their services. Nevertheless, as more jurisdictions consider implementing comparable ex-ante directions for digital platforms, they will undoubtedly monitor any challenges to the DMA closely as well as the actions took by various countries in response to the DMA regulating their services. However, it is important that different countries adopt a careful and analytical approach while replicating a regulation like DMA and conduct a thorough analysis of there pre-existing competition policies before jumping to legislative trends that might backfire and stifle innovation.

EXPANDING CIRCUMFERENCE OF ABORTION LAWS AND THE CONUNDRUM OF AUTONOMY

Ananya Tyagi[1] and Yash Tiwari[2]
[1]*Advocate, LL.B. 3 Yrs. Faculty of Law, University of Delhi,*
email: ananyatyagi1995@gmail.com, ORCID: 0009-0003-4258-4622

[2]*Legal Columnist at Case Mine, LL.B. 5 Yrs. Amity Law College, Noida, email: justicelegalblogspot@gmail.com*

Abstract

The expansion of abortion laws has been a topic of much debate and discussion in recent times. The conundrum of autonomy lies at the heart of this issue, as individuals and societies grapple with the balance between personal freedom and societal norms. In India, the Medical Termination of Pregnancy (Amendment) Act 2021 caters to safe and legal abortion services on therapeutic, eugenic, humanitarian, and social grounds to ensure universal access to comprehensive care. This move has been hailed as a win for women's autonomy and reproductive rights. A recent landmark case in India that touches upon this issue is X v. The Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi. In this case, the Supreme Court of India ruled that every pregnant woman has the intrinsic right to choose to undergo or not undergo an abortion. This article critically examines this case, question of real autonomy and critical loop holes and probable acceptable alternatives. However, the debate continues as different countries have different laws and cultural attitude towards abortion. The right to accessible, high-quality abortion care is considered a human right by many organizations, but restrictive laws and policies continue to undermine women's autonomy and reproductive rights, in effect. The judgement in question, as well as its impact and the true scope of the autonomy that women have in this matter, are all critically examined in the paper. The research project examines the implemented improvements and pinpoints any discrepancies that need criticism along with potential solutions.

Keywords: Abortion, Medical Termination of Pregnancy (Amendment) Act, 2021, Reproductive Rights, Supreme Court, X v. The Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi

(Supreme Court recently in X vs. Govt. of NCT of Delhi expanded the meaning of the terms in abortion laws and inclined towards a purposive construction, in the application of the MTP

Act. As India walks ahead, we will walk down the growth and milestones to see where we started and what we have moved to).

A woman frequently gets caught in entangled ideas of caste, religion, society, and family. Particularly when it comes to decisions about reproduction, such external societal variables have an impact on how a woman exercises freedom and authority over her body. Legal restrictions that limit a woman's access to abortion frequently bolster societal factors. Only the woman can decide independently, free from outside pressure or influence, whether to have an abortion or not given her complex life circumstances. Every pregnant woman must have the absolute right to choose whether or not to undergo an abortion, without the approval or consent of a third party, to practise reproductive autonomy

The Medical Termination of Pregnancy Act[1] was originally a creation in 1971. Better to say it rather belonged to a different era, where women's rights were unidentified or breathed a narrow existence. Back then, women were treated as responsibilities & chattel, with no property rights and lived absolutely by the socially assigned specific gender roles. Time has flown at its own pace and clapped a few wings that have brought drastic changes in women's positions, roles assigned, and social and familial constructions.

On November 17, 1969, the Medical Termination of Pregnancy Bill was drafted and presented to the Rajya Sabha. On August 2, 1971, the MTP bill was introduced in the Lok Sabha in order to "liberalise some of the restrictions under section 312 of the IPC." The MTP Act was passed by Parliament as a "health" measure, a "humanitarian" measure, and a "eugenic" measure.

Married women were a major focus of the 1971 MTP legislation as it stood at the time, which stated that most of the women seeking abortions were married, and thus "under no particular necessity to conceal their pregnancy." Despite the passage of the MTP Act in 1971, unsafe abortions remain the third greatest cause of maternal death, with close to eight women dying in India every day from causes associated with unsafe abortions. Another study published in the BMJ Global Health points out the grim statistics of unsafe abortions in India: between the years 2007 and 2011, an estimated 67% of abortions carried out were classified as unsafe.

The Amendment of 2021

In order to guarantee women's access to safe and legal abortions without sacrificing the safety and quality of care, the MTP Act was amended in 2021. This ensured that women who choose

[1] Medical Termination of Pregnancy Act, 1971, Act No.34 of 1971 (INDIA)

to abort would be accorded dignity, autonomy, confidentiality, and justice. Reproductive rights, bodily autonomy and ancillary decisions branch from the fundamental rights in terms of the right to dignity, personal liberty, privacy and health under Article 21 of the Constitution of India. India traces it back to constitutional rights. So, this encompasses wider aspects in its ambit including maternity health and safety along with just the right to terminate.

In ***K S Puttaswamy v. Union of India,***[2] a nine-judge bench of this Court recognized the right to privacy -as a constitutionally protected right under Article 21 of the Constitution. This Court determined in Puttaswamy (above) that the right to privacy allows people to maintain and exercise control over their bodies and minds. "The ability to make decisions on vital matters of concern to life" is the definition of autonomy given to an individual. “Woman’s freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy.”, according to Chelameshwar, J.

In the case of Suchita Srivastava v. Chandigarh Administration,[3] the court rightly recognised that the right of women to make reproductive choices is a dimension of personal liberty under Article 21. It was decided that a woman had the right to have an abortion, carry her pregnancy to term, give birth, and raise her children. More crucially, it acknowledged that the option not to have children was also part of the right to reproductive choice. By doing this, it positioned women's reproductive rights as fundamental constitutional rights.

Judicial Evolution of The Terms and The Law

After the amendments in 2021, the Supreme Court recently went on to expand the terms and meaning of some rules and provisions of the act that were in dispute in a case and weaved it in harmony with the need of the changing time.

In the latest case of X vs. Govt. of NCT of Delhi,[4] Supreme Court expanded the interpretation of the disputed terms and rules, to rule out arbitrary inequality and secure access to safe abortions. Court took up various aspects at hand-

One of them is extra-legal conditions imposed by the Registered Medical Practitioners (RMPs) authorised to conduct abortions and also the chilling effect cast by the Indian Penal Code,1860 in the interpretation of provisions of the MTP act - A woman may terminate a pregnancy under

[2] Justice K.S.Puttaswamy (Retd) vs Union Of India (2018)
[3] Suchita Srivastava & Anr vs Chandigarh Administration (2009)
[4] X vs The Principal Secretary Health Health and Family Welfare Department, Govt. of NCT of Delhi & Anr. (2022)

the MTP Act based on the opinion formed by RMP(s), either under Section 3 or Section 5. The MTP Act is a provider-centric law, as a result- women are forced to approach the courts or seek abortions in an unsanitary environment because their right to access abortion is contingent on an RMP's approval. As a rampant scenario to discourage abortions and owing to the attached criminal liability, RMPs take up the role of moral policing and insist on extra-legal conditions like family consent, documentary proofs, and legal authorisations, to an extent that they explicitly or consequently deny services in case of non-compliance. These requirements are more of a moral mandate and are backed by social prejudices rather than any law. Court expressly raised concern at such practices and clarified that the woman falling within the ambit of legal abortion is not bound by the requirement of consent of her family. Guardian's consent is a mandate only in cases of minors or mentally ill women. By having a deterrent effect on RMP behaviour, the fear of prosecution under this complex web of laws—including the connection between the MTP Act and the IPC—acts as a significant impediment to safe abortion access. The chilling effect, which has historically been associated with Article 19 protection of free speech and expression, impacts the choices made by medical professionals working under the MTP Act.

This Court has also acknowledged the disastrous results of unnecessary delays and a lack of promptness on the part of the authorities when it comes to pregnancy termination. In ***Z v. State of Bihar***,[5] this Court found that the state authorities, including Patna Medical College and Hospital, had erred in failing to terminate the pregnancy before the passage of twenty weeks, despite the woman validly seeking an abortion on the ground that she was a victim of rape. The court rebuked the authorities for "negligence and carelessness" in this concern. It noted that the proceedings in the High Court were unduly delayed, leading to a situation where the pregnancy could not be terminated without endangering the life of the woman in question.

Another concern at hand, was the exclusion of unmarried women, single women &women without a partner from the ambit of availing abortion as per rules in cases of pregnancies falling within 20 to 24 weeks. Court held this classification to be arbitrary, unconstitutional and discriminatory in nature as under Rule 3B of the act. The court went on to include unmarried women to be legally entitled to seek an abortion. Pregnancy is an aspect of bodily autonomy and personal liberty, not drawn by marital status. Sexual activities weren't limited to married women. The social taboos looming over pre-marital sex prevent access to contraceptives and

[5] Ms. Z Vs. State of Bihar and Others (2017)

safe abortions. The reproductive autonomy looked after by the MTP Act lies with the biological functioning and not the social net of distinctions. Now that courts are recognising live-in-relationships, LGBTQ rights and structural variations, other laws have to change and have to be construed in harmony. The law must remain cognizant of the fact that changes in society have ushered in significant changes in family structures. In ***S. Khusboo v. Kanniammala***,[6] the three-judge Bench of this Court acknowledged that live-in relationships and pre-marital sex should not be associated with the lens of criminality.

Change in the marital status- dealt with in rules as one of the circumstances that allow abortion in cases of pregnancy between 20 to 24 weeks – actually deals with a shift in the responsibility of the child from partners to the mother solely in every aspect. Hence it was interpreted to cover unmarried women in consensual relationships, as the impact of the break-down of the partnership remains the same and motherhood stands independent of the marital status. Even the parent act after the amendment in 2021 substituted the word 'husband' with 'partner' and hence the act lies with the change.

Another contentious aspect that was dealt with by the Supreme Court, in this case, was cases of marital rape, which stands as an exception to the offence of Rape under IPC and hence lends immunity to the husband from the criminal liability for a sexual offence with his wife without consent. The exception is advocated and critiqued on varied volatile grounds but cannot be ruled out as the grim reality of tainted four walls of many. Marital status doesn't affect social prejudices and violent realities. Court went on to include the cases of marital rape within the term 'Rape' to seek legal abortions in cases of pregnancies resulting from rape. Logically such a pregnancy is constituted out of the elements of being 'unwanted' and forcing the continuation of such a pregnancy would be a critical stab to the dignity of the woman and would sabotage the mental and physical health of the mother. So, these cases will now be covered under 'survivors of sexual assault/rape/incest' under Section 3B (a).[7] Incidentally, it was clarified that to seek abortion in such cases there is no pre-requisite for women to go via formal legal proceedings, FIR or to prove the offence of rape before the court.

Along with this was the expansion of the expression 'women' in the MTP Act. The court flexibly increased the ambit of the term 'women', to be all-inclusive of gender identities that require access to safe abortions. Court by this judgment chose to give the term a purposive

[6] S. Khushboo vs Kanniammal & Anr, (2010)
[7] Medical Termination of Pregnancy Act, 1971, §3B, Act No.34 of 1971 (India)

meaning as per the act i.e., providing safe and lawful abortion to those having a reproductive system of the female sex, notwithstanding with which gender they choose to identify.

Supreme Court recognised and dealt with another impediment in access to safe abortions, in cases of minors. The court acknowledged that the mandatory reporting of acts of sexual offences against minors to SPJUs or local police desists the parents or guardians from opting for a legal and proper course of abortions. Supreme Court exempted the Registered Medical Practitioners, from the mandatory reporting under section 19 of the POCSO Act[8]- to the extent that they need not disclose the identity of the minor child involved or such details that would reveal the identity, for conducting abortion under the MTP Act. POCSO Act in itself doesn't identify the concept of consent by minors and seeks to prevent sexual offences against minors. However, as refracts from the real picture- this act cannot prevent consensual sexual relations among minors, which do exist in the world. Minors consensually engage in sexual activities owing to influences, lack of awareness, sexual health education and other facts and circumstances. Even in cases of sexual abuse and offences, these are discovered later, and mandatory reporting would act as a threat owing to hesitancy, taboos or fear and trauma. By this exemption, the court has sought to give a harmonious construction and working of the object of both the acts – as this would promote safe abortions and would prevent the revealing of the identity of the child which is often sought to be prevented at all costs and level by the guardians to maintain confidentiality and prevent the child's involvement in the legal ruckus.

The Court also interpreted 'grave injury to mental health—a condition for abortion within the Medical Termination of Pregnancy Act 1971 (MTPA)—broadly, going beyond mental illnesses - to highlight the unavoidable- severe harm to mental health, from being compelled to carry to term any unwanted pregnancy. In Section 3(2), the phrase "grave injury to her physical or mental health" is used in a broad, all-inclusive sense. The conditions, under which the suffering brought on by pregnancy may be presumed to constitute a grave injury to a woman's mental health is laid out in the two explanations appended to Section 3(2). The term "mental health" broadly encompasses much more than the absence of a mental illness or impairment. The Court construed the concept of mental health as a positive vocab, for the MTP Act, as it went on to clarify that allowing abortion in cases that caused 'grave injury to mental health- is to be seen as the presence of mental well-being and not scaled along absence of mental illness, in prospects of a normal human being. The World Health Organization defines mental health

[8] Protection of Children from Sexual Offences Act, §19, (2012)

as a state of "mental well-being that enables people to cope with the stresses of life, realize their abilities, learn well and work well, and contribute to their community. The MTP Act explicitly recognizes the need to consider the woman's environment when determining whether or not she has suffered harm to her health. According to Section 3(3), the pregnant woman's actual or reasonably foreseeable environment may be taken into account when determining what constitutes "grave injury to her physical or mental health." It is vital to take into account a woman's "actual or reasonably foreseeable environment," particularly when assessing the risk of harm to a woman's mental health. ***In High Court on its own Motion v. the State of Maharashtra***,[9] the High Court of Bombay correctly held that compelling a woman to continue an unwanted pregnancy violates a woman's bodily integrity aggravates her mental trauma and has a deleterious effect on her mental health o because of the immediate social, financial and other consequences flowing from the pregnancy. In ***Mamta Verma v. Union of India,***[10] ***Meera Santosh Pal v. Union of India,***[11] ***and Sarmishtha Chakrabortty v. Union of India***,[12] this Court permitted the termination of post-twenty-week pregnancy after taking into account the risk of grave injury to the mental health of a pregnant woman by carrying the pregnancy to term.

Recently, the USA went on to strike down abortion rights as a constitutional right and hence left it to the absolute discretion of the states, to the extent that they may declare it illegal. Articles and news pieces in India corroborated India's progress on this account. The judgment given by the SC of India -went far as to discuss the issues at hand and give rules a purposive line, in sync with the object of the Act and as needed by time but did not completely deal with the aspect of access to reproductive health rights in general.

As we celebrated our progress over the critique of the USA's regress by Roe vs. Wade, the question of real autonomy remains! The cases up to weeks of pregnancy consent of a pregnant woman with that of one RMP as per the Act is needed and in cases of pregnancies between 20 to 24 weeks – the consent of women along with 2 RMPs is needed. By broadly construing Section 5, which allowed RMPs to terminate pregnancies beyond the twenty-week limit when doing so was necessary to save the woman's life, courts across the nation have allowed women to end their pregnancies when the length of the pregnancy exceeded twenty weeks (the maximum period during which a pregnancy may be terminated under the unamended MTP Act). So, as far as bodily autonomy in true terms finds its expression, MTP veils it blurs!

[9] High Court on Its Own Motion vs The State Of Maharashtra, (2016)
[10] Mamta Verma vs Union of India (2017)
[11] Meera Santosh Pal and Ors vs Union Of India And Ors (2017)
[12] Sarmishtha Chakrabortty vs Union Of India Secretary (2017)

Restrictions on abortion within the MTPA affect women as a group wholly, or pregnant women as a group disproportionately. They restrict women's ability to make reproductive decisions by only allowing access to abortions under specific circumstances and within predetermined time frames. Doctors determine whether these requirements have been met (not women). The MTPA was created as an exception to the IPC's criminal ban on abortion. Because of the risk of criminal sanctions, doctors interpret the MTPA's criteria strictly, which is a factor the Court mentioned in its ruling. The acclaimed autonomy, guarded by constitutional rights – is rather operated by the medical board and the strangers are armed with the actual decisive power with the court having the final veto, in the cases where the aggrieved manages to concur time and reach its doors. Abortion as a decision and in terms of the procedure is over-regulated and densely restricted with layered complexities, which is not driven by the idea of healthy pregnancies or the health of the woman in question. Childbirth, rearing and caring are not equally distributed social and physical responsibilities between men and women.

Being denied an abortion frequently compels women to raise children in patriarchal systems where they are solely responsible for childcare, which is undervalued both inside and outside the house. Women's participation outside of the home is shaped by the fact that they are either compelled to work the "double day" or are excluded from the public realm (for example, from employment). This worsens their economic disadvantage by causing them to be economically ostracized. Furthermore, the MTPA's rejection of reproductive decision-making is premised on stereotypes about women as incompetent decision-makers and unfit mothers. These complexities even seep in as bias among experts and doctors along with a lack of information, sensitisation, infrastructure and myths looming over even the medical aspects of it.

The court expressed its concerns over access to safe abortion, but the case did not explore the room. Unsafe abortions wither into maternal mortality, morbidity, health and reproductive issues. Women placed in comparative underprivileged positions in the social chart in terms of caste, religious minorities, literacy, finances and status swing at a higher risk in this concern, as the complexities get aggravated with these circumstances. A petition asking the Supreme Court to declare the MTPA unconstitutional for violating the right to life of the foetus has already been submitted. If so, then the state is choosing the easier route of "promoting the welfare of the unborn only when it can use women's bodies and lives to realise the potential of unborn life" by insisting on restricting abortion as a means of protecting foetuses the sexual discrimination prism is obviously in violation of the constitutional commitment made under the "equality code."

In real-time effect, subjectivity and third-party involvement still limit the expansive meaning. Also, owing to the attached criminality with illegal abortions RMPs act in a very stringent manner and expansive meanings cannot be drawn individually, in the absence of specific rules or guidelines and this may lead to an increase in litigation in this arena- to interpret the change in circumstances, which runs as a common element in all the cases where abortion is allowed between 20-24 weeks.

As was **repeatedly recognised** in the Constituent Assembly, 'the average woman in this country has suffered now for centuries from ***inequalities heaped upon her by laws, customs and practices of people***. If so, a law like the law on abortion, which perpetuates centuries of inequalities experienced by women, would fall foul of the equality guaranteed under the Constitution

Mandatory timelines can be brought in for disposal of such applications and petitions before the medical board and courts, to rule out delays- as the entire process revolves around the delicate time scales. Fast-track procedures for such cases should be considered.

There is a need to look through and degenerate the structural, social and patriarchal barriers, spreading awareness, engaging in public discussions, sensitising the authorities and doctors involved at various levels, increasing access at the ground level, and conducting seminars and relevant workshops at institutional levels. India has walked a long way and paved its way through changes, but the scope of progress and honest application is wide and remains. So, what now lies in the question of reasonable and unbiased application?

AN OVERVIEW OF HINDU WOMEN'S RIGHT TO PROPERTY

Sukanya Mukherjee
Visiting Faculty, Sister Nivedita University, Kolkata, email: mukherjeesukanya01@gmail.com, ORCID: 0009-0001-6693-0978

Abstract

The significant contribution of women in the society has been in existence since the ancient times. Securing the birth right of a women would indicate a better future on our own end. Though grounds of gender inequality can be enlisted under different facets, the most tedious one relates to property rights of women. The inheritance rights in regard to Hindu women is still governed by the age-old customs of Hindu Law which pulls down the string of development in regard to the fairer gender. The Hindu Succession Act of 1957 was a welfare legislation which remodelled the whole structure of Hindu Law and codified the same. It included revolutionary concepts of testamentary and intestate succession, coparcenary property and identified the property rights of Hindu Women. Though the intent was on the positive note, there were several genders-discriminatory provisions still in the existence. The need for reforms called for an amendment and Hindu Succession (Amendment) Act, 2000 came into existence. This Act introduced the birth right of women to inherit the coparcenary property, deleted several derogatory provisions and made Hindu women eligible of testamentary disposition of the property. In this Article, the researcher has pointed out the analysis of both the Acts and also has pointed out a few reforms which is needed for better implementation of the objective with which the Amendment Act was enacted and with the hope for ensuring equality with the spirits of Indian Constitution.

Keywords: Succession, Coparcener, Inheritance Rights, Hindu Women, Heirs.

Introduction

On 17th June, 1956, a new dawn of the era began in socio legislation history when Hindu Succession Act, 1956 was enforced. It aimed at making comprehensive and uniform provisions for dealing with intestate succession for Hindus. Prior to its enactment, there were several personal laws governing different sects of Hinduism which was no less than a formidable maze in the inherently diverse community.[1]

[1] POONAM PRADHAN SAXENA, FAMILY LECTURES FAMILY LAW II 271 (Lexis Nexis Butterworts, Wadhwa, Nagpur, 2011)

It was due to the decision of Rau Committee, Hindu women were vested with absolute rights over Stridhan and via a separate chapter, the Select Committee provided that after the commencement of the Code, not only it will be an absolute one under the Chapter 'Women's Property', but it can also be inherited by her heirs.[2]

This legislation was passed to bring a progress in the society. It aims to remove the inequalities between genders in respect of right to property and provides heirs solely based on natural love and affection and not efficacy.[3] This legislation aims to empower women to acquire the property in her full power as owner and gives her liberty to dispose it at her pleasure. It also had retrospective effect regarding the acquired property before commencement of the Code.[4]

Fundamental changes bought by The Hindu Succession Act, 1956

This Enactment aimed to make the process and status of women relating to inheriting a property a reality by enacting a few fundamental changes from the ancient personal laws. Some of them are discussed as follows:[5]

i. This Code changes the essence of Hindu Joint Family, Mitakshara School, Coparceners, intestate and to an extent testamentary succession as well.

ii. This Code provides for a uniform code for all the sects of Hindu in relation to devolution of property by intestate succession. It is solely based on natural love and affection and not efficacy or survivorship.

iii. The concept of limited ownership of women was abolished by this Code. She now had full and absolute ownership over her properties and was at liberty to decide on its disposal and enjoyment.

iv. Daughters and their heirs were introduced by this Code as primary heirs over male collaterals and the marital status of the daughter was also made irrelevant.

v. The concept of affinity was also introduced along with consanguinity in terms of inheritance.

vi. The Code abolished the concept of property devolution by way of survivorship which was prevalent under the Mitakshara School. Under new law, it will be assumed that the death of the deceased happened after a partition which will entitle

[2] 2 SABZWARI, HINDU LAW (ANCIENT & CODIFIED) 1078 (2007)
[3] R.K. AGARWAL, HINDU LAW, 243-244 (Central Law Agency, Allahabad, 2007)
[4] *Supra* note 1 at 340
[5] *Supra* Note 1 at 275-277

his share in coparcener property to be converted to separate share so that it can be devolved by the legal heirs.

vii. Under new Code, the mother, daughter, widow and grandmother were made eligible to succeed to the interest of Mitakshara coparcener.

viii. Grounds preventing inheritance based on mental and physical deformities and diseases were removed and the murderer of an intestate was disqualified from inheritance in accordance to public policy.

ix. The ground of unchastity of a widow in order to disqualify from inheritance was discontinued and she was made an absolute owner of her properties.

x. The Act gave priority to the the full blood heirs over half blood and uterine blood heirs and Class I heirs were eligible to simultaneously inherit under the said Act.

xi. The rights of posthumous children were also specifically protected by this Code.

Women's Right to Property under The Act, 1956

1. Partition Rights

Under the Hindu Succession Act, 1956, the female member of joint family was not allowed to be coparcener and was therefore deprived from ownership in the coparcenary property. However, during actual partition of property, the female members were entitled to their share. Except for Dravida School, the female members were entitled to a share of their own. It has to be noted that female did not have the right to demand their portion. They were only entitled if there was a mutual destruction of the joint status of the property by two coparceners. if deceased before the effect of partition, the legal representatives were not entitled to claim the allotted share.[6]

The categories of female entitled to a share in partition are as follows:

i. "Father' wife

ii. Mother

iii. Paternal grandmother

iv. Coparcener's widow

[6] *Supra* note 1 at 241

v. Daughter[7] of a coparcener."

2. As Class-I Heirs

Under the Code, there are 4 categories of heirs who are entitled to inheritance.[8] They are as follows:

i. "Class-I Heirs

ii. Class-II Heirs

iii. Agnates

iv. Cognates"

Most of the female, after Hindu Succession Act, 1956, were positioned in Class-I heirs which gave them a preference over the others. They were made entitled to equal and simultaneous property rights along with the male counterparts.

The Class-I heirs are as follows:

"Son; Daughter; Widow; Mother; Son of a pre-deceased son; Daughter of a pre-deceased son; Son of a pre-deceased daughter; Daughter of a pre-deceased daughter; Widow of a pre-deceased son; Son of a pre-deceased son of a pre-deceased son; Daughter of a pre-deceased son of a pre-deceased son; Widow of a pre-deceased son of a pre-deceased son; Son of a pre-deceased daughter of a pre-deceased daughter; Daughter of a pre-deceased daughter of a pre-deceased daughter; Daughter of a pre-deceased son of a pre-deceased daughter; Daughter of a pre-deceased daughter of a pre-deceased son."[9]

The property belonging to a Class-I heirs is to be divided according to the following rules: [10]

Rule 1- The intestate's widow, if one or more, shall take one share.

Rule 2- The surviving son and daughter shall take single share each.

Rule 3- Remaining heirs of both pre-deceased daughter or pre-deceased son shall take single share each.

Rule 4- According to Rule 3:

[7] After the 2005 Amendment Act, daughter has become a coparcener with the same right of son and became entitled to claim partition in coparcenary property.
[8] Hindu Succession Act, 1956 § 8, No. 30, Acts of Parliament, 1956 (India)
[9] The Schedule, Hindu Succession Act, 1956 (Universal's, LexisNexis, 2021)
[10] Hindu Succession Act, 1956 § 10, No. 30, Acts of Parliament, 1956 (India)

i. The distribution of share among the heirs of pre-deceased son shall be made accordingly to incorporate equal portions to his widow(s) surviving son and daughters.

ii. The distribution among the pre-deceased daughter shall be made accordingly to incorporate equal portions to surviving son and daughters.

3. As Class-II Heirs

The schedule of Class-II works in according to the order i.e., one gets the chance of inheritance if the person previous to him/her is not available to inherit.[11] This does not include brothers or sister by uterine blood.

"Father

i. (1) Son's daughter's son; (2) Son's daughter's daughter; (3) brother, (4) sister

ii. (1) Daughter's son' son; (2) daughter's son's daughter; (3) daughter's daughter's son; (4) daughter's daughter' daughter.

iii. (1) Brother's son; (2) Sister's son; (3) brother's daughter; (4) sister's daughter.

iv. Father's father; father's mother

v. Father's widow; brother's widow

vi. Father's brother; father's sister

vii. Mother's father; mother's mother

viii. Mother's brother, mother's sister."

Concept of Full Ownership for Hindu Female under Sec. 14 Of Hindu Succession Act, 1956

The vision of Hindu Succession Act, 1956 of upgrading position of Hindu female in relation to inheritance was best reflected in Section 14 of the said Act. It introduced the concept of absolute ownership for women. The section was said to have progressed toward practical recognition relating to equality in gender by elevating women to a higher pedestal.[12]

Under present Hindu law, the confusion and controversy regarding the position of the widow under law of inheritance and what was the share she is entitled upon her husband's death was

[11] The Schedule, Hindu Succession Act, 1956 (Universal's, LexixNexis, 2021)
[12] Bai Vijaya vs. Thakuribai Chelabai, AIR 1979 SC 993, 1003

converted by Section 14 of the Hindu Succession Act, 1956. She is entitled to the husband's property as a primary heir and nature and amount of her share is exactly similar to that of her son. The share is ascertained by notional partition and she is entitled to the same as an absolute Class-I heir.[13] The section has retrospective effect. Thus, it had ended the concept of the women's estate, introduced philosophy of Vijnaneshwara on Stridhan.

Thus, Section 14 provided that female Hindu women is entitled to her property as an absolute owner and a limited owner.

Condition required for Conversion of Limited Estate to Absolute Estate

There are two condition which needs to be fulfilled before converting a limited ownership into an absolute one. They are as follows:

i. She had the same property in possession in the capacity of a limited ownership

ii. She must have the possession of property during commencement of the Act.

- **Possession**

The term 'possession' signifies 'possession in law', meaning having a valid title without having an absolute or constructive position of the property.[14] It is immaterial whether the title was acquired by traditional Hindu Law means or statutory law.[15] The term limited owner signified that mere actual possession was not eligible to be converted to an ownership which is absolute. Under the Section 14, title is not modified. It is being enlarged. The meaning of possession was given by Supreme Court in *G.T.M. Kotturwamy vs. Setra Veerava*[16] as "the word possessed in Section 14 of the Act, had been used in a broader sense and in context of means the state of owning or having in one's hand or power…"

"Thus, the word 'possession' means and includes:

i. Actual or physical possession of the property

ii. Constructive possession of the property

iii. Possession in Law i.e., a possession that can be recovered and regained via process of law."

[13] *Supra* note 1 at 340
[14] Mahesh Chandra Sharma vs. Raj Kumara Sharma, AIR 1996 SC 869
[15] ANJALI KANT, WOMEN AND THE LAW, 356 (A.P.H Publishing Corporation, New Delhi, 2003)
[16] G.T.M. Kotturwamy vs. Setra Veerava, AIR 1959 SC 577

- **Possession lost Through the Transfer of Limited Ownership**

The important feature of the limited ownership is that transferring power of widow can only be exercised during legal necessities or performance of rites related to spiritual salvation of husband. But if the same possession is lost by way of transfer in favour of third party before this Act, despite of Sec 14(1), it won't convert to absolute one. Only if the interest was re-conveyed to her before the commencement, it will not affect the conversion to absolute ownership even if there was temporary loss of possession.[17] This concept was upheld by Supreme Court in the case of *Jagannathan Pillai vs. Kunjithapadam Pillai.*[18]

- **Possession Lost by Remarriage**

It was held by High Court of Rajasthan that in the case of *Bhuri Bai vs. Champa Bai*[19] that if a widow remarries after the commencement of the Act of 1956, her estate won't be forfeited in accordance to Sec 2 of The Hindu Widow Remarriage Act, 1856. Supreme Court in *Punithavalli vs. Ramalingam*[20] held that rights under Sec 14(1) of Hindu Succession Act, 1956 is absolute one and cannot in any circumstance be defied. But the case won't be same if the marriage and diversion of limited estate happened prior to the commencement of the Act in 1956.[21]

In a nutshell, it can be inferred that:

i. Section 14 of the Act does have retrospective application in case of those estates where the possession was there during the commencement of the Act.

ii. Section 14 does not apply to those estate where the Hindu female did not have a possession during the commencement of the Act. It that case, the same will fall under the umbrella of old Hindu law.[22]

Limited Estate under Award or Will [Section 14(2)]

The property absolutely acquired by a woman under Sec 14(1) is subject to Sec 14(2). It states that property received by her in form of gift, will, award, decree or any other instrument cannot be considered as absolute property if the same gives her only restricted rights.[23]

[17] *Supra* note 1 at 342-343
[18] AIR 1987 SC 1493
[19] AIR 1968 Raj. 139
[20] AIR 1970 SC 1730
[21] Velamure Venkata Sivaprasad vs. Kothuri Venkateswarlu, AIR 2000 SC 434
[22] PARAS DIWAN, MODERN HINDU LAW, 395-396 (Allahabad Law Agency, Faridabad, 2015)
[23] R.K AGARWAL, HINDU LAW, 287 (Central Law Agency, Allahabad, 2007)

The purpose of this combination was to exclude the disability under customary Hindu law regarding acquisition of property but it does not extend to the rights acquired by her via will etc. which gives her limited ownership.[24] It is an exception to Sec 14(1) which provides protection to the owner's power of settling the property according to wish. Therefore, when a Hindu female receives any property with limited interest, won't convert into absolute interest.

In *Sharad Subramanyan vs. Soumi Mazumdar,*[25] the Court observed that for application of Sec 14(2), three essentials need to be satisfied:

i. The property must be acquitted by was on any instrument like gift, will, decree, award etc.

ii. Any of the instruments executed for Hindu female should be in a restricted format in the estate in the property.

iii. The said instruments must confer, or create a new title, interest or right and not merely recognize a pre-existing right.

The Court finally held that if the legatee does not have any pre-exiting rights in the said property, she will not be allowed to claim an absolute ownership relying on Sec 14(1) rather, her rights would be controlled by the terms of the will and Sec 14(2) of the Act.

Recently, in the case of *Basanti Devi (D) by Lrs. vs. Rati Ram*[26] considering its earlier judgments, it was held by the Supreme Court if there is a right on a property acquired by a compromise decree in which the Hindu female had no pre-existing rights, it would not get converted to an absolute ownership and the transferee would not get a better title than the former. Therefore, Sec 14(2) would apply and her right won't mature via virtue of Sec 14(1).

Succession of Property of An Intestate Hindu Female under Section 15 of Hindu Succession Act, 1956

This section is the first one to deal with status of property for female intestate. Prior to 1956, in majority cases, her limited interest over a property would extinguish upon her death and no question of succession would arise. The primary objective of the legislature was to bring an improvement toward securing property and maintenance rights over providing an inheritance scheme. Thus, Section 15 of Hindu Succession Act, aimed at abolition of Hindu woman's estate

[24] Gumpa vs. Jaibai, (1994) 2 SCC 511
[25] AIR 2006 SC 1993
[26] AIR 2018 SC

and its conversion to her absolute property (applicable on properties in existence prior to commencement of the Act and over which the Hindu female had possession).

The Determining Factor

Under this legislation, there has been a line of difference drawn between devolution of property among both gender on the basis of source of property. In case of devolution of male's, there is uniform rules laid down by the Code irrespective of the source. But in the case of dying female intestate, the heirs are allotted based on source of property.[27]

Accordingly, determining factors for the scheme of succession for her heirs in relation to the property acquired can be divided into three types:

i. Property which is inherited in general under Section 15(1)

ii. Property which has been inherited from parents or husband or father-in-law under Section 15(2)

iii. Escheat

Heirs to Property in General under Hindu Succession Act, 1956

Inheritance of Hindu female's property from any source other than from "father, mother, husband or father-in-law" is mentioned under Sec 15(1), not under Sec 15(2). Under Section 15(1), the Hindu female's heirs are categorised into five 'entries.' If none available, it goes as Escheat to Government.

The rule of preference is that former entry eliminates the latter entry. They are as follows:

i. Entry (a) – "1. Son, 2. Daughter, 3. Husband, 4. Son and Daughter of a pre-deceased son, 5. Son and daughter of a pre-deceased daughter."[28]

Under son and daughter, it includes those by natural birth as well includes legitimate, illegitimate and adopted children. Legitimate child maybe from one or several husband. Child procreated from any marriage is included. However, though step-children are not included, it might happen that they succeed to property as heirs of husband.[29]

In case of grandchildren, they will be included only in case of legitimate children procured by natural birth or adoption. Illegitimate children are not included. In case of husband, only those

[27] *Supra* Note 22 at 415
[28] Hindu Succession Act, 1956 § 15, No. 30, Acts of Parliament, 1956 (India)
[29] *Supra* Note 22 at 437-438

who is lawfully wedded at the time of death will be considered as one. Therefore, neither divorced nor husband of void or nullified voidable marriage is included.

Shares of heirs: The Entry (a) heirs have simultaneous inheritance capability. It can be deduced that there are three rules in regard to distribution of property among entry (a) heirs. They are:[30]

a) Daughter, Son and the husband take one share each.

b) In case of branches of pre-deceased sons, the rule of representation will apply i.e., they will inherit the same share which the son or daughter would have inherited, if alive.

c) Among heir of branch, they take per capita

ii. Entry (b) - It goes as "Upon the heirs of the husband."

It states that upon the failure of presence of any heir in entry (a), the property will be devolved as her husband's property in accordance to the rules relating to Hindu male intestate.[31]

iii. Entry (c) – Father and Mother

Under this group, there are two heirs, the father and the mother. The term "mother" includes both natural and adoptive mother, not including a step-mother. The term father does not include a putative or a step-father. Only natural or adoptive father is included.[32]

iv. Entry (d) – The heirs of Father

It states that upon absence of any heirs in entry (d), the property would devolve upon the father's heirs. Here, the definition of father is similar as that in the Entry (c). Since the devolution will be based on the conception that property belonged to father, the heirs will be Class I, Class II, Agnates and Cognates respectively.

v. Entry (e) –Mother's heirs

Upon failure in Entry (d), the property will be inherited by the mother's heirs as if it was originally the property of mother. This means a Hindu female's heirs, from Entry (a) to Entry (c).

The Hindu Succession Act, 1956 has laid down various different schemes for devolution of Hindu female property depending on its mode, whether it is special or general. Another

[30] Hindu Succession Act, 1956 § 16, No. 30, Acts of Parliament, 1956 (India)
[31] Hindu Succession Act, 1956 § 8-12, No. 30, Acts of Parliament, 1956 (India)
[32] *Supra* Note 22 at 439

exception to this special rule is added via subsection 2 of section 15. This exception provides for a special succession order when the property is inherited from her husband, father-in-law or parents. But this particular exception is confined only to cases of her dying without any immediate heirs like son or daughter or grandchildren, in that case, it won't devolve upon any heirs referred in subsection (1).[33]

Under Section 15(2)(a):

"Notwithstanding anything contained in sub-section (1), any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father."

Here, two things are noteworthy:

i. The legislature here has used the term 'inherit' and not 'received'. Therefore, the property received via will of gift by the daughter will be considered as general property. Whether she sells out the inherited property and purchases another one, it would still be her general property.

ii. If she dies without having any issue, but the husband is present, the property reverts back to heirs of the father.[34] The step son does not qualify as a person who has the power to inherit.[35]

In these cases, it will be assumed that after death of Hindu female, the heirs of the father would be ascertained accordingly. In case of an unmarried woman who dies after inheriting her father's property, the sisters of her father will succeed to the said property as heir.[36]

Thus, this provision emphasizes that property inherited by Hindu female would go back to father's heir if she dies issueless. Same is in the case the property inherited is of mother as it would go back to the father's heirs and not mothers.[37]

In another situation, the Hindu female could inherit the property from father-in-law as well as a widow of his pre-deceased son. Here, according to Section 15(2)(b), the devolution of

[33] SATYAJEET A DESAI, MULLA HINDU LAW, 1198 (LexisNexis Butterworts Wadhwa, Nagpur, 2012)
[34] *Supra* note 1 at 373-374
[35] Lachman Singh vs. Kirpa Singh, AIR 1987 SC 1616
[36] Apurti vs Suna Stree, AIR 1963 Ori 166
[37] *Supra* note 1 at 374-375

property will be on to the heirs of the husband, and not one mentioned in subsection (1) of Section 15.

Under Section 15(2)(b), it is provided that:

"Notwithstanding anything contained in sub-section (1), any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

Here, husband's heir does not include those she could have re-married, but whose property was inherited by her as a widow.

In *Dhanishta Kalita vs. Ramakanta Kalita,*[38] High Court of Gauhati held that for the purpose to inherit mother's property, the term 'son and daughter' would include that of the husband from whom, or from whose father, the mother inherited the property. The objective of the Court regarding Section 15(2) was ensuring that the property of Hindu female is not left without its original source. If same is not prevented, it would negate the purpose of section 15(2) and it would then be allowed to be inherited by children from other husband (whose property it was not).

It must also be noted that the term "in absence of any heirs of the deceased" means children without qualification and they so not mean children of any particular husband. It would include all children, legitimate, illegitimate, from any husband. Every child has rights of equal share over their mother's property and only in her absence the question of source arises.[39]

The intent of legislature can be clearly inferred from this sections that if a property belonged to the deceased female's parents originally, it must revert back to father's successors and if it was of the property of husband/fathers-in-law, then it should go to husband's successors. Again, the female is perceived as an individual who has no identity of her own. This reversion shows that she is treated as a temporary owner of the properties she inherits in her lifetime.[40]

Government: Escheat

[38] AIR 2003 Gau 92
[39] *Supra* note 1 at 376
[40] Archana Mishra, "*Vicissitudes of Women's Inheritance Right- England, Canada and India at the dawn of 21st century*", 58:4 JILI 157

If any Hindu female dies without any successor, Government as an heir inherits the property along with all liabilities and obligations on the intestate.[41]

Constitutional Validity: Section 15

Section 15(2) of the Act's constitutional validity was challenged stating that there was hostile gender discrimination.[42] The Court favored the rule of reversion under the legislation and held it as clear objective in maintain unity in family. The question of protecting family unity via a single scheme was raised and it was unanimously seen that female were not treated as independent individual. In a recent case, it was held the rules of inheritance and succession governing Hindu males and females is subjected to the concept of equality provided under article 15(1) of the Indian Constitution.[43]

Critical Evaluation of The Hindu Succession Act, 1956

The Hindu Succession Act, 1956 was a welfare legislation created to grant social upliftment to Hindu woman by granting them equal inheritance rights with absolute ownership. However, after evaluating the said legislation, it does bring out some anomalies within the provisions which might have an impact on its goal of protecting woman's rights related to succession. Some of them are as follows:

i. Devolution of property on the principle of consanguinity –nearness to blood is recognized for only males and not for females. The heirs of female dying intestate are recognized on the basis of affinity and are categorized into five categories and husband's relatives are preferred over her parents. The distinction in the rules of inheritance based on sex is administrated by the principle of equality under Article 14 &15(1) of the Constitution.

ii. Agnatic relation i.e., one related through male are preferred over cognates i.e., ones related through females in the property of a deceased male.

iii. Even though under the Section 14, 1956 women 's estate was converted into Stridhan, the issue of female inheritance was still a burning question with limitation clause.

[41] Hindu Succession Act, 1956 § 29, No. 30, Acts of Parliament, 1956 (India)
[42] Somu Bai Yashwant Jadev vs.Balgovinda Yadav, AIR 1883 Bom 156
[43] Mamta Dinesh Vakil vs. Bansi S. Wadhwa, BOM HC, 2012

iv. The daughter in law is only allowed to inherit the father-in law's property when she is a widow under Section 15 of the Act, and not until the husband is alive.

v. Similarly, father's heirs are preferred over heirs of mother in the property of deceased female signify no justifiable reason.

vi. According to Section 14 of the Act, property inherited by the way of partition was a part of Stridhan property but Section 23 discriminated the position of women while dealing with the partition of dwelling house.

Grey Areas in Hindu Succession Act, 1956

Primary intent of abovementioned legislation was uplifting the status of the women in arena of inheritance under the Hindu Law. Though the same was achieved to a considerate level, there were still several lacunas in existence which hindered the process of achieving its ultimate goal. A few of them are mentioned as below:

i. There is an existence of overlap between the Class I and the Class II heirs. Few heirs like "Son's Daughter's daughter, Daughter's son's daughter, Daughter's daughter's son and Daughter's daughter" were promoted to the Class I but were not removed from the class II.

ii. There is still a discriminatory provision in existence in relation to devolution of the self-acquired property of Paternal heirs. They are still not eligible to inherit the self-acquired property of Hindu Female.

iii. There is no requirement of naming the heirs of Hindu Female on the lines of heirs of a Hindu male. The present structure of heirs marginalizes the independent identity of a Hindu female and her heirs are referred as 'heirs of husband', 'heirs of father' etc.

iv. The aim should be to gradually abrogate the traditional coparcenary system and hence to remove the distinction between separate and joint family property.

Reforms Made in The Hindu Succession (Amendment) Act, 2005

In the light of urgency of the situation, 174th Law Commission prepared a Report on the 'Property Right of Women- Proposed Reforms under Hindu Law' on May 5th, 2000 under the Chairmanship of Justice B.P. Jeewan Reddy. The report suggested that exclusion of daughters from being a part of the coparcenary property was unjust gender discrimination. Therefore, a

primary change made in the amendment act was inclusion of daughters as coparceners under Section 6 of the said Act.[44]

Various other major reforms made are as follows:[45]

i. The theory of The Doctrine of Survivorship was abolished in case of male coparceners. According to the Section 6(3) of the Hindu Succession (Amendment) Act, 2000, if any Hindu dies and his properties were governed by Mitakshara School, Doctrine of Testamentary Succession or Intestate succession shall apply in place of Rule of Survivorship and division of coparcenary property will be treated as been divided via partition.

ii. The Amendment Act bought changes in gender-discriminatory provision of former Act and one of the essential was entitlement of coparcenary right as a birth right for female as well.

"According to Section 6(1) of Amendment Act, 2005, in a joint family governed by Mitakshara law, the daughter of a coparcener shall-

a. by birth becomes a coparcener in her own right in the same manner as the son.

b. have the same rights in the coparcenary property as she would have had if she had been a son.

c. be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and further references shall include daughter of a coparcener as well. Therefore, the present case scenario states that any child, regardless of the gender, either natural born or adopted, can validly have a birthright over coparcenary property."

iii. The amendment also included the fact that along with the absolute interest over the coparcenary property, various incidents attached to the same can also be inherited by the child. Though the legislature has not exactly defined what are incidents in relation to a coparcenary property, the following two can be inferred:[46]

[44] *Supra* note 22 at 402
[45] *Supra* note 1 at 280

[46] *Supra* note 1 at 287

a. They have a joint title and possession to the property till the time of the partition.

b. The interest in a coparcenary property is inherited by surviving coparceners and not their heirs. Here, the legislation has created confusion because there is an express provision which has abolished the doctrine of survivorship in the case of male coparceners.[47]

iv. Concept of pious obligation was abolished under the amendment Act. The debts contracted by the father or great-grandfather was no longer an obligation for the son to pay subject to certain exceptions.[48]

v. Another major amendment which happened in the Hindu Succession (Amendment) Act, 2000 was abrogating the provisions regarding dwelling house. Previously, Section 23 excluded female heirs to have right over the dwelling house unless male heirs allow such. They were only granted right of residence over the same. This gender derogatory section was abolished in Amendment Act.[49]

vi. Under Sec. 30 of HSA, 2000, the daughters are also recognized with right to testamentary disposition of the coparcenary property which previously was only available to the male heirs.[50]

Critical Analysis of The Hindu Succession (Amendment), Act, 2000

Though this Act was enacted with the intention of removing discrimination of women both sociologically and historically, the application of the same has not yet happened in full fledge. Few of the reasons are as follows:

i. Increase the cases of female feticide- Most of the Hindu orthodox families don't accept that the portion of their joint property should go to the daughter who will take it in another house after marriage. So, before facing of this type of situation, they even do not hesitate to kill the female child in womb itself.

ii. Increase the conflict between relations- Still in the modern society; daughter is considered the member of another family. That's why most of the Hindu families

[47] *Supra* note 1 at 288
[48] *Supra* note 1 at 291
[49] *Supra* note 1 at 292
[50] *Supra* note 1 at 294

do not want to give share to the daughters and if they demand, this results the breaking of joint family.

iii. Women has always been considered as carrier for property to in-laws' family by means of dowry. Dowry Prohibition Act, 1961 gives enough scope to convert Stridhan into dowry in various camouflaged ways.

iv. The Amendment of 2005 has abolished application of the rule of survivorship in any manner but reading of section 29-B of the States Amendment seems the retention of rule of survivorship in these particular States, however, with some exceptions. These discrepancies create difficulties in the application of the 2005 Act in the territories of these States.

v. No doubt, position of women has been improved by the 2005 amendment Act by conferring birth right in the coparcenary property but their position remained same after marriage as this Act is silent on the right of women in the undivided property of her in-laws.

Conclusion

The former Act was a welfare legislation with the intent to promote women's status to a great extent in terms of societal norms. The discriminatory and derogatory gap was bridged to an extent by inclusion of the concept of coparceners, testamentary and intestate succession, abolition of the concept of limited ownership etc. Yet there were few anomalies which needed a reconsideration and hence, Amendment Act of 2005 was enacted. This Act bought the revolutionary change by identifying female heirs as coparceners, retaining the concept of notional partition and also identifying women as Karta of joint family property. But as similar to a coin, there are two sides to this Act as well. While uplifting the social status of the women, it also paved the path for increase in ill treatment of women in terms of dowry, female feticide and other unequal rights of inheritance. therefore, it can be said that even though legislature did confer right upon women, grassroot level effort should be made to remove the problems in implementation of the Act and serious efforts should be made to get the required positive results.

CENTRE FOR REGULATORY STUDIES, GOVERNANCE AND PUBLIC POLICY
THE WEST BENGAL NATIONAL UNIVERSITY OF JURIDICAL SCIENCES, KOLKATA
E : crsgpp@nujs.edu
B : https://nujs.edu/nujs-crsgpp.html
P: +91(033) 2335 7379 (Ext. 7210)