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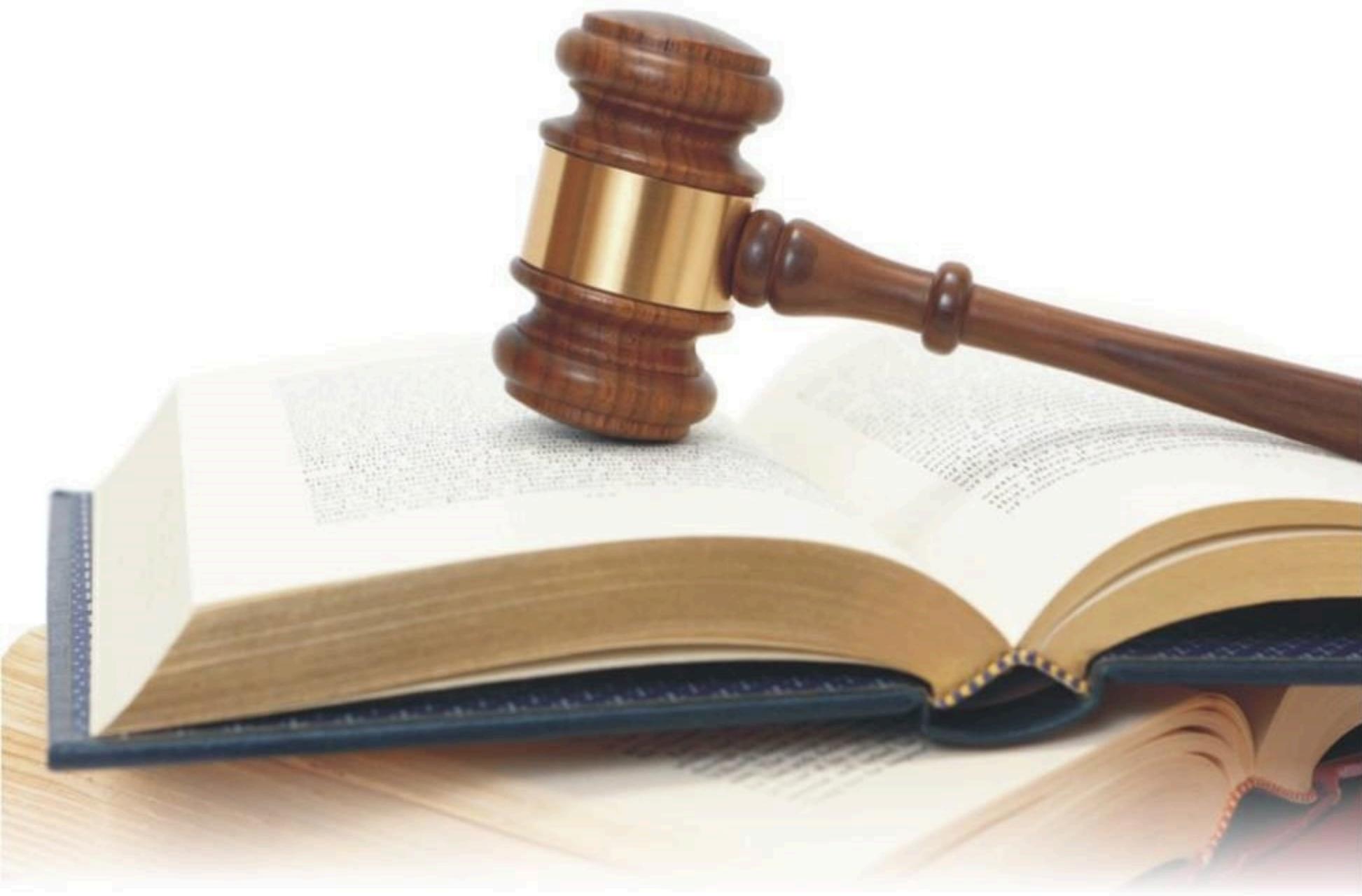
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“From time immemorial, the principle has been that the excessive bail is no bail. To grant bail and thereafter to impose excessive and onerous conditions, is to take away with the left hand, what is given with the right. As to what is excessive will depend on the facts and circumstances of each case.”

K. V. Viswanathan, J. in

Girish Gandhi v. State of Uttar Pradesh,

(2024) 10 SCC 674, para 25



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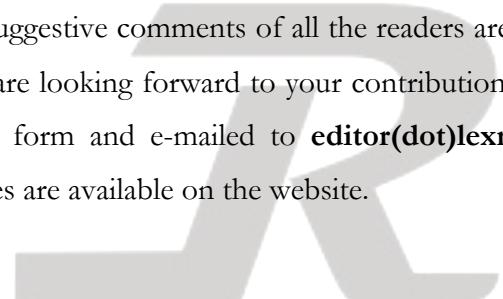
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SEALED COVER JURISDICTION AND ITS IMPLICATION FOR THE JUDICIAL PROCESS IN INDIA

- Tanya Mittal*

Abstract

This research aims to critically examine the implications of sealed cover jurisdiction on the transparency and accountability of the judicial process in India. The focal issue revolves around how the practice impacts the fundamental rights of litigants and the integrity of judicial proceedings. By investigating these concerns, the study seeks to illuminate the balance between the right to a fair trial and national security, ultimately arguing that sealed cover mechanisms, while often justified on the grounds of protecting sensitive information, may jeopardise the very foundations of justice. The scope of this research encompasses an in-depth exploration of relevant case law, legislative frameworks, and scholarly viewpoints surrounding sealed cover jurisdiction in India. Key resources include seminal texts, judicial pronouncements, and interviews, which collectively afford a multi-faceted perspective on the issue. Constraints encountered during the research process include limited accessibility to certain judicial documents subject to sealed cover, which may hinder a fully exhaustive analysis. The findings indicate that sealed cover jurisdiction poses substantive challenges to judicial transparency, raising considerable concerns about equitable access to justice for litigants and the potential erosion of public trust in the legal system. The analysis reveals that, despite its intended purpose, the practice often undermines accountability and can obfuscate judicial reasoning. These conclusions underscore the urgent need for reform in the application of sealed cover jurisdiction, advocating for mechanisms that better protect fundamental rights without compromising the integrity of judicial processes, thereby reinforcing the overarching tenets of justice in India.

Keywords: Sealed Cover, Judicial Transparency, Fair Trial, National Security, Public Interest Immunity.

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INTRODUCTION

The judiciary serves as the cornerstone of the rule of law and democracy, safeguarding individual rights and resolving disputes impartially. In India, the concept of judicial transparency and accountability is particularly significant as it resonates with the constitutional guarantees embodied in Articles 14 (the right to equality) and 21 (the right to life and personal liberty).¹ However, the legal landscape is increasingly marred by practices that cast shadows over these principles, one of which is the phenomenon of sealed cover jurisdiction. Originating from the need to protect sensitive information related to national security and other critical matters, the application of sealed cover practices has sparked substantial debate regarding their implications for the judicial process. This article aims to critically examine the implications of sealed cover jurisdiction on transparency and accountability in the Indian judiciary, exploring its impact on the integrity of judicial proceedings and the fundamental rights of litigants.

Sealed cover jurisdiction in India emerged in the broader context of safeguarding sensitive information, particularly in cases involving matters of national importance. Judicial processes have often necessitated the classification of certain documents or even whole cases to preserve national security interests. The historical roots of this phenomenon can be traced back to the colonial era when laws and practices were structured to suppress dissent and manage information flows. With India's independence, the legal framework evolved, but the underlying tensions between state security and individual rights persisted. This legacy endures in current legal practices, making sealed cover jurisdiction a vital area of inquiry. Moreover, the rapid expansion of digital technology and communication in contemporary society further complicates the judicial handling of sensitive information, prompting critical questions about access to justice, due process, and the extent to which individuals can challenge state mechanisms that restrict transparency.²

The research problem embedded within this inquiry focuses on a specific yet critical question: How does the practice of sealed cover jurisdiction impact the transparency and accountability of the judicial process in India? This inquiry is rooted in the observation that, while the use of sealed covers is often justified under the guise of national security, it raises pertinent concerns

¹ Mitchel de S.-O.-l'E. Lasser, 'On Judicial Transparency, Control, and Accountability', *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy*, Oxford Studies in European Law (Oxford, 2009; online Edn, Oxford Academic, 1 Jan. 2010)

² Digvijay S. Chaudhary & Afzal Mohammad, Guest Post: "For Your Eyes Only: On the Supreme Court's Sealed Cover Jurisprudence", available at: <https://indconlawphil.wordpress.com/2019/10/04/guest-post-for-your-eyes-only-on-the-supreme-courts-sealed-cover-jurisprudence/> (last visited on: September 10, 2024).

regarding the erosion of public trust in the judicial system and the potential infringement of basic rights. Moreover, scant attention has been paid to the practical ramifications of this jurisdiction, as existing literature predominantly explores its theoretical dimensions. Consequently, there exists a notable gap in understanding the lived realities of litigants and legal practitioners within this context.

The significance of this study resonates on multiple levels, both academically and practically. Academically, this research contributes substantially to the literature on judicial processes in India, providing a critical analysis that is currently underrepresented in the discourse on sealed cover jurisdiction. Practically, the findings may provide legal practitioners, policymakers, and stakeholders with valuable insights into the consequences of sealed cover practices, thereby influencing approaches to legal reform. In an age where the legitimacy of judicial systems hinges upon their perceived transparency and accountability, this research stands to advocate for necessary reforms that protect individual rights while still addressing legitimate state concerns. This balance is crucial for maintaining public confidence in the judiciary and upholding the fundamental tenets of justice.³

LEGAL FRAMEWORK OF SEALED COVER JURISDICTION IN INDIA

Sealed cover jurisdiction refers to a legal practice where courts receive and review confidential documents or evidence in sealed envelopes without disclosing the contents to the opposing parties or the public. This practice is frequently employed in cases where sensitive information related to national security, state secrets, or personal privacy is involved. In such cases, only the judges have access to the sealed material, and their decision is often influenced by the undisclosed information.⁴

In India, sealed cover jurisdiction has become a point of contention due to its increasing use in cases before the Supreme Court and various high courts. Although not explicitly mentioned in the Indian Constitution, the judiciary derives the authority for this practice from its powers to ensure justice under Articles 129 and 142, which give the Supreme Court the right to make decisions necessary for doing “complete justice.” Additionally, specific statutory laws like the Indian Evidence Act, 1872 (now Bharatiya Sakshya Adhiniyam, 2023) and the Official Secrets

³ S. P. Verma, *Indian Judicial System: Need and Directions of Reforms* (Kanishka Publishers Distributors, India, 2004).

⁴ Diksha Munjal, “What is sealed cover jurisprudence and why is it being opposed?”, available at: <https://www.thehindu.com/news/national/explained-what-is-sealed-cover-jurisprudence-and-why-is-it-being-opposed/article65056013.ece> (last visited on: September 10, 2024).

Act, 1923, allow the government to withhold certain information by submitting it in sealed covers to the courts.⁵

Section 123 of the Indian Evidence Act of 1872 (now Section 129 of Bharatiya Sakshya Adhiniyam, 2023) provides that:

"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

Rule 7 of Order XIII of Supreme Court Rules, 2013, also forms a legal basis for it which provides:⁶

"Notwithstanding anything contained in this order, no party or person shall be entitled as of right to receive copies of or extracts from any minutes, letter or document of any confidential nature or any paper sent, filed or produced, which the Chief Justice or the Court directs to keep in sealed cover or considers to be of confidential nature or the publication of which is considered to be not in the interest of the public, except under and by an order specially made by the Chief Justice or by the Court."

Withholding a document is a significant deviation from the standard rules of evidence, justified by the principle of overriding and paramount public interest, based on the maxim "*salus populi est suprema lex*," meaning the welfare of the people is the highest law. The term "unpublished" refers to documents not disclosed to the public except to officials handling them within the department. If someone against whom privilege is claimed has lawfully viewed the documents earlier, claiming privilege becomes ineffective.⁷

Confidentiality must be balanced against the public interest. In *George Mathew v. Union of India*⁸, the Supreme Court emphasised that privilege claims should be supported by an affidavit, and the court would then decide the nature of the document—whether it pertains to state affairs. If it does, its disclosure remains within the discretion of the head of the department.

Section 123 of the Indian Evidence Act or Section 129 of Bharatiya Sakshya Adhiniyam, 2023 does not specify who determines whether a document pertains to state affairs. However, Section

⁵ C. K. Takwani, *Indian Evidence Act, 1872* (Whytes & Co., 7th Ed., 2023).

⁶ The Gazette of India, Supreme Court of India Notification, available at: <https://main.sci.gov.in/sites/default/files/Supreme%20Court%20Rules%2C%202013.pdf> (last visited on: September 10, 2024).

⁷ K. A. Pandey, *V.P. Sarathi's Law of Evidence* (Eastern Book Company, 8th Ed., 2021).

⁸ (1997) 10 SCC 537

162 of IEA, 1872 or Section 165 of BSA, 2023 mandates that a person summoned to produce a document must present it in court, regardless of objections regarding its production or admissibility.⁹

In *State of Punjab v. Sodhi Sukhdev*¹⁰, the Supreme Court initially took a restrictive view, holding that when privilege under Section 123 is claimed, the court cannot inspect the document before determining its privileged status. This approach was overturned in *S.P. Gupta v. Union of India*¹¹, where the court ruled that if there is uncertainty about whether a document pertains to state affairs, the court may inspect the document to assess whether its disclosure would harm the public interest. Ultimately, the court determines the validity of the privilege claim.

Sealed cover submissions are often justified on grounds of protecting confidential or sensitive information, especially in cases involving national security, defence, and law enforcement. For example, the government may invoke this practice in matters where public disclosure could compromise the integrity of ongoing investigations, endanger lives, or reveal state secrets. This practice is also used in commercial cases involving trade secrets, sensitive financial data, or intellectual property that must be shielded from public access or from competitors.¹²

While sealed cover jurisdiction serves to protect sensitive material, it raises significant concerns regarding transparency, accountability, and the fundamental right to a fair trial. The principle of open justice is a foundational tenet of the Indian legal system, wherein judicial proceedings are meant to be conducted publicly to ensure accountability and uphold the rule of law. Sealed cover practices, however, limit public scrutiny, and in many cases, even the litigants themselves are kept in the dark about the evidence being used against them. This erodes the adversarial nature of the judicial process and raises concerns about fairness.¹³

INSTANCES OF SEALED COVER JURISDICTION IN INDIA

In recent years, the Hon'ble Supreme Court has been presented with numerous sealed cover documents in cases such as the Rafale jets procurement, the Assam National Register of Citizens, the Ayodhya land dispute, the Gujarat Police fake encounter case, the release of the Narendra Modi biopic, the sexual harassment allegations against the then Chief Justice Ranjan

⁹ Batuk Lal, *The Law of Evidence* (Central Law Agency, 24th ed., 2023).

¹⁰ AIR 1961 SC 493

¹¹ AIR 1982 SC 149

¹² Samir Nimba Chavan, "Sealed Cover Jurisprudence in India" 2(2) *Vishwakarma University Law Journal* 1-7 (2022).

¹³ Neha Rani, "What is sealed cover jurisprudence and why is it being opposed?", available at: <https://thleaflet.in/sealed-cover-jurisprudence-is-without-a-rationale/> (last visited on: September 11, 2024).

Gogoi, the electoral bonds matter, the Bhima Koregaon incident, the anticipatory bail plea of former Union Finance Minister P. Chidambaram, and the Board of Control for Cricket in India (BCCI) case.¹⁴ Some of the notable instances are discussed below:

RAFALE DEAL CASE¹⁵

One of the most high-profile cases involving sealed cover submissions was the Rafale fighter jet procurement case, where the Indian government was accused of irregularities in the multi-billion-dollar deal to purchase Rafale jets from France. To defend the deal and justify the pricing and decision-making process, the government submitted information in a sealed cover to the Supreme Court. This included details related to pricing and the procurement process, which were not disclosed to the petitioners or the public, citing national security concerns. The court reviewed the information and ruled in favour of the government, but the use of sealed cover raised serious questions about transparency and accountability in such a significant matter of public interest.¹⁶

BHIMA KOREGAON CASE¹⁷

In the Bhima Koregaon violence case, sealed cover submissions were made by the National Investigation Agency (NIA) and the Maharashtra state government, which contained evidence used to arrest activists and intellectuals under the Unlawful Activities (Prevention) Act (UAPA). This evidence was not made available to the accused, raising concerns about whether the arrested individuals were able to mount a proper defence. The use of sealed cover, in this case, led to significant criticism from legal experts and human rights activists, who argued that it violated the principles of natural justice and the right to a fair trial.¹⁸

NATIONAL REGISTER OF CITIZENS (NRC) IN ASSAM

In the case of the National Register of Citizens (NRC) in Assam, the Supreme Court relied on sealed cover submissions provided by the NRC authorities and the Indian government. These

¹⁴ Arvind Narrain, *India's Undeclared Emergency: Constitutionalism and the Politics of Resistance* (Westland Publications Private Limited, 2021).

¹⁵ *Manohar Lal Sharma v. Narendra Damodardas Modi*, (2019) 3 SCC 25

¹⁶ *Ibid.*

¹⁷ Malavika Parthasarathy, "SCO Shorts: Sealed Cover Jurisprudence" available at: <https://www.scobserver.in/journal/sco-shorts-what-is-sealed-cover-jurisprudence/> (last visited on: September 11, 2024).

¹⁸ Bhima Koregaon Arrests Under UAPA, *Romila Thapar v. Union of India*, available at: <https://www.scobserver.in/cases/romila-thapar-v-union-of-india-arrested-activists-background/> (last visited on: September 12, 2024).

sealed submissions contained details about the verification process and claims regarding citizenship. The use of sealed cover in this case raised concerns about the lack of transparency in a matter that affected millions of individuals, many of whom were left stateless as a result of the NRC process.¹⁹

CVC REPORT ON ALOK VERMA

The Central Vigilance Commission (CVC) submitted a report in a sealed cover to the Supreme Court regarding allegations of corruption against Alok Verma, the then Director of the Central Bureau of Investigation (CBI). Verma was temporarily removed from his position due to these allegations. The court's reliance on sealed cover submissions in this case was criticised for undermining the public's right to know the reasons for the removal of the head of a critical investigation agency.²⁰

AYODHYA LAND DISPUTE CASE

In the landmark Ayodhya Ram Janmabhoomi-Babri Masjid dispute case, the Supreme Court accepted sealed cover submissions regarding the status of the negotiations between the contending parties, the nature of the land ownership, and certain confidential documents related to the dispute. Although the court attempted to mediate and review the sensitive material in private, critics argued that the use of sealed covers diminished the transparency of the proceedings in a case that had immense national and historical significance.²¹

CENTRAL VISTA PROJECT

In the case involving the controversial Central Vista Project, which involved the redevelopment of the government buildings and parliament complex in Delhi, sealed cover submissions were made by the government to justify the project. These submissions were not disclosed to the petitioners, who had challenged the project on environmental and procedural grounds. This led

¹⁹ Malavika Parthasarathy, "Sealed Covers: Safeguarding Secrets or Eroding Transparency?" available at: <https://www.scobserver.in/journal/sealed-covers-safeguarding-secrets-or-eroding-transparency/> (last visited on: September 12, 2024).

²⁰ Sushant Singh, "CVC's Alok Verma verdict: Clean chit in some, call for probe in other cases", available at: <https://indianexpress.com/article/india/cvcs-alok-verma-verdict-clean-chit-in-some-call-for-probe-in-other-cases-5535896/> (last visited on: September 12, 2024).

²¹ *Mohammad Siddiq v. Mahant Suresh Das*, 2019 SCC OnLine SC 1482

to further criticism regarding the government's lack of transparency in a major public infrastructure project.²²

PEGASUS SPYWARE CASE²³

The Pegasus spyware case involved allegations that the Indian government used the Israeli software Pegasus to conduct illegal surveillance on journalists, activists, and politicians. When the matter reached the Supreme Court, the government refused to provide full details of whether or not the spyware was used, citing national security concerns. Instead, the government offered to submit the information in a sealed cover. The court, however, refused the offer, stating that the public has the right to know about potential breaches of privacy and violations of law. The refusal of the court to accept a sealed cover submission in this case marked a departure from the usual practice.

RECENT POSITION OF JUDICIARY ON THE SEALED COVER JURISPRUDENCE

In the recent case of *Indian Ex-Servicemen Movement v. Union of India*²⁴ (One Rank One Pension Scheme case), the Supreme Court declined to accept a sealed cover document. The Court remarked orally, "*I am personally averse to sealed covers. There has to be transparency in what happens in court*" and further stated, "*There cannot be secrecy in the court. The court has to be transparent. Secrecy is understandable in a case diary; the accused is not entitled to it, or it affects the source of information or somebody's life. But this is the payment of pension in pursuance of directions in our judgment. What can be great secrecy in this?*" Similarly, the Supreme Court refused to accept the government's sealed cover document in the Adani-Hindenburg case.²⁵

The Supreme Court has also criticised various High Courts for accepting sealed cover documents without establishing a solid basis for confidentiality. For instance, in the S. N.

²² Prachi Bhardwaj, "Here's why the Supreme Court gave a go-ahead to Central Vista Project in a 2:1 verdict [Read majority opinion]", available at: <https://www.scconline.com/blog/post/2021/01/05/heres-why-the-supreme-court-gave-a-go-ahead-to-central-vista-project-in-a-21-verdict-read-majority-opinion/> (Visited on September 13, 2024).

²³ Jagran Josh, "What is the Pegasus case in India? Know about the pegasus project, revelations, and the History", available at: <https://www.jagranjosh.com/general-knowledge/explained-what-is-the-pegasus-case-in-india-know-about-the-pegasus-project-revelations-and-the-history-1661446834-1> (last visited on: September 13, 2024).

²⁴ 2023 LiveLaw (SC) 264

²⁵ Padmakshi Sharma, "Supreme Court's Changing Attitude Towards 'Sealed Cover' Procedure", available at: <https://www.livelaw.in/top-stories/supreme-courts-changing-attitude-towards-sealed-cover-procedure-224310> (last visited on: September 13, 2024).

Velumani case, the Supreme Court criticised the Madras High Court for accepting a sealed document when the state had not even claimed any specific privilege.

While there are arguments in favour of sealed cover jurisprudence under certain conditions, the Supreme Court has introduced a new standard for assessing the confidentiality of such documents. In its judgment on the Pegasus case, the Court emphasised that the government must not only submit documents in sealed cover but also demonstrate and substantiate why the information must remain confidential, particularly if disclosing it could compromise national security. Therefore, merely submitting a sealed cover document is insufficient; the government is now required to establish the grounds for its confidentiality.²⁶

In *Cdr Amit Kumar Sharma v. Union of India*²⁷, the Supreme Court has noted that the use of sealed cover procedures sets a “dangerous precedent” by making the adjudication process unclear and opaque. In a judgment delivered on October 20, 2022, by Justices DY Chandrachud and Hima Kohli, the Court highlighted that this approach undermines the justice delivery system and results in a serious breach of natural justice. The Court emphasised that the nondisclosure of sensitive information in rare circumstances must be proportionate to the objective it seeks to achieve, and such exceptions should not become routine practice.

This observation was made while allowing appeals against an Armed Forces Tribunal (AFT) decision that had dismissed applications challenging the denial of Permanent Commission (PC) in the Indian Navy, finding no gender bias or malice in the PC grant. The central issue in the appeal was whether the AFT had acted properly in ruling on the validity of the selection process when crucial documents (the board proceedings) were only shared with the AFT in a sealed cover.

The appellants argued that the sealed cover procedure adopted by the AFT had caused significant prejudice, while the respondents maintained that it was standard practice to present board proceedings to the AFT in a sealed cover. Referring to earlier judgments, the Court made several important points regarding sealed cover procedures:²⁸

²⁶ Akhil Kumarks, “Sealed Cover Jurisprudence: It’s Implication For The Judicial Process In India”, available at: <https://www.legalserviceindia.com/legal/article-15010-sealed-cover-jurisprudence-it-s-implication-for-the-judicial-process-in-india.html> (last visited on: September 13, 2024).

²⁷ 2022 LiveLaw (SC) 951

²⁸ Ashok K. M. “Sealed Cover Procedure Sets a Dangerous Precedent: Affects Function Of Justice Delivery System: Supreme Court”, available at: <https://www.livelaw.in/top-stories/supreme-court-sealed-cover-procedure-dangerous->

1. *Serious Violation of Natural Justice:* The Court reaffirmed the basic legal principle that any material relied upon in a judicial proceeding must be shared with both parties. Even if the material is not central to the final decision, information relevant to the dispute that could reasonably influence the outcome must be disclosed. The unilateral submission of such material to the adjudicating authority, without the other party's knowledge, severely compromises natural justice. In this case, it caused significant harm to the careers of the officers involved.
2. *Vague and Opaque Adjudication Process:* The Court warned that providing relevant materials to the adjudicating authority in a sealed cover, without disclosing them to the affected party, creates an unclear and opaque decision-making process. This sets a dangerous precedent for future cases.
3. *Problems with the Sealed Cover Procedure:* The Court outlined two major issues with the sealed cover practice. First, it deprives the aggrieved party of the opportunity to effectively challenge the decision since key materials influencing the judgment remain undisclosed. Second, it fosters a culture of secrecy, granting unchecked power to the adjudicating authority. This often skews the balance of power in favour of the dominant party, typically the state, which controls the information. A judicial decision accompanied by reasoning is essential to uphold the rule of law, but the sealed cover practice shields the decision-making process from scrutiny.
4. *Exceptions Must Remain Exceptional:* The Court clarified that not all information must be disclosed publicly. For example, sensitive data, such as the identity of a victim in a sexual harassment case, should remain confidential. However, the restriction of information must be proportional to the purpose it serves, and exceptions should not be routinely applied.

In this case, the Court concluded that withholding relevant material had significantly harmed the appellants, illustrating the risks of relying on a sealed cover procedure. Consequently, the Court instructed the AFT to reconsider the matter in its entirety.

In the case of *Madhyamam Broadcasting Limited v. Union of India*²⁹, the Supreme Court ruled that the sealed cover procedure violates the principles of natural justice and transparency, as it allowed the Malayalam news channel MediaOne's appeal against a telecast ban imposed by the Central

²⁹ precedent-cdr-amit-kumar-sharma-vs-union-of-india-2022-livelaw-sc-951-213944 (last visited on: September 14, 2024).

²⁹ 2023 SCC OnLine SC 366

government. The channel had been unaware of the reasons for the denial of security clearance, as these reasons were presented to the High Court by the Ministry of Home Affairs in a sealed cover. The Supreme Court criticized the High Court's reliance on this procedure, stating it rendered the channel's ability to seek redress ineffective.

A bench comprising Chief Justice DY Chandrachud and Justice Hima Kohli ruled that the State cannot avoid its obligation to act fairly by merely invoking national security. The Court held that it is the judiciary's role to scrutinize whether the claim for non-disclosure has a valid and proportionate connection to national security concerns. The Court further explained that when the sealed cover procedure is used, two harms occur: the affected party is deprived of access to the documents, while the opposite party, often the State, uses these documents during arguments, leading to judicial findings based on undisclosed material. Such practices promote "a culture of secrecy and opaqueness" and prevent meaningful challenges to judgments, placing them beyond scrutiny.³⁰

PUBLIC INTEREST IMMUNITY CLAIM

Even in cases where withholding information for national security reasons is justified, the Court emphasized the need to adopt less restrictive alternatives. The judgment introduced a "public interest immunity claim procedure" as a more transparent approach. The Court suggested that if public interest immunity claims or other less intrusive means could achieve the same purpose, the sealed cover procedure should be avoided. The judgment cited examples from foreign jurisdictions, such as the "Totten claim" in the U.S., where cases involving state secrets are barred from adjudication, and the "closed material procedure" in the UK, used in terrorism cases. The "public interest immunity claims" allow the State to remove sensitive materials from a case if disclosing them would harm public interest, making the document inadmissible in court. The key difference between a closed material procedure and a public interest immunity claim is that, under the latter, the document is removed from evidence, while in the former, it is used but not disclosed to the other party.³¹

³⁰ Manu Sebastian, "Sealed Cover Procedure Infringes Open Justice: Supreme Court Devises Public Interest Immunity Claim Procedure as Alternative", available at: <https://www.livelaw.in/top-stories/supreme-court-sealed-cover-procedure-public-interest-immunity-procedure-225548> (last visited on: September 14, 2024).

³¹ Parliament of Australia, "Public Interest Immunity", available at: https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice_7/HTML/Chapter17/Public_interest_immunity (last visited on: September 14, 2024).

"The courts could adopt the course of action of redacting the confidential portions of the document and providing a summary of the contents of the document instead of opting for the sealed cover procedure to fairly exclude the document from the proceedings on a successful public interest immunity claim. Both the parties can then only be permitted to refer to the redacted version of the document or the summary in the proceeding", the judgment opined.

SAFEGUARDS AND PROCEDURES

The Court introduced additional safeguards for the public interest immunity claim procedure:

1. Courts may appoint an amicus curia to assess the State's claim of immunity from disclosure.
2. The amicus curiae will have access to the withheld materials.
3. The amicus curiae will consult with the applicant and their counsel before proceedings to help make informed submissions regarding the need for disclosure. However, the amicus curiae cannot interact with the applicant after accessing the confidential material.
4. The amicus curiae will represent the applicant's interests and is bound by an oath not to disclose the material.
5. The public interest immunity proceedings will take place in a closed setting.
6. The Court must issue a reasoned order regarding the immunity claim in open court, explaining the principles applied, even if sensitive material is redacted.
7. Redacted material will be preserved in the court's records and can be accessed by future courts if necessary.³²

The Court also warned that national security claims cannot be made without sufficient supporting facts. It emphasized that if less restrictive measures are available, sealed cover procedures should not be used. Courts must ensure that the dilution of procedural safeguards is carefully weighed against the public interest. In this case, the Court found no valid reason for withholding the reasons for the ban from the channel.

COMPARISON WITH INTERNATIONAL PRACTICES AND STANDARDS

³² Prachi Bhardwaj, "Sealed Covers violate natural and open justice: The Why-What-How of 'Public Interest Immunity proceedings', the 'fairer' alternative suggested by Supreme Court", available at: <https://www.scconline.com/blog/post/2023/04/06/sealed-cover-public-interest-immunity-natural-justice-non-disclosure-of-material-fairer-alternative-open-justice-supreme-court-cji-chandrachud-hima-kohli-legal-updates-national-security-research-news/> (last visited on: September 14, 2024).

In examining sealed cover jurisdiction and its implications for the judicial process in India, it is crucial to draw comparisons with international practices and standards, particularly in jurisdictions that grapple with similar tensions between national security and judicial transparency. One notable instance is found in the United States, where classified information is often shielded from public disclosure through mechanisms like the state secrets privilege. This doctrine, established in the mid-20th century, allows the executive branch to prevent the disclosure of information that may compromise national security in the context of litigation. While this privilege aims to balance governmental interests with judicial proceedings, it has also generated considerable criticism for potentially undermining judicial accountability and the right to a fair trial. Critics argue that its application can lead to unjust outcomes, particularly for litigants deprived of their ability to fully understand or contest the evidence against them, bearing parallels to the sealed cover practices observed in India.³³

Similarly, the European Court of Human Rights (ECHR) addresses the delicate balancing act between state secrets and fair trial rights, as seen in cases involving intelligence services and terrorism-related prosecutions. Under Article 6 of the European Convention on Human Rights, the court emphasises the necessity of ensuring that the accused have access to information vital for their defence, reflecting a commitment to safeguarding individual rights against the backdrop of national security threats.

Moreover, the United Kingdom has faced similar dilemmas, particularly in the realm of public interest immunity, where the government can refuse to disclose documents deemed detrimental to national security or sensitive state interests. This practice, while intended to protect state secrets and preserve the integrity of national security, also invites concerns regarding the predictability and consistency of judicial outcomes. The interaction between security interests and judicial processes raises significant questions about how justice is rendered under such conditions; ultimately, the implications of public interest immunity might create a similar atmosphere of uncertainty and concern as those prevailing in sealed cover jurisdictions. This impasse prompts a critical examination of how these international standards echo within the Indian context, where sealed cover jurisdiction is increasingly deployed, perhaps with less judicial oversight than seen in some western democracies.³⁴

³³ Ishika Kedwal, "Whether the Doctrine of Sealed Cover Jurisprudence followed in India as an Antithesis of the Principle of Natural Justice?", available at: <http://dx.doi.org/10.2139/ssrn.4818490>

³⁴ Public Interest Immunity, available at: <https://www.lexisnexis.co.uk/legal/guidance/public-interest-immunity> (last visited on: September 14, 2024).

Although the Indian judiciary has incorporated procedural safeguards to counter potential abuses, such as requiring judicial approval for the application of sealed covers, the opacity surrounding their usage can lead to situations where litigants find themselves at a distinct disadvantage, mirroring challenges faced in other democratic contexts. The authoritative character of judicial rulings that arise from processes shrouded in secrecy may erode public trust in the legal system, ultimately jeopardising the legitimacy of judicial authority itself.³⁵

Furthermore, the burgeoning discourse around international human rights norms increasingly questions the effectiveness of sealed cover practices, as they may contravene principles of transparency and accountability intrinsic to the right to a fair trial. As legal frameworks evolve globally, various human rights instruments call for restrictions on rights to be minimal and only justified where absolutely necessary. For instance, the adoption of the principles outlined in the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR advocates that any restrictions on rights must, notably, be subject to strict tests of necessity and proportionality.³⁶

In this regard, the Indian judiciary must grapple with not only domestic imperatives but also the expectations set forth by these international frameworks. As such, this comparison reveals a significant global dialogue surrounding the necessity of transparency and the legitimacy of sealing documents in judicial processes, and how such issues resonate across borders. The potential for significant abuses and miscarriages of justice necessitates a re-evaluation of how sealed cover practices are administered in India, particularly in light of the overarching principles of justice upheld by various international legal frameworks; this renders the discussion not just a theoretical exercise but a practical imperative for enhancing the judicial landscape.³⁷

Additionally, emerging socio-legal studies indicate that the trend toward sealed cover jurisdiction can reflect broader patterns of governance and its relationship with civil society. For instance, Juliet Lodge's exploration of bioethics and security practices raises pertinent questions about the

³⁵ Gautam Bhatia, "A petty autocracy: The Supreme Court's evolving jurisprudence of the sealed cover" available at: <https://indconlawphil.wordpress.com/2018/11/17/a-petty-autocracy-the-supreme-courts-evolving-jurisprudence-of-the-sealed-cover/> (last visited on: September 15, 2024).

³⁶ Peter Kovacs, "Developments and Limits in International Jurisprudence", 31(3) Denv. J. Int'l L. & Pol'y 461 (2003) available at: <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1363&context=djilp> (last visited on: September 15, 2024).

³⁷ Diksha Singh & Prateek Sharma, "The Practice of Sealed Cover An Interplay of Judicial Discretion and the Rights of the Accused" 3(2) Int'l J. Law M & H 461 (2020), available at: <https://www.ijlmh.com/wp-content/uploads/2020/05/The-Practice-of-Sealed-Cover-An-interplay-of-judicial-discretion-and-the-rights-of-the-accused..pdf> (last visited on: September 16, 2024).

privatisation of security mechanisms and how these intersect with democratic principles, particularly regarding accountability and oversight. As states navigate the complexities of information management amidst globalised security threats, it becomes essential to revisit how sealed cover protocols align—or clash—with established norms of judicial accountability and public oversight. These dynamics highlight the necessity of scrutinising state actions in the context of civil liberties and the public's right to know.

Ultimately, the convergence of these international practices provides a rich backdrop against which India's sealed cover jurisdiction can be critically evaluated, highlighting the potential need for reform that not only embraces the security concerns at hand but also fortifies the foundational principles of an open and fair judicial system. In recognising the significant implications of international standards on domestic practices, it becomes increasingly clear that aligning Indian practices with these global benchmarks can bolster the judiciary's credibility while reinforcing the very tenets of justice that underpin democratic governance. Such alignment not only enhances legal protections and transparency but also affirms India's commitment to upholding the rule of law in a manner that is consistently equitable and just across all strata of society.³⁸

CONCLUSION

The use of sealed cover proceedings in the Indian judicial system has been a subject of controversy for over a decade. Many judges and legal scholars have criticized the practice for its lack of transparency and rigidity. While sealed cover jurisprudence is often justified on the grounds of protecting the confidentiality of government documents, critics argue that its frequent use is problematic, particularly when it is invoked in cases involving the government. Prominent figures such as Chief Justice D.Y. Chandrachud and former Chief Justice N.V. Ramana have expressed concerns, warning that if the practice is overused, it could become a tool for the government to unfairly gain an advantage in legal proceedings.³⁹

Chief Justice Chandrachud, for example, has pointed out that sealed cover proceedings lack transparency and undermine the fairness of the judicial process. When one party is not allowed

³⁸ Shreya Atrey & Gautam Bhatia, “New Beginnings: Indian Rights Jurisprudence After Puttaswamy”, available at: <https://ohrh.law.ox.ac.uk/wp-content/uploads/2021/04/U-of-OxHRH-J-New-Beginnings-2-1.pdf> (last visited on: September 16, 2024).

³⁹ Komal Ahuja, “Sealed Cover Jurisdiction and its Implications for the Judicial Process in India”, available at: <https://bhattacharyyassociates.com/sealed-cover-jurisdiction-and-its-implications-for-the-judicial-process-in-india/> (last visited on: September 16, 2024).

to access the evidence presented against them, it becomes impossible for them to defend themselves adequately, thereby violating the principles of natural justice. This stands in direct opposition to the open court system, where both parties are fully aware of the arguments and evidence presented. Withholding critical information from the opposing party significantly hampers their ability to mount a defence, while simultaneously giving the government, which often provides these sealed documents, an undue advantage.⁴⁰

To ensure fairness, both parties should be treated equally before the court. No side should receive special treatment, except in cases where national security, foreign policy, or defence interests are at stake. In the Pegasus spyware case, the court required the government to demonstrate why the information submitted in a sealed cover should remain confidential, marking an effort to limit the practice's unchecked use. This approach aims to curb the over-reliance on sealed cover submissions, ensuring that they are only employed when absolutely necessary.

The Supreme Court has also suggested the use of Public Interest Immunity proceedings as a more flexible and less restrictive alternative to sealed cover proceedings. However, it has acknowledged that Public Interest Immunity is not a complete substitute. The sealed cover process remains an important tool in certain cases, particularly when dealing with sensitive information. The core issue lies in the frequent and sometimes unnecessary invocation of this method, which can be misused to gain an unfair advantage rather than for its intended purpose of safeguarding legitimate confidential material.

In conclusion, while sealed cover proceedings serve a purpose in protecting sensitive information, their misuse risks compromising the fairness of the judicial process. It is crucial to limit their application to cases where confidentiality is truly warranted, rather than allowing them to be a default tool that tilts the scales of justice in favour of one party.

⁴⁰ Gautam Bhatia, "Proportionality, Sealed Covers and the Supreme Court's Media One Judgment", available at: <https://thewire.in/law/supreme-court-media-one-sealed-cover-analysis> (last visited on: September 16, 2024).

LEGAL ACCOUNTABILITY FOR DISHONOURING POST-DATED CHEQUE WITHOUT SUFFICIENT BALANCE

- Dr. Farhana* & Khushboo**

Abstract

Issuing a post-dated check without sufficient balance in the bank account at its presentation can lead to serious legal consequences. Although post-dated cheques are widely used due to their reliability, low risk, and security, they can create difficulties when there aren't enough funds in the account when presented. To protect the interests of the payee, Sections 138 to 142 of the Negotiable Instruments Act cover the dishonour of such checks. This research paper examines the legal responsibility of dishonouring post-dated checks due to insufficient funds, analyses the relevant legal framework, discusses potential consequences, and proposes preventive measures to reduce associated risks.

Keywords: Negotiable Instruments, Banking, Cheque Dishonour, Bank Account, .

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INTRODUCTION

The term “thing” in jurisprudence refers to an object of rights, such as a negotiable instrument. It is considered a “thing” because it not only represents money but also embodies rights. When a person lawfully obtains possession of such an instrument, they acquire legal title to it. Additionally, the instrument is not affected by any defects or fraud in its source as long as its acquisition is genuine and of value.¹

Cheques are important not only for corporate entities but also for ordinary people when they receive payments such as their salaries, rent in advance, finalising business deals, or securing home loans in the form of cheques. In routine commercial dealings, transactions are not always conducted in cash. As commerce and trade continue to expand, the increasing demand for money cannot always be met with immediate cash exchange. Often, a business may not have ready cash available or may prefer not to carry large amounts of money. To address these challenges, businesses have adopted the use of negotiable instruments (NI) as substitutes for money. These instruments facilitate transactions and represent a written, unconditional order or promise to pay a specific sum of money, negotiable from one party to another by delivery or endorsement. The legal framework governing NIs in India is primarily contained in the Negotiable Instruments Act 1881², along with its subsequent amendments in 1988, 2002, 2015, and 2018. The origins of this law can be traced back to personal laws, as well as the customs and usages of merchants and traders long before the Act was passed. This framework is crucial in regulating the issuance and dishonour of post-dated cheques, particularly when there are insufficient funds in the issuer's account, highlighting the importance of legal provisions under Section 138 of the Act.

In this context, understanding the rights and obligations of parties to a cheque is essential. The drawer of the cheque is obligated to ensure that there are sufficient funds in the account to cover the amount. The payee, on the other hand, has the right to expect payment upon presentation of the cheque. If the cheque is dishonoured, the payee can initiate legal action under Section 138 of the NIA.

Precautions while drawing a cheque include ensuring the accuracy of the date, the amount in words and figures, and the signature. It is also important to avoid any alterations or overwriting, as these can lead to the cheque being dishonoured. Similarly, precautions while receiving a

¹ LSD Law, “Things in Action.” available at: <https://www.lsd.law/define/things-in-action> (last visited on: July 15, 2024).

² Hereinafter referred as NIA

cheque involve verifying the details such as the date, the amount, the drawer's signature, and the validity of the cheque. Additionally, it is prudent to confirm that the drawer has a history of sufficient funds and to present the cheque for payment within the stipulated time frame to avoid issues related to the validity period.³

What is a post-dated check, and how does the specified date impact its validity and acceptance by the bank?

A post-dated cheque is a standard or regular cheque with a future date written on it instead of the date on which the cheque is written. The bank can only honour the cheque on or after the specified date, which can be in the future. The specified date determines the validity of the post-dated cheque.⁴

Suppose Raj has to pay a supplier INR 5,000 on 10th August for transactions he made 60 days ago. Since Raj lacks the funds to pay the supplier, he agrees to send the supplier two INR 2,500 cheques, one dated 10th September and the other dated 10th October. The supplier undertakes to hold and deposit the cheques as specified. In addition, Raj ensures the supplier that his bank will pay the cheques on the specified dates.

When Raj's PDC cheques arrive on 20th August, the supplier must not debit cash or credit accounts receivables because the dates on the cheques state that the cheques cannot be encashed before those dates. This feature allows Raj to issue a cheque but has control over when the supplier gets paid.

Validity of a post-dated cheque

Post-dated cheques, like regular cheques, are valid for three months from the date of issuance. The Reserve Bank of India reduced the validity period of all cheques from six months to three months, effective April 1, 2012. It's important to note that the three-month period is calculated based on the date of issuance, not the number of days. For example, if a cheque is issued or payable on January 1, 2024, it will be valid until March 31, 2024, regardless of the number of days in between.⁵

³ Avtar Singh, Negotiable Instrument (Eastern Book Company, New Delhi, 3rd Ed., 2016).

⁴ Khatabook, "All You Need to Know About Post-dated Cheques" available at: <https://khatabook.com/blog/what-is-post-dated-cheque-and-how-to-write-it/> (last visited on July 18, 2024).

⁵ Ibid.

What is a bank cheque, and how is it used in financial transactions?

A cheque is a written instruction to the bank requesting the payment of a specified sum from the account holder to the payee. Cheques are designed with specific security features to prevent forgery, and they are often customised by the respective banks with the account holder's name or number to ensure uniqueness and traceability.

Cheques are used in financial transactions:

1. Payment for Goods and Services,
2. Salary Payments,
3. Rent and Utilities bills,
4. Loan Repayments,
5. Clearing Debts,
6. Security Deposits,
7. Gifts and Donations.

OBJECTIVES

To examine the legal accountability for dishonouring post-dated cheques due to insufficient balance under Section 138 of the NIA and to propose improvements to the legal framework and preventive measures to enhance enforcement and reduce incidences of cheque dishonour.

This paper aims to investigate the legal responsibility for bouncing post-dated checks due to insufficient funds under the NIA. This study will analyse Section 138 and relevant case laws, identify challenges faced by recipients of this cheque, and propose practical precautions. Additionally, it seeks to provide policy recommendations to enhance the legal framework, ensuring better protection for recipients and creating a more secure financial transaction environment.

LEGAL FRAMEWORK: DISHONOR OF POST-DATED CHEQUES

When a bank refuses to process a cheque you have submitted, it is known as a dishonoured cheque. This rejection can occur for reasons such as insufficient balance in the account, a signature mismatch, a post-dated cheque, and several other reasons like overwriting, stale cheques, or stopping payment.

The NIA regulates post-dated cheques; according to this Act, if a post-dated check is dishonoured, it could lead to the following legal consequences:

- A fine of up to twice the amount specified on the check,
- Imprisonment for up to one year,
- And, or both of the above.

The NIA was created to define and amend the laws regarding Promissory Notes, Bills of Exchange, and Cheques. This act has been periodically amended to ensure quick resolution of cases involving the offence of cheque dishonour.

The ingredients of the offence as contemplated under the Act are as under⁶

1. The cheque must have been written to settle an existing debt or obligation. Legally enforceable debt:
2. The cheque must be presented within 3 months or before the validity period ends, whichever comes first
3. A cheque will be returned unpaid if there are insufficient funds or if it exceeds the arranged amount.
4. The fact that the cheque has been dishonoured must be communicated to the drawer within 30 days.
5. The drawer of the cheque must fail to make payment within 15 days of receiving the notice.⁷

Classification of offence

A violation under Section 138 is considered a non-cognizable offence, which means a police officer cannot arrest the accused without an arrest warrant. It is also a bailable offence. In the case of *Dashrath Rupsingh Rathod v. State of Maharashtra*⁸, it was held that an offence under Section 138 is considered complete upon the dishonour of a cheque. However, no court can take cognisance of the offence until the complainant has a cause of action under clause (c) of the proviso, read in conjunction with Section 142.

⁶ Tejaswi Pandit “Dishonour of Cheque [S. 138 NI Act and allied sections]” available at: <https://www.scconline.com/blog/post/2019/05/07/dishonour-of-cheque-s-138-ni-act-and-allied-sections/> (last visited on July 20, 2024).

⁷ The Negotiable Instruments Act, 1881, sec. 138

⁸ 2014 (9) SCC 129

Liabilities on Dishonour of Cheques

Civil Liability: According to Section 138 of the NI Act, civil liability is imposed by requiring a fine of twice the amount of the dishonoured cheque. If the payee files a suit under Order 37 of the Code of Civil Procedure, 1908, and the judgment favours the payee, the drawer must pay the amount specified in the court order.

Criminal Liability: Section 138 prescribes punishment of imprisonment for up to two years, or a fine, or both. Additionally, the drawer of the cheque can be prosecuted under Sections 417 and 420 of the Indian Penal Code (IPC), 1860.

Judicial Interpretations and Case Law

*ICDS Ltd. v. Beena Shabeer*⁹

The Supreme Court has clarified Section 138 of the NIA, emphasising its broad scope and intent. The Court noted that the section's language is specific, beginning with the phrase "Where any cheque," and the term "any" is important, indicating that regardless of the reason, if a cheque is drawn on an account with a banker to discharge a debt or other liability, the liability under this provision cannot be avoided if the cheque is returned unpaid by the banker. The Court stressed that the clear language of Section 138 leaves no doubt that if a cheque is issued to settle a debt or liability and is dishonoured, the provisions of Section 138 apply.

*Sampelly Satyanarayana Rao v. Indian Renewable Energy Development*¹⁰

On March 15, 2001, Sampelly Satyanarayana Rao, a director of a power generation company and Indian Renewable Energy Development Agency Limited, entered into a loan agreement for Rs. 11.50 crores for a Biomass Power Project. According to clause 3.1(iii) of the agreement, the appellant was required to issue post-dated cheques as security for the repayment of loan instalments, including both principal and interest. However, the post-dated cheques were dishonoured, leading to a complaint filed by the respondent.

The main legal question was whether the dishonour of post-dated cheques issued as security for a loan would fall under the provisions of Section 138 of the NIA.

⁹ (2002) 6 SCC 426

¹⁰ (2016) 10 SCC 458

The Supreme Court ruled that the applicability of Section 138 of the Act depends on whether the post-dated cheques were issued for the discharge of a legally recoverable debt or liability on the specified date. The Court clarified that even though the cheques were described as “security” under the loan agreement, they were actually issued to cover the repayment of the outstanding loan instalments.

The Court stated that once the loan was disbursed and instalments became due on the specified dates, the dishonour of such cheques falls under Section 138 of the Act as they represent the outstanding liability.

*Indus Airways (P) Ltd. v. Magnum Aviation (P) Ltd.*¹¹

In the Indus Airways case, it was determined that the dishonour of a post-dated cheque did not fall under Section 138 of the NIA. This was because the purchase order for which the cheque was issued had been cancelled, and therefore, the cheque did not represent any existing outstanding liability or debt. In this context, a post-dated cheque is not considered an offence under Section 138 if it does not correspond to a legally enforceable liability or debt.

In contrast, the present case involves post-dated cheques issued as “security” for a loan. Despite being termed as security in the loan agreement, the primary purpose of these cheques was to repay the loan instalments, thereby satisfying the outstanding liability. The Court distinguished between a cancelled purchase order transaction and a valid loan transaction where the loan was disbursed, and repayment was due on the date of the cheque. The Court held that Section 138 is applicable in the latter scenario because the dishonoured cheques were intended to discharge a legally enforceable debt.

Precautions to take while writing a Cheque

1. Upon receiving your chequebook, verify the number of cheque leaves. If there is any discrepancy, inform the bank immediately.
2. Always keep your chequebook secure and never leave it unattended. Store it in a safe, locked place.
3. Never sign blank checks. Ensure you fill in the date, recipient's name, and amount before signing.
4. When appropriate, cross your check to prevent misuse.

¹¹ (2014) 12 SCC 539

5. Never issue blank cheques under any circumstances to prevent the risk of cheque bounce.
6. After filling in the recipient's name, amount, and any other open spaces, draw a horizontal line to prevent unauthorised alterations.
7. If corrections are needed, clearly cross out the error and sign the correction. However, it is better to use a new cheque instead of making multiple changes on one.
8. When cancelling a cheque, invalidate it by drawing a line across the face and writing "CANCEL" on it.
9. Always store your chequebook and bank cards separately to improve security.
10. Properly destroy all cancelled cheques.
11. Avoid issuing a post-dated cheque.

Precautions to take when receiving a cheque

1. Only accept a cheque or banker's draft from someone you know and trust, especially for high-value transactions.
2. Do not accept cheques written in pencil.
3. Ensure that the cheque is accurately dated and fully completed.
4. Do not accept cheques that show any signs of alteration.
5. Avoid accepting post-dated cheques or agreeing to hold a cheque for future deposit.
6. Be cautious with single or loose cheques that are not part of a complete cheque book.
7. Store received cheques in a safe place and deposit them into your account as soon as possible.
8. Deposit your cheque within six months of its date, as it becomes stale and may not be honoured by the bank after that period.
9. If you receive a cheque for more than the agreed amount when selling an item, do not transfer the excess amount to the buyer or release goods until you are sure the cheque or draft is genuine and has been cleared.

Implications of the New Law

The new law introduces several significant changes for both businesses and individuals in India:

1. Accelerated Case Resolution: Cases will now be resolved within six months, providing quicker relief for cheque bounce disputes.

2. Enhanced Flexibility: Filing cases can now be done at either the place where the cheque was issued or where the complainant's bank branch is located, offering greater convenience.
3. Compounding of Offenses: This provision aims to ease the court's workload and expedite resolutions through settlement options.
4. Tougher Penalties for Repeat Offenders: Stricter penalties for repeat offenders deter future cheque bounce incidents and reduce their overall frequency.

CONCLUSION

The dishonouring of cheques is a significant issue in financial transactions involving negotiable instruments. As this problem has become more prevalent in legal settings, the law has evolved rapidly to address various aspects of cheque dishonour. According to the NIA, the drawer of a cheque can be held liable for dishonouring it, even if they were initially unaware of insufficient funds in their account. The law outlines a reasonable timeframe for repayment to the payee, and failure to rectify the situation within this period is considered a criminal act, reflecting an unlawful intention to withhold payment from the rightful party.

Post-dated cheques, while useful for scheduling or deferring payments, must be issued with full awareness of the account balance to avoid legal repercussions. Recent developments in the law offer faster resolution and stricter penalties for repeat offenders, aiming to enhance accountability and reduce the frequency of such cases.

To mitigate the risks associated with cheque dishonour, both businesses and individuals should take proactive measures. Maintaining a sufficient balance, carefully verifying cheque details, keeping track of issued cheques, and considering alternative payment methods, such as online transactions, can significantly reduce the likelihood of cheque bounce incidents. By adhering to these precautions, parties can ensure smoother and more reliable financial transactions while aligning with the legal expectations set forth by the NIA.

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INTERNAL DISPLACEMENT IN KASHMIR POST-2019: THE IMPACT OF REVOCATION OF ARTICLE 370 ON LOCAL POPULATIONS AND MIGRATION PATTERNS

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Abstract

This paper looks at the case of internal displacement in the context of Jammu and Kashmir's post-Indian government action to revoke Article 370 in August 2019. Article 370 granted special autonomy to the region, thereby rendering tremendous changes in the political, social, and economic landscape, resulting in heightened militarisation and new land laws that have increased internal displacement, especially among rural communities, minorities, and vulnerable groups. Qualitative analysis with interviews and some secondary data from human rights organisations in looking into how increased military operations, changes in laws of land ownership, and disruption in governance have resulted in new trends in the issue of migration. Issues analyse displacement among farmers and tribal groups along economic lines, a marginalisation of social and political frameworks for minorities, and mental health implications within the displaced populations. The paper, in its conclusion, appeals for policy reforms along the lines of granting legal protections to the IDPs and so providing mental health support and overall development processes that would ensure stakeholder participation.

Keywords: Internal Displacement, Article 370, Kashmir Conflict, Land Reforms, Special Status.

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INTRODUCTION

The Indian government, on August 5, 2019, abrogated Article 370, establishing a watershed moment in the political life of Jammu and Kashmir (J&K), whose issues, already harsh in themselves, profoundly exacerbated displacement issues in the region. Introduced primarily to afford special autonomy to J&K, Article 370 recognised the uniqueness of the demographic and historical context of the place following its accession to India in 1947, as it was permitted to have its own constitution and laws. However, it lost all its significance with amendments over the years and was gradually effaced from national politics, causing conflict in local desires for autonomy and the central government policies of integration. The decision taken by the BJP government to scrap this article was portrayed as an imperative move for national integration and development, but this evoked complete unrest and fears amongst the residents that their rights were being taken away. Immediately, militarisation started booming with a huge increase in the security forces whose presence instilled fear and prompted most of the residents to start fleeing their homes in pursuit of safety. It is reported that thousands of families, especially those close to conflict zones, would migrate to safer areas in Jammu or altogether move out of J&K¹. The revocation also led to judicial reforms that further added to internal displacement; the expropriation of land by non-natives through a new statute, which epitomises demographic dislocation and loss of identity within those natives, made things even more complex. Socio-economic insecurity arising from political instability pushed people into poverty and urged them to look for greener pastures elsewhere. The effects of this internal displacement are drastic; internally displaced families mainly end up losing their source of income since they are forced to abandon agricultural lands or small businesses, which eventually contributes to the worsened poverty levels. It is also psychosocial in nature since most of the victims narrated feelings of loss and trauma; findings of the studies portrayed an enormous number of IDPs with symptoms of PTSD. Areas like Jammu, at any time when the displaced persons arrive, face resource allocation problems and social cooperation problems that invite tensions between newcomers and long-time residents. This is that dimension of disruption in education that's inevitable for children; any displacement or instability at home in the present means a hitch in schooling². Though the government has ensured certain policies on rehabilitation and resettlement, bureaucratic

¹ Sameer P. Lalwani & Gillian Gayner, "Special Report on India's Kashmir Conundrum: Before and After the Abrogation of Article 370", (US Institute of Peace, 2020), available at: <http://www.jstor.org/stable/resrep25405> (last visited on: 18.10.2024).

² Khurram Abbas, "Strategizing Kashmiri Freedom Struggle Through Nonviolent Means" 16 (2) *Policy Perspectives* 41 (2019), available at: <https://doi.org/10.13169/polipers.16.2.0041> (last visited on: 18.10.2024).

inefficiency does not help in enforcing such policies efficiently. The NGOs supplement what the IDPs are trying to do by filling certain gaps with even the most elementary forms of services like rendering legal and mental health advice. Their work's efficacy is often belied by security situations. Such situations of internal displacement would demand integrated responses that address not only the cause but also work towards social cohesion, economic opportunities for all those residing there, and other sustainable solutions through actualized immediate humanitarian assistance complemented by long-term development plans that empower such dislodged populations. Advocacy for human rights protections at the national and international fronts will be essential in ensuring that this miserable plight of the internally displaced populations of Kashmir is brought to the world's attention. In other words, the dynamics around this phenomenon will be important for developing policies for Kashmir that succeed in addressing the needs of those internally displaced yet can still promote stability in the region--as these changes take place, local voices must be at the heart of any discourse over governance and community rebuilding that may occur going forward³.

LITERATURE REVIEW

Internal displacement in Kashmir, within the lens of Article 370 revocation, has been one of the most widely covered scholarly literature themes in relation to its immediate people-level implications and migration trends. This literature review is an attempt to synthesise key findings from several sources that examine the diversified implications of this political intervention.

The write-up by Lalwani and Gayner speaks about the political scenario of Kashmir before and after the annulment of Article 370. According to the authors, "*current abrogation has further escalated already existing tensions that have rendered the space more militarized and therefore displaces the locals*". The authors contend that the actual present displacement is neither a result of direct violence alone but is based on historical grievances and socio-political dynamics for several decades. The work very aptly depicts how a sense of insecurity amongst the residents' communities gets expanded due to abrogation, particularly amongst weak groups like Kashmiri Muslims and tribal communities, and the resultant forced migration.

Abbas discusses the extra political ramifications of internal displacement within the freedom struggle in Kashmir. He advocates for a non-violent response to address the issues of internally displaced individuals, positing that listening to their stories is important as a prelude to a

³ Alyssa Ayres, "Human Rights and Democracy in South Asia", Council on Foreign Relations (2020) available at: <http://www.jstor.org/stable/resrep26155> (last visited on: 18.10.2024).

meaningful resolution of the conflict. Abbas's standpoint highlights the need to engage the voices of stakeholders who have been affected by displacement in wider discussions on the future of Kashmir and claims that these voices must be at the centre of policy formulations.

Ayres, in his paper, notes that even increased militarisation since the revocation of Article 370 has resulted in huge human rights violations. His analysis points towards rising unlawful killings and arbitrary detentions that further add to an atmosphere of fear and instability, making people run away from their homes. Ayres's work remains fundamentally critical of reframing displacement from being anything but a population issue to becoming a human rights crisis that urgently needs attention from both national and international actors.

Bilal Ahmad Mir, a conflict-induced displacement case study on the Kashmiri Pandit community, has several doubts over migrant-specific issues. The author of this study comes to the conclusion that though some cases have been rehabilitated successfully, many face identity and belonging and resource access issues after migration. According to Mir, a return migration policy can be created so that it may help overcome psychological shocks or trauma and socio-economic needs for effective resolution.

Whilst focusing on the experience of Kashmiri Pandits, Sudha Rajput engages the global landscape of displaced groups in order to draw a comparative study of internal displacement. A comparative approach facilitates a deepening understanding of common patterns within forced migration due to conflict because it points out how socio-political contexts may configure individual experiences, as the findings for Rajput convey that despite universal elements of displacement, local histories and identities are profoundly influential in how communities react to crises of this nature.

The BBC describes in journalistic terms what went around Article 370 with abrogation, putting things in the right context for public sentiments and governmental responses, including how this political step has been received both around the world and back home to frame this as one of the most pivotal moments in the long-held struggle of Kashmir for autonomy and self-determination.

As far as mental health outcomes are concerned, the psychosocial implications of displacement among IDPs in Kashmir. They found that there was a wide prevalence of mental health problems among the IDPs who had been further debilitated due to lost means of survival and social disturbances. This paralleled the findings whereby they stressed that chronic exposure to

trauma from conflict amplifies the manifestations of PTSD and depression among affected individuals.

Different sources point to the need for these policy reforms. For example, the Institute of Peace and Conflict Studies concludes that this sets forth comprehensive legal protection of the rights of IDPs concerning the issues of housing, health care, and education. Similarly, WHO puts forth the integration of mental health services into humanitarian responses as a precondition for effective psychological attention to displaced populations.

Being a distant past affair for Jammu and Kashmir post 2019, human rights violation issues continue. As stated by Amnesty International, increased militarisation has resulted not only in physical loss but also in psychological tension among these affected communities, thus putting an urgent call from national authorities and international organisations to act effectively and safeguard human rights in the region.

Radha Kumar contributes to this by mentioning how ‘the erosion of autonomy in Kashmir post-Article 370 has all the significant implications for local governance and community resilience. He pointed out how politics can distil and exacerbate vulnerabilities among already marginalised groups.

In fact, the literature written on displacement in Kashmir post-2019 reveals an interplay of politics with socio-economic implications for the local population. However, the decision to abrogate Article 370 has not only sharpened existing conflict but also challenged all those who have suffered at the hands of violence and insecurity that causes displacement. The issues will, therefore, require multilevel responses, ranging from human rights perspectives to psychological counselling and broader policy changes intended to build stability and resilience in impacted regions. As researchers continue their critical examination of these topics, it becomes increasingly evident that an understanding of the realities experienced by displaced people forms a key development point for meaningful intervention and sustainable peace in Kashmir.

METHODOLOGY

The current qualitative study undertakes a historical analysis of the effects of Article 370 abrogation on the internal displacement within Jammu and Kashmir (J&K) after 2019. For this research, the design is two-fold: primary interviews and secondary data analysis.

Primary Data Collection

1) Interviews:

For some direct first-hand experiences regarding displacement, the research will try to interview three significant groups using semi-structured interviews:

- Displaced People: Interviews would be conducted with those affected since the rescission of Article 370. Such a population will relate personal testimonies of their experience, factors that make them migrate, and how displacement has affected them socio-economically. The interviews would thus be structured towards eliciting specific stories along themes such as loss of livelihood, resource availability, and psychological effects.
- Community leaders: By contacting local community leaders representing diverse ethnic and social groups, the individual experiences can be contextualised within the whole of community dynamics. They might give insights into the community response, coping mechanisms, and the socio-political climate in J&K since 2019.
- Local Officials: Interviews with local government officials will reveal how the officials tackle displacement through policy measures, including rehabilitation measures and changes in land ownership laws. Recognition of the official narrative will, therefore, enable an understanding of the success or failure of government measures and bring out inconsistencies between policy and practice.

Interview Methodology

- A purposive sampling strategy would be used; the participants selected with whom good, appropriate information can be gathered.
- They shall be held in person or by alternative, safe digital means, taking into account issues of access and safety.
- All interviews will take about 45-60 minutes, and they will be audio-recorded with the subjects' consent for accuracy.
- It will involve thematic analysis in a bid to provide dominant patterns and insights generated from interviews so that the experiences of individuals or communities are gotten in-depth.

Secondary Data Analysis

- 2) Document Review: With the major data acquired during the interviews, this study shall rely on the following secondary sources to complement them:

- Human Rights Organisations: Studies of organisations like Amnesty International and Human Rights Watch will be consulted with the objective of gathering information regarding documented and verified reports on human rights violations caused by enforced displacement. For example, Bilal Ahmad Mir's article "Kashmiri Pandits Amid Conflict-induced Displacement: Facts, Issues, and the Future Ahead" addresses the situation of the displaced Kashmiri Pandits since 1990 and how their plight has become a long story as no international help has come forward⁴.
 - Government Documents: Official Indian government documents related to the policies adopted after the revocation of Article 370 will be consulted. These would include the legislative texts that account for amendments in land ownership law. The article "Transitional Policies and Durable Solutions for Displaced Kashmiris" resonates by making a statement that initial policies could not work as durable solutions for the displaced communities⁵.
 - Media Reports: Socio-political changes occurring in the J&K region can be put into perspective due to media reports not only of the country but across the globe. For instance, the BBC article "Article 370: What Happened with Kashmir and Why It Matters" details the happenings that made Article 370 revoked as well as its after-effects on locals⁶.
- 3) Data Analysis: These secondary data will be grouped on sub-themes such as the trends of migration, the socio-economic impacts, changes in legislation and land ownership, and the response from the community.
- These would be cross-checked against the results of the primary interviews and some secondary sources for points of consistency or inconsistency in the narrative accounts of displacement.
- 4) Ethical Issues:
- In any research involving vulnerable groups, ethics should be given top priority. Before the data collection of interview respondents, informed consent will be sought from the respondent. The respondents will also be assured of confidentiality and anonymity

⁴ Bilal Ahmad Mir, "Kashmiri Pandits Amid Conflict-induced Displacement: Facts, Issues, and the Future Ahead" 14(1) *Journal of Internal Displacement* 2-23 (2024)

⁵ Sudha Rajput, *Internal Displacement and Conflict: The Kashmiri Pandits in Comparative Perspective* (Routledge, London 2019), available at: <https://doi.org/10.4324/9780429427657> (last visited on: 18.10.2024).

⁶ BBC, *Article 370: What Happened with Kashmir and Why It Matters*, 6 August 2019, available at: <https://www.bbc.com/news/world-asia-india-49234708> (last visited Oct. 18, 2024).

throughout the research. Emotional sensitivity to the experiences of displacement will also be cherished during interviews.

This shall be a mixed-methods one: qualitative interviews together with secondary data analysis to give an all-rounded account of the complex dynamics involving internal displacement in Jammu and Kashmir since 2019. Living testimonies will go hand-in-hand with documented evidence for the illumination of the socio-political landscape of the region underpinned by the lived experience of the displaced people and communities.

INCREASED MILITARIZATION AND ITS ROLE IN DISPLACEMENT

The military in Kashmir has increased further after the revocation of Article 370 in August 2019, thus increasing fear, insecurity, and further displacement of forced migration in local populations. The Indian government, after this political turn, increased military presence within the region, where security operations increased, and curfews were repeated, especially in regions like the conflict-prone Pulwama and Shopian districts. Accounts by groups such as Amnesty International and Human Rights Watch report the internal displacement of civilians attributed to military operations and curfews⁷. For instance, the report by Amnesty International illustrates how security measures that barred movement resulted in mass evacuations in the security operations against acts of insurgency. Only, it fed the perpetual oppressive atmosphere of fear and drove people out of their homes seeking safety and stability. Where proponents will argue that only a semblance of stability would exist if the military is increased, critics quite rightly have pointed out that this so-called stability came through too high an expense: civilian displacement and gross human rights violations⁸. This proposition to keep a region in order fails to take into account the toll it takes psychologically and socially on the local populace in terms of militarisation. In one report, Human Rights Watch comments that overkill by the forces may boost the civilian death toll and violence within communities. The residents are very afraid to go back home even after some periods of relative calm owing to the risk of incurrence of wrath of violence and retribution. Further, the characterisation of Kashmiri Pandits as “migrants” has complicated matters even further because it seemed to be something taken on their part rather than something with violence⁹. Perception has alienated them from the host communities and limited access to services that seem meant to serve them. The narratives of increased

⁷ *Supra* note 1

⁸ *Supra* note 2

⁹ Institute of Peace and Conflict Studies, *Article 370 and the Reorganisation of Jammu and Kashmir*, (Special Report, 2019), available at: <http://www.jstor.org/stable/resrep19799> (last visited on: 18.10.2024).

militarisation for ensuring national security further complicate matters because it push out the voices of the ones actually affected by the displacement. This way, the escalated military force in Kashmir since 2019 has not only increased insecurity perceptions but also seriously displaced the civilians there. The militaries argue that such increases were necessary to maintain order, while their critics argue that such an approach has brought along human rights violations and long-term psychological traumas to the affected communities. The situation, therefore, calls for a more nuanced understanding of how increased militarisation shapes the security situation and the broader socio-political scenario in Kashmir¹⁰.

LAND LAW REFORMS AND ECONOMIC DISPLACEMENT

Abolishing Article 370 in August 2019 opened the gates for the increasing militarisation of Kashmir, and fearsome and insecure factors are found to be in growing proportions in terms of forced migration amongst the locals. Since such an incident, this shift in politics has been observed, and the Indian government has made tremendous efforts through crackdowns and curfews in some instances, mostly in conflict-prone districts such as Pulwama and Shopian¹¹. These were already notorious areas of violence and rioting, and it worsened with increasing military activities. It has some pieces of evidence from nongovernmental organisations like Amnesty International and Human Rights Watch, which indicate many situations where militant activities, such as raids and curfews, result in the displacement of civilians. For instance, all inhabitants have been subjected to forced evacuation from their neighbourhood in the course of security operations carried out in the quest to curb insurgency activities; hence, families have little alternative other than dispersal seeking safety¹². Such an atmosphere characterised by chronic fear leads to a vicious cycle of trauma and instability so that many residents are forced not only to abandon their homes but also their livelihoods. Proponents of militarisation believe that this is a necessity for keeping the region stable and at peace. Critics retort that such stability comes at ghastly price-tortured civilians and barbarities against human rights. The anecdotal claim so readily attributed to proponents of militarization—that militarisation means national security, the extreme psychological and social consequences the militarisation impacts on the civilian population. According to a report from Human Rights Watch, the typical victims of civil civilians and increased tension and violence in communities have been brought about by the

¹⁰ Chayanika Saxena, Iftekharul Bashar, Abdul Basit, Mohammed Sinan Siyech, & Amresh Gunasingham, “SOUTH ASIA: Afghanistan, Bangladesh, India, Pakistan, Sri Lanka” 12(1) Counter Terrorist Trends and Analyses, 40-69 (2020), available at: <https://www.jstor.org/stable/26865752> (last visited on: 18.10.2024).

¹¹ *Supra* note 1

¹² *Supra* note 9

heavy-handed tactics of security forces. Fear of violence and retribution is one good reason why most residents did not return home even after periods of relatively calm. Add to that, branding them as “migrants” has added insult to injury because the term is known to connote a voluntary emigration rather than an involuntary exile due to violence and insecurity¹³. Misrepresentation by such labelling alienates them from host communities and limits access to essential support services. These narratives that describe higher militarisation as an action measure for national security can only be listened to as merely silencing the voices of those who are in the face of displacement, and to remedy this, critics say this approach is not just a way of continuing human rights violations but also undermines any genuine efforts toward reconciliation or peacebuilding in that region. Such psycho-social long-run effects on the affected communities are important because many suffer trauma from their experiences of violence and displacement that eventually translate into future mental health challenges¹⁴. In a nutshell, even though some may view increased militarisation as a way to calm Kashmir, its strategy has resulted in grave human rights abuses and immense civilian displacement. That calls upon the situation to factor in how increased militarisation not only affects problems relating to security at that level but also the social and political factors that would determine Kashmir. It leads policymakers crucially to the task of drafting rights-based policies that would preserve human rights and community well-being instead of military solutions. Commitment is required to the dialogue and acknowledgement of the complex realities faced by those residing in this historically troubled region.

IMPACT ON MINORITY AND VULNERABLE COMMUNITIES

After 370, visibly, the displacement unmatched to the minority groups and other marginalised groups in Jammu and Kashmir, mainly including Kashmiri Muslims and tribal society, was received on issues of land dispossession and socio-political changes. Reports of mass forced evictions and discriminatory policies told the story of the forced displacement of several rural Muslims immediately after the abolition of Article 370¹⁵. For example, Human Rights Watch narrates security forces operations in villages dislodged families under the guise of counterinsurgency. It uprooted people but also tore apart social fabrics and cultural affiliations. Besides, human rights bodies focus on challenges that these communities encounter while

¹³ Jagmohan, “The Politics of Maximum Autonomy” 37 (3/4) *India International Centre Quarterly*, 126-141 (2010), available at: <http://www.jstor.org/stable/41804083> (last visited on: 18.10.2024).

¹⁴ Radha Kumar, “Is Kashmir’s Autonomy History?” 48 (7/8) *Social Scientist*, 29-40, available at: <https://www.jstor.org/stable/26978884> (last visited: 18.10.2024).

¹⁵ *Ibid.*

relocating and access the government's support mechanisms to secure their socio-economic exclusion. Many reports show that the displaced family finds it difficult to get documents for their resettlement or to get any form of financial assistance, and consequently, is without a safety net. Though some pronounce the abrogation of Article 370 as a step for national integration since it places one consistent legal framework for all of India, the truth for many minorities remains one of increased vulnerability to displacement and exclusion from policy benefits. For example, such so-called integration often neglects the specific historical and cultural backgrounds of the concerned communities, thus making them further alienated from political processes¹⁶. Usage of terms like "migrant" or "displaced persons" for Kashmiri Muslims has created an impression that it was rather a voluntary exodus from the state and regions of their own accord instead of being forced out of violence and systemic discrimination. This distortion gives the authorities an avenue to circumvent responsibility for the occurrences that made these communities flee from their homes. The problems that other tribal communities have faced are also comparable, given new land laws post-revocation have made it easy for land ownership and a reduction in their traditional source of livelihood and cultural pursuits. Socio-economically, it is quite disastrous, with most of the people living in desolate conditions without education and employment opportunities, hence propelling the cycle of poverty and marginalisation. Poor policies are not representative of those particular minorities whose needs they claim to address but only inflame the flames that they would have otherwise been suppressing. Such policies do not promote integration and inclusion¹⁷. Instead, they bring about inequality and widen social cleavage. As such, even as proponents of revocation sing the praises of national unity in benefits, it is also telling that for most, the ravaging realities of displacement, disidentification, and continued struggles for recognition and rights place at the core of the plights of the Kashmiri marginalised populations amidst rapid socio-political change. This would call for a reappraisal of policies in the state and a promise to assert that voices from marginalised communities have been given due consideration against governance and development discussions in Jammu and Kashmir¹⁸.

PSYCHOSOCIAL CONSEQUENCES OF DISPLACEMENT

¹⁶ Muhammad Sajjad Malik, "Pakistan-India Relations: An Analytical Perspective of Peace Efforts" 39 (1) *Strategic Studies* 59-76 (2019), available at: <https://www.jstor.org/stable/48544288> (last visited on: 18.10.2024).

¹⁷ A. G. Noorani, "Kashmir and National Human Rights Commission" 35 (21/22) *Economic and Political Weekly* 1785-1787 (2000), available at: <http://www.jstor.org/stable/4409309> (last visited on: 198.10.2024).

¹⁸ *Supra* note 3.

Since Article 370 was abrogated, all the affected populations, especially women and children, are living through extreme psychosocial changes. Families share their stories of trauma, depression, and anxiety while reflecting on the loss of livelihood and social dislocation. For instance, whilst militarisation and crackdowns are on the rise, many families can now go without homes or places, many of whom are experiencing deep instability and fear¹⁹. Mental health studies carried out by organisations in that region show an acute rise in post-traumatic stress disorder, among many other mental health disorders, among displaced populations. According to Evidence for Policy and Practice Information and Co-ordinating Centre, such a systematic review published in this regard reflects the additive effects of trauma experienced during displacement, including violence, loss of loved ones, and disruption of community ties, which often result in severe psychological distress for people who have been displaced. It further reveals that nearly one-third of the people internally displaced are being subjected to very high levels of anxiety and depression, as well as PTSD, directly from their experiences²⁰. More particularly, the case is a crisis in the mental health areas of women and children due to family and societal pressure during those unsettling times. The level of vulnerability in resettlement through gender-based violence and discrimination is much higher, but the children are likely to suffer developmental delays as well as emotional disturbances directly from the traumatic experiences themselves. While certain government programs target relief efforts for the displaced, mental health care remains grossly underserved, especially for some of its most vulnerable service users, e.g. children and women²¹. Despite calls for reform of the national system by the UNHCR with regard to access to mental health care, stigma around mental illness, lack of knowledge regarding services offered, and prevailing cultural beliefs continue to represent several major factors contributing to more barriers in accessing a service. The stigma around mental illness can prevent persons from seeking help that may end up being the saving grace for those afflicted, thus maintaining a culture of shame around psychological health. So, the best community-based interventions that could address those issues are the least funded or badly implemented²². It is

¹⁹ Angela Nickerson, Shraddha Kashyap, *et al*, "Impact of displacement context on psychological distress in refugees: A longitudinal study", 31, e51 *Epidemiology and Psychiatric Sciences* 1-8 (2022), available at: <https://doi.org/10.1017/S2045796022000324> Published (last visited on: 18.10.2024).

²⁰ Kaz de Jong, Saskia van de Kam, *et al*, "Conflict in the Indian Kashmir Valley II: psychosocial impact", 2:11 *Conflict & Health* (2008), available at: <https://doi.org/10.1186/1752-1505-2-11> (last visited on: 18.10.2024)

²¹ Lana Ruvolo Grasser, "Addressing Mental Health Concerns in Refugees and Displaced Populations: Is Enough Being Done?", 15 *Risk Management & Health Care Policy* 909-922 (2022), available at: <https://doi.org/10.2147/RMHP.S270233> (last visited on: 18.11.2024)

²² Saleh Adel G. A. Al-Tamimi & Gerard Leavey, "Community-Based Interventions for the Treatment and Management of Conflict-Related Trauma in Low-Middle Income, Conflict-Affected Countries: a Realist Review",

already known that women and children in displacement require psychosocial support programs, yet those programs are grossly under-resourced, lacking adequate trained personnel to deliver effective service. Other than those mentioned above, some post-migration stressors, including poverty, insecure housing, unemployment, and legal challenges, contribute to conditions of mental health crisis that befall displaced populations. Economic instability often wracks families, restricting good-quality health care and education for children. It is an inwardly vicious cycle: poor mental health makes it difficult to have economic opportunities that are further compounded by mental health issues. This situation calls for inclusive mental health care, offering psychosocial support as part of broader responses by humanitarian actors. The specific needs of women and children demand short-term psychological interventions but strategies in the long term that work on social cohesion and economic empowerment²³. In essence, the psychosocial impacts of the displacement due to scrapping Article 370 are stark and permanent. Victims involving women and children suffer extreme trauma and anxiety resulting from the loss of livelihood sources as well as disruption to their respective social networks. There are some government-led relief efforts that fall far short of special mental health needs for these groups of victims. A collaborative effort between governmental and non-governmental sectors needs to build an all-inclusive support service system of mental health that is culturally appropriate for all the affected people in the vulnerable group. The model should take into account the inter-relations between psychological well-being and socio-economic stability to facilitate resilience in the affected displaced populace of Jammu and Kashmir.

POLICY IMPLICATIONS

Population displacement in the wake of the revocation of Article 370 brings the imperative need to the policy dialogue to ensure holistic policy intervention for many issues IDPs face in the state. Legal protection to be afforded to IDPs is one of the most crucial intervention areas. Thus, the Indian government should present clear, specific, and relevant legal provisions to ensure the evicted's rights regarding housing, health, and education. Many of the current IDPs remain unrecognised by formal documents, hindering their opportunities to receive basic services and accompanying support networks. As far as legislation is passed that ensures such rights, there would be a foundation on which dignity and stability could be restored to the displaced

²³ 15 *Journal of Child & Adolescent Trauma*, 441-450 (2022), available at: <https://doi.org/10.1007/s40653-021-00373-x> (last visited on: 07.01.2025).

²³ Anushikha Mondal, "The Impact of Historical Trauma on 'Internally Displaced' Kashmiri Pandits" 10 (3) *International Journal of Indian Psychology* 1303-1322 (2022), available at: <https://ijip.in/wp-content/uploads/2022/10/18.01.140.20221003.pdf>

populations. In particular, this legislation should provide them with safe housing, healthcare services, and means of education that re-embed them into society.

In addition, there is an urgent need for policy reforms on the land. The structure now often offers protection to development projects and acquisitions of land that displace local communities, especially vulnerable groups such as tribal populations and rural Muslims. Priority should be placed on local ownership of land, and development initiatives should not disadvantage the groups on the fringes. This can be achieved by participating in planning processes by engaging the local people at the decision-making levels on land-use and development project decisions. In this respect, inclusive approaches by governments can minimise the negative impact of displacement as they promote sustainable development for all members of the community²⁴.

Another area that deserves equal attention is the delivery of mental health care to the displaced. The psychological impacts of displacement, therefore, are of real significance. Most people suffer from trauma, anxiety, and depression due to such displacement. It is, therefore, highly important to have vigorous mental health care programs focusing particularly on the needs of the displaced populations. These are centred on trauma recovery and community support so that mental health care can be integrated into the existing healthcare frameworks. For example, community-based mental health support systems that empower the people concerned along with their psychological needs are very vital. Training the local health personnel so that they would be able to identify and treat improves service delivery in the sense that those displaced people are given proper treatment²⁵.

There is also a need for inclusive development policies that accommodate the active involvement of displaced people in the processes of decision-making. Development support projects should not only tie to direct relief but also ensure the resilience of the affected people in the long run. Policies incorporate IDPs in local economic and social development debates, thereby giving them a voice that ensures needs are met by policymakers. It will encourage successful interventions toward social cohesion and economic empowerment.

²⁴ Maknoon Wani, "BJP land reforms and the shifting political landscape in Kashmir", *Progressive International*. 14.06.2023, available at: <https://progressiveinternational.wire/2023-06-14-bjp-land-reforms-and-the-shifting-political-landscape-in-kashmir/en/> (last visited on: 18.10.2024).

²⁵ UNHCR Emergency Handbook, "Mental Health and Psychosocial Support", available at: <https://emergency.unhcr.org/emergency-assistance/health-and-nutrition/mental-health-and-psychosocial-support-mhpss/> (last visited on: 18.10.2024).

The UN High Commissioner for Refugees stresses that MHPSS should be integrated into the broader humanitarian response to displacement crises. Since mental health is part of the overall spectrum of well-being, UNHCR advocates for increased access to national mental health care systems for displaced persons, including capacity building of local health staff to establish an appropriate mental health service tailored specifically to the needs of IDPs²⁶.

In short, policies relating to the internally displaced persons of Jammu and Kashmir deal with seemingly unanswerable challenges. The legal rights have to be built in order to protect the rights of IDPs, while the land reforms should encourage local ownership and prevent further displaceable and developmental activities. A strong mental health support system would be required to address the psychological impact of being displaced on the affected people. The development policies, which include taking part of displaced people in decision mechanisms, will be the hallmark of resilience and adequate needs fulfilment. With such policy implications, the Indian government will move towards an equitable and supportive environment for internally displaced persons in Jammu and Kashmir, hence working for stability and social cohesion in the region.

CONCLUSION

The militarisation spurt in Kashmir post-abrogation of Article 370 generates broader implications for the region at large and possesses socio-economic and psychological impacts on affected populations. The spiking military presence here indeed creates a climate of fear and insecurity, especially in conflict-prone districts like Pulwama and Shopian, where security crackdowns and curfews have become a norm. Reports from Amnesty International and Human Rights²⁷ Watch, amongst others, have reported the instances in which the local populations were forcibly uprooted by military operations. The human cost is, therefore, the aftermath in the light of security measures. While proponents, in their theoretical analysis, would hold that increased militarisation brought stability to the area, critics would argue that such stability is achieved at the expense of civilian lives and hallow them open to human rights abuses while further marginalising vulnerable communities. The militarisation complemented by new land laws after

²⁶ WHO, “Delivering effective and accountable mental health and psychosocial support (MHPSS) during emergencies and beyond” 9 June 2023, available at: [https://www.who.int/news-room/feature-stories/detail/delivering-effective-and-accountable-mental-health-and-psychosocial-support-\(mhpss\)-during-emergencies-and-beyond](https://www.who.int/news-room/feature-stories/detail/delivering-effective-and-accountable-mental-health-and-psychosocial-support-(mhpss)-during-emergencies-and-beyond) (last visited on: 07.01.2025)

²⁷ Amnesty International, “India: Increase in unlawful killings in Jammu & Kashmir highlights government’s failure to protect its minorities” (2022), available at: <https://www.amnesty.org/en/latest/news/2022/06/india-increase-in-unlawful-killings-in-jammu-kashmir-highlights-governments-failure-to-protect-its-minorities/> (last visited on: 18.10.2024).

2019 has deepened economic displacement among rural farmers and tribals²⁸. Under these new rules, outsiders were made to own land ownership rights in Jammu and Kashmir, which evoked fear and intimidation among the local farmers about losing their ancient pieces of land. Already, a number of local NGOs have recorded incidents of foreign investment in real estate development, which resulted in the loss of land for small farmers and tribal people like Gujjars and Bakarwals. The positives argued that landed reforms would open investment, development, and growth opportunities in the region, while the negatives attest that the impacts would only restrict exclusions from said growth, dispossessing the local economies with resultant economic migration into further dislocation. These developments are seriously destructive for the regional minorities and other minority groups in the region, such as the Kashmiri Muslims and the poorer tribal communities. Nowadays, media reports are replete with cases of forced eviction, as well as discriminatory policies, followed by government machinery against these communities since Article 370 was abrogated. Human rights bodies have also raised issues of resettlement and help offered by the government to such groups, which further worsen their socio-economic exclusion. Although it is argued that the revocation encourages national integration, in actuality, for most minorities, this amounts to an increased vulnerability for displacement and less opportunity to benefit from policy benefits. Serious psychosocial impacts of displacement, particularly on women and children. Trauma, depression, and anxiety among the displaced families have compounded with loss of livelihood and social dislocation. The studies reveal a sharp rise in PTSD and other mental health disorders from the mental health organisations in the region. Other government programs were envisaged to provide relief, but mental health service delivery is not satisfactory and remains poor, especially towards vulnerable groups like children and women who bear additional layers of stress. Such issues demand profound policy implications that would effectively respond to the plight of Kashmir IDPs²⁹. There is a need for legal protection of IDPs. It really matters for the Indian government to follow up on clear legal frameworks giving rights to housing, healthcare, and education for the IDPs. Legal recognition is critical for regaining dignity and stability in affected populations. Land policies need to be reformed to address issues of community ownership of land and prevent eviction of vulnerable groups by the development project or land acquisition. It is, however, through the participatory

²⁸ Amnesty International, "Protection of the human rights of the people of Jammu and Kashmir must guide the way forward. (2023), available at: <https://www.amnesty.org/en/latest/news/2023/12/india-protection-of-the-human-rights-of-the-people-of-jammu-and-kashmir-must-guide-the-way-forward/> (last visited on: 18.10.2024).

²⁹ Médecins Sans Frontières, "Meeting mental health needs in Jammu and Kashmir" (2023), available at: <https://msfsouthasia.org/project/meeting-mental-health-needs-jammu-and-kashmir/> (last visited on: 18.10.2024).

planning processes that not only the negative impacts are availed but also sustainable development benefitting everybody in the community is encouraged. Third, support programs for populations internally displaced will require better-designed mental health support programs: healing from trauma and community support well synthesised within existing health care frameworks capable of appropriately treating the psychological effects of displacement. There is again a powerful push for pro-inclusive development policies to ensure that IDPs are included in the decision-making process; of course, more than just providing relief services that alleviate short-term issues, development programs systemically build long-term resilience in affected communities, too. Including IDPs in any policy discussion of local economic and social development would ensure that these voices are heard and that their needs are considered by policymakers. Thus, Deep Impact on Militarization and Socio-political Change The impact of repealing Article 370 in Kashmir and its responses to militarisation and socio-political change is very deep. This kind of displacement results in the disruption of lives, erosion of livelihoods, and very deep psychological scars on the affected populations. This would be a multi-pronged approach to place emphasis on legal protections for IDPs, land policy reforms, improved mental health support services, and inclusive development strategies. The implemented policy implications would allow the Indian government to most effectively create a balancing environment within the Jammu and Kashmir area for the displaced persons while maintaining stability and social cohesion in the area.

ATF PRICES & CIVIL AVIATION SECTOR: A CRITICAL STUDY OF GOVERNMENT POLICIES

- Dr. Nitin Ramling Kumbhar*

Abstract

The civil aviation industry possesses various unique features and problems as well. Those problems and perspectives can be reasonably classified from the rest of the industrial sectors. The regulatory framework in the civil aviation sector has not been developed in India. Most of the decisions are made through policy reforms, which change frequently. There is a communication gap between the government and the stakeholders. The Aircraft Act of 1934 was enacted prior to the enforcement of the Indian Constitution and did not address the key issues in the area. This is the principal legislation governing the civil aviation sector that is only in the area of issuing licenses to fly aircraft. Statutory authorities like the DGCA and AAI are under the control of the Ministry of Civil Aviation. India is going to be a super-hub of the civil aviation sector in the next few decades, but this seems impossible due to various regulatory and operational barriers. The domestic civil aviation sector urgently needs policy reforms to address its problems. This sector is on the back foot in terms of financial stability due to a lack of clear laws and policies. Huge operational cost is a major concern. Air turbine fuel prices are deregulated, which is a major concern. All these collectively contribute to creating hurdles in the path of the civil aviation sector in India. The researcher has studied the problems of the civil aviation sector in this paper with special emphasis on uncontrolled ATF prices and their effect on the domestic civil airline sector.

Keywords: ATF, Operating Cost, Civil Aviation, Tax, Duties.

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INTRODUCTION

The majority of Indian airlines still require government assistance due to the lingering effects of the pandemic and the elevated price of aviation turbine fuel. India has risen to become the third-largest domestic aviation market in the world, and by 2024, it is predicted to surpass the UK to assume that position. Stakeholders in the aviation industry have long advocated for policy changes that will enable India to become a global hub for passenger and aircraft maintenance, repair, and operations due to India's favourable geographic location between major Asian and European countries. Additionally, contributing 5% to the GDP, Indian aviation generated 4 million new jobs. Additionally, this sector contributes a gross value added to the GDP of US\$72 billion. The aviation sector offers global connection, a crucial role in promoting tourism, and an important role in natural catastrophes or even in conflicts. In times of famine, the aviation industry is responsible for handling food, supplies, and people's transportation. The aviation sector not only moves people from one location to another but also makes a significant contribution to the global movement of all kinds of goods. When compared to the same time last year, domestic freight traffic grew by 19.9% from April to September 2022. Despite of this, the civil aviation sector is facing various problems as well. The profit margins are considerably less as compared to other industrial sectors due to excessive operational costs. The majority of the profit share is spent on the maintenance of aeroplanes, purchasing of parking slots at airports, uncontrolled air turbine fuel prices, and expenditure on human resources, safety, and security according to the international standard. The deregulation policy has made the market very competitive; hence, the slightest increase in airfare is having a serious effect on the profit margin. The laws and policies on the civil aviation sector are at a developing stage in India.

Research question: Uncontrolled ATF prices or Defective Laws and Policies; what affects the dismal financial performance of the Civil Aviation sector in India?

A BRIEF OVERVIEW OF THE CIVIL AVIATION SECTOR

The aviation sector is divided into two categories. One is civil aviation, and the other is Military aviation. Military aviation is not the subject of this research article. Civil Aviation is further divided into two categories- Domestic & International. There are various organisations working at the international level to ensure the smooth functioning of civil aviation. The United Nations passed the Chicago Convention, which is also known as a charter of civil aviation activities. The International Air Transport Association (IATA) is a private body of civil aviation companies

worldwide. These two organisations are playing important roles in shaping the civil aviation sector at the domestic and international levels. The civil aviation sector, especially the domestic sector, has certain problems that need to be addressed as early as possible; otherwise, they will take the shape of big problems in the future.

PROBLEMS IN THE DOMESTIC CIVIL AVIATION SECTOR

As per the Union Ministry of Civil Aviation, the industry in FY 2020-21 suffered a loss of Rs 12,479 crore, and in FY 2021-22, it was Rs. 11,658 crore.¹ The operating costs and regulatory barriers are discouraging new investors from entering the civil aviation market in India. The COVID-19 Pandemic has forced further losses in the aviation sector due to the lockdowns worldwide and restrictions from 2020 to 2022. Hence, the civil aviation sector is suffering from all these difficulties. The International Air Transport Association (IATA) predicted a bright future for the Indian aviation sector on the basis of strong fundamentals, but regulatory and procedural barriers are the major obstacles.

The Indian Civil Aviation sector is one of the fastest-growing sectors in the world. India must offer them every essential assistance. It is necessary to modify or revise laws and policies concerning them. Liberalisation has changed the global scenario. New approaches and new challenges are being developed at the same time. Natural disasters such as volcanic eruptions, poor weather, and the ongoing threat of the pandemic have caused this business to suffer unexpectedly. COVID-19 is an example of a disaster that has brought down the civil aviation industry throughout the world.

Despite the fact that India's civil aviation sector is now ranked as the world's third-largest domestic civil aviation market, it is hampered by a number of issues. The following are the major challenges to the Indian Civil Aviation Sector's growth.

MAJOR CHALLENGES

1. There is no pricing regulator - A price regulator is required to keep ticket costs under control.
2. DGCA is not publishing the required material in the aviation sector. Researchers have to rely on private circulations like magazines, news articles, and reports from

¹ IANS, "Indian aviation industry suffers over Rs 24,000 Cr. loss in 2020-22", *infra.com* from *The Economic Times*, Feb 2, 2023, available at: <https://infra.economictimes.indiatimes.com/news/aviation/indian-aviation-industry-suffers-over-rs-24000-cr-loss-in-2020-22/97550848> (last visited on: 22.03.2024)

private agencies.

3. Passengers are suffering because of the lack of claims and compensation policy.
4. No proper aviation lawyer is available in India. Since the government's policies on this sector are not clear.
5. Lack of knowledge of Air Passenger Rights. Passengers do not even know their rights, especially domestic passengers who are travelling for hardly one or two-hour air journeys.
6. The majority of Airline Companies have been doing their business for hardly 4 to 5 years, and thereafter, they shut down their operations. Jet Airways was the biggest domestic private airline company that was allowed to fly at the international level, but it has also shut down its business since 2019 due to excessive debt.

All these are policy-related challenges in India's Civil Aviation sector. The following are the major issues identified by the researcher while doing research in this area.

1. Government Intervention

Frequent government interference is proven to be a significant impediment to the aviation industry's progress. Several aviation experts have stated that the Indian government should support the aviation business by removing regulatory barriers such as controlling airfares and lowering taxes, especially those on jet fuel. Furthermore, the Government is concentrating on infrastructure development and the air navigation system. The Indian aviation sector, which accounts for 5% of GDP, employs four million people, with another seven million people employed by tourism and associated industries. As a result, greater efforts are required to build infrastructure that will support future growth. In nutshell, Government is eying on revenue only rather than solving actual problems.

2. Higher Airport Cost

The Airport Authority of India charges higher airport (aeronautical) fees. The fees charged at international airports are greater than those charged at domestic airports. As a result, local airlines in India are suffering higher expenses at internationally designated airports while receiving no additional benefits. In other words, domestic airlines pay at par with international airlines at international airports, which is a discriminative policy of the government. The airport

fees charged by Indian airports (domestic and international terminals) are among the highest in Asia and the Gulf. Aviation firms will be burdened much more as a result of this.

3. Stiff Competition

Due to ticket pricing, the top airline is up against stiff competition. Low-cost carriers are threatening established airlines by cutting into their market share. Top premium airlines were compelled to lower their ticket prices by 15 to 20% in order to maintain their market share. Such a price cut will, in the long term, lead to a price war among airlines, with the only objective of expanding market share. There is unhealthy competition amongst low-cost carriers, ultra-low-cost carriers, and premium carriers, and this results in the instability of airline companies.

4. Foreign Investments

A foreign airline company is now allowed to invest in Indian air carriers. The Indian government had allowed cent percent FDI in scheduled air transportation sectors, state-level air transportation and domestic scheduled passenger airline business under automatic route of investment. An investor who wants to operate scheduled air services in India shall have to fulfil these conditions:

- The Operators permit, and Principal Office must be registered in India,
- Chairman & its 2/3rd Directors are to be Citizens of India,
- The Indian National must have substantial ownership and effective control.

All Foreign Investors who are willing to invest either in Scheduled or Non Scheduled airline businesses must possess Security Clearance before entering through FDI. There are several regulatory processes for international airlines that invest in the airline sector of India, including the Ministry of Civil Aviation, the Directorate General of Civil Aviation, The Indian Securities and Exchange Board, the Foreign Investment Promotion Board and the Reserve Bank of India. Furthermore, any immigrants who wish to work for the airline must first get security clearance. The demise of Kingfisher, Jet Airways, Air Sahara, Air Deccan, and now Air India has created fear in the minds of Foreign Investors. Lots of procedural and policy hurdles made FDI initiatives fruitless.

5. Land Acquisition Problems

Land Acquisition is the major concern in the development of various projects in India. The

Rehabilitation model in India has created serious problems over the years. The Land Acquisition for the construction of new airports or renovation at airports causes inordinate delays in many cases. The proposed International Airport at Pune has still not been finalised owing to the acquisition of land in the last 20 years. If this was the picture, then how could our civil aviation sector grow further, and how could India become the largest aviation sector in the world? Various areas were notified as high-security zones by the Ministry of Defense, which further aggravated the issues. The Defense Department does not share its air space and aerodromes for civil aviation activities. This has resulted in a shortage of land for expanding airports and airstrip operations.

All these above policies are directly affecting the performance of the Civil Aviation sector in India. The Government shall rethink its Laws and Policies. On one hand India is allowing deregulation of the airline industry but on the other hand doing nothing for the proper growth of this sector. India is privatising all sectors by selling its share in the market. Infrastructure and maintenance at the airport are now provided to private companies through a bidding process. The highest bidder will get the contract, but the experience is that allotting a contract to the highest bidder does not entail the desired results. It has been proved in Brazil and Australia that the highest bidder failed to yield the results.²

EFFECT OF AIR TURBINE FUEL PRICES ON CIVIL AVIATION SECTOR

The sector anticipates action from the Union Government to address pertinent policy measures, particularly those linked to taxation, which has been long overdue. The majority of Indian airlines still require government assistance due to the pandemic's lingering effects and the elevated price of aviation turbine fuel. The cost of the aviation sector is huge and the major burden is put on by the Air Turbine Fuel. The taxation on ATF is a matter of concern. Various countries do not allow any tax benefit for aircraft registered in foreign countries. Indian Parliament passed the Foreign Aircraft Exemption from Taxes and Duties on Fuel and Lubricants Act, 2002.

The Civil Aviation Policy relating to Air turbine fuel and lubricants is prescribed in this legislation. The cost of air travel is determined by the cost of ATF, i.e., Air Turbine Fuel. The policy of the Indian government regarding ATF is to give exemption to foreign aircraft from paying taxes and duties on fuel and lubricants. This exemption is in accordance with the

² Prof. Anne Graham, "Airport Privatisation: A Successful Journey?", 89 *Journal of Air Transport and Management* (2020), available at: <https://doi.org/10.1016/j.jairtraman.2020.101930>

Convention on International Civil Aviation, which is well known as the Chicago Convention. India has passed the above legislation as per the mandate of the Chicago Convention. The policy in this area is mostly governed by Bilateral Agreements. The aircraft of the contracting countries mostly benefited from the inception of this legislation.

The case of *M/s BPCL v. M/s Etihad Airways of UAE*³ has thrown a clear light on the actual execution of government policies on the exemption of Taxes on Fuel and Lubricants according to the Foreign Aircraft Exemption from Taxes and Duties on Fuel and Lubricants Act, 2002.

Bharat Petroleum Corporation Ltd. (BPCL) has entered into an Agreement with Etihad Airways from 1st April 2013 for the purpose of refuelling Etihad Airways aircraft at Mumbai, Delhi, Bangalore and Trivandrum Airports. Etihad Airways operates only International Flights to and from the above-mentioned Indian Airports. In 2013, Etihad agreed to buy a 24 % stake in Jet Airways as a part of the UAE Carrier's Equity Partnership Strategies. In Mumbai, on 31st May 2013, Etihad Airways operated Indian-registered aircraft (Jet Airways aircraft) for their scheduled International Flights. BPCL supplied ATF to Etihad Airways at nil sales tax rates even though the aircraft used by Etihad Airways are Indian-registered. These transactions created a cause of action, and the issue was- to determine u/s 56(1) (f) of the MVAT Act as to whether ATF Supplies can be made at nil Sales Tax rate to Etihad Airways using Indian Registered Aircraft of Jet Airways?

The contention from Etihad Airways was that the United Arab Emirates is a party to the International Convention on Civil Aviation 1944 and entered into an Air Service Agreement with India. Etihad Airways, being a national airline in the UAE, is eligible to get ATF supplies at NIL sales tax rates. However, Etihad Airways' claim was denied, and the Commissioner of Sales Tax, Maharashtra State, Mumbai, imposed a tax on the sale of ATF supplies to Etihad. Hence, after studying this, the researcher felt that the ATF policy is not liberal in India.

How are ATF prices fixed?

Hindustan Petroleum Corporation Ltd., Bharat Petroleum Corporation Ltd., and Indian Oil Corporation Ltd. are the three principal OMCs that provide ATF to Indian airlines. An Administered Price Mechanism (APM) that had previously controlled ATF prices in India was abolished in April 2001. In accordance with predetermined capacity utilization, the government set the price of ATF under the APM, guaranteeing a defined profit margin for the oil marketing

³ C.F., Proceedings before Commissioner of Sales Tax Maharashtra, DDQ/11/2013/Adm-6/39/B-1, 05.01.2015.

companies (OMCs). However, ATF pricing was adjusted to a market-based system due to the ever-increasing weight of subsidies on the government. Since that time, the OMCs have set the price of ATF based on the current price of crude on the international market plus input expenses.

ATF is made from Brent petroleum, which India imports from OPEC, and as a result, the price of ATF is influenced by changes in the price of crude oil around the world. ATF is not shipped as a completed goods into India. The Indian carriers, being the single largest user of ATF, are the worst affected, especially as the price of ATF in India has been rising continuously in recent years. Indian carriers currently pay a 65 percent higher price for ATF than their foreign competitors. This makes the domestic carriers loss-making entities by preventing them from properly competing with the global players. The airlines are also placed at a serious disadvantage on account of the irrational tax structure of ATF and cartelisation of the OMCs through monopoly pricing.

The price of ATF is based on the import-parity principle. The price structure includes the import price of crude oil, import duties levied by the government, and the cost of refining crude. According to the revised numbers, The government on February 4th, 2023, revised windfall gains tax with the Centre adjusting its Special Additional Excise Duty (SAED) on crude petroleum by Rs 3,150 per tonne, diesel and air turbine fuel (ATF) by Rs 2.5 per litre each. From the current rate of Rs 1,900 per tonne, duty on unrefined oil is anticipated to rise to Rs 5,050 per tonne. ATF will now be subject to a litre-based tax of Rs. 6 instead of Rs. 3.5.⁴ This will additionally add to the operating cost of airline companies in India. There are other additional taxes like VAT, customs duty and excise tax, which are imposed by the state governments on ATF. At the same time, the Indian aviation industry has been requesting the Indian government to bring aviation turbine fuel under the Goods and Services Tax regime for several years. This move will benefit the airline sector, and airline companies will be able to take an input tax credit if it is covered under the GST regime, but it still remains in the pipeline.

Fuel prices are a major cost component for Indian airlines as they account for more than 50 % of an airline's expenditure as against the global average of nearly 30%. The cost of the ATF used

⁴ ET Online, Government hikes windfall gains tax on crude, diesel and ATF, *The Economic Times*, Feb. 04, 2023, available at: https://economictimes.indiatimes.com/industry/energy/oil-gas/government-hikes-windfall-gains-tax-on-crude-diesel-and-atf/articleshow/97598456.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited on: 21.03.2024).

in foreign flights is lower because the imported crude used in its production is exempt from customs taxes. ATF sold for foreign bound flights was declared as a 'Deemed Export' and Domestic carriers' aviation turbine fuel (ATF) purchases for international flights are exempt from 11% basic excise duty. Indian carriers could have profited from the advantage of affordable ATF for operating in the international segment, but they are unable to do so due to their small market share. The ATF purchased for domestic operations is charged more than international operations, which is clearly a defective and discriminative policy of the Government. Recently, the data revealed by the DGCA says that passengers carried on international flights operated by Indian carriers accounted for 43.5% of total overseas travel in October-December 2022. It was 39.2% in the corresponding period of 2019.⁵ These data show us that domestic airlines are ready to compete but need to be treated at par with international airlines to compete against international giants like Emirates. Another typical constraint faced by Indian carriers to fly internationally was that they must have to their credit at least five years of domestic operations and a minimum fleet size of 20 aircraft, referred to as the 5/20 rule. This condition has now relaxed, and if a domestic airline has 20 aircraft, then it can fly on international routes. So the condition of 5 years of domestic experience is now no longer required to fly internationally. One sure way to curtail fuel costs is to increase international operations. But, the major international carriers operating in India, such as Emirates, Qatar and Etihad, have been increasing their seat capacity on lucrative routes to attract passengers. Here the role of government should be very liberal. Furthermore, the ATF price is decided with heavy taxation.

Tax Burden on ATF

In India, there is no direct import of ATF, and the ATF supplied by the Indian oil companies is from imported crude refined by them. The import duty for ATF is 20%. Oil companies thereby follow an import parity principle and levy a 20% add-on to the refinery transfer price⁶. Higher ATF prices are a major concern and it has to be addressed at global forums. Fuel prices are a major cost component for Indian airlines as they account for 35-40% of an airline's expenditure as against a global average of nearly 30%.⁷ Indian Government levies various taxes on ATF,

⁵ Gaurav Joshi, "Indian Carriers Grab a Bigger Share Of International Market" *Simple Flying* Mar. 08, 2023, available at: <https://simpleflying.com/indian-carriers-bigger-share-of-international-market/> (last visited on: 07.01.2025)

⁶ Import parity is a price-setting mechanism for a commodity in which the price is set based on the cost of importing the commodity into a location. Import parity is calculated as the cost of the commodity in the source location, plus the cost of delivery to the destination.

⁷ Anu Sharma, "Maharashtra reduces VAT on ATF to 18%" *Mint* Mar 09, 2023, available at: <https://www.livemint.com/news/india/maharashtra-reduces-vat-on-atf-to-18-11678379878735.html> (last visited on: 21.08.2024)

which are summarised below:

1. Custom Duty

ATF is refined in the nation and subject to a 10% tax even though it is not imported as a finished good. Counter veiling tax (CVD) cess and IGST are added to this basic duty, totalling 15.5%. However, only ATF lifted for domestic operations are subject to this obligation. If the next portion of the flight is a domestic route, fuel that is still in the aircraft's tanks after finishing an international operation is subject to customs duty, according to Customs Circular 65/2001, dated November 19, 2001.

2. Excise Duty

Around 11 percent of excise is levied on ATF. Airlines are already reeling under record-high fuel prices. Confusion arose on whether or not excise duty was leivable on domestic airlines for their foreign flights after the government slapped a ₹6 per litre special additional excise duty on the export of jet fuel from July 1, 2022. Now, the Government has made it clear that there is no excise duty on the international operations of domestic carriers, but the domestic sector is still suffering.

3. Sales/State Tax

Sales tax varies from 5 % to 30 % state-wise. Hon'ble Minister for Civil Aviation has appealed to State Governments to reduce the Sales Tax on ATF, and accordingly, various governments have replied to it positively. Recently, in a respite for airlines, the state government of Maharashtra announced a reduction of the value-added tax on aviation turbine fuel to 18%, a reduction of 28% from the current level of 25%. In a scenario of high fuel prices, this step will prove to be a catalyst to ramp up air connectivity.

The reduction in VAT on jet fuel in Maharashtra is a significant step as the state capital, Mumbai, is the second largest hub for airlines in India. Mumbai handled over 14% of international and domestic passenger traffic in India in January 2023, as per the data from the Airports Authority of India. Delhi has the largest airport in the country, and Delhi and Mumbai have a combined market share of more than 30% in the domestic segment. So far, Andaman & Nicobar Islands, Uttarakhand, Jammu & Kashmir, Ladakh, Tripura, Madhya Pradesh, Himachal Pradesh, Uttar Pradesh, Arunachal Pradesh,

Haryana, Dadra and Nagar Haveli and Daman and Diu, Manipur, Jharkhand, Mizoram have reduced the VAT on ATF to 1-4%. Gujarat has decreased the rate to 5% from 30%, Goa has brought it down to 8% from 18%, and Karnataka has reduced it to 18% from 28% earlier. All these proactive moves are welcomed by the civil aviation sector.

4. Value Added Tax (VAT)

It is crucial to comprehend the intricate nature of the VAT levied on different petroleum products, including ATF. To prevent the cascading impact of taxes, VAT has largely replaced sales tax in India. With the exception of alcohol, gasoline, diesel, ATF, lottery tickets, and other motor spirits, the prices of which are not entirely decided by the market, all commodities, including declared products, are subject to VAT and eligible for Input Tax Credits (ITC). These exclusions must continue to be charged in accordance with the Sales Tax Act, State Acts, or even a provisional VAT Act, with a uniform floor rate chosen by the Empowered Committee. The following are the main implementation cracks for VAT:

- ATF is taxed at special rates that are significantly greater than the standard VAT rates rather than at the regular VAT rate.
- Despite the fact that ATF is the taxed end product of crude oil, neither input (crude) nor the capital goods used in exploration nor refining are eligible for an input tax credit.
- ATF is subject to a multi-point tax, but there is no consistency across states because some impose a single-point tax and others a multi-point tax.
- In addition to the VAT, some states also impose other fees, like the cess.
- There is no access to even the Input Tax Credit for entry fees.
- There are still unrecoverable taxes on ATF that cannot be passed on to customers. Irrecoverable taxes on ATF are still being levied, and their impact cannot be passed on to consumers.

5. Throughput Charges

At airports, airstrips, and helipads across the nation, fuel-related fees are assessed as Airport Operator Fees, Fuel Infrastructure Fees (FIC), Into Plane Fees, or a combination of the three, commonly referred to as Fuel Throughput Fees (FTC). The world's best practices for airports advise against charging fuel suppliers a double fee for the use of the airport's land as well as a market access or concession fee for opening up business opportunities when the airport operator is not providing any underlying tangible service. Global carriers Emirates and Air France, too, had opposed the charges. Airlines have argued against the tax and encouraged the government to abandon it, as in Europe. Airlines have also complained of double taxation as both airports and oil companies collect tax in the process. IATA is opposed to airports levying charges on aviation fuel services that are not cost-related and justified. Thus, due to these agitations, in January 2020, the Government of India finally scrapped the FTC, and this move will help airlines earn close to Rs 500 crore per year. Fuel is one of the highest-cost components for airlines.

Thus, Air Turbine Fuel is heavily burdened with discriminative tax structures. The sector also requires favourable tax policies, with the industry's stakeholders frequently calling for the reduction of ATF-related duties or the inclusion of the sector in the scope of the goods and services tax (GST).

SUGGESTIONS

The United Nations should have played a vital role in drafting the regulatory policy on fuel prices. There is a need for a Fuel Price Regulator. It will definitely improve the financial performance of aviation companies in India.

The ATF prices are not regulated in India. OMCs are levying charges on their own. ATF price is revised on the 1st of every month based on the average rate of international benchmark and foreign exchange rates. This directly affects ticket prices, and ultimately, the passenger suffers. The government is getting revenue, but the interest of the consumer is being neglected. The Civil Aviation Ministry had not paid attention to the much-needed legal reforms. The delay or negligence in the establishment of the Oil Regulatory Authority is contributing to huge operational costs for the airline industry. The monopoly of oil companies in the fixation of ATF prices is a major obstacle to the growth of airline companies. Below are the suggestions for reducing ATF prices in India.

1. Incentives for the good performers in ATF Prices

The Indian Government should start an encouragement scheme for aviation companies. The performance of an aviation company should be tested on the feedback of the passengers. The incentives for fuel prices should be given on the basis of good, better, and the best performer. This will reduce the cost of airline companies, and healthy competition will survive.

2. Establishment of Air Turbine Fuel Price Regulatory Authority

The cost of expenditure on ATF in India is more than 50% of the total airline operational cost. Hence most of the airlines are not even recovering the basic cost of the expenditure. This is the primary cause behind poor financial performance by airline companies in India. The prices of ATF are rising, and there is no regulatory control over them. Hence, there is an urgent need to create the Air Turbine Fuel Price Regulatory Authority. There has been a long demand from aviation stakeholders to bring the ATF under the purview of the Petroleum and Natural Gas Regulatory Board (PNGRB), but it is learned that the state-owned oil companies themselves had opposed the move despite several requests forwarded by the Federation of Airlines in India. The ATF prices are fixed by the oil companies with lots of ambiguity and a multiplicity of taxes. On the first day of every month, the state-owned firms Indian Oil Corporation (IOC), Bharat Petroleum Corporation Ltd (BPCL) and Hindustan Petroleum Corporation Ltd (HPCL) modify the rates of ATF and LPG to reflect the foreign exchange rate and the average international benchmark fuel price.⁸

Hence, the creation of an independent ATF price regulatory authority is a necessity. It will definitely prove helpful for domestic air carriers, which will result in better financial performance.⁹

3. Hedging of Aviation Turbine Fuel (ATF)

Deregulation of commodity hedging is proceeding slowly. Domestic airlines have to procure ATF only through domestic refineries at International Prices. Since they are not physically

⁸ ET Online, “ATF price hiked by over 3 per cent in Delhi, Mumbai”, *The Economic Times* Nov. 01, 2024, available at: <https://economictimes.indiatimes.com/industry/energy/oil-gas/atf-price-hiked-by-over-3-per-cent-in-delhi-mumbai/articleshow/114842571.cms?from=mdr> (last visited on: 23.12.2024)

⁹ Arindam Mazumdar, “No independent regulator for ATF price: OMCS”, *Business Standard* Mar. 29, 2016, available at: https://www.business-standard.com/article/economy-policy/no-independent-regulator-for-atf-price-omcs-116032801220_1.html (last visited on: 12.08.2024)

importing the commodity, the airlines are not permitted to hedge the commodity risk.

In an upward-moving oil regime, the airlines have no option but to see their input costs explode and, whenever possible, pass on the same to passengers. A similar situation was faced by local refiners on hedging their refinery margins where the Government and RBI came out with a notification permitting national oil companies to hedge their refinery margins without having physical imports/exports. At a time when there are concerns about crude continuing to be floored at USD 70-75 with no apparent ceiling in sight, it becomes even more relevant to seek relief through the hedging market. An urgent re-look at the present oil/petro products hedging regulations is needed. Domestic airlines should be permitted to hedge their ATF price risk. Many global airlines have used fuel hedging for effective risk management for themselves. US airline companies are hedging and benefitting in such a volatile market. Hence, the ticket prices can be fixed at a stable rate for a few months if hedging is permitted in India.

4. Use of Sustainable Aviation Fuel (SAF)

India should encourage the use of SAF to reduce the carbon emission level. It is an alternative to ATF. In order to achieve the net-zero carbon emissions goal, the aviation sector must reduce emissions as much as possible at the source, which can be done by using sustainable aviation fuels (SAF), cutting-edge new propulsion technology, and other efficiency enhancements (such as improvements to air traffic navigation). The government should invest more money in R & D of the SAF. Financial incentives, such as Production Linked Incentives (PLI) and tax exemptions, will be essential to encourage early investments in SAF facilities.

These are the suggestions to reduce ATF prices until the proposed Oil Price Regulatory Authority came into existence.

CONCLUSION

The domestic civil aviation sector is expanding. It has huge potential to contribute to GDP. The laws and policies should be supportive. Problems exist, but perspective is the target. New companies are ready to enter this sector, but the policies have to be changed. ATF prices are a major concern, and they should be addressed preferentially. The National Civil Aviation Policy needs to be amended, and the suggestions given by the researcher must be accepted. ATF should be freed from heavy taxation, and the benefit to the consumer should be in terms of quality services and competitive ticket prices. Regulation of ATF is the key to success in the civil

aviation sector. Recently, to minimise emissions from aviation activities that require offsetting of emissions above a baseline value, ICAO has introduced the Carbon Offsetting & Reduction Scheme for Aviation (CORSIA). The CORSIA Programme is divided into three stages: Pilot Phase - (2021-2023), First Phase - (2024-2026) and Second Phase (2027-2035).¹⁰ While the pilot and first phases are optional, the second phase is required for all ICAO member States. The Indian government has chosen not to take part in the CORSIA voluntary phases. For Indian carriers, the CORSIA offset obligation will begin in 2027. Now, it is in the hands of the Indian government to either reduce the duties or encourage renewable energy options like Sustainable Aviation Fuel.

¹⁰ Ministry of Civil Aviation, “Initiatives taken by MoCA to promote sustainable development in the aviation sector and reduce carbon emissions at airports” PIB Delhi Mar. 22, 2023, available at: <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1909435> (last visited on: 24.08.2024).

SUPREME COURT'S STANDPOINT IN EFFECTUATING GENDER NEUTRALITY VIS-À-VIS GUARDIANSHIP IN INDIA: CHANGING STATUS OF WOMEN IN 21ST CENTURY

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Abstract

This paper focuses on how the Hon'ble Supreme Court has pioneered a significant change in the status of Women in the facet of Guardianship in the 21st century in India. Since age-old times, women have always been entrusted with the responsibility of upholding the custody of their children, but the natural guardianship has been presumed to be of the father. Scrutinising the leading judgments of the Supreme Court, a progressive change has been brought about in recognising women as not only having custody rights but also being the natural guardians of the children before the law. These judgements have set forth a precedential value and have been an inspiration to the high courts of India in delivering their judgments. The authors have analysed that all the personal laws presiding in India have always favoured the 'father' of the child to be their natural guardian, but with the advent of the 21st century, the focus is shifting towards women in the role of guardianship to be bestowed with the same privilege. In our developing nation, a surge in the population of women becoming more financially independent has resonated with the Supreme Court, which observed that women are capable of assuming the responsibility of sole guardianship by supporting their children both emotionally and financially. Guardianship has a prominent role in the lives of both the father and mother of the child, and repudiating the rights of women in the matter of guardianship shall not meet the ends of justice. It is still a vigorous battle to achieve the feat of women empowering them in the role of guardianship beyond the horizon.

Keywords: *Guardianship, Natural Guardian, Hizanat, Minority, Custody.*

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INTRODUCTION

The Hindu Minority and Guardianship Act of 1956 defines a guardian as someone who takes care of a minor's welfare, property, or both. In common parlance, the "guardian" is the "protector" of the minor child. The following types of guardians are among those recognised by the progressive Indian Society:

- Natural Guardians,
- The guardian chosen in accordance with the minor's will, known as the lawful guardian
- A guardian appointed or declared by the court is known as the legal guardian.

According to Section 6 of the Hindu Minority and Guardianship Act, 1956, the natural guardians of a Hindu minor who are responsible for both the person of the minor and the minor's property (apart from his or her undivided interest in the joint family property), are:-

- if there is a male child or an unmarried girl child, it is the father, and after him, the mother; however, the custody of a child under the age of five is typically with the mother,
- if it is the case of an illegitimate male child or illegitimate unmarried girl- then it is the mother, and after her, it is the father,
- If a girl is married, then the natural guardian is her husband.

Section 6 of the Hindu Minority and Guardianship Act 1956 grants to the father the right to act as the natural guardian of a legally born child. A mother can only be a child's natural guardian after the father, which means she can only take on that role if the father has died or is otherwise unable to do so. The stepfather and stepmother are not included in the category of the father and mother, according to the interpretation of Section 6 of the Hindu Minority and Guardianship Act, 1956. The adoptive mother gets the guardianship of her adoptive son only after the death of the adoptive father, as explicitly stated in Section 7 of the Hindu Minority and Guardianship Act, 1956. The mother can be the natural guardian of a minor only when the child is illegitimate, as it could be comprehended from Section 6 of the Hindu Minority and Guardianship Act, 1956. Only a parent or parent figure may be appointed as a minor's guardian because the guardianship of a minor is concerned more with the child's welfare than with the minor's legal rights. As a result, Section 6 of the Hindu Minority and Guardianship Act, 1956, should always be read in accordance with Section 13. If a girl marries, her husband automatically

becomes her guardian, according to Section 6 Clause (c) of the Hindu Minority and Guardianship Act, 1956. Even if a minor girl is married, her husband serves as her legal guardian.

Guardianship is listed in Section 2 of the Muslim Personal Law (Shariat) Application Act 1937 as one of the matters to which the Muslim personal law (Shariat) shall apply, despite the fact that the Dissolution of Muslim Marriages Act, 1939 is quite on the subject. In all schools of Muslim law, the father's right to guardianship is recognised. Even if the mother or any female with custody rights has custody, the father still has the right to general control and supervision. The fundamental tenet of hizanat in Islamic law is the wellbeing of the child. Every other factor must take the well-being of the kid into account, according to the Muslim law of hizanat. Because of this, in terms of custody of young children, Muslim law provides the mother the advantage over the father. In cases where it is necessary for the child's well-being, even a woman with poor credit can keep custody of her minor child.

DIFFERENCE BETWEEN GUARDIANSHIP AND CUSTODY

Custody is a more specific concept connected to the raising, daily care, protection, and control of the kid, whereas guardianship refers to a collection of rights and powers that an adult has regarding the person and property of a minor. The term "custody" is not defined in Indian family law, either secular or religious. In other words, having custody of a child entails having that child under one's care and protection, ensuring his or her physical presence. It requires the capacity to make consistent, ongoing decisions about the child's education, medical treatment, and general movement. The custody exists over the person of the minor and not over his or her property. While the idea of guardianship, especially in Hindu law, seems to have its origins in the Vedic Era, when the Hindu family was essentially a patriarchal structure with significant power lying with the head of the household. A guardian's responsibilities are more demanding than those of a simple custodian. The custody may be brief or temporary and for a specific reason, as was held in the case of *Ramesh Tukaram Gadhwe v. Sumanbai Wamanrao Gondkar*.¹ In each case's specific facts and circumstances, the issue of guardianship may stand alone and be distinct from the issue of custody. In the case of *Athar Hussain v. Syed Siraj Ahmed*,² the court held that it was not constrained by the bar envisioned in Section 19 of the Guardians and Wards Act, 1890.

A few Ahadis and certain verses in the Quran serve as the foundation for Muslim guardianship and custody laws. The guardianship of a minor's person is barely touched upon in these verses,

¹ AIR 2007 SCC OnLine Bom 975.

² AIR 2010 2 SCC 654.

but guardianship of their property is extensively discussed. Muslim law makes a distinction between actual physical custody, or hizanat, the responsibility for the day-to-day care of a child and the authority to make crucial choices affecting the minor's upbringing. The idea of hizanat is comparable to the concept of custody under Hindu law.

Personal laws in India distinctly determine who the minor's natural guardian will be. All personal laws automatically make the father the guardian as long as he is sound and alive. The mother is also the chosen custodian of very young minors in both Hindu and Muslim law, despite the fact that the father is the child's natural guardian. The welfare and best interests of the minor children may, however, be prioritised by the courts over personal laws. The court's rulings must override the existing rigid Personal Law legislations accustomed to the changing needs of modern times.

The Guardians and Wards Act (GWA) of 1890 and the parties' current personal laws, which are partly based on custom and partly codified laws, for instance, the Hindu Minority and Guardianship Act (HMGA) of 1956, which establishes the guardianship laws for Hindus governing the guiding principles of adoption, guardianship and custody of minors in India. In addition, it also establishes the guidelines for child custody and guardianship during divorce procedures between the child's parents who were married and are now seeking divorce.

The marriage and divorce laws of Hindus, Muslims, Parsis, and Christians are well governed and substantiated by the Hindu Marriage Act of 1955. When deciding custody disputes, a court is not constrained by precedents, rigid rules of evidence or procedure, or by statutes. The court must consider the child's happiness, satisfaction, health, education, intellectual growth, and favourable circumstances in addition to their bodily and mental comfort.

In *Nil Ratan Kundu v. Abhijit Kundu*³, the court held that if the youngster is old enough to develop an intelligent choice or judgement, the court must also take that preference into consideration. However, the court should ultimately decide the best possible solution for the minor's welfare with its discretion. In *Lahari Sakhamuri v. Sobhan Kodali*⁴, it was concluded that, among other things, the following are some of the crucial factors that courts must take into account while evaluating the welfare of the kids and equitably for the parents: maturity and judgement, mental stability, the ability to provide access to education, moral integrity, the ability to provide ongoing

³ AIR 2008 (9) SCC 413.

⁴ AIR 2019 SC 2881.

community involvement, financial sufficiency, and the relationship between the parent and the child.

The Supreme Court has consistently held that if the child has been brought into Indian territories, the Indian courts may either undertake a short inquiry or a comprehensive probe into the custody issue. In the event of a summary inquiry, the court may determine that it is appropriate to order the child's return to the nation from which they were removed unless it can be demonstrated that doing so would be injurious to the child. In other words, regardless of a previous order of return of the kid by a foreign court, the court is free to refuse the remedy of returning the child to the country from which he or she was removed, even in the case of a cursory inquiry, as it was held in *Nithya Anand Ragbavan v. State (NCT of Delhi)*⁵.

PRECEDENTS OF THE SUPREME COURT BEFORE THE 21ST CENTURY

The Supreme Court has set a number of precedents before the 21st century also in favour of women regarding the matter of custody and guardianship that are still commended in modern society. However, the precedents that have been delivered and favoured to the women are mostly related to the matter of custodial rights of the mother and not of guardianship. The pattern in the judgements that have been seen was that the custody used to be mostly awarded to the mother rather than the father in a normal circumstance where the mother is fit to take care of the child.

An eleven-year-old girl who resided with her father was the subject of *Thrity Hoshie Dolikuka v. H.S. Dolikuka*⁶. The girl allegedly suffered from psychological stress and a nervous breakdown because the father, according to the mother, poisoned the child's mind to turn it against her. In contrast to the mother, who wanted to take the child away from the father's home and keep sending her to boarding school, the father was fixated on the concept of having sole custody and possession of the child. The mother had a job and could afford to pay for the boarding school. The High Court had first denied the mother custody of the daughter, mostly on the grounds that she was a working mother. The father was deemed unfit by the Supreme Court to be the child's legal guardian. The daughter could continue her education in a boarding school after turning sixteen, according to the court's ruling, which stipulated that the mother should have custody of the child during that time. In accordance with the laws and regulations of the school, the parents were each granted the freedom to see their daughter on an as-needed basis. This situation serves

⁵ AIR 2017 SC 3137.

⁶ AIR 1982 SC 1276.

as an example of the idea that a woman's employment status has no bearing on whether she can care for her child. Whether the mother worked outside the home or was a stay-at-home mom had no bearing on her suitability to serve as a custodian of her child.

According to Section 6 of the Hindu Minority and Guardianship Act, 1956, the father is the child's natural guardian. However, this provision will not supersede the essential consideration of what is in the best interest of the child, held in *Smt. Surindar Kaur Sandhu v. Harbax Singh Sandhu & Ors*⁷.

In the case of *Suresh Babu v. Madhu*⁸, the father kept the female child, who was eighteen months old, and the mother was expelled from the marital home. The mother requested custody in accordance with Section 25 of the Guardians and Wards Act, 1890 while residing with her grandparents. The mother received custody from the court. The child's welfare, according to the court, should be understood broadly and not just in terms of the child's financial and physical well-being. The court recognised that the mother would provide the child with better affection and attention than the father, despite the father's claims to be wealthier than the mother since he was too busy with his business.

The Supreme Court noted in *Jijabai Vithalrao Gajre v. Pathankhan & Ors.*⁹ that the father is the child's natural guardian while he is still living and that the mother only takes over when he passes away. The father is unquestionably the minor's natural guardian of both the person and his or her property, as shown by the case. A "fit" father who is the natural guardian is also the custodian of the person or minor and their property in accordance with section 19 clause (b) of the Guardians and Wards Act and section 4 sub-section (2) of the Guardians and Wards Act. A "guardian" is defined as the person who has custody of the person or property of the minor or both. Therefore, it is to be assumed that the existence of a "fit" father will prevent the court from designating any other individual as the minor's guardian, even if it is the mother of the minor child.

When it came to awarding the guardianship to the women, the Supreme Court set a condition of 'after' in these cases where the mother could have been awarded the right to have guardianship of her minor child only after the death of the father of the child or if the father is unfit to hold the guardianship rights sincerely in uncertain circumstances.

⁷ AIR 1984 SC 1224.

⁸ AIR 1984 Mad 186.

⁹ AIR 1971 SC 315.

As part of a public interest lawsuit challenging Section 6 of the Hindu Minority and Guardianship Act, the Supreme Court also sent a notice to the Centre requesting a response. As it discriminates against women in concerns of natural guardianship, the law has been contested as a violation of the “Equality” principle entrenched in Article 14 of the Constitution.

In *Geeta Hariharan v. Reserve Bank of India*¹⁰, the petitioner Geeta Hariharan asked the Reserve Bank of India in 1984 to hold a bond in her minor son’s name, indicating that she would function as a natural guardian for investment purposes. The bank rejected the application and instructed the applicant to provide a copy of it that was signed by the father or, in its place, a certified copy of a court-issued guardianship order. The mother disputed the bank’s activities, arguing that the mother and father are the natural guardians while citing section 6 and section 4 clause (c) of the Hindu Minority & Guardianship Act, 1956. The Supreme Court gave a broad interpretation of the word “after” in the provision in the case of *Geeta Hariharan v. Reserve Bank of India*¹¹, noting that “the word did not necessarily mean after the death of the father”, on the contrary, it signifies “in the absence of”, whether that absence is short or long term, complete apathy of the father towards the child, or even the father’s incapacity due to illness or another factor. The Supreme Court ruled that the mother cannot be considered the minor’s natural guardian only after the passing away of the father as doing so would violate the Hindu Minority and Guardianship Act of 1956’s legislative intent is the welfare of the child, and it will also be discriminatory in nature. Therefore, the natural guardian could be either the mother or the father, depending on who is most qualified, available, and concerned for the welfare of the minor. According to this case, the mother’s standing as a natural guardian of her child’s property would only be recognised in situations where the father has given up his parental duties or given his approval to raise the mother to that level. It is problematic for the sake of fiercely debated custody disputes that the court refrained from granting the mother of the child equal status as a natural guardian¹².

The Supreme Court noted that the definitions of “guardian” and “natural guardian” under the Hindu Minority and Guardianship Act of 1956 Act did not discriminate in any way between mothers and fathers, and since the mother was mentioned as a guardian under Section 6 of the Act, it could not be said that the mother could not also be a natural guardian. However, Section 6 clause (a) of the 1956 Act unambiguously specifies that the “father, and after him, the mother”,

¹⁰ AIR 1999 SC 1149.

¹¹ Ibid.

¹² Tejaswi Pandit & Manovi Mittra, “Custody of Children” SCC Online Times Nov. 25, 2019, available at: <https://www.scconline.com/blog/post/2019/11/25/custody-of-children/> (last visited on: 08.01.2025)

are the minor's natural guardians. A cursory reading of the passage might lead one to believe that mothers only gain the right to natural guardianship after the father, which would indicate that she only receives the right after the father's passing. The welfare of the minor is considered most while making decisions about guardianship and custody. Even when the father was still living, the courts might grant guardianship to the mother or any other qualified person for the child's care. The interests of the minor are of utmost significance; thus, this would be possible. The welfare and interests of the minor would therefore take precedence over the words "after" as they appear in Section 6 clause (a). As a result, the Supreme Court gave the provision at issue a harmonic interpretation that is in keeping with Constitutional requirements to correct the legal anomaly and bring the law into compliance with the rights guaranteed by the Constitution. It was noted that the word "after" need not imply "after the lifetime" of the father; it could equally be interpreted as "in the absence of", where the word absence would reflect the father's absence from providing for the minor's physical or financial needs. Therefore, the mother can act as natural guardian of the minor in situations where the father and mother have agreed that the mother should be the guardian, in situations where the father is completely absent from the life of the minor and shows no interest in their welfare, in situations where the father is physically unable to protect the interests of the minor because he lives in a different location or has some form of mental or physical incapacity, and in other situations that are similar.

PRECEDENTS OF THE SUPREME COURT REVOLUTIONIZING THE STATUS OF WOMEN IN 21ST CENTURY

In the matter of granting custody of the minor in the 21st century, the welfare of the children has been seen as utmost importance by the Supreme Court which has still been seen as relief by many mothers in India.

The High Court is required to (a) consider the wishes of the child in question, and (b) evaluate the psychological impact, if any, on the change in custody after consulting with a child psychiatrist or a child welfare worker before making a decision regarding whether custody should be given to the mother or the father or partially to one and partially to the other. According to the ruling in *Mamta v. Ashok Jagannath Bharuka*¹³, all of this must be done in addition to determining the relative material welfare that the child or children may experience with either parent.

¹³ AIR (2005) 12 SCC 452.

Better financial standing of either parent or their affection for the child may be crucial factors, but they cannot be the sole deciding factor for the child's custody. A high burden is placed on the court in this situation to apply its judicial discretion wisely in light of all the pertinent facts and circumstances, with the child's welfare as the top priority. In Section 13 of the Hindu Minority and Guardianship Act 1956, the term "welfare" must be construed in a literal sense and in the broadest sense possible. This was held in *Moitra Ganguli v. Jayant Ganguli*¹⁴.

According to *Nil Ratan Kundu v. Abhijit Kundu*¹⁵, the "positive test" that such custody would be in the minor's best interests is what is important, not the "negative test" that the father is not "unfit" or ineligible to have custody of his son or daughter. The court should use this standard when deciding whether to grant or deny custody of a minor to the father, the mother, or any other guardian.

It was held in *Gaurav Nagpal v. Sumedha Nagpal*,¹⁶ that in the event of a disagreement between the mother and the father, the court is expected to strike a fair and appropriate balance between the needs of the minor children's welfare and the rights of the parents. To ensure that children can develop in a healthy, balanced way and become contributing members of society, parents' ultimate control over the destinies and lives of their children must give way in today's transformed social context. Along with the child's bodily welfare, the court must consider the child's moral and ethical welfare. There is nothing that can prevent the court from using its parens patriae jurisdiction that arises in such instances, even while the provisions of the particular legislation that control the rights of the parents or guardians may be taken into consideration.

When deciding who should have custody of a minor, the court must consider several pertinent factors, including the child's desires, the presence of a supportive and suitable environment for the child's upbringing, and the ability and resources of the involved parent to care for the child, and it was held in *Gaytri Bajaj v. Jiten Bhalla*¹⁷.

According to *Sheoli Hati v. Somnath Das*,¹⁸ when deciding on custody or other issues concerning children, the 'welfare of the child' is the most crucial consideration to take into account. According to the Guardians and Wards Act of 1890 or the Hindu Minority and Guardianship

¹⁴ AIR (2005) 12 SCC 452. AIR 2008 SC 2262.

¹⁵ *Supra* note 3

¹⁶ AIR 2008 SC 2262.

¹⁷ AIR 2013 SC 102.

¹⁸ AIR (2019) 7 SCC 490.

Act of 1956, standards must be followed when the court makes a custody decision for young children, with the welfare and best interests of the child being given top priority. When choosing which parent is entitled to custody, it is not the right of either parent that would require judgment.

However, even in the 21st century, there are still not many cases where the Supreme Court has talked specifically about providing rights of natural guardianship to the ‘married mother’ or where the rights of guardianship are being provided equally to the father and mother in any normal circumstances. The rights of guardianship have been preferred and given to women only when the mother has illegitimate children, if the father denies the responsibilities of guardianship, or if he is unfit to take care of the minor in unfortunate circumstances.

The petitioner in *ABC v. State (NCT of Delhi)*¹⁹ was a Christian woman who was an unmarried mother with a good education, a job, and a strong religious conviction. Without the father’s involvement in the child’s upbringing, she had, since the child’s birth, looked after all of his interests and met all of his requirements. She had approached the appropriate authorities with the intention of designating her son as her nominee in all of her bank accounts and insurance policies. The authorities informed her that she would need to either disclose the father’s name as the child’s natural guardian or obtain a court certificate confirming her guardianship of the child. She made a court application pursuant to Section 729 of the 1890 Act to be recognised as the guardian and issued a notice of the same in the local newspaper, but she refused to give the father’s name or address. She even signed an affidavit saying that if the father ever filed a claim for guardianship of the child in the future, the guardianship might be changed in accordance with the court’s ruling. The Guardian Court and the High Court declined to comply with her request, stating that under Section 1130 of the 1890 Act, a guardianship application could not be entertained without notifying the child’s parents. They reasoned that even though the couple was not married, it could not be assumed that the father had no interest in the welfare of the minor. She filed an appeal to the Supreme Court. According to the Supreme Court, the mother had custody of the illegitimate child under Hindu and Muslim law, as well as the Succession Act of 1925-1931. No matter whether the father was raising the child or not, mothers often enjoyed the right to priority guardianship over their illegitimate children in other countries. The judge commented that it was common knowledge that mothers love and care for their children deeply.

¹⁹ AIR 2015 SCC OnLine SC 609.

Therefore, it would not be a problem if unwed mothers were given preference over paternity. It would not be feasible to impose a father on the established and loving relationship between the petitioner and her kid in modern times when women want to raise their children alone and provide them with all the care necessary. There was no dispute that the father was responsible for the minor's welfare because he had no interest in seeing that the child was taken care of.

The minor's welfare would not be served by giving the father notice because doing so would just lead to needless conflict. In Section 11 of the 1890 Act, the term "parents" was to be understood to refer to the parent who was solely responsible for the minor's welfare and care. The unmarried mother was designated as the child's natural guardian since she was the most qualified person to ensure the welfare of the child. The Supreme Court also issued guidelines stating that when single women register the birth of a child, only an affidavit should be asked, and the mother cannot be forced to divulge the identity of the father. In *ABC v. State (NCT of Delhi)*²⁰, the Supreme Court acknowledged single women as parents and natural guardians. Therefore, the passport office could not insist that the father's name be included in the document. Instead, the mother should be able to submit an affidavit under oath attesting to the fact that her parents were divorced or that she was a single mother in order for the passport to be issued without the father's name being required.

As a result of the husband's absence in *Aniswar v. Union of India*²¹, the mother's ex parte divorce became legally binding. The minor child of the couple received a "person of Indian origin" card; however, when the mother later applied for the minor's registration as an overseas citizen of India card holder, his application was denied on the grounds that the mother must produce documents proving that she was granted custody of the minor following the divorce. In an effort to overturn the denial, she petitioned the court. In both of the cases, *Geeta Hariharan v. Reserve Bank of India*²² and *ABC v. State (NCT of Delhi)*²³, the Madras High Court noted that the mother had been recognised as the child's natural guardian. Since the divorce had been granted and the child had always resided with the mother since returning to India, it was established that the mother held both legal custody and the child's natural guardianship. Therefore, the petitioner, who is the minor's natural guardian, was qualified to deliver the minor's application to the relevant authorities, and those authorities are required to act quickly to evaluate that application. As a result, it can be said that despite the support of the legal system and the judiciary, the

²⁰ *Ibid.*

²¹ 2016 SCC OnLine Mad 12549.

²² *Supra* note 10.

²³ *Supra* note 19.

difficulties faced by single moms, divorced mothers, and unmarried mothers have not improved over time.

CHALLENGES NEEDED TO BE OVERCOME IN THE CONTEXT OF CONTEMPORARY INDIAN SOCIETY

The role of women in the family was historically viewed as secondary, and they were rarely given a voice in key family discussions or issues. Due to their status as equal partners in raising a kid, both parents must have an equal voice in decisions affecting the welfare of their child. In Indian culture, men hold a dominant role inside the family, giving them access to and control over all the resources. Even though women are legally entitled to custody, men always have the upper hand when it comes to positions of authority like guardianship. Hindu Minority and Guardianship Act, Section 6, which grants the child's father natural guardianship over the mother, breaches Article 14 of the Indian Constitution, which guarantees the right to equality based on gender and creates complications in achieving the objective of gender neutrality. The law no doubt recognises the mother as a caregiver but not a decision-maker by giving her a preference in custody.

As part of a public interest lawsuit challenging Section 6 of the Hindu Minority and Guardianship Act, the Supreme Court also sent a notice to the Centre requesting a response. As it discriminates against women in concerns of natural guardianship, the law has been contested as a violation of the “Equality” principle entrenched in Article 14 of the Constitution.

The husband is declared to be the natural guardian of a minor married girl, which is where Section 6 of the aforementioned Act is in contravention. This was so when persons lured young girls away from their legal guardians and then married them to avoid being charged with the offence of kidnapping them from their legal guardianship as per section 137 clause (b) of the Bharatiya Nyaya Sanhita. Minors cannot marry under the Prohibition of Child Marriage Act of 2006, and the marriage of a minor girl, which has been done by kidnapping, is null and void according to Section 12 of this legislation. Thus, when marriage with the minor itself is prohibited under law, then it should also be illegal to confer guardianship upon a person who has been party to such an illegal act. The possibility also arises that the husband of the minor girl in such child marriage is a minor, too.

The rights of the mother over her children are unquestionable and undeniable. The law does not allow her to be removed from her proper position. Both parents should be equally entitled to

guardianship of their children as well as equal rights to make decisions affecting the child's welfare. To comply with the equality ideals entrenched in Article 14 of the Constitution, the Law Commission of India proposed changes to Section 6 in its 257th report titled "Reforms in Guardianship and Custody Laws in India." While reiterating the recommendations of its 133rd report, they had argued for the removal of the superiority of one parent over the other and suggested that since the welfare of the child should always come first in all situations, both the mother and the father should be taken into consideration at the same time as the minor's natural guardians. Unquestionably, mothers play a significant and important role in a child's upbringing. Nobody, not even the father of the child, may treat her like a lesser being when it comes to holding the guardianship rights of her children.

The comments and digests, which are regarded as the most important sources of Hindu law, included descriptions of both the new traditions that were asserting their legitimacy and the traditional practises that were documented in the smritis. Despite claiming to be based on smritis, the comments expanded, amended, and explained the traditions that were recorded there in order to make them consistent with the accepted customs of the period and to meet the perceived needs of the time. Many aspects of Hindu and Islamic law have historically remained unaltered by centuries of political instability and social and economic change. In the past, practises covered by Hindu and Muslim personal laws had total protection from the law. In India, the laws governing the issue of natural guardianship are incredibly unfair and discriminatory. All personal laws, whether they be those of Hindus, Muslims, or other communities, give the father a preference over the mother in cases of natural guardianship, placing mothers in the background. Divorced, separated, deserted, or single mothers often suffer because of this since they give up many of their rights and bear the weight of the unfair rules. The balance should tilt in favour of mothers who are both breadwinners for their households and capable carers of their minor children, putting them on a par with their male counterparts. This is because the patriarchal outlook of Indian society is slowly disintegrating, and women are increasingly viewed as independent, capable beings. It should be highlighted strongly that rules governing guardianship for married couples should be equal and joint and that single mothers, as well as married mothers, should be given preference for natural guardianship.

The landmark judgments of the Supreme Court on the matter of natural guardianship given to mothers are unsatisfactory and missed the opportunity to elevate the status of mothers as true natural guardians in modern society, where both men and women are considered to be equal in the eyes of the law. The precedents by the Supreme Court are undoubtedly of great importance

in availing natural guardianship rights to mothers to a certain extent. However, giving constitutional validity to Section 6 clause (a) of the Hindu Minority and Guardianship Act, 1956, till the current times has brought a lot of questions in achieving gender neutrality and not discriminating on the basis of gender under Article 14 of the Indian Constitution. The laws for guardianship once again restrict the rights of women while granting full control to fathers by constructing “after” as “in the absence of”. The unconditional recognition of the mothers as natural guardians can only come if the mothers are given equal status alongside the fathers as natural guardians.

CONCLUSION & SUGGESTIONS

The idea of patriarchy has influenced the traditional laws of the diverse ethnicities that make up India. In addition to relegating women to a subordinate status in society, this normalised the idea of patriarchal families. This generated numerous difficulties for separated mothers, divorced mothers, and single mothers and was especially detrimental to women who were outside the accepted parameters of the “complete happy family of four”- the father, mother, and their two children. The experiences of single mothers are a testament to how they have faced discrimination over the years because fathers were viewed as the primary caretakers of children in India. The vivid idea of the “complete happy family of four” has become so deeply ingrained in people’s minds that when a single mother enters the picture, society looks down on them because of the conventional notions of a complete happy family that are deeply ingrained in people’s minds. In many cases, single mothers are even despised for deviating from the ideals of the ideal Indian family. The traditional idea of a four-person happy family is no longer an untouchable benchmark for the Indian family. The rise of single mothers is partly a result of the spread of live-in partnerships. This position has changed as a result of the rising number of single parents, particularly single mothers, as more women are opting to raise their children alone. With the advancement of technology and the accessibility of new conception techniques like artificial insemination and in vitro fertilisation, single mothers today include those who have adopted a child, married women who are solely responsible for the child, divorced women, separated women, abandoned women, unwed mothers, and rape victims. With the number of single mothers increasing, it makes sense that the law should change to give mothers equal and joint rights to natural guardianship. The right to equality before the law is provided by Article 14 of the Indian Constitution. The law must be applied equally among equals, and like and unlike must not be treated equally.

In many cases, the women face difficulties in getting out of their toxic marriages because of the fear that they may get separated from their children or they may have to go through many difficult court procedures to get the right over their minor children. The real problem is that even if they get custody of their children, they will not have the rights of guardianship over their minor children, and the presumption of guardianship will always be with the father of their children unless any unfortunate circumstance arises.

The primacy of the father over the mother as the natural guardian cannot have a rational relation with the object of “welfare of the child” sought to be achieved in every single case, which is why the Hindu and Muslim laws that give fathers preference over mothers in matters of natural guardianship cannot pass the test of intelligible differentia as theorised under Article 14. Similar to Article 14, Article 15 makes it clear that sex-based discrimination is prohibited. Therefore, no law passed by the legislature shall discriminate against individuals solely based on their gender.

It is the need of the hour that women should receive the same respect and recognition as men in society. In a nation where women fight the patriarchal model of society and struggle for their rights, the situation of women has significantly advanced. Nonetheless, certain provisions of family laws continue to prevent women from progressing forward. One such facet is the right to have natural guardianship of her children. The commendable amendment to Section 19 clause (b) of The Guardians & Wards Act, 1890 by the government recognised mothers' equality in guardianship. It is now hoped that the legislature would take up the challenge of modifying Sections 6 and 7 of the Hindu Minority and Guardianship Act of 1956, as well as all other customary personal laws on the subject, to grant mothers and fathers joint and natural guardianship rights. As natural guardians, both parents must continue to execute their guardianship responsibilities concurrently and for the benefit of their children while they are still married. The legislature is now in charge of bringing about changes in the contemporaneous circumstances. It has the ability to alter the current situation's discrimination and provide equity, fairness and justice to the laws governing natural guardianship. It is high time for mothers to be fairly acknowledged as the children's primary natural guardians.

When the mothers are given a chance to fight for the custody of their children equally as the father, then the law should also not show biases in letting women fight equally as men for the natural guardianship of their minor children if any special circumstance arises and the law itself must presume that both the father and mother have equal rights over their minor children including the right of having the natural guardianship in all situations alike.

THE ROLE OF HISTORY IN SHAPING LEGAL SYSTEMS: A STUDY OF ITS IMPORTANCE IN LEGAL EDUCATION

- Dr. Puja Prerna*

Abstract

The study of law is intrinsically linked to historical understanding, as legal systems are products of their time and context. This paper explores the significant role that history plays in shaping legal systems and its importance in legal education. By examining the historical roots of legal principles, doctrines, and institutions, the paper argues that a comprehensive understanding of law requires awareness of its historical development. Additionally, the paper examines how the study of history aids law students in interpreting legal texts, understanding jurisprudential evolution, and ensuring a fair and just legal process. It concludes by emphasising the need to integrate history into legal education curricula for the development of well-rounded legal professionals. This paper delves into the importance of history in the study of law, highlighting its role in shaping legal thought, institutions, and the overall legal framework. This paper advocates for a historical approach to legal education, urging the historical analysis of legal curricula to produce lawyers who are not only skilled in contemporary legal practices but are also deeply informed about the evolution of law through history.

Keywords: Legal Education, History, Legal Profession, Court, Advocacy.

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INTRODUCTION

Legal systems across the globe are not static they evolve over time, shaped by political, social, cultural, and economic forces. The history of a legal system provides insights into how laws were formed, why they were created, and how they have changed over time. Understanding these factors is essential for a deeper appreciation of legal principles and the dynamics that influence them. Legal education, often perceived as an academic pursuit rooted in statutes and case law, can sometimes neglect the broader historical context that underpins these laws. In a broad sense, legal education is the process of educating people about the rules, procedures, and philosophy of law before they become advocates. Getting a law degree puts one in a position where he can stop someone from violating his human rights and understand how the legal system operates. In general, legal education is the process of teaching people the theory, procedures, and principles of the law before they start practising. It involves acquiring knowledge and skills related to a legal system, enabling individuals to become legal professionals and practice law.¹

'Practice of law' means and includes:²

- a) practising before the Court, Tribunal, Authority, Regulator, Administrative Body or Officer and any Quasi-Judicial and Administrative Body,
- b) giving legal advice either individually or from a law firm, either orally or in writing,
- c) giving legal advice to any government or international body or representing any international dispute resolution bodies, including the International Court of Justice,
- d) engaged in legal drafting and participating in any legal proceedings and
- e) representing in arbitration proceedings or any other ADR approved by law.

A legal education empowers individuals to change the world and improve the lives of others. Many individuals don't know how the legal system operates or what rights and obligations they have. Getting a law degree puts you in a position where you can stop someone from violating your human rights while also understanding how the legal system operates. Students who study law are also better able to comprehend the laws that are established and how they relate to both themselves and other people. Studying law confers status and reputation, and people who work in the legal field are paid exceptionally well. All around the world, a legal degree is valued. Providing legal advice, researching legal issues, drafting legal documents, representing clients,

¹ Law is a system of rules created and enforced by social or governmental institutions to regulate behaviour, maintain order, and establish norms within a society.

² Rule of Legal Education, Bar Council of India, Section 2 (xx).

negotiating settlements, managing cases, and offering compliance and risk management advice are just a few of the many tasks and obligations that lawyers have. Successful attorneys possess a variety of traits, including strong analytical abilities, research and investigational skills, logical thinking, and problem-solving abilities. A thorough grasp of the law, its inception, development, and intricate relationships with societal dynamics requires a study of history. This historical perspective can inform both the practice and the scholarly analysis of the law.

Objective of Study: The objective of this research paper is to find out how the study of History, as a subject in Legal Education, is beneficial.

Scope of the study: This research paper will cover only the importance/ benefits of History as a subject in Legal Education in India and the relationship between History and Law.

Method of Study: Various legislation, books, journals, commentaries, reports, magazines, newspapers, websites, etc., have been studied and referenced as needed for this paper's adoption of the Doctrinal Method. This work was prepared using a variety of analytical, critical, historical, evaluative, and socio-legal methodologies.

Importance of the Study: Through this research paper, we will be able to learn the benefits of history as a subject in legal education and its relationship with law.

LEGAL EDUCATION IN INDIA

Only after obtaining +2 standard education can a student in India join a legal course, such as an integrated five-year program or a unitary three-year program, after completing an undergraduate program in any field in order to become an advocate. Only after completing an undergraduate degree or +2 standard education can the Legal Education Centres offer legal education to the students. The Bar Council of India, New Delhi, a statutory organisation created under Section 4 of the Advocates Act 1961, oversees legal education in India. The Bar Council of India must approve the Legal Education Centre to impart legal education, and then the students can enrol as advocates after completing their legal education from such approved legal education centres.

The following various programs are running with the approval of the BCI, New Delhi, for the purpose of enrolling as an advocate:

- Bachelor of Laws (LL.B.) - The LL.B. is the most common law degree offered and conferred by Indian universities which has a duration of three years.

- Integrated Undergraduate Degrees - B.A. LL.B., B.Sc. LL.B., BBA. LL.B., B.Com. LL.B., B. Tech. LL. B., B. S. W. LL. B. These degrees last five years.

Depending on their professional area and the particular demands of their customers, lawyers may have a variety of tasks and obligations. Providing legal advice, researching legal issues, drafting legal documents, representing clients, negotiating settlements, managing cases, and offering compliance and risk management advice are some of the typical tasks and responsibilities of attorneys. Successful lawyers have traits like strong analytical abilities, excellent communication skills, research and investigation abilities, logical thinking and problem-solving abilities, integrity and ethical judgment, a strong work ethic, perseverance, and dedication. Interpersonal skills, organisational and time management abilities, and the capacity to adjust to new obstacles brought about by evolving laws and technology. “Integrated degree course in law”, as mentioned above, means “double degree course comprising the bachelor degree in any branch of knowledge prosecuted simultaneously with the degree course in law, in such an integrated manner as may be designed by the University concerned for a continuous period of not less than five years.”³ “The number of courses/ papers of liberal subjects in integrated programs must be 12 (twelve) as one major subject with two minors except for law subjects/papers. There may be six papers in major and three papers each in minor.”⁴ For the B.A.LL.B. program, the above 12 courses/ papers can be from the social science, such as History, Sociology, Political Science, Philosophy, Economics, English, Psychology, Mathematics, etc.

WHY HISTORY IN LEGAL EDUCATION?

History and law are closely intertwined. The study of history provides important context and precedent for understanding the development and evolution of legal systems, principles, and practices. The social, cultural, and political context in which law functions both influences and is influenced by it. Grasp the significance of law in forming and expressing the human experience requires a grasp of society’s history, norms, values, and relationships with societal developments. History helps us understand the past so that we can influence the future. History is more than a dry list of historical names and dates. It serves as a compass pointing to the future, a guide to the present, and a mirror reflecting the progress of our society. Studying the past helps one comprehend human nature and cultural patterns. History cultivates a common narrative and a

³ Ibid. rule 2.

⁴ Ibid. rule 6.

feeling of identity. History is essential for the development of analytical and critical thinking abilities.

The value of history lies in its power to elucidate past events, inform the present conditions, and guide future decisions. Through a structured analysis and application of historical context, one appreciates its role as an essential discipline. Some key ways in which History is related to law include:

- 1) The study of history examines how different systems and traditions have emerged and changed over time in response to social, political, and economic factors,
- 2) Analysing the historical context and rationale behind any law is crucial for understanding the reason behind the present law,
- 3) Understanding of history is vital for interpreting and applying the foundational legal documents,
- 4) Comparing the historical development of systems in different countries and regions can provide valuable insights into the diversity of legal traditions and the factors that have influenced their formation and transformation over time.

Analysing Past, Present, and Future: History offers a thorough account of previous occurrences that have a substantial impact on current social structures and future developments. Patterns seen throughout history have influenced civilisations, communities, and customs. Thanks to this study, people may learn from their past choices and comprehend the potential ramifications for future results.

Role in Society: Because it preserves the communal memory, cultivates knowledgeable citizens, and advances an appreciation of cultural and religious variety, history plays a vital role in society. Every one of these elements helps create a civilisation that respects its history while influencing its present and future.

Communities benefit from history by preserving a feeling of continuity and identity. Without this, civilisations run the risk of losing their sense of belonging and the linkages to common experiences that shape their values and customs.

Strengthening Democracy: A robust democracy is built on the foundation of an informed citizenry. History is very helpful in making citizens aware. Knowing the past gives students the background information they need to comprehend the present regulations and how they affect rights and obligations. Along with learning about historical events, they also learn how to

evaluate sources critically and identify trends that affect contemporary government. A student who has knowledge of History knows how laws and social norms change throughout time.

Understanding Cultural and Religious Diversity: History sheds light on the customs, beliefs and faith of the civilisations. Understanding the historical backgrounds of cultures and religions enables one to recognise the variety of viewpoints and customs that exist. This comprehension promotes tolerance and helps lessen disputes brought on by misinterpretations of culture or religion.

Importance of Historical Context: Historical events offer invaluable insights into the complexities of human experience, from the sobering repercussions of wars and conflicts to the transformative power of significant milestones. It guarantees a nuanced perspective of previous choices and acts in the context of their era and keeps them from making the same mistakes again.

History underscores the credibility of historical narratives and validates their relevance to current understandings. It fosters an awareness that present conditions result from human choices. History grounds students in the temporal dimensions of human experience. Educational systems globally include history to various extents, recognising its role in cultivating critical thinking and an understanding of how societies have evolved. The reason for including history in curriculums is to provide context for current events.

INTERDEPENDENCE OF LAW & HISTORY

The relationship between law and history is profound and symbiotic. Historical events and social changes often necessitate legal reforms, while legal institutions, in turn, impact the course of history. For example, the laws governing property rights, contract formation, and criminal liability have evolved as societies have progressed, shaped by political upheavals, economic development, and cultural shifts.

- I. **The Origin of Legal Systems:** The origins of legal systems can be traced back to ancient civilisations. The Code of Hammurabi, for instance, is one of the earliest and most influential legal texts, providing insight into the legal structures of ancient Mesopotamia. Similarly, the laws of ancient Greece and Rome, such as the Twelve Tables and Roman law, laid the foundations for modern legal systems, including the common law tradition in England.

In India, the Manusmriti, Arthashastra, and other ancient texts provided a framework for law and governance. Colonial rule, however, brought about significant changes in these systems, imposing British common law, which has since become a cornerstone of the Indian legal system. Understanding the historical roots of law in India offers valuable insights into the current legal framework and its development.

- II. Colonial and Post-Colonial Legacies: The influence of colonial powers on legal systems is another important historical consideration. During the colonial period, colonial rulers often imposed foreign legal systems on their colonies. For example, British colonial rule in India brought the Indian Penal Code and other common law principles that continue to govern Indian law today. This colonial legacy shaped not only the law but also the way legal education is taught in many countries, including India.

The post-colonial era often involves the process of legal reform and indigenisation. In India, after independence, there was a strong emphasis on revising colonial-era laws and adapting them to meet the needs of a newly independent nation. The process of legal reform, however, remains heavily influenced by historical precedents and colonial legal structures.

IMPORTANCE OF HISTORY IN LEGAL EDUCATION

Incorporating historical knowledge into legal education offers several advantages for law students and legal professionals.

Contextualising Legal Doctrines

One of the primary functions of history in legal education is to provide context for legal doctrines. Numerous legal precepts have a long history, including the ideas of justice, equality before the law, and property rights. Law students can better grasp how these concepts are applied in contemporary legal systems by knowing their historical background.

For instance, historical discussions over the distribution of power among the legislative, executive, and judicial departments of government had an impact on the creation of the American concept of judicial review. Similar to this, the foundation of the Indian legal system - natural justice - has its roots in ancient philosophical traditions, such as Aristotle and Kautilya's writings. A law student's comprehension and application of these concepts are improved by having a firm knowledge of their historical backgrounds.

Understanding Legal Evolution

Legal systems evolve over time in response to changes in society, politics, and culture. The study of history helps law students understand how legal systems have developed and why certain legal principles have been adopted, modified, or abandoned. This understanding is crucial for interpreting legal precedents and anticipating the future trajectory of the law.

The evolution of human rights law is a prime example. Human rights as a concept have their roots in historical events such as the Magna Carta, the American Revolution, and the French Revolution. The Universal Declaration of Human Rights, adopted by the United Nations in 1948, is the result of a historical process of codifying human rights principles into law. Legal education that incorporates the historical development of human rights law enables students to understand its relevance and application in modern-day legal systems.

Interpreting Legal Texts

Historical knowledge is essential for interpreting legal texts, whether they are statutes, case law, or constitutional provisions. Laws are often written in the context of specific historical events or social conditions. Without an understanding of the historical context in which a law was created, it is difficult to understand its meaning or intent fully.

For example, the Indian Constitution, which was adopted in 1950, was drafted in a particular historical context: the aftermath of British colonial rule, the partition of India, and the need for a cohesive democratic framework for a newly independent nation. The historical context of these events informs the interpretation of constitutional provisions, such as those relating to fundamental rights and the structure of government.

CONCLUSION

The role of history in shaping legal systems cannot be overstated. Legal systems are products of their historical contexts, and understanding this historical backdrop is essential for law students and legal professionals. History provides crucial insights into the development of legal doctrines, the evolution of legal systems, and the interpretation of legal texts. As such, integrating history into legal education is vital for developing well-rounded legal professionals who can approach the law with a deep understanding of its historical roots and its role in society. Incorporating historical study into legal curricula will not only enhance the intellectual foundation of law students but also ensure that they are better equipped to navigate the complexities of legal

practice in a changing world. Legal education emphasising the importance of history will lead to a more nuanced and informed approach to law, one that is aware of the past while being attuned to the needs and challenges of the future.

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PLURALISM AND INDIA: AN EXAMINATION OF THE NATION'S CONSTITUTIONAL FRAMEWORK

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Abstract

The paper provides an analysis of India's diversity and examines the interrelationship among various factors that contribute to its variation, tracing its evolution from a colonised entity lacking its own rights to an independent and rapidly developing nation. Numerous scholars acknowledge India as a multifaceted society due to the significant variety of its ethnic groups, languages, religions, and customs. The Indian Constitution, adopted in 1947 following India's independence, serves as a significant example of plurality. The concept of pluralism originated in the pre-Socratic era, articulated by philosophers including Anaxagoras, Archelaus, and Empedocles during the 5th century B.C. The research paper will provide an overview of his ideology, as well as an examination of the ideologies of Indian economist and philosopher Amartya Sen. This research paper aims to inform readers about the landmark cases that have tested the Constitutionality of this nation in the context of pluralism. The author elucidates the differences between cultural diversity and pluralism, as there exists a potential for confusion among individuals regarding these concepts.

Keywords: Pluralism, Secularism, Religion, Constitution, Minority.

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INTRODUCTION

As discussed earlier, the context of Indian pluralism goes way beyond religion. It is faith, trust, the constitution, the marginals, the Indians, or the citizens. Indian ethos is constructed in a way that sees things beyond the surface level of religion; we see more than religion. Though, as Indians, there are various versions of us, some, as discussed above, look beyond religion and have one national feeling, while on the other hand, we have the ones who might at first or always find difficulty as experiencing pluralism is, for us an easy virtue, but is a totally different thing when it comes to practising in theory, as it demands much more of us¹. Again, experiencing pluralism is very effortless, but defending the idea of pluralism against dangerous, planned attacks is nothing but intellectual exercise.

But thinking deeply about these lines, the author would like to raise some questions or would love to discuss that,

- 1) Why do we just talk about India when we just talk about democracy? Are other neighbourhood countries not good examples of democracy? Why do we need to compare them?
- 2) Why are so many teenagers becoming religious, and is it another propaganda, or is it the same with every other religion, and what's the theory behind it?
- 3) Why do we just talk about caste and religion only when we think of pluralism and not gender and sexual orientation? Is pluralism theoretically talking about caste and religion? Can this theory NOT be applied depending on the kind of orientations present in modern-day India?

WHAT IS THE DEMOGRAPHIC STRUCTURE OF INDIA, AND HOW DOES IT DEAL WITH THE CELEBRATED DEMOCRACY?

India has been a great appreciator and welcomer of all the refugees from the neighboring countries, thus making sure that its relationship with the already existing ones doesn't fade away and that it can get help in the form of humanitarian aid from these countries. Now, if we elaborate more on India's democratic scenario, what exactly is going on might differ when talked about and might differ when it's being experienced.

Pluralism is a cornerstone of Indian democracy. According to this Indian ethos, every other community feels equally represented, and no other community pressures or dominates the other.

¹ Amartya Sen, "Indian Pluralism", *India International Centre Quarterly* 1993.

Indian diversity goes beyond religion and extends to language, culture, and religion, which can be seen in the eighth schedule of the constitution of India, which includes over 22 official languages². Indians celebrate a multitude of festivals and national holidays, each with its rituals and traditions. The Pew Research Centre survey asked Indians of all religious backgrounds whether they participate in celebrating one national holiday (Independence Day), a few religious festivals associated with various groups (Diwali, Holi, Christmas, and Eid), and the Western holiday of Valentine's Day, which recently has gained some popularity in India.

Hindus who are less religious are more likely to say they participate in celebrations of Christmas. These celebrations also are more common among Hindus in the South and among Hindus with a college education. For example, 23% of Hindus in the South

One-in-five Indian Muslims, three-in-ten Christians say they celebrate Diwali

% of Indian adults who say they participate in celebrations of ...

General population	Independence Day	Diwali	Holi	Valentine's Day	Christmas	Eid
General population	87%	85%	78%	21%	18%	17%
Hindus	88	95	88	22	17	7
Muslims	82	20	16	14	10	93
Christians	79	31	25	27	97	11
Sikhs	77	90	87	26	19	5
Buddhists	86	79	70	20	13	9
Jains	90	98	93	31	18	9

Source: Survey conducted Nov. 17, 2019-March 23, 2020, among adults in India. See Methodology for details.

"Religion in India: Tolerance and Segregation"

PEW RESEARCH CENTER

say they celebrate Christmas, compared with about half as many in the Northeast (11%), even though both regions have a strong Christian presence. Christmas is also more commonly celebrated by urban Hindus than rural Hindus (23% vs. 14%). Muslims vary regionally when it comes to celebrating Diwali and Holi. Among Muslims in the North, nearly a quarter (24%) say they celebrate Diwali, and 15% participate in Holi festivities. In Western India, even larger shares of Muslims say they participate in Diwali (39%) and Holi (31%) celebrations³. Following were the findings of the research centre's survey.

If we start to compare the culture and diversity of the other nations with India, the purpose of the paper would shift somewhere else and would not hold a greater value for the readers, so to sum up or just to include it, the author adds that India with its refugee policies has made itself democratic and much more diversified as we were earlier just for the namesake. The world faces

² Department of Official Language, "Languages Included in Eighth Schedule of Indian Constitution" (Government of India) available at: <https://rajbhasha.gov.in/en/languages-included-eighth-schedule-indian-constitution> (last visited on: 10.11.2024).

³ Neha Sahgal, Jonathan Evans, Ariana Monique Salazar, Kelsey Jo Starr & Manolo Corichi, "Diversity and Pluralism", Pew Research Center June 29, 2021, available at: https://www.pewresearch.org/wp-content/uploads/sites/20/2021/06/PF_06.29.21_India.full_.report.pdf (last visited on: 10.11.2024).

the challenge of die-out resources, climate crises, increasing populations, regional disputes, and accentuated differences within and across national boundaries. These have led to mass migration flows across countries, continents, and hemispheres. India still continues to advocate the primacy of diversity and rights and will need to go much further. India is also subject to the same pressures as the rest of the world. Specifically, it has porous borders with its neighbours, Pakistan, Bangladesh, and Afghanistan, that enable significant illegal immigrant flows. While the official number of immigrants from these countries totals 3m⁴. Political pluralism can be seen in a very diversified and not-so-dominant way in a political environment. The clearly defined and established institutions resulted in the division of the state itself internally. Politics is all about gathering popularity and influence by having competing interest areas, so political parties are always under pressure from interest groups. Though ideologies, personal goals, and ambitions are the main reasons for these internal divisions, cross-party relations are much more common among parliamentary members. This was commented on way before in books authored by Rajni Kothari and Rudolphs, the books titled, 'Politics in India', published by Orient Longman, and 'In Pursuit of Lakshmi: The Political Economy of the Indian State', published by the University of Chicago Press, respectively.⁵

HOW DOES YOUR POLITICAL OPINION AFFECT YOUR UNDERSTANDING OF A PARTICULAR RELIGION?

Do you ever wonder why the youth, or simply the people, have been becoming or starting to lean more towards the right wing in recent years? This seemed impossible in the 1970s and 1980s. People used to think that in recent years when there would be a significant rise in globalisation, the individual identity of many countries would be diminished. Only one single global identity would exist, but the total opposite happened. Countries became more religious identity-sensitive, which eventually made people give more importance to cultural, individual and religious identity, making right-wing popular. It has started to influence people many people, but how did this shift happen?

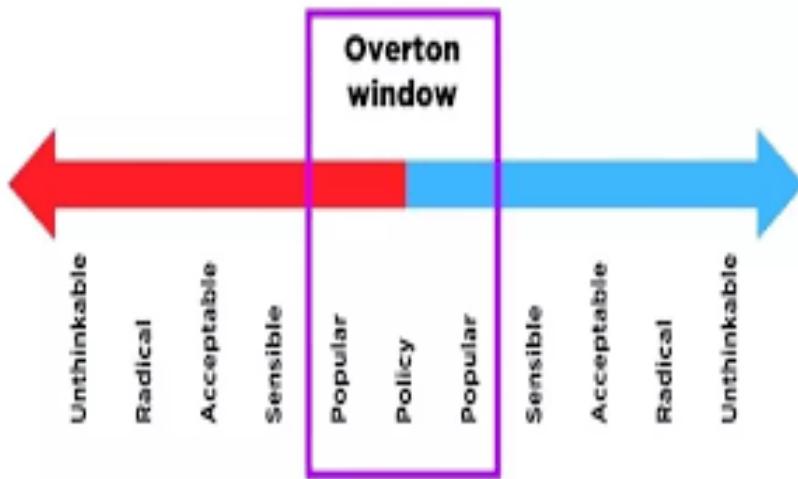
But who exactly are the left and right wing? The political parties who support more liberal and secular ideology call themselves the left-wing. While the party that emphasises more on cultural,

⁴ Greater Pacific Capital "India's Diversity is a Strategic Asset", available at: <https://www.greaterpacificcapital.com/thought-leadership/indias-diversity-is-a-strategic-asset> (last visited on: 10.11.2024)

⁵ Andrew Wyatt, "Political Pluralism: India's Party Politics Deliver Uneasy Win for BJP", *The Hindu Centre for Politics and Public Policy* June 18, 2024, available at: <https://www.thehinducentre.com/the-arena/current-issues/political-pluralism-indias-party-politics-deliver-uneasy-win-for-bjp/article68299551.ece> (last visited on: 10.11.2024).

conservative, and religious ideas calls itself the right wing. The major difference was that the leftists had a more capitalist approach while rightists had a socialist one, but this definition doesn't sit right in the Indian context, as both the wings follow the socialist idea. In the global context to get an idea before hundreds of years ago, the whole of Europe had Marxism followed, Communism in the Soviet Union, and Maoism in China; each one of them showcased the left-wing idea in the population and had a strong hold over the country's academia, which emphasised more on leftist ideology as expected in the Indian context during the very much celebrated "Ram Mandir" case in the 1990s where, until the morning of December 6, 1992, it was the Babri Masjid, a mosque built in 1528 and named after the Mughal king Babur, that stood at that place. A mob of Hindu nationalists pulled down the mosque, chanting religious slogans after more than a decade of an angry and, at times, violent campaign. After years of being closed to the public, in November 2019, India's Supreme Court ruled that the site must be handed over to a trust that would be specially set up to oversee the construction of a Hindu temple. A separate piece of land in Dhannipur village on the outskirts of Ayodhya was allocated to Muslims for a mosque that may serve as a replacement for the Babri Masjid. Its construction is yet to begin.⁶

This was one major reason back then for popularised right-wing religious opinion, and now many YouTube videos, articles and podcasts are on spirituality and religion that might have the watcher there. My analysis is the theory or the concept of the "Overton window",



which talks about a scale that has the ideas of both left and right-wing and is, at some point in time, popular. It starts with popular ideas that might be sensible and acceptable and, on the extreme, ends with radical and unthinkable notions of both sides. This overturn window is never constant; with time, it keeps on shifting from left to right, and the notion of the people keeps on changing according to who is heading the government. The idea is that any policy falling outside

⁶ Areesha Lodhi, "Why is India's Ram Temple in Ayodhya Controversial?", *Al Jazeera* Jan. 22, 2024, available at: <https://www.aljazeera.com/news/2024/1/22/why-is-indias-ram-temple-in-ayodhya-controversial> (last visited on: 11.11.2024)

the Overton window is out of step with public opinion and the current political climate and is formulated to try and shift the Overton window in a different direction or to expand it to be wider.⁷

Once unthinkable ideas are now the same ideas on which our policies are being framed. Be it the abolition of article 370, discussing UCC, the making of Ram Mandir, making a law on triple talaq, etc., nobody could even think of these ideas back then as they seemed to be very radical and unthinkable in the 80s; it felt like a joke to ministers that time when somebody would raise an issue regarding that. The side this overturn window shifts becomes more popular among the youth, and then they start to rationalise according to what seems right to them. The downfall of communism is also one major reason, as we can experience in the Indian ethos the rise of capitalistic ideas (not much as of now) and how we accepted the idea of it with open hands for our economy is a potential nightmare of any possible communist. And because of this capitalistic approach, people cannot connect themselves more to socialism and communism, and because capitalism and the left wing do not have anything in common, people who support capitalism also somewhat lean toward the right wing and their ideologies as well. Earlier, the left wing had great control over the academia and media of the country, which is now destroyed by social media. Thoughts that were prohibited by the media in its controlled environment started to come out so openly and widely because everyone got access. Things that should've been confidential and things that should have been not circulated on the internet are still on the internet, easy and accessible for everyone to go through. I'm so not against the idea of free access to the internet; it sure is a basic amenity these days, both academically and financially, but where did the restrictions go? Do you not think the religious educators sitting online are the reason for propagating the wrong idea about religion and Hindutva and instigating the viewers in the wrong way? This would definitely be one downside of the right to free speech.

ANOTHER PHASE OF PLURALISM - GENDER PLURALISM

The landmark judgment of *National Legal Services Authority v. Union of India*⁸ established that transgender people are also a gender in India and will be termed as the ‘Third Gender’. In this case, The Court had to decide whether persons who don’t fall under the male/female gender binary can be legally recognised as “third gender” persons. It had to decide whether ignoring non-binary gender identities is a violation of fundamental rights guaranteed by the Constitution

⁷ New Statesman, “What is the Overton Window?”, *The New Statesman*, available at: <https://www.newstatesman.com/politics/2015/04/what-overton-window-politics> (11.11.2024).

⁸ AIR 2014 SC 1863.

of India. It referred to an “Expert Committee on Issues Relating to Transgender” constituted under the Ministry of Social Justice and Empowerment to help it decide.⁹

This was a historic judgement where the court recognised “third gender”/transgender persons for the first time and discussed “gender identity” in detail. The Court said third-gender persons are entitled to fundamental rights under the Constitution and International law. It also directed state governments to create mechanisms to realise the rights of “third gender”/transgender persons. The Court upheld the right of all persons to self-identify their gender. Further, it declared that hijras and eunuchs can legally identify as “third gender”. The Court clarified that gender identity did not refer to biological characteristics but rather referred to it as “an innate perception of one’s gender”. Thus, it held that no third-gender persons should be subjected to any medical examination or biological test that would invade their right to privacy.¹⁰

Although the Indian constitution promises gender equality and freedom from gender and religious discrimination, the pluralist nature of the Indian legal system has not delivered on this promise. Gauri Sawant, India’s first trans mother and transgender activist, says, *“Acceptance within the family was the foremost thing that would bring a change in society.”* Every year, the month of June is a developmental occasion for transgender persons. Pride Month is, in fact, social media as the fight for gay rights and social justice. The community is still fighting to have identity cards even after the court recognised our gender; what is there to celebrate Pride Month? Even after that verdict, we don’t have jobs, and neither is their implementation [of the court order]. There should be a one-window approach for the transgender community.¹¹

Legal pluralism, which is a key feature of the Indian legal system, mainly involves the existence of many laws within the same state. The efforts to codify decades and even centuries-old religious laws resulted in the emergence of India’s official faith-based pluralist system. Although it was practised long before, this system includes “Mohammedan” or Sharia law, whose legal roots are traced back to the Sharia Act of 1937, which codified a section of the Fiqh (the law that has an Islamic basis and is interpreted in Islamic sources). For family issues, Hindu Law is applied and used largely only. However, Hindu law covers Sikhs and Buddhists as well, thus making it more inclusive than the Mohammedan law. Muslim women are particularly badly off

⁹ Ibid.

¹⁰ Ibid.

¹¹ Sushmita Ghosh, “7 Years After SC Judgment, Third Genders Say They Feel Like Second Class Citizens”, *India Today* June 16, 2021, available at: <https://www.indiatoday.in/india/story/supreme-court-nalsa-judgment-third-genders-transgenders-pride-month-1815578-2021-06-16> accessed 12 November 2024 (last visited on: 05.01.2025)

under religious laws. This was starkly highlighted in the Shah Bano Begum case¹², where a Muslim woman was denied alimony by her husband under Sharia law, although if she were a Hindu or Christian and treated under different religious laws, she would have got relief. Although the Indian Supreme Court overturned the religious court's decision and the Muslim Women (Protection of Rights on Divorce) Act 1986 was passed after the collapse of the marriage of Muslim women, their rights under Sharia law are still minimal.

In fact, there have been cases where polygamous marriages have been accepted in Shari'a courts where men have been denied money to take care of children to their first wife on the grounds that they prefer their second wife, which is not seen in Christian or Hindu cases. Moreover, the triple Talaq rule has been recognised by Sharia courts in India – men can divorce their wives by saying Talaq – divorce – thrice. Women, on the other hand, must go through months of lengthy arbitration to achieve the same result and are at a disadvantage if they are in an abusive relationship¹³. Lastly, Sharia courts have also given unfavourable property rights to Muslim women except for recognising the traditional Mahr - a gift a husband gives to his wife during their marriage. So, the impact of legal pluralism on women is that they have fewer rights than other Indian women, and we have a stratified citizenry where social cohesion is absent.

On religious tensions, legal pluralism has had two effects. The purpose of legal pluralism in the framework of faith-based organisations is to address the issues of religious minorities' autonomy and partnership with them. However, pluralism has made the political divide between Hindus and Muslims worsen through the positioning of people into faith-based legal compounds. As evidenced by recent polls, this viewpoint is emerging; hence, only 22% of the Indians polled indicated their agreement that until the implementation of the Uniform Civil Code, there can never be integration between the religions of India. This indicates that legal pluralism has been one point that has been used to entrench differences between Hindus and Muslims. An Interview with Elham Manea dashed our optimism when she quipped that pluralism, by its very nature, puts one team above the other and does not promote unity but ensures that nasty divisions are created within society. Also, it has changed the understanding of religion many citizens have developed. However, even though India is culturally diverse, and the religious groups are highly diverse as well, pluralism is a rude approach that reduces the faith groups to

¹² *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556.

¹³ Poppy Kemp, "Legal Pluralism in India - Divisive and Discriminatory?", (Cambridge University Law Society), available at <https://www.culs.org.uk/per-incuriam/legal-pluralism-in-india-divisive-and-discriminatory#:~:text=Although%20the%20Indian%20constitution%20guarantees,poor%20treatment%20under%20religious%20laws> (last visited on: 12.11.2024).

cultural blobs. This is evident from a MARG survey¹⁴ that was conducted on 481 Hindus in Bombay in 1993, where 13% of the Hindus said they would not hire a Muslim at their homes, 20% of the Hindus believed Muslims should not be banned in the armed forces, and 28% believed that Muslims and Hindus are so different that they cannot live together. Lacing them into faith-based legal enclaves. Recent surveys have reflected this increase in tensions; hence, 78% of Indians interviewed insisted that until a uniform civil code is established, there will never be social cohesion between the religions in India. This suggests that legal pluralism has been a central point in cementing the differences between Hindus and Muslims, a view endorsed in an interview with Elham Manea, who noted that pluralism, by its nature, leverages one group above another and never serves to develop social cohesion, but rather creates harsh swathes within communities. Therefore, legal pluralism is no longer suitable for India. There is a need for changes in the new ‘one law for all’, as the practices faced by many Indian Muslim women who are discriminated against and to right the wrongs of creating a religious harmonious state.

CONCLUSION

India through pluralism: It remains, in more general terms, inundated with constitutional pluralism arising from its tremendous religious and cultural diversity. Under the principle of pluralism, the Constitution protects the right to govern oneself in different communities, but the matter remains more of a theoretical question. Arranging society according to legal and religious categories and adhering to legal pluralism leads to disparities for women and society groups. Landmark cases like *NALSA v. Union of India*¹⁵ Looking into the legal system of the country and the judgment delivered in Omar Abdullah and the Shah Bano case, some of the reasons why people demanded the implementation of the Uniform Civil Code are worth mentioning. Lately, the political divide coupled with the right-wing agenda has exaggerated the chasm between religion and culture. Either way, the referenced Overton window shift, as well as social media reinforcement, have mobilised multiple religions against each other and hence impacted social solidarity.

Hence, for the country to achieve a true form of pluralism, there is a need to enhance its position to close this gap between laws enacted and social norms. This includes legal matters concerning the change of some laws, such as the ongoing process to pass a Universal civil code

¹⁴ John Ward Anderson, “India’s Muslim fear new physical threat”, *The Washington Post* Mar. 11, 1994, available at: https://www.washingtonpost.com/archive/politics/1994/03/12/indias-muslims-fear-new-physical-threat/b4cebe13-8385-4107-8dc7-ad7d414394fc/?utm_term=.e2c2b69006e0 (last visited on: 05.01.2025)

¹⁵ *Supra* note 8.

and for intolerance against discrimination. The prejudices cast in the structure and prejudices that are religious, caste, gender, and sexual colour are the essence of India only if social prejudices derived from religion, caste, gender, and sex have been done away with; only then does India stand the chance of being a pluralist democracy where each Indian citizen has rights equally that is protected and respected.

DIGITAL CONTRACTS AND ITS LEGAL VALIDITY IN INTERNATIONAL TRADE: AN ANALYSIS

- Ramsha Haque*

Abstract

This paper delves into the legal validity of digital contracts within the framework of international trade, presenting a comparative analysis of the legislative environments in India, the United States, the United Kingdom, and the European Union. As businesses increasingly adopt digital platforms for their transactions, understanding the legal recognition and enforceability of electronic agreements becomes paramount. The study scrutinises pivotal regulations, including the Indian Contract Act, the Electronic Signatures in Global and National Commerce Act (ESIGN), the Uniform Electronic Transactions Act (UETA), and the EU's Data Act. It explores the ramifications of electronic signatures and smart contracts, addressing the complexities introduced by technological advancements, such as discrepancies in interpretation and potential liability concerns. Furthermore, this analysis evaluates the strengths and limitations of existing legal frameworks, identifying best practices and areas that require enhancement. By emphasising the importance of harmonisation and adaptability in legal approaches, the findings contribute to the development of a more coherent and effective international legal environment for digital transactions. This work ultimately aims to facilitate smoother cross-border trade in an increasingly digital economy, providing valuable insights for policymakers, legal practitioners, and businesses navigating this evolving landscape.

Keywords: Digital Contracts, Comparative Analysis, Electronic Signature, Cross-Border Trade, Digital Economy.

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INTRODUCTION

Just as vending machines have supplanted human vendors, smart contracts possess the potential to render intermediaries obsolete across various sectors, as articulated by Nick Szabo.¹ An American computer scientist and the creator of the digital currency Bit Gold, Szabo defined “smart contracts” in 1998 as “computerised transaction protocols that execute the terms of a contract.”² Smart contracts are digital agreements capable of autonomous execution, enabling parties to transfer digital and physical assets, or any item of value, between themselves in a transparent and conflict-free manner³. They implement the necessary logic to deliver complex services in response to customer demands, encompassing functions such as state management, governance enforcement, and identity verification. Furthermore, smart contracts facilitate the storage and retrieval of data from blockchain systems without requiring extensive searches; instead, they provide a computational interface to access the underlying blockchain storage structures⁴.

A smart contract can be said to be a set of computer code that autonomously executes all or part of an agreement stored on a blockchain platform. It exists along a continuum, ranging from fully encoded digital agreements to the automated execution of traditional paper contracts. These contracts are designed to minimise the transaction costs effectively. Thus, breaching the agreement is both challenging and costly for the involved parties. As a result, there is a growing interest among businesses in utilizing smart contracts to enhance efficiency in international trade. Many experts have started to examine the potential of smart contracts to reduce transaction costs in this domain. Ramesh Gopinath, IBM’s Vice President of Blockchain Solutions, has pointed out the inefficiencies inherent in the current supply chain system, which relies heavily on the physical movement of a multitude of paper documents for shipping transactions.⁵ He emphasises that this system is particularly vulnerable to fraud, human error, and inadvertent delays. Wolfgang Lehmacher, Head of Supply Chain and Transport Industries at the World

¹ Tharika Dishani Lamappulage Donn, “Smart Contracts and International Trade: European Legal Strategies for Managing Challenges”, 1 (4) *Journal of Digital Technologies and Law* 1042-1057 (2023), available at: <https://doi.org/10.21202/jdtl.2023.41> (last visited on: 28.12.2024)

² *Ibid.*

³ IBM, “What are smart contracts on blockchain?” available at: <https://www.ibm.com/topics/smart-contracts> (last visited on: 08.01.2025)

⁴ Nanayakkara, Samudaya, Srinath Perera, Sepani Senaratne, Geeganage Thilini Weerasuriya, & Herath Mudiyanselage Nelanga Dilum Bandara, “Blockchain and Smart Contracts: A Solution for Payment Issues in Construction Supply Chains” 8 (2) *Informatics* 36, available at: <https://doi.org/10.3390/informatics8020036>

⁵ Anna Duke, “What Does the CISG Have to Say About Smart Contracts? A Legal Analysis”, 20 (1) *Chicago Journal of International Law* 141 (2019), available at: <https://chicagounbound.uchicago.edu/cjil/vol20/iss1/4> (28.12.2024)

Economic Forum, had viewed blockchain technology and smart contracts as solutions to these transaction costs, offering the promise of more straightforward and transparent payments and collaborations among traders.⁶ Additionally, Emmanuelle Ganne, a former advisor to the Director General of the World Trade Organization, has published a report outlining the revolutionary potential of blockchain and smart contracts in reshaping international trade.⁷

Despite all the buzz surrounding the advantages of blockchain and cross-border smart contracts, it is essential to recognize that some of this enthusiasm may be driven by hype from an increasing number of startups in the blockchain sector. As noted by industry insiders, realising the full benefits of smart contracts in international trade will require considerable time, given the entrenched nature of existing financial infrastructures and the difficulty in achieving cooperation among competing institutions. Nevertheless, the legal and business sectors have begun to engage with this discourse, seeking to capitalise on its potential. For example, IBM and Maersk have made joint investments aimed at integrating blockchain technology into the shipping industry⁸; however, they face challenges in securing participation from carriers, many of whom remain hesitant due to the unprecedented nature of the blockchain initiative. Furthermore, Legal Zoom has partnered with a blockchain firm to implement smart contracts in the creation of legal documents encompassing a range of products, from wills and trusts to trademarks and copyrights. However, the application of smart contracts in business agreements has raised some critical questions regarding their legal validity, which remain largely unanswered in existing case law and relevant international legal texts. The diversity of smart contracts necessitates an exploration of their various forms; at one end of the spectrum, a smart contract may encompass all contractual terms in coded form, functioning as a complete agreement in execution. Conversely, on the other hand, a smart contract may simply automate basic actions, such as payment, in conjunction with an associated traditional contract. Given the broad range of smart contract configurations, the determination of when a smart contract becomes legally binding is often contingent upon the applicable legal framework and the specific circumstances surrounding each case.

DIGITALIZATION OF CONTRACTS IN INTERNATIONAL TRADE

⁶ Wolfgang Lehmacher, "Why blockchain should be global trade's next portal of call", World Economic Forum, available at: <https://www.weforum.org/stories/2017/05/blockchain-ports-global-trades/> (last visited on: 28.12.2024)

⁷ *Supra* note 5.

⁸ *Supra* note 5.

On average, a cross-border transaction necessitates the exchange of 36 documents and 240 copies. For example, a shipment of roses from Kenya to Rotterdam can generate a stack of paperwork measuring 25 cm in height, with the associated handling costs often exceeding those of transporting the containers themselves. According to Maersk (Maersk is a Danish shipping and logistics company that offers supply chain and logistics services for businesses of all sizes), the cost of processing trade documents can account for up to 20 percent of the physical transportation expenses for a shipment.⁹

The COVID-19 pandemic has underscored the vulnerabilities of supply chains that rely on physical documentation.¹⁰ Lockdowns, health protocols, and teleworking measures significantly affected the ability of traders to import and export goods within traditional paper-based systems.¹¹ Furthermore, paper documents are prone to forgery, and while trust services that ensure the authenticity and integrity of these documents as notary services exist, they often lack time and cost efficiency¹². Transitioning from paper to digital formats offers numerous advantages. Firstly, it significantly reduces processing times and enables companies to leverage data more effectively. Artificial intelligence can be employed to automatically detect faulty patterns and fight trade-based money laundering. Additionally, the pandemic has highlighted the health benefits of digitalisation, which minimizes physical contact among stakeholders. Moreover, digital systems allow supply chain participants to access consistent and real-time information. Technologies such as blockchain and distributed ledger technology (DLT) ensure the integrity and authenticity of data exchanged on these platforms, thereby enhancing trust among supply chain stakeholders and addressing the double-spending problem that has contributed to various fraud scandals.¹³ To foster the global adoption of electronic transactions and documents in international trade, governments have a critical role in developing comprehensive legal frameworks that explicitly recognise the validity and enforceability of these

⁹ WTO, *The promise of TradeTech*, 28-39 (World Trade Organisation, February 2022), available at: <https://doi.org/10.30875/9789287071026c005> (last visited on: 28.12.2024)

¹⁰ Suriyan Jomthanachai, Wai-Peng Wong, Kend-Lin Soh & Chee-Peng Lim, “A global trade supply chain vulnerability in COVID-19 pandemic: An assessment metric of risk and resilience-based efficiency of CoDEA method” 93 *Research in Transportation Economics* (2022), available at: <https://doi.org/10.1016/j.retrec.2021.101166> (last visited on: 08.01.2025)

¹¹ Enrico Battisti, Simona Alfiero & Erasmia Leonidou, “Remote working and digital transformation during the COVID-19 pandemic: Economic-financial impacts and psychological drivers for employees” 150 *Journal of Business Research* 38-50 (2022), available at: <https://doi.org/10.1016/j.jbusres.2022.06.010> (last visited on: 08.01.2025)

¹² *Supra* note 9, available at: https://www.wto.org/english/res_e/booksp_e/tradtechpolicyharddigit0422_e.pdf (last visited on: 28.12.2024)

¹³ Scott Nevil, “Distributed Ledger Technology (DLT): Definition and How It Works”, available at: <https://www.investopedia.com/terms/d/distributed-ledger-technology-dlt.asp> (last visited on: 28.12.2024)

digital mechanisms within their jurisdictions¹⁴. Establishing such frameworks is essential for ensuring that electronic transactions are treated with the same legal standing as traditional paper-based transactions. This recognition is vital for businesses and individuals engaged in electronic commerce, as it provides them with the assurance that their digital agreements and documents can be legally upheld. Key elements of these legal frameworks should include specific provisions for electronic transferable documents and trust services, such as electronic signatures. Electronic transferable documents facilitate the exchange of ownership and rights in a digital format, which is crucial for streamlining transactions and enhancing efficiency in trade. Trust services, including e-signatures, provide a means to authenticate and verify the identity of parties involved in electronic transactions, thereby enhancing security and trust in digital interactions. By incorporating these provisions, governments can create a more enabling environment for electronic trade, encouraging businesses to adopt digital solutions.

Moreover, it is imperative that these legal frameworks align with international standards. Doing so will facilitate cross-border recognition and utilisation of electronic transactions and documents, allowing businesses to operate seamlessly across different jurisdictions. This alignment helps mitigate legal uncertainties that can arise when dealing with electronic transactions in various countries, ultimately promoting confidence among international trading partners. For instance, aligning national laws with standards set by international organisations, such as the United Nations Commission on International Trade Law (UNCITRAL) or the International Organization for Standardization (ISO), can provide a consistent legal foundation that supports the growth of global electronic commerce¹⁵. In addition to legal recognition, governments must take a coordinated approach to address the legal implications of various algorithms and technologies increasingly utilised alongside TradeTech. The rapid advancement of technology, including artificial intelligence and blockchain, introduces new complexities in legal interpretation and regulation.¹⁶ Without a cohesive strategy, there is a risk of regulatory fragmentation, where different jurisdictions may adopt conflicting regulations that could hinder the effectiveness and efficiency of electronic transactions. By proactively engaging with stakeholders, including businesses, technologists, and legal experts, governments can develop a

¹⁴ Liliyana Daza Jaller, Simon Gaillard & Martin Molinuevo, *The Regulation of Digital Trade: Key Policies and International Trends*” (World Bank Group, 2021), available at: <https://documents1.worldbank.org/curated/en/998881578289921641/pdf/The-Regulation-of-Digital-Trade-Key-Policies-and-International-Trends.pdf> (last visited on: 28.12.2024)

¹⁵ United Nations, “United Nations Commission on International Trade Law”, UNCITRAL, available at: <https://uncitral.un.org/> (last visited on: 08.01.2025)

¹⁶ The World Bank, “Transformative technologies (AI) challenges and principles of regulation”, available at: <https://digitalregulation.org/3004297-2/> (last visited on: 09.01.2025)

unified regulatory framework that supports innovation while protecting the interests of all parties involved. Furthermore, it is essential for governments to foster collaboration between public and private sectors in the development and implementation of these frameworks. Engaging industry stakeholders in the legislative process can provide valuable insights into the practical challenges and opportunities associated with electronic transactions. This collaborative approach can lead to more effective regulations that not only enhance legal certainty but also promote innovation and competitiveness in the digital economy.

In summary, to promote the global adoption of electronic transactions and documents in international trade, governments must develop robust legal frameworks that recognise and validate these digital mechanisms. By ensuring alignment with international standards, addressing technological implications, and fostering public-private collaboration, governments can create a conducive environment for electronic commerce. This comprehensive strategy will ultimately enhance the efficiency and security of international trade, benefiting businesses and consumers alike in the increasingly interconnected digital marketplace.

INTERNATIONAL PERSPECTIVE

1. UK

The Thirteenth Programme of Law Reform directed the Law Commission to conduct research and analysis on smart legal contracts at the request of the Lord Chancellor¹⁷. In November 2019, the UK Jurisdiction Taskforce (UKJT) published a legal statement addressing crypto assets and smart contracts, establishing that these contracts can create legally binding obligations.¹⁸ Following this, the Ministry of Justice placed an order to the Law Commission to undertake a comprehensive review of the existing legal framework surrounding smart legal contracts. In response, the commission has sought to clarify ambiguities and identify deficiencies in current legislation while assessing the need for further research, both immediate and future¹⁹. In instances of contractual disputes, courts will refer to a specific publication that offers guidance on interpreting the contracts in question. This publication advises that courts evaluate the meaning of the programming language from the perspective of a reasonable programmer, considering all relevant contextual information available to the parties at the time the contract was created. The Law Commission emphasised the necessity of interpreting smart contracts,

¹⁷ Lord Chancellor and Secretary of State for Justice, “Smart legal contracts (Advice to Government), Law Commission 2021”, available at: <https://lawcom.gov.uk/project/smart-contracts/> (last visited on: 09.01.2025)

¹⁸ *Supra* note 1.

¹⁹ *Supra* note 17.

even those composed entirely in code, due to the potential difference between the intended meaning of the code and its actual execution. This distinction highlights the difference between the semantic interpretation of the code and its practical implementation, which may lead to interpretive challenges.

The Law Commission recommends adopting a modified version of conventional interpretive tests, wherein the understanding of coded terms is informed by the expertise of individuals knowledgeable in the relevant field. This approach aligns with established methods of contract interpretation. The significance of legal certainty in this context cannot be exaggerated. English law is recognised as capable of accommodating smart contracts, providing assurance to parties engaged in computerised global trade agreements governed by English law. Furthermore, the Law Commission's report identifies key considerations for contracting parties, particularly those operating within the realm of Decentralized Finance.²⁰

2. EU

On March 14, 2023, the European Parliament adopted legislation regarding smart contracts and the Internet of Things as part of the Data Act²¹. This legislation received broad support, passing with 500 votes in favour and only 23 against, with the aim of fostering innovative business models that can lead to the development of new industries and job opportunities²². Article 30 of the Data Act outlines essential requirements for smart contracts related to data sharing²³. The successful implementation of the Data Act requires the development of mechanisms to halt ongoing transactions effectively. These mechanisms might include internal features that allow for the resetting or termination of a smart contract. It is crucial to clearly define the conditions under which a smart contract should be reset or terminated. In the field of information technology, the “kill switch” mechanism is often employed to disable a device, network, or software in response to security threats. In the context of smart contracts, a kill switch can either

²⁰ *Supra* note 1.

²¹ European Parliament, “Proposal for a regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)”, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0069_EN.html#:~:text=It%20imposes%20the%20obligation%20on,an%20im%20a%20transparent%20manner (last visited on: 09.01.2025)

²² Assad Jafri, “EU Passes Data Act including Smart Contract Regulation”, CryptoSlate, available at: <https://cryptoslate.com/eu-passes-data-act-including-smart-contract-regulation/> (last visited on: 09.01.2025)

²³ European Union Cybersecurity Agency, “Draft Article 30 of the Data Act: Implications for DLT and Smart Contracts in the EU”, available at: <https://eu.cci/data-act-position-paper-euci/> (last visited on: 09.01.2025)

terminate the contract or trigger a pause, repair, and subsequent reissue of the contract in the event of a significant vulnerability or breach²⁴.

The Data Act is a pivotal initiative aimed at improving data accessibility in line with EU principles and regulations. It is a fundamental element of the European data strategy, contributing significantly to the digital transformation goals outlined in the Digital Decade initiative. Compliance with the essential requirements will be evaluated by the smart contract provider, who will be responsible for issuing a declaration of conformity and ensuring adherence to the necessary standards. However, the term “responsible” remains ambiguous in this context, raising questions about whether users of the smart contract could face civil liability. If a supplier fails to provide a compliant smart contract, the consequences will be determined according to the laws of the relevant EU member state.

3. USA

In the United States, two key regulations govern the use of electronic contracts in e-commerce and digital transactions:

1. The Electronic Signatures in Global and National Commerce Act (ESIGN):

Enacted by the U.S. Congress in June 2000, the ESIGN Act was made to facilitate and validate electronic transactions by establishing the legal status of electronic signatures and records²⁵. This legislation specifically addresses both the interstate and the international contexts, ensuring that electronic signatures are recognised as having the same legal authority as traditional handwritten signatures. By doing so, the ESIGN Act promotes confidence in electronic commerce, allowing businesses and consumers to enter into binding agreements without the need for physical documentation. This federal statute not only underscores the importance of technological advancements in commerce but also aims to enhance the efficiency of transactions in an increasingly digital marketplace.

2. The Uniform Electronic Transactions Act (UETA): The UETA serves as a complementary framework to the ESIGN Act, providing a comprehensive legal structure

²⁴ Fabio Bassan & Maddalena Rabitti, “From smart legal contracts to contracts on blockchain: An empirical investigation”, 55 *Computer Law & Security Review* 106035 (2024), available at: <https://doi.org/10.1016/j.clsr.2024.106035> (last visited on: 09.01.2025)

²⁵ Federal Deposit Insurance Corporation Consumer Compliance Examination Manual - January 2014: X-3.1, “Electronic Signatures in Global and National Commerce act (E-Sign Act)”, available at: <https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/10/x-3-1.pdf> (last visited on: 09.01.2025)

for electronic transactions across the United States. Developed by the National Conference of Commissioners on Uniform State Laws in 1999, the UETA seeks to standardise the use of electronic signatures and records in various contexts, including governmental and commercial transactions. This act affirms that electronic records and signatures hold the same legal validity as their paper-based counterparts, thereby simplifying the process for parties engaged in electronic dealings. The widespread adoption of UETA by most U.S. states marks a pivotal development in establishing a cohesive legal environment for electronic transactions, paving the way for enhanced interoperability and consistency in the enforcement of electronic contracts²⁶.

Together, these regulations reflect the United States' commitment to embracing digital innovation in commerce while ensuring that legal frameworks evolve to meet the demands of a rapidly changing economic landscape. By facilitating electronic transactions, the ESIGN Act and UETA foster a more efficient and accessible marketplace, enabling businesses and consumers alike to engage in seamless, legally binding agreements in an increasingly digital world.²⁷

4. INDIA'S PERSPECTIVE

In India, the framework governing all agreements and contracts, including electronic contracts, is primarily outlined in the Indian Contract Act of 1872.²⁸ This Act establishes the legal foundation for contractual relationships in the country by defining what constitutes a valid contract and setting forth the essential elements required for enforceability under the law. A contract is fundamentally defined as an agreement that can be enforced by law, meaning that the parties involved have legal recourse in the event of a breach.²⁹ Section 10 of the Act enumerates the essential requirements for a contract to be valid, beginning with the necessity of an offer made by one party and acceptance by another. This principle of mutual consent is crucial; it indicates that both parties agree to the terms and conditions of the contract, thus forming the basis of their legal obligations.³⁰

²⁶ "ESIGN Act and UETA", available at: <https://www.docusign.com/learn/esign-act-ueta> (last visited on: 09.01.2025)

²⁷ "E-Signatures and E-Contracts for cross boundary transactions- Are they legally valid?", available at: <https://signdesk.com/in/esign/esignature-and-electronic-contracts-for-cross-boundary-transactions> (last visited on: 09.01.2025)

²⁸ Indian Contract Act 1872, sec. 10.

²⁹ Ironclad Journal "Contract Law: Know the fundamentals", available at: <https://ironcladapp.com/journal/contracts/contract-law/> (last visited on: 09.01.2025)

³⁰ Abhay Pandey & Aksshay Sharma, "Essentials of a Valid Contract", available at: <https://blog.ipleaders.in/essentials-of-a-valid-contract/> (last visited on: 09.01.2025)

The intention to create legal relations is another critical element specified in the Act. This requirement ensures that the parties involved genuinely intend to enter into a legally binding agreement rather than a mere social arrangement or informal understanding. It highlights the need for a clear purpose behind the agreement, reinforcing the legal implications of their actions. Legal capacity is also a fundamental requirement. The parties to the contract must possess the capacity to enter into a binding agreement, which includes being over 18 years of age, of sound mind, and solvent. This provision protects individuals who may be vulnerable, such as minors or those with mental incapacities, ensuring that they cannot be bound by agreements that they do not fully understand or that exploit their situation. Additionally, the object of the contract must be legal. This means that the agreement cannot involve illegal activities or contravene public policy. For example, an agreement to sell prohibited drugs or engage in illegal gambling would be deemed invalid. This requirement serves to uphold societal norms and legal standards, ensuring that contracts promote lawful behaviour. Consideration is another vital aspect of a valid contract, referring to the value exchanged between the parties. This can take the form of money or other benefits, but it must be something of value that each party agrees to provide. Without consideration, a contract may be considered a mere gift, lacking the necessary enforceability. The agreement must also be capable of performance, meaning that the terms set forth in the contract should be feasible and realistic. If the obligations outlined in the contract cannot be performed, the contract may be rendered void. Lastly, the terms of the contract must be clear and certain. Ambiguities in the agreement can lead to disputes and uncertainty, making it difficult to enforce the contract. Therefore, it is essential that the rights and obligations of each party are defined explicitly to avoid any misunderstandings.

In summary, for a contract to be valid under the Indian Contract, it must satisfy a comprehensive set of criteria, including mutual consent, intention to create legal relations, the legal capacity of the parties, a lawful object, consideration, capability of performance, and clarity of terms. Only when all these elements are present can a contract be deemed valid and enforceable, ensuring that the legal framework supports fair and just contractual relationships in the realm of both traditional and electronic commerce. Electronic contracts are recognised as legitimate and enforceable in India under the Information Technology Act; section 10-A of the act talks about it. To validate an electronic contract, compliance with the relevant requirements established in the Indian Contract Act is essential. Furthermore, the Indian Evidence Act also recognises electronic contracts as admissible evidence of contractual consent in court

proceedings.³¹ Section 10-A of the Information Technology Act³² specifically affirms the legal validity of contracts formed through electronic means, stating: “*Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals, and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.*”

INTERNATIONAL LAWS FOR ELECTRONIC AUTHENTICATION

International laws for electronic authentication primarily focus on establishing a legal framework for recognising electronic signatures and ensuring secure electronic transactions. It aims to create a secure and reliable environment for electronic transactions. By establishing legal recognition for electronic signatures and promoting best practices, these frameworks facilitate global commerce and build trust in digital interactions. The following international laws and frameworks collectively establish a robust legal environment for digital authentication in international trade. By ensuring the legal validity and reliability of electronic transactions, they facilitate a more secure and efficient global trading system. As digital trade continues to expand, these laws will play a crucial role in promoting confidence and enabling seamless cross-border transactions. Through ongoing collaboration and adaptation of these frameworks, countries can enhance their participation in the increasingly digital global marketplace.

1. UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS (2005)

The United Nations Convention on the Use of Electronic Communications in International Contracts, adopted in 2005, seeks to promote international trade by establishing a comprehensive and uniform legal framework governing electronic communications in the context of contract formation.³³ This convention is particularly significant in an era where digital transactions are increasingly prevalent, as it recognises that electronic communications should not be denied legal effect, validity, or enforceability solely due to their electronic nature. This

³¹ AZB & Partners, “At a glance: Electronic contracts in India”, available at: <https://www.lexology.com/library/detail.aspx?g=299292f4-aed9-4e09-990d-a3169e02c48d#:~:text=Additionally%20the%20Indian%20Evidence%20Act,of%20proof%20and%20will%20be> (last visited on: 09.01.2025)

³² Information Technology Act, 2000, sec. 10-A

³³ United Nations Commission on International Trade Law, “United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)”, available at: https://uncitral.un.org/en/texts/e-commerce/conventions/electronic_communications#:~:text=The%20Electronic%20Communications%20Convention%20aims,their%20traditional%20paper%2Dbased%20equivalents (last visited on: 09.01.2025)

principle is essential in ensuring that digital contracts can be executed with the same legal standing as traditional paper contracts, thereby facilitating smoother transactions in the global marketplace. A critical component of the convention is Article 9, which underscores the necessity of mutual consent among contracting parties regarding the use of electronic communications. This provision aligns with fundamental contractual principles, affirming that parties have the freedom to determine the terms of their agreements, including the method of communication. By explicitly requiring consent, the convention reinforces the importance of autonomy in contractual relations, ensuring that all parties are fully aware and agreeable to the electronic processes involved.³⁴

Article 10 further addresses the issue of authenticity in electronic communications. It stipulates that a message should be considered authentic if it can be reliably attributed to the sender. This provision is vital in establishing trust in electronic transactions, as it provides a legal basis for verifying the identity of the parties involved and the integrity of the communications exchanged. Consumer protection is another critical aspect of the convention. It includes provisions designed to safeguard consumers by ensuring they are adequately informed about the terms of the contract and that they can provide consent electronically. This emphasis on consumer rights is particularly important in the realm of e-commerce, where consumers must feel confident that their rights are protected when engaging in online transactions. To facilitate the widespread adoption of these principles, the convention encourages member states to harmonise their domestic laws with its provisions. This alignment is intended to reduce legal uncertainties and discrepancies in cross-border transactions, making it easier for businesses to operate internationally and enhancing the overall efficiency of global trade.

In summary, the United Nations Convention on the Use of Electronic Communications in International Contracts establishes a robust framework that not only legitimises electronic communications in contract formation but also prioritises mutual consent, authenticity, and consumer protection. By encouraging the harmonisation of laws among member states, the convention aims to foster a more coherent and reliable legal environment for international trade in an increasingly digital world.

³⁴ “United Nations Convention on the Use of Electronic Communications in International Contracts”, available at: https://wipolex-res.wipo.int/edocs/lexdocs/treaties/en/uncitral-uecic/trt_uncitral_uecic.pdf (last visited on: 09.01.2025)

2. UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE (1996)

The UNCITRAL Model Law on Electronic Commerce, adopted in 1996, plays a critical role in establishing a legal framework that recognises and regulates electronic transactions. Its primary aim is to facilitate international trade by promoting legal certainty and consistency in electronic communications, which is increasingly vital in today's digital economy³⁵.

One of the cornerstone principles of the Model Law is the legal recognition of electronic records. It explicitly affirms that electronic records are valid and enforceable as long as they meet specified criteria. This provision is essential because it assures businesses that electronic communications, such as emails, digital contracts, and electronic signatures, hold the same legal standing as traditional paper documents. By removing legal ambiguities surrounding electronic transactions, the Model Law encourages businesses to adopt digital methods without the apprehension of potential legal challenges³⁶. Another significant aspect of the Model Law is the principle of functional equivalence. This principle states that electronic communications should be treated equivalently to traditional ones if they perform the same functions. For example, a signed electronic document should be considered equivalent to a signed paper document, provided it meets certain standards of reliability. This principle is foundational for developing other legal frameworks governing electronic transactions, as it reinforces the idea that the medium of communication should not diminish the validity or enforceability of the content. The adaptability of the Model Law is also noteworthy. It is crafted to be flexible, allowing countries to tailor their laws according to their unique legal environments while still conforming to the overarching principles set forth by UNCITRAL. This adaptability is crucial in accommodating the diverse legal systems and cultural contexts of different jurisdictions, enabling nations to integrate the Model Law into their domestic legislation effectively. Global adoption of the Model Law has been substantial, with numerous countries incorporating its principles into their national laws. This widespread acceptance is vital for the harmonisation of laws related to electronic commerce, as it creates a more consistent legal landscape for businesses that operate across borders. By reducing legal disparities and uncertainties in different jurisdictions, the Model Law enhances the ability of companies to engage in international trade and fosters greater confidence in electronic transactions. Additionally, the Model Law addresses issues such as the integrity and authenticity of electronic messages, further reinforcing trust in electronic commerce. By

³⁵ United Nations Commission on International Trade Law, "UNCITRAL Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998", available at: https://uncitral.un.org/en/texts/e-commerce/modellaw/electronic_commerce (last visited on: 09.01.2025)

³⁶ Ibid.

establishing guidelines for verifying the sender's identity and ensuring the integrity of the message, the Model Law contributes to a secure and reliable framework for electronic transactions.

In summary, the UNCITRAL Model Law on Electronic Commerce represents a significant advancement in the legal recognition of electronic transactions. Through its principles of legal recognition, functional equivalence, adaptability, and global adoption, the Model Law not only facilitates international trade but also lays the groundwork for a robust legal environment that supports the continued growth and evolution of electronic commerce in a rapidly digitising world.

3. UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES (2001)

The UNCITRAL Model Law on Electronic Signatures, adopted in 2001, is an important legislative framework that complements the Model Law on Electronic Commerce by specifically addressing the legal status and validity of electronic signatures³⁷. As the use of electronic signatures becomes increasingly prevalent in commercial transactions, this Model Law plays a crucial role in ensuring that these signatures are recognized as legally binding, thus providing a foundation for the enforceability of digital contracts. One of the key aspects of the Model Law is its explicit recognition of electronic signatures as valid and legally binding, provided they satisfy certain criteria. These criteria include reliability, security, and the intent of the parties to authenticate the signature³⁸. This legal acknowledgement is essential because it provides the necessary assurance for individuals and businesses to engage in electronic transactions with confidence, knowing that their digital agreements will hold up in a legal context.

The principle of technological neutrality is another significant feature of the Model Law. By adopting a stance of neutrality, the Model Law does not favour any specific technology or method of creating electronic signatures. Instead, it allows for a wide range of electronic signature technologies, ensuring that the law remains relevant and adaptable as technological advancements occur. This flexibility is crucial in a rapidly evolving digital environment, as it enables businesses to choose the electronic signature solutions that best fit their needs without

³⁷ United Nations Commission on International Trade Law, "UNCITRAL Model Law on Electronic Signatures (2001)", available at: https://uncitral.un.org/en/texts/e-commerce/modellaw/electronic_signatures#:~:text=The%20MLES%20establishes%20criteria%20of,parties%20intervening%20in%20the%20signature (last visited on: 09.01.2025)

³⁸ United Nations, "UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001", (20) United Nations Publication, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml-elecsig-e.pdf> (last visited on: 09.01.2025)

being constrained by outdated legal frameworks. Moreover, the Model Law promotes cross-border applicability by encouraging countries to adopt similar legislative provisions regarding electronic signatures. This harmonisation is particularly beneficial for businesses engaged in international trade, as it facilitates the mutual recognition of electronic signatures across different jurisdictions. By minimising discrepancies in legal standards related to electronic signatures, the Model Law helps reduce the risk of legal disputes that can arise from differing interpretations of signature validity in cross-border transactions. In addition to establishing legal recognition and technological neutrality, the Model Law provides valuable guidance on best practices for the implementation of electronic signature systems. This guidance emphasises the importance of security measures to protect the integrity and authenticity of electronic signatures³⁹. By outlining best practices, the Model Law fosters confidence among users and encourages the adoption of secure electronic transaction methods. Furthermore, the Model Law addresses the need for accountability and traceability in electronic signatures, thereby reinforcing the legitimacy of electronic transactions⁴⁰. It emphasises that an electronic signature must be linked to the signatory in a manner that allows for the verification of the signatory's identity. This aspect is critical in preventing fraud and ensuring that the parties to a transaction can trust the authenticity of the signatures involved.

In summary, the UNCITRAL Model Law on Electronic Signatures provides a comprehensive and forward-looking framework that addresses the complexities of electronic signatures in today's digital economy. By recognising the legal validity of electronic signatures, maintaining technological neutrality, promoting cross-border applicability, and offering guidance on best practices, the Model Law plays a vital role in enhancing the reliability and acceptance of electronic transactions. It ultimately contributes to a more secure and efficient framework for conducting business in a global marketplace, ensuring that electronic signatures are upheld and recognised in legal contexts worldwide.

4. EUROPEAN UNION ELECTRONIC IDENTIFICATION AND TRUST SERVICES REGULATION (eIDAS)

The European Union Electronic Identification and Trust Services Regulation (eIDAS), adopted in 2014, provides a robust framework aimed at facilitating secure electronic transactions across

³⁹ *Ibid.*

⁴⁰ Carmen Maria Ramirez Ortiz & Luca Castellani, "Driving Digitalization in Global Trade: UNCITRAL Model Law on Electronic Transferable Records", available at: <https://www.adb.org/sites/default/files/publication/932456/adb-brief-280-driving-digitalization-global-trade.pdf> (last visited on: 09.01.2025)

EU member states⁴¹. This regulation is a significant step towards creating a unified digital market within the EU, enhancing the legal certainty of electronic identification and trust services. A central feature of the eIDAS Regulation is the categorisation of electronic signatures into three distinct types: simple, advanced, and qualified. Simple electronic signatures, while valid, do not provide the same level of security or legal assurance as the other two types. Advanced electronic signatures offer a higher degree of security by ensuring that the signature is uniquely linked to the signatory and that any subsequent changes to the signed data are detectable⁴². However, it is the qualified electronic signature that carries the highest level of security and legal standing, making it equivalent to a handwritten signature under EU law. This equivalence is vital as it allows for a reliable and legally binding means of conducting transactions electronically, particularly in sensitive areas such as finance, legal agreements, and governmental processes⁴³. The eIDAS Regulation also emphasises interoperability among electronic identification systems within the EU. By promoting interoperability, the regulation allows for seamless recognition of electronic signatures and identities across member states, thereby eliminating legal uncertainties that could arise in cross-border transactions. This uniformity is crucial for businesses that operate in multiple jurisdictions, as it fosters confidence in the use of electronic signatures and streamlines the process of conducting international business.

In addition to electronic signatures, eIDAS outlines a range of standards for trust services. These services include electronic seals, which ensure the authenticity of documents; time-stamping, which provides a reliable date and time for the signing of documents; and website authentication, which confirms the identity of the entity behind a website. Together, these trust services enhance the overall security of digital transactions and are designed to build consumer trust in the electronic marketplace. Moreover, the regulation imposes specific compliance requirements on service providers, mandating that they adhere to the established standards for electronic identification and trust services. This accountability is essential in maintaining the integrity and reliability of electronic transactions. Service providers are required to implement measures that ensure the security of their systems and the confidentiality of user data. This level of oversight fosters trust among users, as they can be assured that the services they are using comply with

⁴¹ “eIDAS Regulation”, available at: <https://digital-strategy.ec.europa.eu/en/policies/eidas-regulation#:~:text=The%20eIDAS%20regulation%20facilitates%20secure,digital%20services%20in%20the%20EU> (last visited on: 09.01.2025)

⁴² “Types of Digital Signatures: AES, QES, SES Explained”, available at: <https://www.docusign.com/en-gb/blog/types-digital-signature-aes-qes-ses-explained> (last visited on: 09.01.2025)

⁴³ “What is qualified electronic signatures”, available at: <https://www.agrello.io/digital-signing/what-is-a-qualified-electronic-signature> (last visited on: 09.01.2025)

stringent EU standards. The eIDAS Regulation also plays a crucial role in supporting innovation within the digital economy. By providing a clear legal framework, it encourages the development and adoption of new technologies related to electronic identification and trust services. This adaptability is essential in a rapidly changing technological landscape, where emerging technologies like blockchain and biometric identification are becoming increasingly relevant.

In summary, the eIDAS Regulation represents a comprehensive and forward-thinking approach to electronic identification and trust services within the European Union. By categorising electronic signatures, promoting interoperability, establishing standards for trust services, and ensuring compliance and accountability among service providers, eIDAS significantly enhances the security and reliability of electronic transactions. This regulation not only facilitates smoother cross-border business operations but also fosters greater trust among consumers and businesses in the digital economy, paving the way for a more integrated and secure European digital market.

5. GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

The General Agreement on Tariffs and Trade (GATT), established in 1947, is a foundational international treaty aimed at promoting and facilitating global trade by reducing barriers such as tariffs and quotas⁴⁴. While GATT is not specifically focused on digital authentication, its principles are increasingly relevant in the context of digital trade, which has grown significantly in the age of globalisation and technological advancement⁴⁵. One of the core tenets of GATT is the principle of non-discrimination, which encompasses the most-favoured-nation (MFN) treatment. This principle ensures that any favourable trading conditions granted by one member country to another must also be extended to all other GATT member countries. This creates an equitable trading environment where nations are treated equally in their trade relations, including those that involve digital goods and services. By applying this principle, GATT helps to prevent discriminatory practices that could hinder access to digital markets, thus promoting fairness and competition in international trade⁴⁶. Transparency is another fundamental principle emphasised by GATT. The agreement underscores the necessity for member countries to provide clear and

⁴⁴ Christine Majaski, "What is the General Agreement on Tariffs and Trade (GATT)?", by Christine Majaski, available at: [https://www.investopedia.com/terms/g/gatt.asp#:~:text=The%20General%20Agreement%20on%20Tariffs%20and%20Trade%20\(GATT\)%20was%20signed,aspects%20of%20the%20prewar%20period](https://www.investopedia.com/terms/g/gatt.asp#:~:text=The%20General%20Agreement%20on%20Tariffs%20and%20Trade%20(GATT)%20was%20signed,aspects%20of%20the%20prewar%20period) (last visited on: 09.01.2025)

⁴⁵ The International Monetary Fund, "Digital Trade for Development", World Trade Organization, available at: https://www.wto.org/english/res_e/booksp_e/dtd2023_e.pdf (last visited on: 09.01.2025)

⁴⁶ "Most-favoured-nation Treatment Principle", available at: https://www.meti.go.jp/english/report/data/2015WTO/02_01.pdf (last visited on: 09.01.2025)

accessible information regarding their trade regulations and policies. This transparency is vital in fostering trust among trading partners, particularly in the realm of digital transactions where parties may be located in different jurisdictions. By making regulations known and understandable, GATT helps stakeholders—such as businesses and consumers—navigate the complexities of international trade, enhancing their confidence in engaging in electronic commerce.

As the global economy evolves with the rapid digitisation of trade, the principles outlined in GATT may need to be adapted to address the unique challenges posed by electronic transactions. One significant challenge is the legal recognition of digital contracts. In traditional commerce, contracts are often documented on paper, making them straightforward to authenticate and enforce. However, digital contracts require specific mechanisms for verification and authentication to ensure their legitimacy in a legal context. The adaptation of GATT principles to encompass these new realities is essential for providing a robust framework that can support the growth of digital trade. Moreover, as businesses increasingly rely on electronic means for transactions, issues surrounding data security, privacy, and the integrity of digital communications become paramount. GATT's principles can guide the development of international norms and regulations that address these concerns, promoting secure and reliable digital transactions. For instance, member countries might collaborate on establishing standards for electronic signatures, data protection, and dispute resolution in the context of digital trade. Furthermore, the integration of GATT principles with other international agreements focused on digital trade, such as the World Trade Organization's Trade Facilitation Agreement and the recently established Digital Economy Partnership Agreement, can provide a more comprehensive approach to addressing the complexities of electronic commerce. By aligning various trade frameworks, countries can create a cohesive legal environment that facilitates cross-border digital transactions while upholding the values of fairness, transparency, and non-discrimination.

In summary, while the GATT is not specifically centred on digital authentication, its principles of non-discrimination and transparency are crucial for the development of a fair and trustworthy environment for digital trade. As international trade continues to adapt to the challenges and opportunities presented by digitalisation, the principles established by GATT can serve as a foundational framework that promotes equitable practices, fosters trust and encourages cooperation among nations in the increasingly interconnected digital economy.

6. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) GUIDELINES

The Organization for Economic Co-operation and Development (OECD) Guidelines are a set of comprehensive recommendations designed to enhance electronic commerce among member countries⁴⁷. These guidelines play a pivotal role in shaping policies and practices that support the growth of digital transactions and foster a secure, trustworthy environment for users⁴⁸. A focus of the OECD Guidelines is the cultivation of user confidence in digital transactions. This aspect is critically important, as user trust is foundational to the adoption and success of electronic commerce⁴⁹. The guidelines emphasise that effective digital authentication mechanisms are essential for building this trust. By implementing reliable authentication processes, countries can ensure that users feel secure when engaging in online transactions, thereby encouraging broader participation in the digital economy. User confidence is bolstered by measures that protect personal data and enhance the overall integrity of digital interactions. In addition to fostering user confidence, the OECD Guidelines advocate for the development of robust legal frameworks that support electronic commerce. Such frameworks are vital for creating a conducive environment for international trade and facilitating seamless digital transactions. The guidelines encourage countries to establish clear laws that address the validity of electronic contracts, the use of electronic signatures, and the protection of consumer rights. By harmonising legal standards across jurisdictions, countries can reduce barriers to trade and create a more cohesive digital marketplace. This legal clarity is especially important in cross-border transactions, where differing regulations can lead to confusion and disputes⁵⁰.

Moreover, the OECD Guidelines outline best practices for ensuring security, privacy, and consumer protection in electronic commerce. These practices are designed to help businesses and governments create systems that safeguard sensitive information and protect consumers

⁴⁷ OECD Legal Instrument, “Recommendation of the Council on Consumer Protection in E-commerce”, OECD/LEGAL/0422, available at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0422> (last visited on: 09.01.2025)

⁴⁸ OECD, “Digital”, available at: <https://www.oecd.org/en/topics/policy-areas/digital.html> (last visited on: 09.01.2025)

⁴⁹ *Supra* note 47.

⁵⁰ “A global Action Plan for Electronic Commerce: Prepared by Business with Recommendations for Governments”, OECD Digital Economy Papers No. 44, available at: https://www.oecd.org/content/dam/oecd/en/publications/reports/1999/10/a-global-action-plan-for-electronic-commerce_g17a1b50/236544834564.pdf (last visited on: 09.01.2025)

from fraud and abuse. The guidelines recommend implementing strong data protection measures, conducting regular security assessments, and fostering transparency in data handling practices. By prioritising security and privacy, countries can enhance user trust and promote the widespread adoption of digital contracts. The guidelines also emphasise the importance of stakeholder collaboration in advancing electronic commerce. They encourage governments, businesses, and civil society to work together to address the challenges and opportunities presented by the digital economy. By fostering partnerships among these groups, countries can develop innovative solutions that enhance the digital landscape and promote sustainable growth.

In conclusion, the OECD Guidelines serve as a vital framework for member countries seeking to enhance electronic commerce. By focusing on user confidence, advocating for robust legal frameworks, and promoting best practices for security and privacy, the guidelines contribute to the creation of a secure and trustworthy digital environment⁵¹. This, in turn, supports the growth of electronic commerce and facilitates international trade, ensuring that the benefits of the digital economy can be realised by all stakeholders.

7. INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO) STANDARDS

The International Organization for Standardization (ISO) plays a significant role in establishing secure digital authentication processes through its various standards. These standards provide frameworks and guidelines that organisations can adopt to enhance their security measures, ensure compliance with legal requirements, and build consumer trust in digital transactions⁵². One of the most prominent standards is ISO/IEC 27001, which focuses on information security management systems (ISMS)⁵³. This standard outlines comprehensive requirements for establishing, implementing, maintaining, and continually improving an organisation's information security management system. For organisations involved in international trade, compliance with ISO/IEC 27001 is vital, as it helps them manage sensitive information effectively and secure transactions against various threats.⁵⁴ The standard requires organisations to assess risks,

⁵¹ OECD, "Privacy and Data Protection", available at: <https://www.oecd.org/en/topics/policy-issues/privacy-and-data-protection.html> (last visited on: 09.01.2025)

⁵² eMudhra Limited, Feb. 24, 2024 "ISO Standards in Digital Security Setting the Global Benchmark", available at: <https://emudhra.com/blog/iso-standards-in-digital-security-setting-the-global-benchmark> (last visited on: 09.01.2025)

⁵³ "Information Security, cybersecurity and privacy protection- Information security management Systems - Requirements", ISO/IEC 27001:2022, available at: <https://www.iso.org/standard/27001> (last visited on: 09.01.2025)

⁵⁴ Mark Sharron, "ISO 27001 Certification, Simplified", available at: <https://www.isms.online/iso-27001/certification/> (last visited on: 09.01.2025)

implement security controls, and conduct regular audits, thereby ensuring that their information security practices are robust and up to date. By adhering to this standard, organisations not only enhance their security posture but also demonstrate their commitment to safeguarding sensitive data, which is crucial for maintaining the trust of customers and partners. Another important ISO standard is *ISO/IEC 29100*, which provides a privacy framework designed to guide organisations in protecting personal data during digital transactions⁵⁵. This framework outlines key concepts and principles for managing privacy risks, emphasising the need for organisations to adopt a proactive approach to data protection. In the context of digital authentication, implementing the guidelines of ISO/IEC 29100 is essential, as it helps organisations create mechanisms for obtaining consent, informing users about data handling practices, and ensuring that personal data is processed transparently⁵⁶. By following these guidelines, organisations can significantly enhance consumer trust, which is critical in encouraging individuals to engage in electronic transactions. Additionally, ISO/IEC 29151 specifically addresses the protection of personal information, providing further clarity and direction for organisations looking to strengthen their privacy practices⁵⁷. This standard builds on the principles outlined in ISO/IEC 29100 and provides detailed guidance on best practices for handling personal data. It focuses on the confidentiality, integrity, and availability of personal information, encouraging organisations to implement strong data protection measures. By adhering to ISO/IEC 29151, organisations can enhance their compliance with privacy regulations and demonstrate their commitment to protecting user information, thus fostering greater trust among users⁵⁸.

In summary, the ISO standards related to digital authentication provide a comprehensive framework that organisations can leverage to enhance their security and privacy practices. By implementing ISO/IEC 27001, organisations can establish effective information security management systems, while ISO/IEC 29100 and ISO/IEC 29151 guide them in protecting

⁵⁵ “Information Technology - Security Techniques - Privacy Framework”, ISO/IEC 29100:2024 (en), available at: <https://www.iso.org/obp/ui/#iso:std:iso-iec:29100:ed-2:v1:en> (last visited on: 09.01.2025)

⁵⁶ Privacy Engine, “ISO 29100 Information Security Standard”, available at: <https://www.privacyengine.io/resources/glossary/iso-29100-information-security-standard/> (last visited on: 09.01.2025)

⁵⁷ Privacy Engine, “ISO 29151 Information Security Standard”, available at: <https://www.privacyengine.io/resources/glossary/iso-29151-information-security-standard/#:~:text=The%20primary%20focus%20of%20ISO,the%20protection%20of%20personal%20data> (last visited on: 09.01.2025)

⁵⁸ “Information technology- Security Techniques- Code of practice for personally identifiable information protection”, ISO/IEC 29151:2017, available at: <https://www.iso.org/standard/62726.html> (last visited on: 09.01.2025)

personal data and ensuring compliance with privacy requirements⁵⁹. Collectively, these standards play a critical role in establishing secure and reliable digital authentication processes, ultimately contributing to a safer and more trustworthy digital economy. Through adherence to these internationally recognised standards, organisations can not only mitigate risks but also build lasting trust with consumers, which is essential for the continued growth and success of digital commerce.

CONCLUSION

The emergence of digital contracts signifies a transformative development in international trade, propelled by the necessity for enhanced efficiency, security, and adaptability in an increasingly globalised marketplace. This analysis underscores the vital legal frameworks that govern electronic authentication, including key instruments such as the United Nations Convention on the Use of Electronic Communications in International Contracts, the UNCITRAL Model Law on Electronic Commerce, and the eIDAS Regulation within the European Union. These regulations establish a solid foundation for recognising the validity of digital contracts, ensuring they hold the same legal authority as traditional paper agreements.

Across these jurisdictions, there is a common recognition of the importance of digitalisation in contracts and the need for robust legal frameworks to support their validity. Each country has unique regulatory environments and challenges, but all are moving towards enhancing the legal recognition and enforcement of digital and smart contracts in international trade. This shift aims to foster innovation, improve efficiency, and promote consumer protection in the digital economy.

From the Indian perspective, the legal landscape is guided by the Indian Contract Act of 1872 and the Information Technology Act of 2000, which collectively facilitate the recognition and enforcement of electronic contracts. India's efforts to align its legal framework with international standards demonstrate its acknowledgement of the significance of digitalisation in fostering trade and commerce.

Across India, the USA, the UK, and the EU, there is a clear trend toward recognising the validity of digital contracts, driven by the need for efficiency in international trade. While each jurisdiction has developed its legal framework, common themes include the emphasis on

⁵⁹ Mark Sharron, "ISO 27701- The Standard for Privacy Information Management", available at: <https://www.isms.online/iso-27701/> (last visited on: 09.01.2025)

electronic signatures, the recognition of smart contracts, and the ongoing challenges related to interpretation and liability. This comparative study highlights the importance of aligning legal frameworks to facilitate smoother cross-border transactions and address the complexities arising from digitalisation. Continued collaboration and adaptation will be essential as the landscape of international trade evolves in the digital age.

In summary, the interaction between international laws and national regulations creates a comprehensive framework for the adoption of digital contracts in global trade. As nations continue to navigate the digital era, ongoing collaboration and harmonisation of legal standards will be essential for building trust and reliability in digital transactions. This evolution will not only enhance efficiency in international trade but also encourage the development of innovative business models, ultimately contributing to economic growth and prosperity across borders.

CASE COMMENT

CORFU CHANNEL UNITED KINGDOM v. ALBANIA

1949 ICJ 4

- Achyut Mishra*

INTRODUCTION

In this case, two British warships passed through the Corfu channel situated between Albania and Greece, where Albania laid mines, and as a result, British Nationals sitting in the warship got injured. The case went to the International Court of Justice, where Albania made an allegation that the UK had entered Albanian waters to remove mines without its permission. ICJ said that Albania was aware & laid down the mines and had not taken proper action to remove those mines. Hence, they were held responsible for damages caused to the United Kingdom and also liable to pay compensation, and thus, there was a violation of Sovereignty. This case set a major precedent exemplar in International Law. Freedom of Navigation and the State's responsibility for the protection of its territory, along with Art.17 of the United Nations Convention on Law of Sea, was highlighted in this case.

FACTS OF THE CASE

Corfu Channel was situated between the United Kingdom and Albania. Two British warships passed from the Corfu Channel on 15 May 1946 without obtaining permission from the Albanian government, and they were fired by Albanian coastal batteries. Then, on October 22nd 1946, these ships departed from Corfu port on 22nd Oct 1946 and headed to the North side where Albania land mines. Since these warships were going above the mines that were kept there, as a result of this, mines blasted, and British Nationals sitting in Warships got injured. After the occurrence of this incident, the Government of the United Kingdom sent a note to the Albanian Government stating the intention of the UK to cross the channel. By means of the International Central Mine Clearance Committee, the proposition was passed on the first of November, 1946, and London received a note on the 31st of October stating that the Albanian Government would not give permission to move across the mines till the question was about within the jurisdiction of Albanian territorial waters. The Albanian Government has strictly stated that any movement of ships across the mines without the approval of the government

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would amount to a violation of Albanian sovereignty and territory. This case came to Court on 22nd May 1947 by means of a Petition by the Government of Great Britain and Northern Ireland starting proceedings against the Government of Albania People's Republic.

ISSUES

1. Is Albania held liable for a mine accident in Albanian Waters and the loss of lives in British Warships?
2. Did the United Kingdom violate Albania's sovereignty through its entrance into Albanian waters without its permission?
3. Should the United Kingdom be granted compensation for losses?

Laws that shall be applied

1. Article 51 of the UN Charter explains that every country has the right to exercise self-defence against another country that installs an armed attack against them, and it was included during San Francisco in 1945.
2. Convention XIII of Hague Convention 1907¹: In relation to the case, when we talk about this convention where Article 1 discusses that violation of neutrality committed when the sovereignty of Neutral powers is disturbed, Article 10 states that neutrality of Power is not affected just by the passage of warships of the other state through territorial waters and Article 17 explains that such warships shall carry only repairs required for their sea journey, not other material that can cause harm to other nation.
3. Geneva Convention on Law of Sea²: Article 16 of this Convention supports innocent passage, and it applies where international navigation comes from one to another high sea, providing that no difference shall be made when we talk about the innocent course of warships.
4. Principle of State Responsibility: According to this principle, it shall be the responsibility of the State not to place any harmful substance in their territory which can cause harm or damage to other States. It has been enlisted under Article 1 of the United Nations Convention of Sea Laws.

¹ International Institute of Humanitarian Law, 'Convention concerning Rights and Duties of Neutral powers in Naval War'; available at: https://www.onlinelibrary.iihl.org/wp-content/uploads/2021/04/16_H-XIII-EN.pdf (last visited on: 21.08.2024)

² Tullio Treves, '1958 Geneva Conventions on the Law of Sea'; available at: https://legal.un.org/avl/pdf/ha/gclos/gclos_e.pdf (last visited on: 21.08.2024)

5. Principle of Equal Sovereignty: As per standards provided under Art. 2(4) of the UN Charter of 1945 states it is the duty of every Country to esteem Sovereignty & should not violate the territorial integrity of other Nations or states.
6. Freedom of Navigation: Article 17 of UNCLOS (1982) states that ships of every state have freedom of navigation, which means that without any form of interference, they can enter international waterways.
7. Article 25 of the UN Charter: This Article explains Reservation criteria set up by the Albanian Government for the maintenance of principle and for the establishment of precedent & Court's compulsory Jurisdiction.
8. Right of Innocent Passage: Article 19 of UNCLOS (1982) defines the term 'Innocent Passage', which means that Innocent passage is constituted until the peace and security of the coastal State is maintained.

Observations

1. Judgement was passed on 25th March, where the objection was and continued merit-based proceedings fixing time limits of the succeeding pleadings.
2. On 26th March 1948, the Court decided that the Special Agreement constituted the basis of upcoming proceedings in front of the Court, and it also made a note that the United Kingdom filed a memorial of Critique submissions dated 1st Oct 1947. Then, held on 2nd November 1948, that time-limit shall be fixed ending on 7th November under which Albanian Government specifies the name of the person nominated as 'Pro tempore Judge' in place of Dr Daxner & postponing of the hearing till 9th November.
3. On 10th December 1947, the President of the Court passed an order that fixed 20th January 1948 as a time-limit as a written statement presentation containing observations and submissions regarding preliminary objections by the United Kingdom Government. The court then heard arguments on behalf of the parties involved. Hence, I rejected the opening objection on behalf of the Albanian Government & decided that merit-based proceedings shall continue and, for filing of the succeeding pleadings, fix the time limit.
4. Therefore, it was finally determined by the Court that the appeal by the British was not valid from the start. Now, coming to the first issue, the Court found that explosions were caused by mines that had been laid down by Albania and as a result, there was a great loss of lives in great numbers.
5. The Court held in the next issue that British warships crossed Albanian waters without obtaining permission from the Albanian Government and, hence, violated its principle of

Sovereignty. And then lastly comes the question of whether the United Kingdom be entitled to be paid for damages where the Court observed that since there was the loss of lives of British caused by the mines laid down by Albania and Albanians, even having knowledge didn't give a warning to the UK, so should be paid compensation for it.

ANALYSIS

In this case, as per Article 51 of the UN Charter, Convention XIII of the Hague Convention and the Geneva Convention on Law of Sea, it was observed that neutral powers i.e. Sovereignty of Albania, shall not be breached by innocent passage of the other state but we saw in this case that movement made by UK warships was for mines removal without its approval and principle of State Responsibility has been violated as Albanian Government lay down the mines due to which British Warships met with an explosion accident and suffered damages and even though no warning given by Albania. UK not taking permission to enter waters within its territory to remove mines has not violated its principle of Sovereignty because British entering with its Naval forces during peacetime is allowed, and for that, it's not necessary to take clearance of coastal state provided that passage should be innocent meaning that State passing by must have no intention to steal the resources or to harm the other nation, then in such a case, there shall be no breach of Sovereignty. However, when the UK started removing the mines from territorial waters, it amounted to a violation of Albania's sovereignty as consent for international mine clearance was also taken, as there might be possibilities of harm to the nation. When we talk about freedom of Navigation, it must not be permitted as this form of freedom allows any ship to enter International waters, disturbs integrity and violates the concept of Sovereignty. Now, as per Article 25 of the UN Charter, the Albanian government is not entitled to set up reservations because the Albanian Government must give a warning first when the UK enters its territory without approval, but laying mines to ensure its security cannot be counted as it amounted to causing harm to other Nation. In my view, the Albanian Government can also not exercise the Principle of Self-defence because the laying of mines is an act done to harm the other state, not to defend itself. Hence, Albania is at fault and entitled to pay a sum of damages. Coming to the description of Article 36 (ICJ Statute), it satisfies jurisdiction as both independent states are part of the United Nations charter. Albania fought by saying Yugoslavia placed mines without its approval & if it has been laid down by them, then also Albania has the right to do so for safety motives or others inside waters, per my opinion. The law allows nations to take necessary action to protect their territory from outer dangers. The step taken by Albania can be justified, but according to International Law, it cannot be held as a right & therefore, it was mandatory for the

Court to proclaim infringement of Albania's Sovereignty due to provisions like where sea above 12 Nautical miles is included, no violation exists similarly covered in the case. We surveyed the Treaty of Lausanne (Art. 23) meets judgement since Albania & UK both are high contracting parties covering provision. We gave a reference to various case laws like S.S. Wimbledon v. Germany, where it held that it was the responsibility of the state to allow Wimbledon the path through the Kiel Canal & its neutrality was not affected. A legal dispute in Italy versus France involved the mining rights of Italian citizens to accumulate phosphate in Morocco, but Italy's appeal was rejected due to lack of jurisdiction. Landmark judgement in Trail Smelter (U.S. v. Canada)³ over ecological damage. Here, a tribunal was established to settle wood and crop deterioration, considering Canada to pay damages to the United States and compelling the United States to compensation payment & lessen pollution. While Coup in Government in Nicaragua versus the U.S., granting Arms to El Salvador & Funding to Honduras. The case went to ICJ, ordering the USA to terminate weapons and financial assistance.

CONCLUSION

The Court decided that Albania's liability arises for loss of lives & damages in the case as per International Resolution leading mine explosions in Corfu Channel. The Court passed the verdict on Non-Contravention of Albania's Sovereignty because, during wartime, crossing by ship was permissible and was not mandatory to obtain the consent of a coastal state where the principle of innocent passage was highlighted. The operation of Minesweeping executed by the UK does not have the approval of International Mine Clearance and, thus, does not exercise the right of innocent passage. Lastly, ICJ awarded 8,44,000 pounds as compensation to the United Kingdom, but it remained unpaid for decades. Hence, the case was decided at a ratio of 50:50 for both sides of the parties.

³ Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941)