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MESSAGE FROM THE PATRON

I am privileged to present to all our dear readers the very first inaugural volume of Journal for Law and Justice. This journal became the need of the hour as there was no journal for the students in our center of learning the law. Since our Center shifted to the new building in the North Campus of the University, the number of young and bright students has increased. Their willingness to learn the art of writing a research article needed appreciation. Their experience with writing a research article got further wings when they expressed their eagerness in publication. This journal is an answer to the needs of not only the students of our Centre, but also of any student of law all over the country and beyond. Students take a lead role in managing the students' Journal society as well as learning the skills of editing from a team of esteemed faculty members on the editorial board. The present volume has selected articles on topics, such as insolvency law, constitutional law, law and language, arbitration law, defamation and the discussion on theories of personality. Seven long and short articles on these topics have been carefully peer-reviewed and sincerely edited by the entire editorial team. In addition, an attractive section, i.e., book review, adds another feather in the cap of this journal as it has selected two books on mediation and sociology of law for it. I wish the entire editorial team a great success in broadening the base of readers of this student research journal.

Regards,

PROF. (DR.) ANUPAM JHA

Patron & Professor-In-Charge
Journal for Law and Justice (JLJ)
Law Centre-II, Faculty of Law
University of Delhi

MESSAGE FROM THE FACULTY EDITOR-IN-CHIEF

Dear Readers,

I am delighted to greet our eminent contributors, devoted readers, and the legal community at large on this first edition of the Journal for Law and Justice. As the Editorial Board of this esteemed publication, we are situated at the crossroads of legal studies, where the deep insights of academic minds meet the currents of changing jurisprudence.

We must consider the potential and difficulties that lie ahead in the constantly evolving field of law. As the forefront of social change, the legal community faces difficult problems that call for in-depth research and careful consideration. The Journal for Law and Justice seeks to serve as a lighthouse of knowledge in this regard by providing a forum for the sharing of innovative legal research and ideas.

Our dedication to quality is ingrained in the long history of the University of Delhi's Faculty of Law, and we take great satisfaction in maintaining the high standards of academic honesty and rigour that have come to be associated with our institute. We invite seasoned scholars and up-and-coming researchers to submit their insightful work to our publication as we begin yet another year of academic endeavours.

Our goal in publishing the Journal for Law and Justice is to present a wide range of legal viewpoints and to create a vibrant inter-disciplinary discourse. We welcome submissions that push the boundaries of legal scholarship and challenge accepted wisdom in addition to adding to the corpus of legal knowledge already in existence. At the core of our work is the pursuit of justice, equity, and fairness. We think that by working together through scholarship, we can shed light on the way toward a society that is more just and equitable.

We are excited to offer our readers a stimulating selection of articles that explore the most important legal topics of the day in the upcoming months. We encourage readers to actively engage with the journal's content as we navigate the currents of legal scholarship, building a community of scholars who are committed to the pursuit of justice and truth. We highly value your opinions, criticisms, and comments, and we invite you to participate with us on this thought-provoking trip. Thank you for your continued support, and we look forward to an era of fostering legal excellence and advancing the frontiers of knowledge.

Warm regards,

Prof. (Dr.) Pinki Sharma

Faculty Editor-in-Chief
Journal for Law and Justice (JLJ)
Law Centre-II, Faculty of Law
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MESSAGE FROM THE EDITOR'S DESK

A friend of mine mentioned that keeping a journal not only provides authors with the opportunity to present and publish their articles, but it also allows them to express their ideas in front of the masses. An open and unrestricted platform, such as a student-led journal, encourages innovative thinking and enables authors to present something truly out of the box. I believe this journal can serve as an important conduit to establish connections with law students, researchers, and readers. Our goal is to address and discuss the gaps in the legal field through the lens of this community, with the care and diligence they deserve, while also amplifying the voices of contributors to this Journal.

The Editor's desk of the Journal for Law and Justice, a flagship student journal of the Law Centre-II, University of Delhi welcomes you to the first issue of Journal for Law and Justice (JLJ). The Journal aims to provide a platform for scholarly discourse and debate on contemporary legal issues and challenges. As the editor, I am delighted to present you with a selection of high-quality articles that showcase the latest advances and innovations in various legal fields. In this current issue, you all will find articles related to topics such as Aviation Insolvencies, Unstamped Arbitration Agreement, Personality Rights and more. All the articles have undergone rigorous peer review and editorial processes to ensure their validity, originality, and relevance. This issue features seven articles and two book reviews by our students editors.

I would like to thank all the authors, reviewers, and editors for their valuable contributions and hard work. I hope you enjoy reading this issue and find it useful for your research and practice.

I also invite you to submit your manuscripts to our journal for possible publication in future issues. We welcome submissions from all disciplines and areas of law relevant to the contemporary significance. For more information, please visit our website or contact us via e-mail lc2studentjournal@gmail.com. Thank you for your interest and support.

Pulkit Dahiya

Student Lead Editor
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Soaring Above the Turbulence: Unveiling the Horizon of MCA's Moratorium Exemption for Cape Town Convention Transactions in Aviation Insolvencies in India

Atri Mukherjee**[*] **and Adarsh Anand Amola**[**]

Abstract: *The Ministry of Corporate Affairs (**"MCA"**) of India heralded a significant regulatory pivot on 3rd October 2023 by issuing a notification that exempts transactions under the Cape Town Convention (**"CTC"**) from the prevailing moratorium instituted by the National Company Law Tribunal (**"NCLT"**) during airline insolvencies. This article meticulously navigates the critical obstacle of aircraft object repossession by lessors, a challenge exacerbated by the NCLT's moratorium, and delineates how the exemption provides a robust solution. The discourse underscores the salient benefits emanating from the exemption including the safeguarding of revenue streams for lessors, assurance of meticulous aircraft maintenance, and a streamlined deregistration procedure, collectively orchestrating a more favourable ambiance for lessors. A profound examination of the legal and pragmatic implications of this exemption is undertaken, rendering a comprehensive understanding of its impact on the extensive aviation insolvency panorama. The article further elucidates the potentially transformative effect on the resolution process for beleaguered aviation entities, showcasing how the amendment substantially amplifies the efficacy of aircraft repossession laws. The narrative also advocates for additional reforms to fortify the enforcement frameworks surrounding aircraft repossession, thereby envisaging a more resilient aviation insolvency infrastructure in India. Moreover, the exploration accentuates India's congruence with global benchmarks, specifically the CTC and Protocol of 2001, reaffirming the nation's commitment to engendering a more lessor-friendly aviation milieu.*

Keywords: MCA Notification, CTC, NCLT Moratorium, Aircraft Repossession, Aviation Insolvency.

I. INTRODUCTION

The Indian aviation industry stands as the third largest worldwide. From 79 million travellers in 2010, the figures soared to 158 million by 2017. By 2037, projections suggest a staggering 520 million passengers moving to, from, or within India.[1] India is not just a key contributor in the global aviation market, but is also witnessing unprecedented growth rates, eclipsing several of its counterparts. Presently, it ranks as the third-largest domestic aviation market on the global stage, and there are strong indicators that by 2024, India will surpass the UK to become the world's third-largest air passenger market.[2]

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[1] *Aircraft Leasing Industry, has India nailed the landing*? PRIMUS PARTNERS (last visited Oct. 20, 2023, 10:35 PM), https://www.primuspartners.in/docs/documents/KVsaluunn0EVD2PZId8P.pdf

[2] *Rise of the Indian Aviation Market*, INDIA BRAND EQUITY FOUNDATION (last visited Oct. 23, 2023, 10:45PM), https://www.ibef.org/research/case-study/rise-of-the-indian-aviation-market.pdf

One cannot overlook the significance of aircraft leasing within the fabric of India's aviation sector. This is evident in the fact that many Indian aviation enterprises predominantly rely on leased aircraft. Reinforcing this perspective, India has been diligently working on transitioning the registration domicile of aircraft from globally recognized hubs like Ireland to GIFT City in Gujarat. Spearheaded by the Ministry of Civil Aviation, Project Rupee Raftaar[3] was rolled out to streamline this transition. In alignment with the overarching policy goal of magnifying international leasing via the International Financial Services Centre Authority (IFSCA), the government has ushered in several tax amendments, including notable inclusions in the 2023 Budget.[4]

A pivotal announcement on October 3, 2023, from India's MCA unveiled a notification.[5] These exempt transactions associated with aircraft, encompassing engines, airframes, and helicopters, from the moratorium provision under section 14(1)[6] of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**). This strategic move is in harmony with India's commitments under the CTC[7] and its associated Aircraft Equipment Protocol.[8] Having signed it in 2008, the CTC offers a safeguard to aircraft lessors, furnishing them with a structure to recuperate their aircraft if needed.

II. BACKGROUND OF THE NOTIFICATION

Price Waterhouse Cooper's 2021 study on aircraft leasing in India unveiled a striking statistic: 80% of India's commercial aircraft fleet operates under lease agreements. This is in stark

[3] Kanakprabha Jethani, *Project Rupee Raftaar: An Analysis*, VINOD KOTHARI CONSULTANTS (last visited Oct. 27, 2023, 3:14 PM), http://Project Rupee Raftaar: An Analysis – Vinod Kothari Consultants.html.

[4] *Go First Insolvency: Lessors' rights gone in thin air?*, VINOD KOTHARI CONSULTANTS (last visited Oct. 20, 2023, 4:13PM), https://vinodkothari.com/2023/06/Go First-insolvency-lessors-rights-gone-in-thin-air/en.html

[5] Ministry of Corporate Affairs Notification, S.O. 4321(E) 3rd October 2023 reads as:
WHEREAS, the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment were adopted under the joint auspices of International Civil Aviation Organization and the International Institute for the Unification of Private Law concluded at Cape Town on 16th November, 2001;
AND WHEREAS, India, being a signatory to and having acceded the Convention and the Protocol by depositing with the International Institute for the Unification of Private Law the instruments of accession on 31.03.2008;
Now, therefore, in exercise of the powers conferred by clause (a) of sub-section (3) of section 14 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby notifies that the provisions of sub-section (1) of section 14 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), shall not apply to transactions, arrangements, or agreements, under the Convention and the Protocol, relating to aircraft, aircraft engines, airframes and helicopters.

[6] The Insolvency and Bankruptcy Code, 2016, § 14(1), No. 31, Acts of Parliament, 2016 (India).

[7] Convention on Integration Interests in Mobile Equipment 2001, 2307 U.N.T.S. 285

[8] Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment 2001, 2307 U.N.T.S. 285.

contrast to the global average of 53%.[9] Choosing to lease aircraft and engines allows aircraft operators in India to retain significant liquid working capital. This strategic choice assists in cost management, ensuring affordable ticket prices. Given India's price-conscious economic landscape, such strategies are indispensable for sustaining high flight seat occupancy rates, maximizing profits, and drawing an ever-growing passenger base.[10]

Yet, the aviation landscape in India has its shadows. A succession of insolvency cases – starting with Kingfisher Airlines, proceeding with Jet Airways, and most recently involving GoFirst – highlighted vulnerabilities associated with the moratorium under Section 14(1) of the IBC.[11] This stipulation rendered lessors powerless in reclaiming valuable assets such as aircraft and engines. Growing ripples of discontent emerged among lessors, with some believing that airlines like Go Airlines (India) Limited, colloquially known as Go First, deliberately leveraged voluntary insolvency under Section 10 of the IBC[12] to sidestep leasing agreement responsibilities. This turbulence did not go unnoticed. The Aviation Working Group (**"AWG"**), an international body overseeing adherence to the CTC, adjusted India's compliance index rating from 3 to 2.5 out of a maximum of 5. Furthermore, in May 2023, India found itself on the AWG watchlist.

The intrinsic nature of the moratorium under Section 14(1) of the IBC[13] inhibits owners or lessors from reclaiming any property in the corporate debtor's custody upon insolvency initiation. Such constraints fuelled apprehensions of escalated leasing costs for Indian carriers. Lessors, anticipating challenges in reclaiming assets if an operator declared insolvency, could levy an initial premium to compensate for potential setbacks.

However, the Delhi NCLT's recent ruling on May 10, 2023, intensified the complexities. It imposed a moratorium on Go First's assets, blocking lessors from retrieving their aircraft. Challenging this ruling, lessors approached the National Company Law Appellate Tribunal

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[9] Vandit Shah & Vasantha Ravula & Shubham Gupta & Janvi Wadhwa & Vrushali Prabhu & Kushagra Kumar & Yash Shah, *Aircraft Leasing in India: Ready to take off* , PRICEWATERHOUSECOOPERS (last visited Oct. 25, 2023, 7:45 PM), http://Aircraft leasing in India: Ready to take off (pwc.in).html

[10] Divyam Agarwal & Pallavi Kumar & Chirag Basu, *Lessors in the Aviation Industry Exempted from Moratorium Under Section 14(1) of the IBC*, LEXOLOGY (last visited Oct. 22, 2023, 111:23 PM), https://Lessors in the aviation industry exempted from moratorium under Section 14(1) of the IBC - Lexology.html

[11] *Supra* note 6, at 2.

[12] The Insolvency and Bankruptcy Code, 2016, § 10, No. 31, Acts of Parliament, 2016 (India).

[13] *Supra* note 6, at 2.

(**"NCLAT"**). Still, the appeal court upheld NCLT Delhi's verdict, marking a direct contradiction with the principles of the CTC.[14]

The historical backdrop reveals a pattern: lessors bearing substantial losses following the collapse of major airlines like Kingfisher Airlines in 2012, Jet Airways in 2019, and the recent Go First debacle. When Go First ceased operations in May, the NCLT, acting as India's bankruptcy tribunal, barred lessors from repossessing their aircraft. The Directorate General of Civil Aviation (**"DGCA"**), taking cues from the NCLT, also rejected the lessors' deregistration pleas. The tribunal's rationale was simple: a potential revival of Go First would necessitate a fleet. Nevertheless, lessors are set on reclaiming Go First's robust fleet of 54 aircraft. With the latest exemption in place, lessors now hold the right to annul a lease contract in default scenarios, empowering them to recover their assets. This move resonates with the ethos of the CTC and is poised to influence ongoing lease disputes, especially those involving Go First and SpiceJet, at the NCLT.[15]

III. KEY CHALLENGE DURING INSOLVENCY – AIRCRAFT REPOSSESSION

The ramifications of insolvency in the Indian aviation sector are manifold, reaching a pinnacle when it comes to the repossession of aircraft by lessors. Historically, the assets of an airline undergoing insolvency were enveloped in a moratorium as delineated by Section 14(1) of the IBC.[16] This provision aimed at preserving the asset value of the beleaguered airline, endeavouring to maintain its operational viability as a going concern. According to the stipulations of the IBC, the moratorium phase spanned an initial duration of 180 days, with a provision for an extension of an additional 90 days under certain circumstances.

During this moratorium interval, the aircraft lessor was bereft of the right to repossess the aircraft, a scenario which juxtaposes starkly against the provisions of the CTC—a global treaty to which India is a signatory, designed to standardize transactions involving movable property

[14] Krrishan Singhania & Abhishek Nair, *The Dichotomy Between Insolvency Laws and Capetown Convention Amidst Gofirst Insolvency*, K SINGHANIA & CO (last visited Oct. 14, 2023, 3:49 PM), https://singhanialaw.com/insolvency-laws-and-capetown-convention/en.html

[15] Andrew Curran, *India Aligns its Repossession Laws with Cape Town Convention*, CH AVIATION (last visited Oct. 25, 4:45 PM), https://www.ch-aviation.com/portal/news/133173-india-aligns-its-repossession-laws-with-cape-town-convention.html

[16] *Supra* note 6, at 2.

like aircraft. The discord between the domestic insolvency law and the international treaty generated a quagmire of legal and financial uncertainties.

The ripple effects of the moratorium transcended beyond mere asset repossession. Primarily, it engendered a revenue void for the aircraft lessor, as the airline, shielded by the moratorium, could eschew its obligations delineated in the lease agreement.[17] This predicament was exacerbated by the lessor's impotence in effectuating deregistration and actual repossession of the aircraft. The moratorium, with its potential to stretch up to a protracted 270 days, not only incubated financial haemorrhage for the lessor but also vitiated the business continuity and asset utility.

Furthermore, the quandary reverberated on a macroeconomic scale, tarnishing India's repute in the global aviation finance landscape. The AWG's index relegated India's rating from 3.0 to 2.5, reflecting a dip in the confidence of global financiers and lessors towards India as a conducive locale for credit facilities. Given that a staggering 80% of the aircraft operating in the Indian skies are leased, this rating plummet augured a significant setback. It also cast a pall over the Government of India's ambitious schemes to morph India into a lucrative global nexus for credit facilities.[18]

In a bid to ameliorate this multifaceted challenge, the MCA promulgated a pivotal notification exempting aircraft from the moratorium during the insolvency of an airline in India.[19] This exemption, aligning India's insolvency framework with the CTC, heralded a significant stride towards redressing the legal and financial conundrums besieging aircraft lessors amidst airline insolvencies. The MCA's notification has been dissected and elucidated further in the ensuing sections of this article, shedding light on its potential to recalibrate the dynamics of aircraft repossession during insolvency, and reinstating India's position in the global aviation leasing and finance arena.

IV. SOLUTION – EXEMPTION OF MORATORIUM FOR CTC TRANSACTIONS

[17] *Go First's insolvency flight leaves Trail of concerns for aircraft lessors*, BUSINESS INSIDER INDIA (last visited Oct. 20, 2023, 5:30 PM), http://Go First's insolvency flight leaves trail of concerns for aircraft lessors | Business Insider India.html
[18] *Supra* note 3, at 2.
[19] Arindam Majumder, *Centre Exempts Aircraft from Moratorium Protection of IBC,* THE ECONOMIC TIMES (last visited Oct. 20, 2023, 5:57 PM), https://ibc: Centre exempts aircraft from moratorium protection of IBC - The Economic Times (indiatimes.com).html

In a recent notable move dated 3rd October 2023, the MCA unveiled a notification signifying a monumental shift in the treatment of transactions, arrangements, or agreements under the CTC relating to aircraft, aircraft engines, airframes, and helicopters in the ambit of insolvency proceedings. This notification explicitly states that the provisions of sub-section (1) of section 14 of the IBC,[20] shall not be applicable to such transactions under the Convention and the Protocol, thereby marking a significant departure from the erstwhile regime where such assets were encompassed within the moratorium during an airline's insolvency.[21]

The core essence of this notification lies in its endeavour to create a conducive environment for aircraft lessors by exempting the aircraft and related equipment from the moratorium stipulated under Section 14(1) of the IBC[22] during the insolvency proceedings of an airline. Although this exemption is primarily directed towards the Corporate Insolvency Resolution Process (**"CIRP"**), it profoundly impacts the aircraft lessor's interests within the Indian aviation sector, addressing the previously discussed challenges of aircraft repossession during insolvency.[23]

By aligning the domestic insolvency laws with the international standards set forth by the CTC on International Interests in Mobile Equipment[24] and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment,[25] this notification facilitates a more streamlined process for the repossession of aircraft,[26] thereby mitigating the revenue losses, maintenance issues, and deregistration hurdles that lessors encountered in the past.[27] The alignment with the CTC is seen as a significant stride towards

[20] *Supra* note 6, at 2.
[21] Tanay Dubey, *India's commitment to the Cape Town Convention: A recent MCA Notification*, INDIACORPLAW (last visited Oct. 20, 2023, 6:13 PM), https://India's Commitment to the Cape Town Convention: A Recent MCA Notification - IndiaCorpLaw.html
[22] *Supra* note 6, at 2.
[23] Dhananjay Kumar & Annie Jain, *Sky is the Actual Limit for IBC? – Exemption from Moratorium Over Aircraft Objects During Insolvency*, CYRIL AMARCHAND MANGALDAS (last visited Oct. 20, 2023, 6:22 PM), https:/Sky is the Actual Limit for IBC? – Exemption from Moratorium over Aircraft Objects during Insolvency | India Corporate Law (cyrilamarchandblogs.com).html
[24] *Supra* note 7, at 2.
[25] *Supra* note 8, at 2.
[26] Ruchika Chitravanshi & Ajinkya Kawale & Deepak Patel, *Corporate Affairs Ministry Exempts Aviation from IBC's Moratorium Clause*, BUSINESS STANDARD (last visited Oct. 20, 2023, 6:29 PM), https://Corporate affairs ministry _exempts aviation from IBC's moratorium _clause-business-standard.com).html
[27] *Supra* note 15, at 4.

bolstering India's aviation leasing market, making it more attractive[28] and less risky for global lessors.[29]

Furthermore, this regulatory amendment is perceived as a response to the recent insolvency cases like Go First, where the moratorium provisions under the IBC were viewed as impediments to the effective repossession of aircraft by lessors.[30] The exemption from the IBC's moratorium on asset recovery provides much-needed relief to aircraft leasing firms, who had previously faced substantial difficulties in repossessing their aircraft from airlines undergoing insolvency. This exemption also has the potential to rectify the adverse effects on India's reputation as an aviation market, consequent to the inability of lessors to recover assets during the insolvency of airlines.[31]

The ramifications of this notification are manifold, encompassing not only the facilitation of aircraft repossession, but also the broader objective of fostering a favourable environment for aircraft leasing and finance in India. By mitigating the discord between domestic legislation and international treaties, this notification underscores India's commitment to adhering to global standards in aviation finance and leasing. The detailed analysis of these impacts, in alignment with the provisions of the international treaties of the CTC and the Protocol, is further elaborated in the subsequent sections of this article.

V. KEY FACTORS IN FAVOUR OF CREDITORS

A. No Loss of Revenue for Lessors

The moratorium provision, as delineated in Section 14(1) of the IBC,[32] serves as a protective mechanism, engineered to shield the assets of airlines amidst the tumult of insolvency proceedings. However, this provision has been susceptible to exploitation by airline entities, serving as a veil to obfuscate their contractual obligations towards lessors, particularly concerning lease payments. The moratorium, by virtue of its design, immobilizes the assets, inclusive of leased aircraft, thereby forestalling lessors from orchestrating any recuperative

[28] *Supra* note 21, at 6.
[29] *Aligning IBC with Cape Town Convention: A Relief for Aircraft Lessors*?, FINANCIAL EXPRESS (last visited Oct. 28, 2023, 11:01 PM), http://Aligning IBC with Cape Town Convention: A Relief for Aircraft Lessors? - Airlines/Aviation News | The Financial Express.html
[30] Anu Sharma, *Lessors Upset as Moratorium Keeps Go Planes Out of Reach*, MINT (last visited Oct. 27, 2023, 7:11 PM), https://Lessors upset as moratorium keeps Go planes out of reach | Mint (livemint.com).html
[31] *Cape Town Convention and IDERAs*, IASGYAN (last visited Oct. 24, 2023, 6:56 PM), https://Government exempting aircraft from some sections of IBC UPSC (iasgyan.in).html
[32] *Supra* note 6, at 2.

actions against the defaulting airline, even in the face of blatant transgressions of lease agreements.

A paradigmatic exemplification of this legal quagmire is manifested in the narrative of Go Airlines (India) Limited. Subsequent to its rebranding as Go First, the airline, ensnared in a fiscal quagmire, sought the sanctuary of insolvency proceedings. The ensuing moratorium, sanctioned by the NCLT, precipitated a cascade of impediments for aircraft lessors.[33]

An analytical dissection of the Go First insolvency saga unveils a multifaceted tableau of issues. The inception phase, characterized as the Voluntary Insolvency Plea and Moratorium, witnessed Go First's proactive engagement with the insolvency apparatus, culminating in a sanctioned moratorium that effectively thwarted lessors' repossession endeavours.[34] This phase accentuates the adversarial impact of the moratorium on lessors' rights, crystallized in SMBC Aviation Capital Ltd.'s futile attempts to repossess aircraft post-lease termination but pre-moratorium sanction.[35]

Subsequently, a pall of Perceived Malicious Intent enveloped Go First's insolvency petition, with SMBC Aviation Capital Ltd. construing it as a 'smokescreen' to elude obligations towards lessors.[36] This narrative phase evokes echoes of antecedent insolvencies such as Kingfisher and Jet Airways, further tarnishing the reputation of India's aviation sector.

The ramifications on repossession and lessors' rights are starkly delineated, with the moratorium effectively erecting a barricade, inhibiting lessors from repossessing their assets for protracted insolvency duration, potentially spanning six to nine months.[37] This phase underscores a glaring discord with the CTC norms, which India has acceded to, and which envisage a protective ambit for aircraft lessors in lessee insolvency scenarios.

The concatenation of these factors propels aircraft lessors into a vortex of challenges. The cessation of lease payments, the primary revenue conduit for lessors, signifies the initial

[33] *Is Govt Notification Exempting Aviation Leases from Moratorium Applicable for go First, Delhi HC asks DGCA*, SME TIMES (last visited Oct. 23, 2023, 10:48 PM), http://Is govt notification exempting aviation leases from moratorium applicable for Go First, Delhi HC asks DGCA (smetimes.in).html
[34] *Supra* note 3, at 2.
[35] Ashmit Kumar, Kanishka Sarkar, *Go First Leases Were Terminated Before Moratorium Order, Lessor Tells Bankruptcy Appellate Tribunal,* CNBCTV18 (last visited Oct. 28, 2023, 10:33 PM), https://Go First leases were terminated before moratorium order, lessor tells bankruptcy appellate tribunal (cnbctv18.com).html
[36] *Go First's insolvency petition a 'smokescreen*': Aircraft lessor tells NCLAT, ET LEGAL WORLD (last visited Oct. 27, 2023, 11:32 PM), http://Go First's insolvency petition a 'smokescreen': Aircraft lessor tells NCLAT, ET LegalWorld (indiatimes.com).html
[37] *Supra* note 17, at 5.

domino to fall. Concomitantly, the moratorium-induced asset freeze accelerates asset depreciation, further exacerbated by missed leasing opportunities during the moratorium epoch.[38] The legal entanglements aimed at aircraft repossession not only embody an arduous odyssey, but are financially onerous as escalating legal and administrative costs augment the financial encumbrance on lessors.

The MCA, cognizant of these challenges, promulgated the notification exempting CTC transactions from the moratorium provision during airline insolvencies under the IBC. This exemption, emblematic of a legal renaissance, mitigates the aforementioned challenges, reinstating a legal equilibrium conducive for lessor interests. By orchestrating congruence between the domestic insolvency framework and international norms, this exemption augments the legal robustness, ensuring a more equitable landscape for all stakeholders in the labyrinthine domain of the Indian aviation industry.[39] Through the prism of legal pragmatism, this notification heralds a propitious epoch, potentially reinvigorating lessors' confidence and fostering a milieu of legal certitude in the Indian aviation sector.[40]

B. Maintenance Assurance: An Indispensable Prerogative

The saga of aircraft maintenance within the purview of insolvency proceedings in India unfurls a narrative of intricate legal and operational dilemmas. Rooted in the fundamental premise of preserving asset integrity, the maintenance paradigm is an indispensable prerogative, particularly accentuated by the substantial investment epitomized by aircraft assets. These high-value assets, representing a confluence of engineering excellence and operational necessity, necessitate a rigorous maintenance regimen to uphold their airworthiness, safety standards, and overall asset value.

Historically, the onus of maintenance has been a contractual obligation embedded within the lease agreements inked between the aircraft lessors and the airlines.[41] This stipulation, fundamental in its essence, safeguards the lessors' investment while ensuring that the aircraft

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[38] Abhinav Dixit, *Analysing the law on airline insolvency in India*, THE CONTEMPORARY LAW FORUM (last visited Oct. 27, 2023, 10:51 PM), https://Analysing The Law On Airline Insolvency In India - THE CONTEMPORARY LAW FORUM (tclf.in).html

[39] Indranil Sarkar & Arpan Chaturvedi & Jayshree Pyasi, *India amends insolvency rules in wake of Jet Leasing dispute*, REUTERS (last visited Oct. 23, 2023, 10:22 PM), https://India amends insolvency rules in wake of jet leasing dispute | Reuters.html

[40] *Go first dispute spurs improvements in India's lessor protections*, CAPA - CENTRE FOR AVIATION (last visited Oct. 29, 2023, 11:29 PM), https://Go First dispute spurs improvements in India's lessor protections | CAPA (centreforaviation.com).html

[41] *Supra* note 31, at 6.

remains in an operable and safe condition, adhering to the stringent aviation standards that govern the skies. The maintenance covenant, thus, is not merely a contractual stipulation but a quintessence of asset preservation and operational reliability.

However, the advent of insolvency proceedings under the IBC ushered in a milieu of uncertainty and legal perplexity. The moratorium provisions, integral to the IBC framework, emerged as a double-edged sword. While on one side, they aimed to preserve the assets of the beleaguered airline, on the flip side, they inadvertently shackled the lessors from enforcing the maintenance obligations stipulated in the lease agreements. This legal quandary manifested a vacuum of accountability, with the airlines, ensnared in the throes of insolvency, evading the maintenance obligations, while the lessors found themselves in a legal straitjacket, unable to enforce the maintenance covenants or undertake the maintenance initiatives independently.

The narrative of Go Airlines (India) elucidates this conundrum in a real-world scenario. The insolvency proceedings, under the aegis of the NCLT, underscored a priority paradigm that relegated the lessors' rights to a secondary pedestal.[42] The moratorium, while protecting the airline's assets, obliterated the lessors' ability to recover, inspect, and maintain the aircraft and engines. This scenario exacerbated the maintenance dilemma, with the aircraft languishing in a state of neglect, accruing substantial maintenance arrears, and depreciating in value.

The financial ramifications for the lessors were manifold and profound. The accrued maintenance costs burgeoned, the asset value plummeted, and the lessors' reputation in the aviation market frayed. This scenario orchestrated a milieu of financial adversity and reputational damage that reverberated through the lessor's future business engagements. The industry narrative of neglected maintenance and the ensuing financial haemorrhage became a cautionary tale that underscored the exigency of a regulatory renaissance.

The exemption, harmonizing the domestic insolvency framework with the international obligations under the CTC, ushered in a new epoch of procedural efficacy and lessor-friendly regulatory environment. The erstwhile challenges associated with maintenance oversight were significantly mitigated, ensuring that the spectre of neglected maintenance was relegated to the annals of regulatory history.

[42] *Supra* note 3, at 2.

The exemption encapsulated in the MCA notification augments the procedural transparency, expedites the maintenance oversight process, and refurbishes India's image in the global aviation sector. The transition from a quagmire of uncooperative business practices to a more collaborative and lessor-friendly environment manifests a balanced approach that not only safeguards lessors' interests but also augments the overall vitality of the Indian aviation sector.

This narrative underscores the exigency of a robust regulatory framework that ensures asset preservation, operational readiness, and financial vitality, even in the crucible of insolvency. The MCA notification is a testament to India's progressive stride towards aligning its insolvency regime with global standards, fostering a conducive ecosystem for aviation business engagements.[43]

While the exemption alleviates the maintenance conundrum, it also precipitates a discourse on the constitutional validity of the distinctive treatment accorded to the aviation industry vis-à-vis other sectors.[44] This discourse, beyond the purview of this article, embodies substantial jurisprudential significance and beckons a broader legal and regulatory deliberation.

In summation, the narrative of maintenance assurance in the face of insolvency proceedings epitomizes a critical facet of the aviation leasing industry. The regulatory innovations encapsulated in the MCA notification exemplify a progressive step towards ensuring that the crucible of insolvency does not compromise the intrinsic value and operational readiness of leased aircraft, thereby fostering a more conducive and collaborative business environment in the Indian aviation sector.

C. Streamlined Deregistration Process: A Leap Towards Regulatory Harmony

The realm of aircraft leasing and financing in India previously navigated through tumultuous waters due to the encumbrance imposed by Section 14(1) of the IBC.[45] The stipulated moratorium during an airline's insolvency process not only ensnared aircraft in a legal quagmire but also metamorphosed them into liabilities for lessors. The deleterious

[43] Deepanshi Gupta & Rajat K Mittal, *Aligning IBC with Cape Town Convention: A Relief for Aircraft Lessors?,* FINANCIAL EXPRESS (last visited Oct. 20, 2023, 10:48 PM), https://Aligning IBC with Cape Town Convention: A Relief for Aircraft Lessors? - Airlines/Aviation News | The Financial Express.html
[44] Reuters, *Govt changes insolvency rules to exclude leased aircraft from moratorium*, BUSINESS STANDARD (last visited Oct. 27, 2023, 11:04 PM), https://Govt changes insolvency rules to exclude leased aircraft from moratorium (business-standard.com).html
[45] *Supra* note 6, at 2.

reverberations of this regulatory framework resonated far and wide, casting a shadow over India's profile as a conducive and secure destination for aircraft leasing and financing.

Historically, the legal conduit for deregistering aircraft in India was enshrined in the Aircraft Rules, 1937.[46] The amended Rule 30(7)[47] posits that upon receipt of an application from an Irrevocable Deregistration and Export Request Authorisation (**"IDERA"**) holder before the termination of the lease, the Central Government is mandated to cancel the registration of an aircraft, to which the CTC or Protocol apply, within a stringent timeline of five working days.[48] Nonetheless, this deregistration procedure is orchestrated in a manner that retains the rights of the Central Government and other designated entities to arrest, detain, attach, or sell the aircraft object under the prevailing legal framework to recoup unpaid dues.[49]

The legal terrain prior to the recent amendments was fraught with challenges. Judicial pronouncements in precedents such as DVB Aviation Finance Asia PTE Ltd. V. Directorate General of Civil Aviation[50] and Wilmington Trust SP Services (Dublin) Limited v. Directorate General of Civil Aviation[51] momentarily alleviated the bureaucratic impediments faced by aviation creditors in India, affording them transient reprieve through remedies including deregistration under the IDERA. Yet, the intransigent lack of enabling domestic legislation for the CTC and Protocol, juxtaposed with a judicial proclivity to uphold domestic laws in scenarios of conflict with India's international law obligations, incubated a perception of India as a less favourable jurisdiction for the aviation industry.[52] The exemption paves the way for lessors to expeditiously repossess their aircraft from airlines in insolvency, thereby restoring their rights which were erstwhile stifled under the moratorium regimen.[53]

[46] Aircraft Rules, 1937 (India).
[47] Aircraft Rules, 1937, § 30(7) (India).
[48] Nitin Sarin, *New Law: Aircraft in India to be De-registered within 5 days*, SARIN & CO (last visited Oct. 23, 2023, 10:36 PM), https://sarinlaw.com/new-law-aircraft-in-india-to-be-de-registered-within-5-days/.html
[49] *Supra* note 6, at 2.
[50] DVB Aviation Finance Asia PTE Ltd. v. Directorate General of Civil Aviation, WP (C) 7661/2012 and CM No. 4208/2013 (DHC).
[51] Wilmington Trust SP Services (Dublin) Limited v. Directorate General of Civil Aviation, WP(C) 871/2015 (DHC).
[52] Bhavini Mishra, *Delhi HC tells DGCA to clarify stand on MCA notification on moratorium*, BUSINESS STANDARD (last visited Oct. 28, 2023, 11:14 PM), https:/Delhi HC tells DGCA to clarify stand on MCA notification on moratorium (business-standard.com).html
[53] Ruchika Chitravanshi, Ajinkya Kawale, Deepak Patel, *Corporate Affairs Ministry Exempts Aviation from IBC's moratorium clause*, BUSINESS STANDARD (last visited Oct. 26, 2023, 11:43 PM), https://Corporate affairs ministry exempts aviation from IBC's moratorium clause (business-standard.com).html

The MCA notification is emblematic of India's evolving regulatory framework, aiming for congruence with the international norms delineated in the CTC. Particularly, Article XI[54] of the Protocol (adopted by India under Alternative A) enshrines a provision that permits a creditor with a security interest or a lessee under a leasing agreement to repossess aircraft objects of the debtor undergoing insolvency proceedings after a stipulated waiting period of two calendar months from the onset of insolvency proceedings, without necessitating court intervention.

However, the journey towards a seamless deregistration process is not devoid of hurdles.[55] A conspicuous drawback of the MCA notification is its non-retrospective nature.[56] This nuance implies that aircraft embroiled in ongoing moratoriums, as exemplified in the case of Go First, remain ineligible for deregistration and repossession by lessors.[57] Despite this caveat, the notification substantively alleviates the challenge concerning deregistration and repossession of aircraft during an airline's insolvency in India's aviation sector for the foreseeable future.[58]

This legislative advancement is a monumental stride towards bridging the schism between international treaty obligations and domestic laws. It not only attenuates the bureaucratic red tape surrounding aircraft deregistration but also significantly augments India's appeal as an attractive and secure haven for global aircraft leasing and financing enterprises. The amendment exudes a message of commitment to fostering a robust legal ecosystem that synergizes with international standards, thereby progressively enhancing India's standing in the global aviation industry.

Moreover, this regulatory pivot underscores the pivotal role of harmonizing domestic laws with international treaty obligations to foster a conducive environment for the growth and sustainability of the aviation industry in India. The MCA notification is a testament to India's resolve to ameliorate the impediments that beleaguered lessors and to recalibrate the legal infrastructure to resonate with industry-standard practices worldwide.

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[54] Convention on Integration Interests in Mobile Equipment 2001, art. XI, 2307 U.N.T.S. 285.
[55] Stewart B Herman, *Aircraft deregistration and repossession in India: Lessons from Kingfisher and SpiceJet*, NATIONAL LAW REVIEW (last visited Oct. 21, 2023, 10:19 PM), https://Aircraft Deregistration and Repossession in India: Lessons from K (natlawreview.com).html
[56] Ruchika Chitravanshi, *Govt may clarify prospective clause of IBC exemption for Aviation*, BUSINESS STANDARD (last visited Oct. 28, 2023, 11:42 PM), https://Govt may clarify prospective clause of IBC exemption for aviation | News - Business Standard (business-standard.com).html
[57] *Supra* note 40, at 9.
[58] *Supra* note 6, at 2.

The narrative of aircraft deregistration in India is gradually unfolding, with the MCA notification being a seminal chapter in this evolving saga. It reflects a nuanced understanding of the intricacies involved in aircraft leasing and financing, and a deliberate endeavour to nurture an environment that is propitious for the flourishing of the aviation sector in India.

VI. LEGAL AND PRACTICAL IMPLICATIONS OF THE MORATORIUM EXEMPTION

Article 30[59] of the CTC specifies that insolvency procedures related to property rights enforcement, overseen by an insolvency administrator under national laws (such as a moratorium impacting security interest enforcement), remain unaffected unless the Contracting States adopt Alternative A. Notably, even after India's accession to the CTC and its declaration of Alternative A, Indian judiciary has persistently applied the broad moratorium from Section 14(1)[60] of the IBC to aviation objects. This application notably extends beyond the 2-calendar month period as stipulated under India's Alternative A declaration.[61]

This prevalent deviation can be ascribed to:

1. Legislative Void: The lack of tailored legislation by the Indian Parliament, which results in the absence of a clear legal apparatus for the CTC's application in India.

2. Statutory Overrule: The non-obstante clause found in Section 238[62] of the IBC could be a contributory factor in the overriding of the CTC stipulations.

As of May 2023, concerns within the aviation sector surfaced when SMBC Aviation Capital labelled the Indian Aviation Industry as a 'risky jurisdiction.' This was instigated by the NCLT inducting Go Airlines (India) Limited into insolvency resolution and consequently limiting lessors from reclaiming Go First aircraft. Leading leasing firms' efforts to re-acquire aircraft engines and restrict Go First airlines from commercial operation were dismissed, citing the moratorium's impact.

Such resolutions have diminished the trust of foreign aircraft lessors in the Indian market. This sentiment was further reflected when the AWG downgraded India's compliance score from

[59] Convention on Integration Interests in Mobile Equipment 200, art 30, 1 2307 U.N.T.S. 285.
[60] *Supra* note 6, at 2.
[61] ET LegalWorld, *supra* note 36, at 8.
[62] The Insolvency and Bankruptcy Code, 2016, § 238, No. 31, Acts of Parliament, 2016 (India).

medium to low. In response, the MCA Notification aimed to counteract this by exempting aircraft-related transactions from the IBC's moratorium. AWG, recognizing these efforts, revised India's outlook from negative to positive.

The MCA Notification is not an across-the-board exemption for aviation companies in the midst of or facing the CIRP. Instead, it specifically negates transactions pertaining to aircraft objects (like engines, airframes, and helicopters) from the IBC's moratorium. Such a modification is poised to rejuvenate trust among international aircraft leasing entities, curtail risk, and reduce credit and lease costs, ultimately fortifying the aviation sector and making airfare more cost-effective for passengers.[63]

The intertwined nature of international treaties and domestic legal systems becomes conspicuous when analysing aircraft deregistration and repossession amid airline insolvency. For a robust aviation sector, synchronizing India's global commitments with local needs is paramount, demanding legal consistency.[64]

Historically, this juxtaposition became especially pronounced during the Kingfisher Airlines fiasco in 2012. The non-existence of localized legislation integrating the CTC posed immense challenges for lessors and financiers seeking aircraft retrieval post-default.[65]

The lack of domestic legislation implementing the CTC introduces lessors and financiers to the unpredictable realm of local repossession laws, especially in India. Here, a dense web of insolvency, taxation, and regulatory rules converge, posing potential threats from tax or airport liens, jeopardizing lessors' interests during insolvency.[66]

The deregistration and repossession protocol post-insolvency is laden with legal nuances and pragmatic hurdles. Even with amendments to the Aircraft Rules, the anticipated outcomes remain elusive. Introducing the IBC in 2016 added layers of complexity, with Section 238[67] of the IBC obstructing the Aircraft Rules' benefits. Recent cases like Go First's insolvency underpin this intricacy.

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[63] *Supra* note 3, at 2.
[64] Harshita Kushwah, *Navigating turbulence: Indian insolvency regime and the Cape Town Convention in the light of GoFirst voluntary insolvency*, IBC LAWS (last visited Oct. 24, 2023, 10:36 PM), https://IBC Laws - Navigating Turbulence: Indian Insolvency Regime and the Cape Town Convention in the light of GoFirst Voluntary Insolvency - Harshita Kushwah.html
[65] *See id.*
[66] *See id.*
[67] Economic Times, *supra* note 19, at 5.

The DGCA is tasked with executing Irrevocable Deregistration and Export Request Authorizations (IDERA) for aircraft retrieval. Yet, implementing Rule 30(7)[68] in the Aircraft Rules has emerged to be more convoluted than anticipated. With Go First, the NCLT rapidly admitted the insolvency plea adhering to the IBC's framework, while the DGCA procrastinated on the aircraft deregistration.

The induction of a moratorium via Section 14[69] of the IBC compounds the intricacies, hindering lessors or owners from recuperating assets held by an insolvent firm. This disparity, as witnessed with Go First and Jet Airways, creates a disconnect between the pre-established regulations and the burgeoning insolvency guidelines. This highlights an imperative need for synchronization between legislative aspirations and their practical ramifications.

The moratorium's exemption for CTC-related transactions carries multifaceted legal repercussions:

1. Aircraft Lessors' Rights: They remain unhindered by the moratorium, enabling them to enforce lease agreements, crucial given the significant security interests they hold in leased aircraft.
2. Creditor's Rights Amid CIRP: Those with CTC rights can reclaim aircraft and engines even during CIRP, crucial for safeguarding their security interests and avoiding asset undervaluation during liquidation sales.
3. Potential Impact on Resolution Process: The exemption might hamper the resolution process for beleaguered aviation entities. This is because a prospective buyer might be deterred, knowing they will be subject to the CTC rights of aircraft lessors and other creditors.

Practical consequences of this exemption could lead to:

1. Increased Repossession: Aircraft and engines might be increasingly reclaimed by lessors during airline insolvencies.
2. Financing Challenges for Distressed Airlines: Lenders might hesitate to finance such entities during CIRP, fearing potential loss of their security interests.

[68] Aircraft Rules, 1937, § 30(7) (India).
[69] The Insolvency and Bankruptcy Code, 2016, § 14, No. 31, Acts of Parliament, 2016 (India).

3. Impact on Indian Aviation: It might raise aircraft leasing costs for Indian airlines and potentially reduce aircraft availability.

While the MCA has used its powers under section 14(3)[70] of the IBC to exempt the aviation sector from the moratorium, the CTC still awaits ratification by Parliament. This presents two significant hurdles in the insolvency resolution pathway for airlines:

1. Efficacy of IBC: It might be compromised in addressing insolvencies within the aviation sector. The Supreme Court's verdict in the Sundaresh Bhatt case[71] underscores the moratorium's intent to safeguard the assets of the corporate debtor during CIRP. Absent a moratorium, especially on assets like aircraft, the viability of an airline in insolvency is questionable. However, the tribunal might still categorize aircraft as essential under section 14(2)[72] of the IBC.
2. CTC's Implementation: Without parliamentary ratification, it is challenging to execute the CTC's insolvency framework, as treaties often mandate domestic legal alterations, as established in the Jolly Verghese case.[73] The current scenario reveals a misalignment between the CTC and IBC provisions, amplifying the intricacy of the insolvency resolution process for airlines, regardless of whether using the CTC or IBC guidelines.

VII. IMPACT ON THE RESOLUTION PROCESS FOR DISTRESSED AVIATION COMPANIES WITHIN THE INDIAN REGULATORY FRAMEWORK

The exemption from the moratorium for CTC transactions promises to reshape the resolution landscape for distressed aviation companies within India. This exemption underscores the delicate balance between safeguarding aircraft lessors' and certain creditors' rights under the CTC and ensuring the viability of the insolvency resolution process for aviation companies. While this move might bolster foreign confidence in the Indian aviation sector, making aircraft leasing smoother for domestic airlines, it simultaneously presents hurdles for financially beleaguered aviation companies in their efforts to attract buyers or secure financing during the

[70] The Insolvency and Bankruptcy Code, 2016, § 14(3), No. 31, Acts of Parliament, 2016 (India).
[71] Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs Civil Appeal No. 7667 of 2021 (India).
[72] The Insolvency and Bankruptcy Code, 2016, § 14(2), No. 31, Acts of Parliament, 2016 (India).
[73] Jolly Verghese v. Bank of Cochin 1980 SCR (2) 913 (India).

CIRP. This is driven by the potential risk buyers and financiers face regarding their security interests in an insolvency scenario.

To address these challenges, the Indian government could contemplate several strategies:

- Offering fiscal assistance to beleaguered aviation entities during CIRP.
- Refining the IBC to equip the resolution professional with enhanced latitude in managing CTC entitlements.
- Instituting a tailored insolvency framework exclusive to the aviation sector in distress.

Upon its enactment, the Cape Town Bill is poised to supersede the IBC's moratorium clauses. In line with Article XI of the Protocol[74] and reflecting India's commitments upon joining the CTC, it dictates that if an airline defaults for more than two months post the initiation of insolvency proceedings, the lessor can reclaim the aircraft. Throughout this duration, it is imperative for the insolvency administrator to uphold the aircraft's worth in accordance with the leasing terms. The lessor also possesses the prerogative to seek any other provisional remedies under Indian jurisprudence. Remarkably, the aircraft can remain with the insolvency administrator or lessee if within the two-month window they rectify all contractual breaches (barring the insolvency initiation itself) and pledge to honour future commitments within the lease.[75]

This legislative development aligns India with its commitments under the CTC and Protocol, which it embraced in 2008. By doing so, it nullifies the inadvertent inconsistencies introduced by the IBC, reaffirming critical safeguards for aircraft lessors. Nevertheless, a cloud of uncertainty persists over whether bankruptcy tribunals will defer to the Convention/Protocol or Section 14(1)(d) of the IBC.[76] Additionally, there's anticipation regarding the course of action courts might adopt if a lessor secures a decree from a foreign court for aircraft retrieval in India. Such deliberations must be juxtaposed with Article XII of the Protocol,[77] which mandates India's maximal collaboration with overseas courts and insolvency custodians in executing the Convention or Protocol's stipulations.

[74] *Supra* note 54, at 13.
[75] Ashwin Bishnoi & Charu Chitwan & Amrit Mahal, *Insolvency in Indian aviation what does India's new cape town convention*, KHAITAN & CO (last visited Oct. 29, 2023, 11:24 PM), https://Insolvency In Indian Aviation What Does Indias New Cape Town Convention | Khaitan & Co (khaitanco.com).html
[76] *Supra* note 6, at 2.
[77] Convention on Integration Interests in Mobile Equipment 2001, art. XII, 2307 U.N.T.S. 285.

In reality, a comprehensive understanding will materialize only post the Bill's transition into law, especially regarding aspects such as documentary prerequisites, fiscal implications tied to repossession petitions following insolvency commencement, associated repossession costs, and the role local legal practitioners play in facilitating these requisitions.

VIII. IMPROVING THE IMPLEMENTATION OF AIRCRAFT REPOSSESSION LAWS

Leading aircraft leasing nations are adherents to the Convention on International Interests in Mobile Equipment, commonly referred to as the CTC. This international treaty oversees the transactions involving mobile equipment, notably aircraft, railways, and space assets. At its core, the CTC aims to provide foundational default remedies for creditors. These remedies include measures such as de-registration and export of aircraft to offer immediate relief and the establishment of a clear legal framework for handling disputes. By instilling such measures, the Convention and Protocol aspire to diminish risks for creditors. This, in turn, provides debtors with an advantage by enhancing legal clarity, thereby reducing their borrowing costs.[78]

A significant byproduct of this is the promotion of credit allocation towards acquiring advanced, fuel-efficient aircraft. Airlines from nations that uphold both the Convention and the Protocol are potentially eligible for a reduction of up to 10% on their export credit premiums.[79]

India, although a signatory to the CTC since 2008, has faced hurdles in its smooth implementation. This has, unfortunately, portrayed India as a challenging arena for aircraft financing.

Tensions arose due to disparities between the CTC and indigenous Indian legislations, such as the Companies Law 2013[80] and the IBC.[81] It was not until 2017 that local amendments, specifically in the Aircraft Rules, 1937,[82] were made, aligning them with the CTC's directives for the creation and registration of security interests in aircraft.

In an attempt to bridge this gap, the Government introduced measures like the IDERA. This mandates the DGCA to de-register an aircraft within five days once an IDERA holder exercises

[78] *Supra* note 1, at 1.
[79] *Supra* note 1, at 1.
[80] The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).
[81] The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).
[82] Aircraft Rules, 1937 (India).

their rights. The efficacy of such measures was visibly demonstrated in 2019 when IDERA holders managed to de-register their aircraft in what could be termed as the most systematic and prompt action witnessed in Indian aviation history.

Yet, it took until 2022 for a comprehensive legislation titled the 'Protection and Enforcement of Interests in Aircraft Objects Bill'[83] to be introduced. This Bill focuses on the full-scale implementation of the CTC, providing a robust legal scaffold for the creation, registration, and enforcement of security interests in aircraft. These procedural delays have fuelled a perception among industry stakeholders that India remains a challenging environment for the aircraft financing and leasing industry.

To foster greater transparency and reinvigorate trust, it is imperative for the Government to ensure meticulous adherence to and implementation of the CTC in India, primarily through the Protection and Enforcement of Interests in Aircraft Objects Bill/Act.

IX. CONCLUSION

In light of the multidimensional analysis undertaken in this research, it becomes unequivocally evident that the MCA's notification on 3rd October, 2023 marks a pivotal juncture in the realm of Indian aviation insolvencies. The exemption of the moratorium requirement for CTC Transactions addresses a long-standing impediment faced by lessors— the repossession of aircraft objects during an airline's insolvency. This exemption, born out of a necessity to align with the CTC's tenets, which were hitherto inadequately enforced in India, heralds a significant stride towards ameliorating the precarious dynamics between lessors and distressed aviation companies.

The core advantages emanating from this exemption are manifold. It ensures lessors are not beleaguered by a loss of revenue, guarantees the maintenance of aircraft, and significantly streamlines the deregistration process, thereby propelling the sector towards a more stable and lessor-friendly milieu. The legal and practical implications of this exemption extend beyond mere transactional facilitations; they potentially redefine the contours of the resolution process for distressed aviation entities, making strides towards a more fluid and equitable resolution mechanism.

[83] The Protection and Enforcement of Interests in Aircraft Objects Bill, 2022 (India).

Furthermore, this development underscores the imperative of enhancing the implementation and enforcement of aircraft repossession laws, thereby aligning India's aviation insolvency framework more closely with international standards. This not only augments the legal robustness surrounding aviation insolvencies but also significantly contributes to instilling a semblance of predictability and assurance in the sector.

The pathway forged by the MCA's notification lays down a robust foundation for fostering an environment that is conducive to the seamless operation of aviation companies while safeguarding the interests of lessors. However, the journey towards a fully harmonized aviation insolvency framework requires a continuous appraisal of the existing laws and regulations, and a relentless endeavour to bridge the gaps therein. This article posits that the exemption of the moratorium is a monumental step in that direction, yet the odyssey towards a comprehensive and just framework is far from over and warrants a concerted effort from all stakeholders involved.

X. SUGGESTIONS

A. Ratification of the CTC

The CTC stands as a pivotal international treaty, delineating standardized procedures and guidelines for transactions involving mobile assets. While India proudly holds its position as a signatory to the CTC, the nation currently lacks the legislative scaffolding required for the treaty's enforcement. In 2018, India took a step towards this by introducing the CTC Bill. However, this bill remains unenacted, leaving a gap in the nation's legal framework.

For the Indian aviation sector, the stakes are high. Most lessors in the industry are multinational entities, and the harmonized processes offered by the CTC would significantly streamline transactions. We strongly advocate for India's ratification of the Convention. Such an action would not only ensure legal consistency and predictability for all stakeholders but would also provide a robust framework for recognizing and safeguarding their rights. This becomes especially pertinent when navigating the murky waters of insolvency proceedings.

The benefits of ratification extend beyond national borders. It would bolster international confidence in India's aviation financing structure, positioning the country as an enticing epicentre for global aviation investments. Furthermore, this step would amplify India's stature as a dependable and adherent jurisdiction in the global arena. Such recognition would dovetail seamlessly with the Indian government's existing initiatives, further cementing India's

reputation as a global aviation credit nexus. To realize this vision, a concerted effort from aviation industry stakeholders, legal luminaries, and policymakers is essential. Together, they must champion the swift ratification of the CTC.

B. Establishment of a Dedicated Aviation Tribunal

We strongly recommend the establishment of a dedicated aviation tribunal within India's judicial framework. Tailored exclusively for the Indian aviation sector, this tribunal should align its operations with the standards set by the CTC. Envision a tribunal where the adjudicating panel possesses profound expertise in aviation law and international regulations; such a body would be uniquely positioned to deliver judgments with enhanced precision, clarity, and coherence.

By focusing solely on aviation-related cases, such a tribunal would promise swifter case resolutions. A streamlined approach would not only ensure legal predictability and consistency, particularly in aviation insolvency cases, but also instil heightened investor and creditor confidence. Demonstrating India's robust commitment to its aviation sector, such a specialized tribunal becomes indispensable when one considers the intricacies and unique facets of aviation transactions. Moreover, a sector-specific tribunal can accelerate the adjudication process in aviation insolvency matters, safeguarding the rights and interests of lessors. Such efficiency could be pivotal in preserving the financial health and viability of airline enterprises, mitigating prolonged legal uncertainties for the tribunal to truly flourish and realize its potential, it is imperative to foster close collaboration with aviation regulatory entities and key industry stakeholders. Instituting clear procedural timelines and facilitating seamless information exchange with the DGCA will further underscore its effectiveness and relevance in the ever-evolving aviation landscape.

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NO ONE KILLED ARTICLE 12: A LEGAL ANALYSIS UNDER INDIAN CONSTITUTION

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Abstract*: The scope of application of Fundamental Rights and jurisdiction of the term "State" was quite a brewing issue in the Constituent Assembly concerning the phrase "other authorities." However, Dr Ambedkar emphatically addressed it by saying, "Other authority" refers to any entity possessing either authority to make laws or having discretionary power vested in it. Indian Judiciary has spent decades deciphering how and against whom, the fundamental rights can be exercised. However, in an unexpected move on January 3, 2023, the Supreme Court of India unsettled the established norms and introduced a new aspect to Article 12 through the Kaushal Kishore Judgment. Thus, this article aims to comprehensively analyse the issue of the Horizontal Application of Fundamental Rights and the consequent impact on Article 12 as discussed in the aforesaid case. This analysis includes a comparative examination of other countries, a definitional and historical analysis of Article 12, and a multidisciplinary evaluation of entities from various sectors that currently are not but should be considered in the context of Part Three of the Constitution. The Kaushal Kishore Judgment is a focal point for this discussion based on which, the authors have explored the current settled scenario, identified loopholes, and presented a forward-looking perspective. The article strives to decipher the reasoning provided by the Supreme Court and the underlying intention behind the judgment.*

Keywords – Article 12, Horizontal effect, Alternate Efficacious Remedy, Kaushal Kishore Case.

I. INTRODUCTION

In the past few decades, the Indian Judiciary has devised several tests to check the constitutional validity of whether an entity can be considered a State, thus, determining the ambit of Article 12 of the Constitution of India. Judicial and Legal forums in the country have relied upon several documents around the globe, analyzed, re-analyzed, revised, and revisited their stances on the matter with great caution to come to any conclusion. Ranging from *Ujjambai v UOI*[1] to *Ajay Hasia*[2] and *Pradeep Kumar Biswas*,[3] Article 12 Jurisprudence is vast, detailed, and at the very same time, a true testimony to the diligent mindfulness displayed by Indian courts.

However, very recently, the Supreme Court (hereinafter called as SC) delivered a judgment named *Kaushal Kishore v. State of Uttar Pradesh,*[4] where it was categorically held that the part III of the Constitution of India could be exercised horizontally. The SC had formed "five hazy questions" to adjudicate upon the *Bulandshahr Rape Case* and the concomitant controversy.

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[1] Ujjambai v. State of U.P., (1963) 1 SCR 778.
[2] Ajay Hasia v. Khalid Mujib Sehravardi, (1981) AIR SC 487.
[3] Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.
[4] Kaushal Kishore v. State of U.P., (2023) SCC OnLine SC.

Not just that, the SC also haphazardly dealt with the global, comparative analysis of the "Horizontal effect" – one of the most intricate issues in modern constitutionalism – in this case.

The Jamaican *Tomlinson v. Television case*[5] and the South African *Khumalo v. Holomisa*[6] judgments garnered considerable interest due to the raised issues about horizontality and freedom of speech. As a consequence, the respective judiciaries developed their jurisprudence on this subject. However, such an issue was irrelevant in the Kaushal Kishore Case. The deliberation, and the reasoning employed by the SC to come on the verdict, needs to be studied meticulously.

Therefore, firstly, the paper at hand analyzes Article 12 based on its definition, followed by an overview of the several Tests formulated by judicial forums over the years and comments upon their relevance and application concerning the facts of the Kaushal Kishore Case.

Secondly, the paper also considers the preponderant increase of involvement of private persons and businesses to carry out the functions that, majorly, used to be performed by State entities, in the recent times. Hence the paper attempts to find logical answers to the questions such as, "If private entities are given the public duties of handling railways, toll collections, banking, telecom sector, etc. then shouldn't they be made responsible for upholding the Fundamental Rights? Moreover, be held liable for the violation of the same?"

Thirdly, the authors have tried to decipher the intent and reasoning employed by the SC to deliver a judgment like Kaushal Kishore vis-à-vis WhatsApp Facebook litigation, followed by a critical comment upon the judgment and how it failed to exhaust other constitutionally feasible alternatives.

This paper addresses significant issues such as how, with a single judgment, the Court has opened floodgates for a deluge of cases that will aid and abet the already clogged judiciary and has nullified the entire jurisprudence of Article 12. The gist of this paper, however, lies in the fact, that the authors firmly believe that the judgment was well-intentioned but terribly written, thus made susceptible to exploitation.

II. WHAT IS A STATE? – ANALYSIS OF THE ARTICLE 12 JURISPRUDENCE

[5] Tomlinson, Maurice Arnold v Television Jamaica Ltd., CVM Television Ltd and the Public Broadcasting Corporation of Jamaica, (2013) JMFC Full 5.
[6] Fred Khumalo v. Bantubonke Harrington Holomisa, (2002) SCC OnLine ZACC 14.

Article 12 of the Constitution of India, 1950 provides a specific definition of the term "State" that has far-reaching implications. According to this article, "*The term State includes not only the Central Government and the State Governments but also the Parliament of India and the State Legislatures, all local authorities, and other authorities within the territory of India or under the control of the Central Government.*"[7]

However, the definition of "State" in Article 12 is not limited to entities explicitly mentioned in the constitutional provision. In reality, the definition incorporates a much broader perspective, encompassing all authorities under the Government's extensive and pervasive oversight.[8]

This definition of "State" is essential because it establishes the basis for the State's powers and responsibilities. The Preamble to the Constitution of India defines India as "a sovereign, socialist, secular, democratic republic."[9] In practical terms, this means that the State is entrusted with the responsibility to implement socioeconomic measures which aim to advance the well-being of the citizens within this republic. These measures draw inspiration from Part IV of the Constitution of India, 1950, which outlines the Directive Principles of State Policy. Accordingly, the State is empowered to undertake various endeavours, such as education, healthcare, housing, and employment, to foster the welfare of the populace. This comprehensive definition aligns with the constitutional framers' intention, as reflected in Part IV of the Constitution of India, which obligate the State to undertake socio-economic measures aimed at promoting the welfare of the people.[10]

III. TEST FOR DETERMINATION OF "STATE"

The Indian SC has established several tests to determine whether an organization can be considered a "State," using the concepts of functional, financial, and administrative dominance as well as deep and pervasive control. The SC in *Ajay Hasia v. Khalid Mujib Sehravardi*[11] by relying on *R.D. Shetty's case*[12] laid down parameters or guidelines for identifying whether a body within the definition of "other authorities" in Article 12. They are as follows:

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[7]INDIA CONST. art. 12.
[8]Som Prakash Rekhi v. Union of India, (1981) 1 SCC 449.
[9]INDIA CONST. Preamble.
[10]Ramnath, Kalyani., *Guarding the Guards: The Judiciary as State within the Meaning of Article 12 of the Constitution*. STUDENT BAR REVIEW, vol. 18, no. 2, (2006) pp. 75–94. *JSTOR*, (last visited Apr. 1, 2023) http://www.jstor.org/stable/44306656.html
[11] Ajay Hasia v. Khalid Mujib Sehravardi, (1981) AIR SC 487.
[12] Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489.

(1) "If the entire share capital of the Corporation is held by Government, it would go long way towards indicating that the Corporation is an instrumentality or agency of Government."

(2) "Where the financial assistance of the State is so much as to meet almost entire expenditures of the Corporation, it would afford some in- dictation of the Corporation being impregnated with governmental character."

(3) "It may also be a relevant factor whether the corporation enjoys monopoly status, which is State conferred or State protected"

(4) "Existence of deep and pervasive State control may afford an indication that the Corporation is an agency or instrumentality."

(5) "If the functions of the Corporation are of public importance and closely related governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of government."

(6) "Specifically, if a department of government is transferred to a corporation, it would be a strong factor supportive of the inference of the Corporation being an instrumentality or agency of Government."

Further, in *Pradeep Biswas v. Indian Institute of Chemical Biology case*, a set of tests was laid down for the determination of State, which include an evaluation of the financial, operational, and administrative control of the government over the organization.[13] In the ratio, the SC recognized that a Democratic, Socialist, Republic requires government involvement in social and economic operations and acknowledged the advantages of using corporations for commercial and economic activities. However, it was noted that the court cannot allow the government to use corporate entities as an excuse to avoid their duty to protect citizens' fundamental rights. If the government could simply assign corporations to conduct business, it would undermine the constitutionally guaranteed rights of citizens.[14]

Augmenting the decision in *Pradeep Kumar Biswas, G. Bassi Reddy v. International Crops Research Institute case* ruled that an organization that was neither established by the government nor is it a government agency cannot be considered a State. The Court established a series of tests that apply in all situations to determine whether a body or authority can be considered a state. One of these tests involves examining whether the government has financial, operational, and administrative dominance or control over the body or authority. This control

[13] Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.
[14] Other Authorities within the Meaning of Article 12 of the Constitution, (1986) 4 SCC J-1.

must be deep and far-reaching, not just superficial. Additionally, if control is regulatory in nature, the body or authority cannot be considered a state according to Article 12.[15]

The *Zee Telefilms Ltd. v. Union of India* case provided further clarification on the types of bodies that can fall under the "other authorities" category, including those engaged in trading, research and development, and private organizations discharging a public responsibility or a positive obligation of public nature. The court also identified several important considerations for determination of State in the form of "hybrid bodies." In this case, the SC of India ruled that the Board of Control for Cricket in India (BCCI) is not a state under Article 12 of the Constitution of India, 1950, because the government's influence over BCCI was just regulatory and not pervasive. The court made a clear and unambiguous declaration that in cases where a private entity voluntarily undertakes State activities or public duties that are not prohibited by law, then it may be considered as functioning as a state instrumentality.[16]

IV. RELEVANCE OF THE KAUSHAL KISHORE CASE

In the case of *Kaushal Kishore v. Union of India*, On July 29, 2016, during their journey from Noida to Shahjahanpur via National Highway 91 to attend a relative's funeral, the petitioner and his family encountered a group of individuals. The petitioner alleges that this group, through coercive means, forcefully deprived them of their belongings, including cash and jewellery. Moreover, the petitioner's wife and young daughter were subjected to the heinous act of gang rape by the said group. In response to the gangrape charges in Bulandshahr, Azam Khan, a Member of Parliament from Uttar Pradesh and the state's minister for Urban Development, they made remarks alleging that the accusations were false and politically motivated. The victims feeling that these dismissive comments by a person of authority had interfered with the ongoing investigation approached the SC seeking its intervention and action against the minister. They also expressed concerns about a fair and unbiased investigation in Uttar Pradesh and requested the case transfer to another jurisdiction.

To address the situation, the SC appointed Fali Nariman as the amicus curiae for the case and halted the ongoing probe. Mr. Nariman emphasized the need for the court to fulfil its constitutional duty of strengthening the justice system and instilling public confidence in the fairness of trials by addressing both the police investigation and the derogatory remarks made by a public servant towards the victims. The amicus curiae's queries were initially presented

[15] G. Bassi Reddy v. International Crops Research Institute, (2003) 4 SCC 225.
[16] Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649.

to a three-judge bench but subsequently referred to a constitutional bench for further consideration.

Simultaneously, a Special Leave Petition (SLP) arising from a Kerala High Court ruling was heard by a three-judge panel. The panel determined that the grounds raised in the SLP were identical to those presented in the writ petition and, thus, consolidated the two cases. The petitioners had filed two writ petitions wherein they made multiple requests. The first petition sought the establishment of a code of conduct for Ministers who have taken the constitutionally mandated oath of office and urged the Chief Minister to take appropriate action against Ministers failing to uphold the said oath. The second petition sought action against a Minister for his statements. However, the Kerala High Court dismissed both petitions, stating that the requests made by the public interest petitioners pertained to moral principles and that the Court lacked jurisdiction to determine whether the Chief Minister should establish a code of conduct for cabinet members. Consequently, one of the petitioners filed a Special Leave Petition challenging the common order.

The three-judge bench combined the petitions as they involved substantially similar issues and referred them to a constitutional bench of five judges. This referral was made because a "substantial question of law" had arisen. Additionally, the constitutional bench formulated five specific questions to be addressed in order to decide the case. These inquiries encompass persistently disputed, complex, and multi-dimensional legal issues. Below are the questions –

a. "Are the reasons listed in Article 19(2), in regard to which reasonable restrictions on the right to free expression may be imposed by legislation, exhaustive, or may other fundamental rights be invoked to impose restrictions on the right to free speech on reasons not included in Article 19(2)?"

b. "Can a basic right protected by Article 19 or Article 21 of the Constitution of India be asserted against parties other than the State or its instrumentalities?"

c. "Whether the State has a responsibility to actively defend a person's rights under Article 21 of the Constitution of India, even if that citizen's freedom is threatened by the actions or inactions of another citizen or private organisation?"

d. "Is it possible to vicariously attribute to the government itself a statement made by a minister that relates to any matters of state or is made to protect the government, especially in light of the principle of collective responsibility?"

e. "Can a Minister's remark, which conflicts with a citizen's rights under Part Three of the Constitution, amount to a violation of those rights and give rise to a claim for Constitutional Tort".

V. HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS: RELEVANCE IN THE KAUSHAL KISHORE CASE

From a common citizen's perspective, the Constitution of India serves as an empowering and emancipating instrument, while for the State, it acts as a constraining force. Undoubtedly, empowerment does not equate to bestowal. Instead, it acknowledges the inherent rights of the citizen. It provides a comprehensive framework to safeguard these rights, thus establishing itself as a credible source of these powers that might otherwise remain nebulous. Without articulation and enumeration of these rights, the traditional notion of State sovereignty could go unchecked, potentially infringing upon the powers of the citizens. As a political entity, the Constitution places limitations on the State, setting boundaries - a metaphorical Lakshman Rekha - that the State is not permitted to transgress. Each branch of the State thus has obligations to fulfil, burdens to bear, conventions to uphold, and objectives to achieve. This is called as verticality.

However, in the Indian context, as the State's functions expanded, it opened avenues for private entities to collaborate as partners in its endeavours. These private entities are authorized to carry out governmental functions or public duties, thereby becoming subject to constitutional obligations. This phenomenon which involves the extension of constitutional compulsions to these private actors is called as Horizontality.[17]

In its most basic sense, the term "horizontal effect" is a concept frequently invoked by legal scholars to elucidate the circumstance wherein constitutional rights, notably fundamental rights enshrined in the Constitution of India, have an impact on interactions between private individuals. This legal principle delves into how these constitutional guarantees permeate the horizontal plane of legal relationships, navigating beyond the traditional vertical interaction between the State and its citizens.

[17] Shree Krishna Education Society v. State of Maharashtra, (2019) SCC Bom 767.

Like its counterparts in the United States, Canada, South Africa, and Germany, the Indian SC[18], notes the learned author and columnist Gautam Bhatia.[19] Mr. Bhatia has had occasions to engage with horizontality, and to craft various kinds of remedies in such cases. According to him, the horizontality is achieved through different devices:

(1) Functional Test: through this device, the private player is assimilated under the rubric of "other authorities", as mentioned in Article 12 of the Constitution.

(2) Positive Rights Enforcement: The courts have transcended the traditional conceptual boundaries of fundamental rights through judicial interpretation, redefining them as more than mere negative restrictions. In this transformative process, fundamental rights have evolved into affirmative duties and positive obligations imposed on the State.

(3) Indirect Horizontality: In this method, as discussed earlier, the fundamental or "basic fundamental rights radiate outwards beyond the Constitution, in a manner that affects private law and private adjudication."

(4) Direct Horizontality: under this method, the Fundamental Rights are directly enforced against non-state players. In fact, the Constitution has a couple of provisions under Chapter III that apply across the board, to all citizens: Articles 15(2), 17, and 23.

These are four distinct approaches which should be kept in mind while applying the constitutional principles to private, non-state entities. However, unfortunately, by consistently mashing up the aforementioned ideas, together, the Apex Court, in *Kaushal Kishore case*, commits a simple yet a galactically consequential blunder, one which could potentially assassinate the well-founded jurisprudence of article 12.

While assessing the answer to the second of the five questions, the SC comparatively analysed the concept of "Horizontal application of Fundamental Rights" in several other jurisdictions. It was observed that the said concept was introduced in the judgment by drawing upon US legal precedent of *Shelley v. Kraemer*,[20] where the issues raised involved state action and with the judiciary being considered to be state. The Civil Rights Case, which addresses the crucial issue

[18] Id.
[19]Bhatia, Gautam., *Horizontality Under the Indian Constitution: A Schema,* (2015), https://indconlawphil.wordpress.com/2015/05/24/horizontalityunder-the-indian-constitution-a-schema/en.html.
[20] Shelley v. Kraemer McGhee, (1948) SCC OnLine US SC 59.

of state action and *New York Times v. Sullivan*,[21] which offers a solution to the indirect horizontality issue and comments upon the Civil Rights Case was also noted.

In the 61st paragraph of the Kaushal Kishore Judgement, the majority discussion on South African constitutional law mixes horizontality under the Constitution with horizontality under statute was considered. However, the SC of India referred to the South African cases only up to the year 2011. Here, it is essential to note that there have been more recent South African judgements on horizontality, including the SC of South Africa's decision in 2021. Additionally, the majority argues that the South African Constitutional Court in Juma Masjid "extended horizontal effect to an extreme."[22] However, the *Juma Masjid* ruling is conservative and places horizontal rights below vertical rights against the State. Furthermore, in paragraphs 66 to 70 of the Kaushal Kishore Judgement, the Court mentions instances from the UK and the ECHR. However, all the examples used by the Court are positive requirements, rather than horizontality.

The majority then turns to Indian law, which is also plagued with ambiguities. In paragraph 76, the majority claims that it will examine various situations that expanded the application of fundamental rights to non-state actors. The subsequent section lists sixteen decisions, some of which relate to positive obligations, such as the Vishaka case,[23] while others deal with the definition of "State," like the Zee Telefilms case. Some decisions relate to direct horizontality, such as the IMA case, while others have nothing to do with the subject at hand, like the RTE judgment. Moreover, in the 77th paragraph of the judgement, after analysing all the previous decisions, the majority notes that "on a case-to-case basis, there is an obligation on the part of the violator," and the funny part is, all this unfolds without referencing to a single Constitutional Assembly Debate.

It is pertinent to note that the judgement at hand did not indicate a shift from a "purely vertical approach" to a "horizontal approach", rather it adjudicated to permit a disastrous shift from an approach where "*vertical effect and horizontal effect was exercised with respect to the circumstances of the case and consistency with the Constitution*" to a "*purely horizontal approach*".

[21] New York Times Company v. United States, (1971) SCC OnLine US SC 147.
[22] Kaushal Kishore v. State of U.P., (2023) SCC OnLine SC.
[23] Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

By the end, the majority went on to cite, how, "*No Jurisdiction in the world appears to be adopting, at least as on date, a purely vertical approach or a wholly horizontal approach*", not realising that they have done absolutely contradictory.

VI. WHAT WAS THE COURT THINKING? DECIPHERING THE SC'S REASONING

Decades ago, the concept that one must be a state employee or instrumentality in order to perform public tasks ceased to exist. This is due to the fact that private persons and businesses perform the majority of State activities. Hence, there's a dire need for a re-evaluation of the assumption that only government personnel undertake public service. Society has definitely made tremendous strides, the role of the State and government authorities in the lives of the people has reduced and changed correspondingly, with a simultaneous increase in the activities performed by private parties.[24] With due consideration to the change attributed to the increasing roles of private non-state entities, it becomes very pertinent to address a question i.e., Suppose private entities are entrusted with performing public duties such as managing railways, toll collections, banking, the telecom sector, and other similar functions. Should they be held accountable for upholding and safeguarding Fundamental Rights with respect to the same? Furthermore, should they be held liable for any violations of these rights that may occur during their operations?

The majority opinion endorses the idea of integration and expansion of the boundaries of Article 12 of the Constitution. The Court effectively acknowledges that strictly confining the scope of Fundamental Rights to the "State and its instrumentalities" is inappropriate. However, despite this acknowledgment, the wording used in the opinion implies a contradictory approach. Expressly, the majority's view can be understood from statements such as "This Court used to be cautious about extending the enforcement of fundamental rights against private individuals. However, this reluctance has changed over time." This indicates the majority's recognition of the shift in legal interpretation, whereby the threshold under Article 12 has been relaxed through judicial decisions over the years.

However, contrary to the suggestion made in the majority opinion, the actual reality is quite the opposite. Precedents such as *PK Biswas* and *Ajay Hasia* have established stringent criteria for an organization to be considered a "State" under Article 12 of the Constitution. These cases

[24] *The Idea of State vis-a-vis Non-State Entities*. http://www.scconline.com/DocumentLink/ER3zru88.html

indicate that the majority is aware of the existence and significance of the Article 12 test, regardless of the norm being applied. However, the conclusion reached in the present case contradicts this acknowledgment. If fundamental rights are deemed applicable to all private entities, then the evaluation of their qualification under Article 12 becomes unnecessary. The majority's conclusion assumes that no such test exists, thereby rendering Article 12 meaningless. Here, this logical leap is problematic and needs more justification.

If we take a more lenient perspective on the court's intention in reaching such an overarching conclusion of absolute horizontal application of Fundamental Rights, it could be reasonably attributed to the notion that non-state entities should be subjected to legal proceedings by individuals whose fundamental rights have been violated.[25] This would expand the scope to encompass entities not qualifying as a state under Article 12. However, the crucial question that needs to be addressed is whether the approach and language employed by the majority align with the validity of the conclusion stated in the judgment.

The majority opinion may have considered non-state entities like significant social media intermediaries. In recent litigation involving WhatsApp and Facebook, the data-sharing agreement between the two platforms is being challenged on the grounds of violating users' right to privacy and freedom of expression. This raises the question of whether these rights can be enforced against non-state actors. While many argue in favour of enforcing these rights, application of the two-part criterion mentioned earlier leads to a different conclusion. Neither Facebook nor WhatsApp are independent private entities subject to government oversight regarding finance, administration, or operations. Since they do not meet the requirements of Article 12, we need to move on to the following analysis stage. We must consider whether the nature and exclusivity of the functions performed by Facebook and WhatsApp make them susceptible to legal action under Article 226 of the Constitution. It is clear that expression and communication, which are the services provided by both platforms, are of significant public importance. However, other companies offer similar services, so the element of exclusivity does not apply. Therefore, neither Article 32 nor Article 226 provide an effective remedy against these corporations.

[25] SCC, *Changing Judicial Discourse on State vis-a-vis Fundamental Rights,* http://www.scconline.com/DocumentLink/5ebnclHO.html

It is important to note that the majority overlooked a crucial question regarding under-the-table transactions involving non-state entities. When the state intentionally incentivizes an exclusive private entity to perform a public function while simultaneously disadvantaging a state entity in the same field by providing funds and maintaining control over its administration, the private entity, even if it does not qualify as a state instrumentality under Article 12, should still be held accountable for violations of individuals' fundamental rights. This accountability gap is widely recognized, but unfortunately, the majority did not consider it. Instead, they took an unnecessary and extravagant step by extending the application of fundamental rights horizontally.

VII. THE ROAD NOT TAKEN: A CONSTITUTIONALLY FEASIBLE ALTERNATIVE

The SC has used various terms and criteria to determine if an entity can be considered a part of the state. These terms include "authorities," "instrumentalities of State," "agency of the Government," "impregnation with Governmental character," "enjoyment of monopoly status conferred by State," "deep and pervasive control," and the "nature of the duties/functions performed." Based on these statements from the judgment, it can be concluded that the SC acknowledges the existence of a test to determine whether an entity has state-like characteristics. However, despite recognizing this test, the Court fails to engage with it meaningfully.

As highlighted by the esteemed Justice B.V. Nagarathna in her dissenting opinion, it is essential to acknowledge and address a particular aspect at the beginning of the discussion,[26] i.e., before resorting to court's intervention through writ jurisdiction, it is essential to first consider if there are any other existing legal remedies available. This principle emphasizes the need to thoroughly examine alternative remedies that effectively address violating rights. If such remedies are adequate and effective, then the court may not need to exercise its writ jurisdiction. Considering this constraint, the utilization of writ jurisdiction under Article 226 of the Constitution of India by the high court necessitates a comprehensive evaluation i.e., whether legislative remedies are available for the alleged conduct that violates fundamental rights. The court can only exercise its authority under Article 226 against the entity accused of violating fundamental rights if no alternative legislative remedies are applicable.

[26] Kaushal Kishore v. State of U.P., (2023) SCC OnLine SC 261, 269, 279.

Constitutionally speaking, there are at least two feasible alternatives that need to be taken into consideration when it comes to claiming recourse even under article 32 of the Constitution of India i.e., Writ jurisdiction of the SC. First, any question concerning the protection of rights under Articles 19 and 21 against any individual or entity must be answered by determining whether the individual or entity falls within the scope of Article 12.[27] To prove this point, the most significant test concerning the entire legal development of Article 12 would certainly be the test established in the case of *Pradeep Biswas v. Indian Institute of Chemical Biology*. Simply put, the court ruled that a thorough examination of the unique factual context of each case is necessary to determine if a body or authority is financially, functionally, and administratively controlled by the government or under its influence.[28] Suppose the respective authority fulfils the criteria set forth by the test. In that case, it can be deemed a State entity under Article 12, rendering it susceptible to claims under Article 32 of the Constitution of India in cases involving the infringement of fundamental rights.

Even if the concerned authority doesn't satisfy the test and cannot be conferred with the status of State, there still exists another feasible alternative in the form of Article 226 of the constitution i.e., writ jurisdiction of the high court. The High Court is empowered to exercise its jurisdiction by issuing orders and writs under Article 226 of the Constitution to "*any person or authority for the enforcement of any of the rights conferred by Part III, and for other purposes*."[29] This implies that even if an entity does not qualify as a state instrumentality under Article 12, it can still be held accountable for a substantial violation of fundamental rights, even without resorting to Article 32. Therefore, a claim alleging a violation of a fundamental right can be brought against an entity, regardless of its classification as a state entity under Article 12.[30]

As evidenced in the Zee Telefilms case, the SC ruled that the Board of Control for Cricket in India (BCCI) does not qualify as a state entity under Article 12 of the Constitution of India. The court determined that although the government exerts regulatory control over BCCI, it does not possess extensive and pervasive control over its operations. The court emphasized that if a private organization voluntarily assumes functions or duties that are typically performed

[27] Singh, Yogesh Pratap, *Concurring opinions enriching constitutional discourse?* JOURNAL OF THE INDIAN LAW INSTITUTE, vol. 61, no. 1, (2019) pp. 97–117. JSTOR, https://www.jstor.org/stable/27097352. (Accessed Apr 3, 2023).
[28] Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.
[29] INDIA CONST., art. 226.
[30] Singh, Satyaveer., *Tracing the Ambit of State under Article 12*, 2.2 JCLJ (2022) 190.

by the state and not prohibited by law, it may be deemed an instrumental entity of the state. Despite the Court's finding that BCCI did not fall within the purview of "State" under Article 12, it was held that the affected party could pursue remedies under Article 226 due to the substantial public significance of BCCI's functions. Additionally, the Court endorsed the utilization of Article 226 in this instance as BCCI had exclusive responsibility for these functions.

Hence, it becomes very pertinent to mention that the majority instead of acting hastily and prematurely, should have tried to satisfy the above-mentioned ingredients and to summarise, should have asked to questions:

Whether or not the entity against which a substantive part III violation has been claimed has been conferred the status of a state?

If the answer to the above question is not in affirmation, does the desired entity perform a significant public function and that too exclusively so as to make it amenable to writ jurisdiction under article 226?

Regrettably, the majority has failed to address these critical questions adequately, and instead, they hastily expand the horizontal application of fundamental rights without providing a well-reasoned and thorough analysis.

VIII. CONSEQUENCES AND WAY FORWARD

According to a recently published report by the Ministry of Law, the judge-to-population ratio in India, based on the sanctioned strength of judges, was 21.03 judges per million population as of December 31, 2021. It is noteworthy that as of March 4, 2023, approximately 6,047,034.[31] cases are pending in the 25 High Courts throughout the country and as on 1st February, 2023, there are 69,511[32] cases pending in the honourable SC. In such circumstances, where the Indian judiciary is unimaginably clogged with cases from all walks of the nation, this, well-intentioned but badly written and badly read Judgement is going to bring nothing but a cascade of umpteen cases to the Apex Court. This will not only overburden the court with cases under article 32 and article 226 of the Constitution of India, but will also give birth to a tussle of numerous more hazy questions, as, whether the court can or cannot adjudicate upon matters pertaining to the violation of fundamental rights by Private entities, because, it is pertinent to note that, Writs

[31] National Judicial Data Grid, *Drill Down,* (last visited Apr 2, 2023). https://njdg.ecourts.gov.in/hcnjdgnew.html
[32] Supreme Court of India, *Statistics*, (last visited Feb 13, 2023). https://main.sci.gov.in/statistics.html

do not entertain cases where contentious question of facts is concerned. Yet, relying upon the Judgement, the Courts will have some kind of obligation to adjudicate upon the cases of aforementioned nature, looking into the merits of the case.

Additionally, as highlighted by the dissenting opinion, if an appropriate remedy is available under common law or statutory law to address the alleged violation, there is no need to resort to Article 32 or Article 226. Adopting such an approach would render numerous legislations and enactments pertaining to specific legal matters redundant, undermining the extensive efforts made by lawmakers in formulating those remedies.

One more catastrophic consequence of the Judgement is, it brashly invalidates the long-standing stance of the Courts pertaining to the availability of alternate efficacious remedy. Time and again, Judicial forums around the nation, have strongly emphasized on approaching competent authorities which are developed to adjudicate upon specific matters and redress the grievances through the means of appropriate alternate efficacious remedies. Therefore, post the Kaushal Kishore Judgement, it is quite challenging not only for the competent authorities but also for the aggrieved parties to determine, which forum should they approach for the violation of their rights. Lastly, as the title of the Paper suggests, this Judgement which went on to discuss five cardinal aspects of modern constitutionalism, it, unconsciously, unintentionally, disproved all the tests and doctrines evolved to determine whether or not a particular entity can be considered as “state” under article 12.

More than a consequence, an apprehension that has been given birth to, by this Judgement is that, in the near future, there will come a day, when we’ll say, No One Killed Article 12!

While attempting to unravel the reasoning employed by the SC in its determination of this complex issue, which has left legal forums worldwide perplexed, it is strongly asserted that the judgment was well-intentioned but poorly drafted and consequently, misinterpreted. It is therefore essential to adopt a forward-looking perspective wherein the Court provides elucidation on its rationale behind allowing the horizontal application of fundamental rights and addresses the identified deficiencies highlighted by the authors. Furthermore, it is imperative for the legal community to interpret the judgment inclusively and utilize it cautiously until clarity is furnished by competent authorities.

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THE CONUNDRUM OF INDIAN SECULARISM: ARE WE EVEN 'SECULAR'? - A CONSTITUTIONAL ANALYSIS

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Abstract: *Have you ever thought- what would have been the status of India if 'secularism' had not been inserted into the Preamble to the Constitution of India? Has its introduction brought any real difference to Indian democracy? Since the country's foundation, the concept of secularism in India, as it is codified in the Constitution, has generated intense discussion and debate. The word 'secular' was added to the Preamble, long before the Constituent Assembly debates- the rich and cultural Indian history itself advocated 'secularism.'*

The Preamble and the Indian is an epithet of the ideals and principles. The Indian people have granted themselves a nation under the Constitution that is sovereign, socialist, secular, and democratic, with a strong emphasis on justice, liberty, equality, and fraternity. A thorough analysis of the CA debates would indicate that a secular constitution with equal rights for all citizens and freedom for all religions was highly desired. As "secularism" should be, the Indian Constitution did not construct a "wall of separation" between religion and the State. Maintaining equal distance from all religions is what secularism entails. However, practically speaking, India lacks that. A Supreme Court petition has also been filed asking for the word "secular" to be deleted from the Preamble. So, how consistent are we in our journey to secularism?

'Religious Pluralism' would be a more suitable term to describe secularism in its actual practice in India. This abstract examines the ongoing conflict between religious freedom, minority rights, and the maintenance of communal harmony as it pertains to Indian secularism. In tackling issues like equitable treatment, identity politics it examines the difficulties of adopting a secular framework in a multiethnic and intensely religious culture. It also emphasizes upon implementation of Uniform Civil Code (UCC) throughout India irrespective of any religion, caste, sex etc.

Keywords: Constitution, Preamble, Secularism, Democracy, Pluralism, UCC

I. INTRODUCTION

The Indian Constitution is revered as the "holy book of advocacy," and its preamble, a formal introduction to the Constitution, is a declaration of its ideals and guiding conceptions. The Indian people have granted themselves a nation-state that is sovereign, socialist, secular, and democratic, with a strong emphasis on justice, liberty, equality, and fraternity. These served as the foundation of the Constitution. The words "secular" and "socialist" were first used in the Preamble of the 42nd Constitutional Amendment, which was passed in 1976, and they eventually entered the philosophy of the basic structure. The landmark judgement of *Keshavananda Bharati v. State of Kerala* set the precedent that no amendments to the Constitution shall seek to amend the basic structure of the Constitution.

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It took a while for the Indian Constitution to incorporate the broad concept of secularism. Secularism's "fundamental unit" is "religion." The word "secular" refers to a connection between man, the state, and religion. When secularism was added to the preamble of the Constitution, it was not defined or explained. A "secular" state is one that treats and safeguards all religions equally and does not promote any particular religion as the official state religion. In England, the Protestant Church is headed by the Queen, while in India, there is no legislation designating any religion as the "established Church." The government upholds a position of impartiality and justice towards all religions.

Before going further into the topic, it is very important to understand the meaning and origin of the word 'secular'. People often talk about secularism and judge an individual or a state act and declare their act in favour or against secularism; but it's a very grey concept with no single definition. Secularism is derived from the classical Latin expression "*Saeculum*" or "*Secyulum*" denoting anything, or any concept which doesn't frequently recur or is not periodical or that which lasts for an age or a century like the secular games of the ancient Romans which they played to honour their principal deities.[1] Secularism is a concept that cannot be defined by a single definition. The definition can be studied from different points of view such as sociological, philosophical, political, etc. The term Secularism was coined by the British Reformer George Jacob Holyoake in 1851.[2] According to him Secularism is not against any religion, but it is one independent of it.[3] According to Merriam-Webster, Secularism means "indifference to, or rejection or exclusion of, religion and religious considerations."[4] There are a lot more such definitions given by Cambridge Dictionary, Oxford Dictionary, Collins, etc. But all these definitions do not completely make us derive into a single conserved definition of secularism. In most of the definitions, Secularism is defined as something which is antithesis of religion and considers it an enemy of religion. But this is not the reality.

Bauberot list three principal elements of a secular society-

1. Separation of the State's institutions from religious institutions;
2. No discrimination by the State against any person on the basis of their religion;

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[1] G. Sunil Kumar, *Secularism and its crisis in India*, 7 IJMRA (2017), https://www.ijmra.us/project%20doc/2017/IJRSS_OCTOBER2017/IJMRA-12391.pdf.

[2] Steven Conn, Secularism, Past and Future (last visited July 12, 2022). https://origins.osu.edu/review/secularism-past-and-future?language_content_entity=en.html

[3] *Id.*

[4] *Merriam- Webster Dictionary*, (last visited Aug. 10, 2022). https://www.merriam-webster.com/dictionary/secularism.html

3. Conscience freedom for all people; and 3. Respect for the rights of other people.[5]

This paper essentially deals with the origin of secularism in India and its essence in Indian context. Part 2 of the paper discusses the models of secularism. In part 3, I have discussed the domination of secularism in Indian history and how it emerged in times of independence. Also, the role of Constituent Assembly Debates and most importantly the 42nd amendment act 1976, as an outcome of which the 'secularism' word got a place in the Constitution. Part 4 of this paper holds a special significance, as I analyse in separate subpoints the essence of secularism in Indian context and how it is clearly becoming a means of oppression by the political parties; how the present political situation of the country followed by the oppressive contemporary happenings which is changing the definition of 'secularism.' Part 5 the paper is of recommendatory nature and provides suggestions which India should have implemented or adopted in order to preserve secularism in true spirit.

II. CONCEPTS OF SECULARISM

A. Western Concept

The Western Concept and the Indian Concept are the two basic forms of secularism. Thomas Jefferson's ideas provide the foundation of the secularism that is understood in the West. He had declared that "erecting the wall of separation between Church and State is absolutely essential in a free society" in 1908. He believed that religious institutions and the government shall be distinct. Respecting the rights of others is a guiding principle, and freedom of conscience is only important for maintaining public order. According to his opinion, there shouldn't be any injustice or discrimination against people based on their religion.[6] The Western idea of secularism has greatly influenced contemporary communities and political structures all over the world. The Western idea of secularism is examined herein, along with its historical origins, fundamental tenets, and consequences for how religion and the state should interact. It envisions the separation of religious institutions from political power, preventing religious authorities from directly influencing or controlling governance. This separation aims to safeguard the autonomy of both religious and political spheres, allowing each to operate independently within its respective domain. It advocates complete separation of state from religion, as well as universal religious freedoms. The legislation too, is made apart from

[5] *Supra* note 3.

[6] Jean- Paul, *Secularization and Secularism- History and Nature of Secularization and Secularism to 1914, SCIENCE ENCYCLOPEDIA* (July 12, 2022), https://science.jrank.org/pages/11240/Secularization-Secularism-History-Nature-Secularization-Secularism-1914.html#google_vignette.html

religious considerations. Due to the State's religious homogeneity, in this concept more focus is given on intra religion dominance than interreligious dominance. The Western Concept of secularism can be regarded as 'secularism' in its true meaning.

B. Indian Concept

The Indian Concept of secularism is very vague and arbitrary in nature. Neither has the Constitution expressly defined it, nor it has any clear interpretations. The ambit of extension is very unclear. However, there is no clear line between the state and religion, and government intervention is very frequent in every religious activity; and these are within legally mandated and judicially established bounds. A unique strategy for regulating religious diversity within the framework of a democratic and pluralistic society is represented by the Indian idea of secularism.

According to the Constitutional Assembly, secularism as it is embodied in the Indian Constitution is not anti-religious; rather, it forbids discrimination against the public on the basis of religion. "*When I say that a State should not identify itself with any one religion, it does not mean that a State should be anti-religious or irreligious*", stated Mr. H.V. Kamath, one of the members of the Constituent Assembly. "*India would be a secular state, but in my opinion, a secular state is not one that is devoid of gods, irreligious, or hostile to religion.*"[7] In his book "Recovery of Faith," former Indian vice president S. Radhakrishnan outlined the idea of Indian secularism, saying that "*it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt religion*." It doesn't imply that secularism itself turns into a good religion or that the State acquires divine rights. According to our beliefs, no religion should be given preference. This perspective on religious neutrality, or understanding and patience, has a prophetic role to play in national and international life."[8]

The idea of "*sarva dharma sambhava*," or "equal respect for all religions," is one of the fundamental aspects of Indian secularism. A spirit of tolerance, harmony, and coexistence is encouraged by this idea, which also recognises and welcomes the diversity of religious traditions. Secularism's adoption in India is not without difficulties, though. With so many distinct religions and sects in the nation, balancing the rights and ambitions of various religious

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[7] Arun Kumar Singh, *Myth and Reality of Secularism in India: An Analysis,* 19 THE NEHU JOURNAL, 74, (2021),https://nehu.ac.in/public/uploads/Pages_Nehu_Journal_Vol._XIX_Jan-June_20216_Arun_Singh.pdf.

[8] Ghosh, Y., & Chakraborty, A. *Secularism, Multiculturalism and Legal Pluralism: A Comparative Analysis Between the Indian and Western Constitutional Philosophy*. *7*(1) ASIAN JOURNAL OF LEGAL EDUCATION, 73-81. (2019), https://doi.org/10.1177/2322005819859674.html

communities raises challenges. It's difficult to defend minority communities while also avoiding being accused of favouritism or appeasement, and this difficulty never really goes away.

III. EVOLUTION OF SECULARISM IN INDIA

A. Secularism and History

1. Ancient India

Secular traditions are very deep rooted in the history of India. Long before the term 'secular' was introduced in our Constitution. India held a secular character, more evidently a plural one. The culture is a composite and a very diverse one which is based on various spiritual traditions and social movements. India's history is rich with secular traditions. India has a secular nature that was more obviously expressed long before the word "secular" was included in our Constitution. The culture is a composite and extremely diversified one that is founded on numerous spiritual traditions and social movements. The Indus Valley Civilization is the oldest civilization in India that may be said to have represented "secularism" at the beginning of the country's history. The fact that India's earliest civilization was so clearly secular is really impressive, in Sir John Marshall's opinion. Thus, secularism is a part of our past and a fundamental element of Indian culture and tradition. The Aryans were also secular people.[9] By inviting many traditions from various civilizations and attempting to combine them into a common ground, the Sanatan Dharma (Hinduism) was essentially allowed to evolve as a universal religion in ancient India. Hinduism has a wide range of religious practices, as evidenced by the development of the four Vedas and the different Puranas and Upanishad interpretations.

2. Medieval India

The concept of secularism in medieval India underwent a complex and evolving trajectory, shaped by the interplay of various political, social, and cultural factors. Despite ongoing foreign invasions, mediaeval India made a significant contribution to the country's cultural continuity. The Sufi and Bhakti movements in mediaeval India brought together members of different cultures in an atmosphere of peace and love. Khwaja Moinuddin, Baba Farid, Sant Kabir Das, Guru Nanak Dev, Saint Tukaram, and Mira Bai were the prominent proponents of these movements. In order to promote the foundations of secularism, Guru Nanak eloquently stated that "*There is no Hindu and no Muslim, as there is no distinction between man and man*."

[9] *Supra* note 2.

Numerous Muslim saints and the Sikh Gurus both strongly supported and fostered secularism in the nation.

The 18th-century Marathi rule and the 19th-century Sikh rule both contributed to India's culture's increased secularism. The most remarkable attribute of Raja Ranjit Singh was his secularism. He had faith in the Muslims since they had always supported him. The Monarchy of Punjab was a secular monarchy where solely merit was considered for awarding services. Additionally, prominent 19th-century social and religious organisations like the Ramakrishna Mission, Theosophical Society, Prarthana Sabha, Brahmo Samaj, and Arya Samaj contributed to the moral and secular traditions of India. Additionally, this era saw the rise of religious orthodoxy and disputes within communities. Secularism's goals were sometimes put to the test by the emergence of sectarian movements and the institutionalisation of religious identities. Political expediency, the monarchs' personal convictions, and the influence of religious leaders were only a few of the many variables that shaped the development of secularism in mediaeval India. It was a complicated and dynamic process, with periods of religious exclusivism and strife coexisting with instances of tolerance and inclusivity.

3. Freedom Struggle

The development of secularism in the nation was significantly shaped by India's battle for independence from British colonial authority. Diverse movements and philosophies characterised the Indian liberation war, which lasted several decades from the late 19th century to 1947. Many well-known leaders who wished to create an inclusive and pluralistic country came to accept secularism as a key value. In the foreground of the freedom movement, the Indian National Congress (INC) upheld secularist principles. Leaders like Mahatma Gandhi, Jawaharlal Nehru, and Maulana Abul Kalam Azad fought for an India that was democratic and secular and recognised the plurality of its residents' religions. The most prominent leader of the liberation movement, Mahatma Gandhi, promoted the notion of Sarvodaya (welfare for everyone), placed a strong emphasis on religious peace, and advocated for nonviolence. His values of inclusion and respect for all religions had a big influence on how India witnessed secularism. The liberals, like Gopal Krishna Gokhale, Govind Ranade, and Sir Feroz Shah Mehta, primarily followed a secular course in politics. Both the Arya Samaj, founded by Swami Dayanand Saraswati, and the Brahma Samaj, founded by Sri Raja Ram Mohan Roy, never harboured any animosity towards other religious beliefs. On the other hand, they made an effort to purge the incorrect traditions that had progressively diminished the vitality of Hinduism.

(i) Constituent Assembly Debates and the 42nd Amendment

The idea of secularism was not incorporated into the Constitution when it was first written. The phrase "sovereign democratic Republic" in the Preamble was changed to "Sovereign, Socialist, Secular, Democratic Republic" by the 42nd Constitutional Amendment Act (1976). That was the first time the phrase "secularism" was used in the Constitution. On October 25, 1976, H.R. Gokhale, the Minister of Law, Justice, and Corporate Affairs, justified the use of the words "Socialism and Secularism" in the Lok Sabha and added that the only goal was to bring about a socio-economic revolution in the nation. The idea of secularism was brought over from Europe. A few hundred years ago, the Church was in charge and the pope decided the futures of the European kingdoms.[10]

The Hindu Code Bill's debate in Parliament in 1951 featured Dr B.R. Ambedkar, the chairman of the drafting committee, who provided the following explanation of the secular idea: "It (Secular State) does not mean that we shall not take into consideration the religious views of the people. The only thing a secular state means is that this parliament will not have the authority to force its faith on the rest of the populace." The Constitution recognises only this particular limitation.[11] Thus began the evolution of secularism.

The Great Secularism Debate

'Secularism' was not a part of the 1950 first version of the Indian Constitution and it is evident that in the Constituent Assembly, there existed a conflict between two differing visions of secularism: negative secularism (a complete wall of separation between state and religion) and positive secularism (the state treats every religion with equal respect). It is also evident from the Constituent Assembly Debates that the majority of the Constitution makers never intended to introduce the concept of 'Secular' for the governance of a democratic Government. Where there is a concept of secularism, 'right to religion' doesn't hold any significance. A secular nation does not vis-à-vis require a separate concept of fundamental right to religion; in turn it suggests a contradiction in itself. Jawaharlal Nehru and B.R Ambedkar were also against insertion of the word. Both of them were secular; however, Ambedkar was religious too whereas Nehru was atheist. Ambedkar himself saw religion as a basis of political entity.[12] He himself coming from a minority community was in want of upliftment of the oppressed through

[10] Anandshankar Pandya, *Indian Secularism: A Travesty of Truth and Justice*, (Aswad Prakashan Pvt. Ltd., Mumbai) (1998).
[11] M.V. Pylee, *Our Constitution, Government and Politics*, (Universal Law Books, Delhi) (200l).
[12] Anand Ranganathan's THE GREAT SECULARISM DEBATE, (last visited July 15, 2022). https://www.newslaundry.com/2015/01/30/the-great-secularism-debate.html

constitutional means. And the Constitution drafted by them clearly advocated the division between majority and minority communities. They knew what 'secularism' meant but also realised that the provisions of the constitution they drafted didn't adhere to the dictionary meaning of 'secularism.' If secularism has to be inserted in the Constitution, provisions like 'Right to religion' don't hold any significance. There had been huge debates in the Assembly regarding whether or not to insert 'secularism.' The Vice President of the Drafting Committee in a discussion stated that "are we being really honest when we say that we are seeking to establish a secular state?"[13] He also clearly stated that if 'secular' has to be added in the Constitution, minorities cannot be recognised based upon 'religion.' Ambedkar in his speech advocated that 'secularism' cannot be added as it will destroy the very concept of democracy in India.[14] An extensive reading and analysis of the Constituent Assembly Debates would suggest there was never any plan to incorporate 'secularism' in the Preamble. It was during the rule of Indira Gandhi, during the period of Emergency of 1976, 'secularism' got formally included in the Constitution as an outcome of the 42nd Amendment.

B. Secularism and the Indian Constitution

The Indian Constitution places a strong emphasis on secularism, which serves as a guiding concept that influences the nation's government, legal system, and social structure. The Indian Constitution's constitutional provisions, judicial interpretation, and the implications for India's religiously varied culture are all highlighted in this abstract as it examines the relationship between secularism and the Indian Constitution. Secularism is one of the foundational concepts of the 1950-adopted Indian Constitution. The right to freedom of religion is protected by Articles 25 to 28 of the Constitution, which guarantees that people are free to practise, spread, and adhere to any religion they choose. Additionally protected by these articles are the rights to administer religious affairs, create and maintain religious organisations, and impart religious instruction.

Additionally, the Constitution requires the state to retain its neutrality regarding religion. Article 15 forbids religious discrimination, while Article 16 guarantees equal opportunity in areas of public employment, irrespective of religion. Every faith and every religious community must be treated equally by the state without any favouritism or prejudice. The

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[13] *The Constitutional Assembly Debates, Book-1* (2014), https://eparlib.nic.in/bitstream/123456789/760449/3/CA_Debate_Eng_Vol_01_edited_page_217-218.pdf.

[14] Adrija Roychowdhury, *Secularism: Why Nehru dropped, and Indira inserted the S-word in the Constitution* THE INDIAN EXPRESS (Dec. 27, 2017).

judiciary also has had an impact how the secularism in the Indian Constitution is interpreted and applied. The Indian Supreme Court has been instrumental in defining the parameters of secularism. While dealing with matters involving religious practises, conversion, and minority rights, the court has consistently upheld the values of religious freedom, equality, and non-discrimination.

The Supreme Court has established the doctrine of "essential religious practices" to uphold the fundamental beliefs of a religion while allowing for regulation of practices that conflict with constitutional ideals like gender equality or public order. The judiciary has strongly emphasized the necessity of preserving a balance between religious freedom and society interests and has taken action to stop religious prejudice and defend individual rights.

1. Important Judicial Pronouncements

The judiciary from time to time through various judicial pronouncements has shaped the meaning of secularism and its interpretation. Some of the very notable cases in this aspect are discussed herein under. *Sardar Taheruddin Syedna Sahib* v. *State of Bombay*[15], In this case, the Supreme Court ruled that Articles 25 and 26 highlight the secular nature of Indian democracy, which the founding fathers believed to be the basic foundation of the Indian Constitution. *Kesavananda Bharati* v. *State of Kerala*[16], In this instance, the Supreme Court ruled that secularism is an integral aspect of the Constitution's fundamental design. According to Chief Justice Sikri, the Constitution's fundamental feature is that it is secular. The secular and federal features of the Constitution, according to Justices Shelatand and Grover, are the fundamental components of its basic framework. Also, the basic structure cannot be altered.

In S.R. Bommai v. Union of India[17], the definition of secularism was appropriately elucidated by the court. The Court ruled that secularism entails treating all religions equally. It was noted that the basic rights protected by Articles 25 to 28 are highlighted by the word "secular," which was added to the Preamble of the Constitution by the 42nd Amendment. The Court further stated that the use of religion for political ends and the use of religion by any political party to further political objectives would breach the State's neutrality. Politics and religion are not related and shouldn't be intermingled *and in Stainislaus Rev v. State of MP*[18] judgement, the High Court of Madhya Pradesh explained that the freedom to practise one's religion includes

[15] Sardar Taheruddin Syedna Sahib v. State of Bombay, (1962) AIR SC 853.
[16] Kesavananda Bharati v. State of Kerala, (1973) AIR SC 1461.
[17] S.R. Bommai v. Union of India, (1994) 3 SCC 1.
[18] Stainislaus Rev v. State of MP, (1977) 2 SCR 611.

the right to publicly declare one's affiliation with a particular religion. The Court further clarified that the right to practise one's religion in secret or in public is included in the definition of freedom of 'practice'. The right to propagate one's religion, it was further clarified, grants one the freedom to share one's religious convictions with another person, but not to convert that person to one's religion.

IV. INDIAN DEMOCRACY AS A 'SECULAR' NATION

A. Post- Independence Era

The first question arises- Are we even secular in a true sense? To analyse this requires vast discussion.The concept of secularism was added to the Preamble in the year 1976 after the 42nd Constitutional Amendment. When India achieved independence, with the partition of the country, India had the liberty whether to adopt a strict Hindu religion in the country just like Pakistan declaring itself as the Islamic state, or remain a secular state, as encouraged in the freedom movement. India did not formally become an exclusively Hindu state. But neither did it become a Secular State. In real practice, what India acquired was- a Hindu version of a pseudo secular nation.[19] We were from the very beginning, and still are- a nation of pseudo-seculars. The implication of pseudo-secularism is that secularism is only a pretence, put on to hide the truth which is of being pro-Muslim and anti-Hindu.[20] Many argue that the inclusion of the word 'secularism' is itself a fraud committed in the Indian democracy. Secularism was introduced in the context of European countries in order to maintain a distance and separate the state from the church.[21] However, such a need did not arise here in the long history of India as we never had a concept of theocratic state. Thus, the introduction of secularism has not brought any real difference in the Indian democracy practically.

Secularism has two connotations- positive secularism and negative secularism. The Indian Constitution offers 'positive secularism' as it recognises the concept of '*Sarva Dharma Sambhava.'* Secularism, in negative connotation implies a process which is against:

a. The control of religion in politics.
b. The promotion of a state structure based on a particular religion (such as the Islamic Republic, Buddhist state, Hindutva, etc.).

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[19] Rasheeduddin Khan, *Bewildered India: Identity, Pluralism, Discord* Har- Anand Publications (1994).
[20] Aswnini Mohapatra, Mridula Mukherjee & Harbans Mukhia, *Are we a nation of pseudo-secularists?,* THE HINDU, (Apr. 28, 2017).
[21] Manmohan Vaidya, *Time to get rid of pseudo-secularism,* SUNDAY GUARDIAN LIVE (Sep. 19, 2020).

c. Dividing the populace into exclusive electoral constituencies on the basis of sects, tribes, castes, religious communities, etc.

Secularism in India has, nevertheless, encountered difficulties and criticism since independence. Social harmony has been challenged by intergroup conflict and acts of religious violence. Secularism's opponents contend that its execution has occasionally led to actions that are viewed as preferential treatment or appeasement, giving rise to charges of "vote bank politics." Secularism has faced challenges from the politicisation of religion as some political parties have used religious affiliations to attract support. Interfaith relations have occasionally been strained by this trend, and communal divisions have widened.

However, no positive reality can be noticed in Indian society in furtherance of this 'positive secularism.' The same shall be methodically discussed in the subsequent parts of the paper.

B. Limitations of Secularism in India

However, in reality, secularism's philosophy and practice encounter many different problems on many different levels. India may appear to be a secular nation. But how about in actuality? India is a secular state, and a secular state does not encourage any particular religion but rather defends and upholds religious diversity. It could be questioned why the Constitution grants special protections for minorities' languages and cultures in Articles 29 (Articles 29(1) & 29(2)) and 30 (Articles 30(1)). Minorities and majorities, which the Constitution itself supports, have been clearly separated. Grants to minority institutions and secularism cannot coexist. These stand in opposition to one another.[22] Again, in relation to Articles 331 and 333 of the Constitution, the state's authority to pass laws on religious issues and its authority to designate individuals from the Anglo-Indian community, a minority group, are in direct contradiction with the term "secular."

In Indian contexts, the term "secular" has a highly constrained connotation. Even religious minorities now enjoy some particular rights under Article 30 of the Indian Constitution, which gives the State permission to engage in religious matters. The 7th Schedule's item 20 list 1 grants the Parliament the authority to pass legislation governing pilgrimages outside of India. Both the Union of India and the States have the authority to enact laws governing trusts and trustees under item 10 of the concurrent list as well as charities, charitable institutions,

[22] *Infra* note 42.

charitable and religious endowments, and religious institutions under item 28.[23] The government would not have offered a subsidy for the Haj if India truly adhered to the secular definition. A pilgrimage made with one's own resources is only recognised in Islam, according to several prominent Islamic scholars. No other Islamic nation offers a subsidy for the Haj, and for this specific reason. It is anti-Islamic and non-secular to continue this practice in India.

Another key obstacle to India's secularism is intercommunal and religious conflict. The values of religious cooperation have been put to the test by instances of communal violence and polarisation, which have harmed social harmony. These tensions are made worse by the politicisation of religion and the manipulation of religious feelings by some political parties. The successful application of secularism might also be hampered by identity politics that are motivated by affiliations with a particular religion or caste. Political parties frequently use religion to their electoral advantage, which results in the appeasement of particular religious groups and claims of preferential treatment. The objectivity and impartiality that secularism seeks to protect is compromised by this.

Furthermore, it is debatable why various personal laws exist in the nation if a secular State is fully divorced from religion and its legal system is also secular. We have umbrella civil and criminal legislation; however still in matters of marriage, inheritance, succession, divorce, and adoption, the cases are governed primarily by the personal laws of our religion.[24] Each community has its own distinctive practices. The Hindus have codified personal laws for every matter which have been amended over time, on the contrary- many aspects of Muslim personal law, though unlegislated and uncodified, are left to the fancies of Islamic jurisprudence and practice. Secularism in true essence cannot apply to such a scenario. There must be a fair and uniform code applying to all Indians irrespective of their religion.

How could Indian courts, which assert to be secular, acknowledge Sharia Muslim Personal Law? If Central and State governments were truly secular, how could they seize control of Hindu temple management? How could a nonreligious organisation fund educational institutions governed by a secular government? Why does the Constitution itself have special clauses that support minorities? Because everyone is a citizen of the same nation in a secular state, the issue of majority and minority should not have arisen. So, unlike the West, India does not practise secularism. These problems put Indian secularism in jeopardy. A nuanced and fair

[23] Indian Constitution. Schedule VII.
[24] Marc Galanter & Jayanth Krishnan, *Personal Law Systems and Religious Conflict- A comparison of India and Israel, in Religion and Personal Law in Secular India* (Indiana University Press) (2001).

approach to secularism is necessary to get beyond these restrictions. While ensuring the equality and welfare of all citizens, it involves defending minority rights and religious freedom. The ideas of secular governance in India must be advanced by addressing social and economic inequality, fostering interfaith dialogue, and developing a culture of tolerance and respect.

C. Dilemmas of Secularism and Politics

A thorough examination of Indian politics and society reveals that, rather than remaining a secular state, the country has become more majoritarian in recent years. Only when equality is a fundamental value in a democratic society can secularism have meaning. There should be enough dedication to equality. If Secularism has been followed in its true sense in India, there wouldn't have been any cases of communal riots, any communal mob lynching, or any incident of Hate speech. Secularism is a complicated concept in our country. Political parties use secularism as a means of power and personal gain.

The political situation of India has always been of great debate. There are numerous parties, and everyone has been using the weapon of religion as a ground to gain votes.[25] Laws that benefit one community at the expense of the rights of other religious communities violate the Constitution's guarantee of religious freedom. As a result, there is discrimination in the law itself. The emergence of majoritarianism presents another challenge to India's secularism. A certain religious or cultural majority's domination can marginalize minority communities and violate their rights. Maintaining a fully secular framework necessitates the protection of minority rights and ensuring their equitable participation in society.

We, the Indians are very arrogant of our religious beliefs and principles and have ourselves given the power to these parties to use that as their means of riding the political staircase. The whole political system has been indulging in Religion-based politics. In various instances, one political party in the name of Secularism tried to assuage the minorities, mainly Muslims. Another has nonetheless done the same by favouring the majority community i.e., Hindus. Our country really doesn't function on the principle of separation of state matters and religion. Government intervention is evident in every matter. In actual practice, India is advocating as a site for political and legal contestation. Slowly, Indian Secularism has decentralised into political pandering.

[25] Ashwin Sanghi, *Want to preserve secularism in India? Well, preserve the Hindu ethos first,* THE PRINT (Aug. 9, 2020).

1. Contemporary Burning Issues

One of the most recent controversies related to a broader aspect of secularism, and the ruling party using it as a means of political gains is the passing of the Citizenship Amendment Act, 2019. The Act gives Indian citizenship to illegal migrants who belong to Hindu, Sikh, Buddhist, Jain, Parsi and Christian religious communities, from Pakistan, Afghanistan, and Bangladesh. But it expressly excludes Muslim migrants.[26] This is the very first instance where an Act is amended based on 'religion.' There have been several debates regarding the constitutionality of CAA; a litigation is still awaiting in the Supreme Court. Kept apart from all these, is the Act constitutionally valid and does it really conform to the principle of 'Secularism' embedded in the Preamble to our Constitution?

India had the option of becoming an exclusively 'Hindu' nation during the time of Partition itself- Like the Islamic republic of Pakistan, India could have been the Hindu Republic; but the then leaders believed in diversity and advocated the principle of *Sarva Dharma Samanvaya* (secularism). As a result, it also became a fundamental part of our Constitution. So, why are they now violating that principle and discriminating on the basis of religion? Why is this much government intervention evident? The creators themselves are becoming the destroyers.

In my opinion, the CAA is clearly violating the provisions of the Constitution. According to the Amnesty International, the Citizenship (Amendment) Act (CAA) stands in "clear violation" of the Constitution of India and international human rights law and "legitimises discrimination" on the basis of religion, [27] "The CAA law that has been passed in my judgment should be turned down by the Supreme Court on the grounds of it being unconstitutional."[28] CAA is argued to be violative of Article 14 and Article 15 (1) of the Constitution. Article 14 of the Indian Constitution states that 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'[29] The word person includes and protects both citizens and non-citizens. Article 15 states that 'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.'[30] The CAA is argued to have violated equality and supported discrimination based on religion.

As a burning instance, in places like Delhi and West Bengal both Hindu and Muslim priests are receiving monthly stipends from the state governments. Isn't it a serious violation of the secular

[26] The Citizenship Amendment Act (CAA), 2019.
[27] PTI, *CAA a clear violation of Indian Constitution,* THE HINDU (Feb. 2, 2020).
[28] PTI, *CAA violates constitutional provisions: Amartya Sen*, THE ECONOMIC TIMES (Jan. 8, 2020).
[29] India Const. art. 14.
[30] Indian Const. art. 15.

principle? Every other temple in the country is run by State Governments. According to one source, the various state governments collected a total of around Rs 6,000 crore from the temples in the year 2020. A total of Rs 2,300 crore from the Tirupati temple were transferred to the treasury of the Andhra government in 2021.[31] Just imagine the possibility of corruption with all these enormous amounts floating around.

Other burning instances in the country are the very recent Hijab Controversy in Karnataka, the Gyanvapi mosque episode, the Nupur Sharma Controversy, and its continuing aftermath. The Nupur Sharma controversy resulted in a wildfire across the country among the Hindu-Muslims. The shocking killings of Kanhaiya Lal, a tailor in Udaipur, and Umesh Kolhe in Amravati[32] have sent shock waves across the country. The government interventions in such religious controversies only make the situation worse in most of the instances. Not only the incidents are one-sided, but the Hindu community also has sufficient contribution. The *gau rakshaks* (Hindu community) regularly seize the possible traffickers and burn their cargo.[33] In several cases, these vigilantes have seized and brutally killed Muslim truck drivers who are allegedly transporting cattle (cows).

The government is intervening into changing names of places which is mainly of Islamic origin-the very recent instance is changing of "Allahabad" to "Prayagraj." The main propaganda of the government seems to be "eradication" of Islam and its proponents from the public sphere.[34] One of the most prominent political leaders and a die heart Hindu nationalist spoke in a rally. 'we cannot let Muslim invaders from centuries ago define us today!'[35] History is a nation's pride. So, why mock History! All these unusual comments result in communal riots hence putting Indian secularism at stake. A crucial concern is the emergence of religious nationalism and its impact on politics. The supremacy of a particular religion or religious identity is emphasized by some ideologies and organizations, potentially marginalizing or alienating minority communities. Secularism may be threatened by the dominance of religious nationalism, which threatens the values of equality and non-discrimination. Violence inside

[31] Arvind Sharma, *Dharma Files This is how secularism has failed India,* OPINION (July 24, 2022) https://www.firstpost.com/opinion/dharma-files-this-is-how-secularism-has-failed-india-10950141.html.
[32] PTI, *Amravati Murder: Police arrest Mastermind, say chemist was killed over posts backing Nupur Sharma*, THE WIRE (July 3, 2022) https://thewire.in/communalism/amravati-murder-police-arrest-mastermind-say-chemist-was-killed-over-posts-backing-nupur-sharma.html
[33] Smita Nair, *Refrain in Sangh turf: Cards will give us power,* THE INDIAN EXPRESS (Jan. 27, 2017).
[34] Christophe Jaffrelot's The Fate of Secularism in India, (last visited July 16, 2022). https://carnegieendowment.org/2019/04/04/fate-of-secularism-in-india-pub-78689.html
[35] Audie Cornish's India is changing some cities' names, and Muslims fear their heritage is being erased, (last visited July 17, 2022). https://www.npr.org/transcripts/714108344#:~:text= YOGI%20 ADITYANATH%3A%20(Foreign%20language%20spoken,Prime%20Minister%20Modi's%20ruling%20party.

communities has been on the rise for some time. It is alleged that secularism is to blame for India's current dilemma. Secularism was described as an "*inadequately defined attitude*" by T. N. Madan, a professor of sociology at the Institute of Economic Growth (University of Delhi).[36]

2. Judicial Incursions and Secularism

In addition to all the political parties, another most important institute that has a huge contribution towards moulding 'secularism' is the Judiciary. The balance of secularism in our country can be maintained if the Rule of Law prevails; and an impartial judiciary is required for that purpose. As argued in previous parts, there are evident government interventions in matters concerning religion in India. No doubt, the judiciary from time to time through its various notable pronouncements, has tried to maintain peace and calm and prevent discrimination based on religion. But in many cases, the aftermath was proven to be inhuman. In describing the secular nature of the Indian Constitution in the case of *Sardar Taheruddin Syedna Saheb v. State of Bombay*[37] , the Supreme Court stated that "Articles 25 and 26 embody the principles of religious toleration that have been the characteristic feature of Indian civilization from the beginning of history." Additionally, they highlight the Indian democracy's secular aspect, which the Constitution's forefathers believed to be its basic foundation.

In the case of *Sri Jagannath Ramanuj v. State of Orissa*[38] (popularly referred to as the Shirur Mutt case), the Supreme Court ruled that people who are not involved in the religious functions of a public temple or other religious institution cannot have an unrestricted and unregulated right of entry. It has long been customary to forbid visitors from entering the most sacred areas of a temple, such as the area where the deity is housed, for example. The idol may have set hours for prayer and slumber during which no public disruption may be permitted by the temple authorities. Government representatives are permitted admission with proper notification to the institution's head and during times that won't obstruct the institution's ongoing rituals and ceremonies.

Through welcome judgements, the judiciary has successfully prohibited religious discrimination, but in many cases, the influence of the majoritarian Hindu attitudes is apparent, especially in the lower courts. In the case of *Mubin Shaikh v. State of Maharashtra*[39], a young

[36] T.N. Madan, *Secularism in its Place*, in 46 (4) The Journal of Asian Studies 747, 759 (Association of Asian Studies) (2014).
[37] *Supra* note 16.
[38] Sri Jagannath Ramanuj v. State of Orissa, (1954) AIR SC 400.
[39] Mubin Shaikh v. State of Maharashtra criminal appeal no. 221 of 2022

engineer was assassinated by a gang of Hindu activists as he was returning from the mosque. According to the district sessions court, Shaikh was attacked "because he looked like a Muslim." However, the Bombay High Court overturned the conviction and released several of the attackers on bail for the following reason: "The deceased's only sin was that he belonged to a different religion. This is a point in the applicants' or accused's advantage, in my opinion. The judiciary, through its welcoming decisions has sufficiently prevented religious discrimination but in many instances, the influence of the majoritarian Hindu sentiments seems very evident mostly in the lower courts. Furthermore, neither of the applicants nor the accused had a criminal history, and it appears that they were provoked and killed in the name of their religion.[40] How can a prominent court of the country be so religiously biased! The Supreme Court later overturned the high court, stating that "the deceased's involvement in a particular community cannot be a justification for any assault" and that the High courts should follow our country's pluralistic constitution. These and other instances imply that subordinate courts have occasionally supported Hindu majoritarian opinions, despite the Supreme Court's general efforts to uphold the secular nature of the Indian Constitution. The 'secular' tenet of our Constitution is largely violated by this.[41]

V. THE WAY FORWARD

A. How can India move forward to Protect Democracy?

"WE, THE PEOPLE OF INDIA,

having solemnly resolved to constitute India into a

SOVEREIGN SOCIALIST SECULAR

DEMOCRATIC REPUBLIC

and to secure to all its citizens……."

'Secular' and 'socialist' the two most debatable concepts pertaining to India, were inserted in the Preamble to the Constitution of India by the 42nd Amendment 1976 during the time of Emergency. The Emergency era 42nd Amendment is famously named as the "Constitution of Indira" pertaining to the autocratic rule of the then Prime Minister of India, Indira Gandhi. In 1973 was the articulation of the 'Basic structure Doctrine' as a result of the famous judicial decision of *Keshavananda Bharati v. State of Kerala*.[42] According to the basic structure doctrine, the Preamble to the Constitution cannot be amended, any amendment which seeks to

[40] Alok Prasanna Kumar, *Is the Bombay High Court saying a Hate Crime isn't Heinous?,* THE WIRE (Jan. 16, 2017), https://thewire.in/law/bombay-high-court-hate-crime.html
[41] *Supra* note 37.
[42] Keshavananda Bharati v. State of Kerala, (1973) AIR SC 1461.

alter the basic structure will be regarded as ultra vires the Constitution. Is this the reason, since all these years, 'secular' still holds a part of the Constitution as it forms a part of the basic structure?

The Supreme Court invalidated various provisions of the 42nd Amendment with the passage of the 45th Constitutional Amendment Act in 1980. However, the Preamble was kept intact since it just "expressed explicitly what was implicit," in the words of the Supreme Court.[43]

The 42nd Amendment Act of 1976 was challenged under Article 32 in the case of *Balram Singh & Ors. v. Union of India & Anr.*,[44] in 2020. The petition claimed that the words "secular" and "socialist" are per se illegal for violating the concept of freedom of "Speech and Expression" enumerated in Article 19(1)(a)[45] of the Constitution of India and the right to "freedom of religion"[46] guaranteed under Article 25 of the Constitution of India, and that the The petitioners claim that "socialist" and "secular" concepts are political ideas and may be suitable for the country's governance while still being in line with a democratic system.[47] The petitioners have submitted that 'Socialist' and 'Secular' concepts are political thoughts and may be applicable for the Governance of the country but at the same time in a democratic setup, application of such completely rests upon the will of the people. The case is still pending.

So, the backdrop has already been set, huge controversies are also in place regarding removal of the word 'secular'- But would mere removal of the word from the Preamble change the situation?

In my opinion, 'pluralism' is the primary set up which India should adopt. Further, there is a strong need for enaction and implementation of Uniform Civil (Religious) Code throughout India. In the next three sections of my paper, I would discuss the recommendations in detail.

1. Concept of Pluralism

Pluralism is a broader concept with an extensive domain. It can be said that secularism, though not completely dependent, forms a part of pluralism. In layman terms, a 'singular' being cannot survive and requires certain other persons to coexist. There comes the concept of being 'plural.' It is a rightful alternative for 'monism.' In a democratic nation, in order for survival, there is a high need for the existence of 'pluralism.' Pluralism, in simple terms, is the coexistence of multiple religions, ethnicities, castes or linguistic groups in a society. It is the belief

[43] Arti Goyal, *Preamble to the Constitution of India,* (2014), (last visited July 20, 2022). https://www.lawctopus.com/academike/preamble-constitution-india.html
[44] Balram Singh and Ors. v. Union of India and Anr
[45] India Const. art. 19, cl. 1(a)
[46] India Const. art. 25.
[47] *Supra* note 47.

that all religions are 'true' and that their truths are not mutually exclusive. It acknowledges the existence of all religions as equal. A society's plurality of identities, viewpoints, and values is acknowledged by pluralism. Recognising the benefits of diversity, it encourages coexistence and respect between various religious communities. The promotion of plurality creates a setting where people are free to display their religious and cultural identities while having productive conversations and working together.

Pluralism is any of the several forms of 'inclusivism'; sometimes also synonymic for 'ecumenism'[48] which means promotion of some level of unity, co-operation, and improved understanding between various religions or different denominations of the same religion. Pluralism is not only about religious diversity, but also diversity in other aspects such as- language, race, caste etc.

Secularism, as already discussed on the other hand, recognizes no religion. Secularism is the belief that religion is a private matter and should not be openly discussed in public. It acknowledges the existence of no religions. It also emphasises upon the kind of relation existing between the state and religion; where the state should not intervene in religious matters and should maintain a principle distance.

Why is India a clear example of 'pluralistic' nation and not completely a 'secular' one?

In practice, India shows a high inclination to the principles of pluralism rather than secularism. There are certain aspects of Indian secularism that distinctly address its pluralistic nature:

1. Unlike Pakistan, where Islam is the official state religion, India does not adhere to any particular faith. It encourages state involvement in religious affairs as well.
2. In addition, the eighth schedule of the Indian Constitution[49] recognises 22 languages, demonstrating linguistic diversity and, consequently, a pluralistic society.
3. Dalits and women are suppressed by unjust religious practices, and Article 17 of the Indian Constitution protects people from these injustices by outlawing untouchability.
4. India, where separate personal laws (Hindu laws, Muslim laws, etc.) are given significant weight and where the Constitution itself divides the community into Majority and Minority, does not have the same concept of secularism as in the West.

[48] Rev. Dr Samuel Kobia, *Ecumenism in the 21st century*, https://www.oikoumene.org/resources/documents/ecumenism-in-the-21st-century.html (last visited Aug. 10, 2022).
[49] Indian Const. Schedule VIII.

5. According to Article 27, of the Indian Constitution, and other similar protective clauses, secularism in India supports including provisions that defend minorities' rights through their own educational institutions.
6. Our constitution is fundamentally pluralistic, although secularism is portrayed as "freedom of religion" in Articles 25 to 30. In actuality, pluralism is the instrument for ensuring India's secularism.

2. Why should independent India have adopted 'Pluralism' instead of 'Secularism?'

The original version of the Constitution didn't enshrine the concept of 'secularism.' It got inserted in the Preamble as an outcome of the 42nd Amendment Act 1976 during the period of State Emergency (1975-1977) declared by Indira Gandhi.

The idea of "secularism" first appeared in the Western world, as was previously discussed. The primary intellectual component of secularism is the notion of the separation of the state and the church or any organised religion. Our founding fathers wished to implement this idea in Indian democracy, where "Dharma" (religion) is the most important and prominent aspect, literally the obsession of everyone. In response to the theocratic state headed by the Pope that had existed for 1,000 years, secularism emerged in Europe. Secularism was implemented in order to detach and release the control of nonreligious things from the Church.[50]

We never had such a concept of theocratic state. So, did the makers of the Constitution try to comprehend Indian reality through a European point of view? The problem which Europe faced in reality to which 'secularism' became the solution was actually a sectarian problem, not a religious one.[51] Europe is dominantly a Christian land, and the conflicts were amongst people of different sects (every one of whom professed Christianity). Whereas what India faced was not inter-sectarian, but inter-religious. But analysing India at large would indicate that mere 'secularism' holds no significance. The constitution provides no single definition of secularism. As a result, it lost its actual meaning amongst a series of interpretations.

India is fundamentally a pluralistic society that finds a space for all beliefs and religions in public life. The great leader Swami Vivekananda referred to India as the "mother of all religions".[52] during his speech to the Parliament of World Religions in Chicago in 1893. We go beyond tolerance and accept all explanations as true, he concluded. Karl Marx, a famous

[50] *Supra* note 24.
[51] *Supra* note 32.
[52] Anagha. P, *The Spiritual Beacon of Profound Nationalism,* https://organiser.org/2021/10/27/17965/bharat/the-spiritual-beacon-of-profound-nationalism/.html (last visited Aug. 4, 2022).

economist, philosopher, sociologist, and political theorist, saw religion as "the soul of soulless conditions" or "opium of the people."[53]

The dominating most factor in India is 'religion.' What people don't want to understand through logic and science, at once grasp and believe in the name of religion. Religious ideologies can make people do such things, nothing else can. 'Religion' gives rise to both- fruitful instances as well as disaster.

If the government's lack of interest in any one religion is what is meant by secularism, then the secularism in question is highly unusual and aberrant for the general population.[54] Therefore, instead of embracing "pseudo-secularism," why not embrace "pluralism"—a truly constructive strategy. If pluralism rather than secularism served as our Constitution's guiding concept, it would better reflect India's rich range of religious customs and cultural expressions. What lies in the *Bharatiya Atmas* (Indian souls) is 'spiritual pluralism' and not secularism.

The Supreme Court rightly observed in the case Mrs. Valsamma Paul v. Cochin University that "Pluralism is the theme of Indian culture and religious tolerance is the backbone of Indian secularism...It represents a difficult interpretive process in which there is both a transcendence of religion and a unity of various religions. It serves as a link between religions in a pluralistic society to overcome the obstacles posed by their differences."[55]

3. Implementation of Uniform Civil Code (UCC)

The principle of Uniform Civil Code essentially connected with the question of contemporary secularism of India. India is a plural nation with diverse religions, caste, language. Due to having various religions, there are different personal laws set up for the citizens of the country. There is no homogeneity in respect of personal laws. As already argued in previous parts, a 'secular' nation cannot and should not recognise any personal religious laws. But that's not the case in India. There comes the need of a Uniform Civil Code (UCC). The UCC is mentioned in our constitution under article 44 DPSP. The debate on whether or not to adopt UCC is going on since Independence, but the issue remained unresolved. Where the father of Indian Constitution, Dr B. R. Ambedkar with other nationalists were in favour of the UCC, on the other hand Muslim fundamentalists were against it as UCC has no room for their Muslim personal laws. According to the opponents of Uniform Civil Code, personal laws are derived

[53]IS RELIGION THE OPIUM OF PEOPLE, https://www.theguardian.com/commentisfree/ 2009/jun/26/ religion.pdf (last visited Aug. 4, 2022).

[54] Animesh Nilesh Vaze, *Spiritual pluralism, and not secularism, lies at the core of Indian-ness,* THE PRINT (Apr.14,2021),https://theprint.in/campus-voice/spiritual-pluralism-and-not-secularism-lies-at-the-core-of-indian-ness/639394.html

[55] Mrs. Valsamma Paul v. Cochin University, (1996) AIR SC 101.

from religious values, therefore it is not required to interfere in them, because this might lead to hostility and friction between different religious groups.

UCC is not in implementation in the country, has the hostility between the religious groups in the name of 'secularism' stopped?

Article 44 corresponds with Directive Principles of State Policy which state that "State shall endeavour to provide for its citizens a uniform civil code (UCC) throughout the territory of India." Uniform Civil Code means a set of common civil laws or personal laws for every citizen of India irrespective of any religion. Personal laws include marriage, adoption, divorce, succession, and maintenance. The need of implementation of UCC have been significantly discussed in the cases of *Sarla Mudgal*[56], *Shah Bano Begum*[57] and *Shayara Bano*[58]. However, no steps are taken for implementation of the same. *The Jordan case* brought to light that in India there is an urgent and pressing need for a common civil code. The Supreme Court in the case of *Mohd. Ahmed Khan* v. *Shah Bano Begum and Ors.*, invited the Government of India through the Prime Minister of the country to take a fresh look at Article 44 of the Indian Constitution.[59]

The main issue which comes in the way of enactment of UCC is that it comes under Part IV of the Constitution which envisages the Directive Principles of the State policy (DPSP). And DPSPs are not enforceable by the court and are just directions to the state.

But it is high time for India to adopt UCC in order to prevent discrimination and religious intolerance in the country. In modern India, a uniform set of personal law is highly desirable for the nation's unity and dignity as a whole.

Uniform Civil Code (UCC) in Goa: Goa is the only state in India where UCC exists for all irrespective of caste, creed, religion, and gender. All the people whether belong to Hindu, Muslim, Christians follow the same rule related to divorce, marriage, and succession. There is no place for personal laws in the state. For instance, in Goa polygamy is prohibited for Muslim men unlike other states. And Goa is on its way to a highly progressive and developed state in India. The best interests of all religions (religious plurality) should be considered when drafting the Uniform Civil Code in order to achieve uniformity. UCC is a symbol of modernism and a highly developed, progressive society. It does away with personal laws and gets rid of caste and religion-based politics in the country.

[56] Sarla Mudgal v. Union of India, (1995) 3 SCC 635.
[57] Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 3 SCR 844.
[58] Shayara Bano v. Union of India and Ors., (2017) 9 AIR SCC.
[59] Indian Const. art. 44.

VI. CONCLUSION

India is far larger than what is seen on a map in terms of geography. India has endured numerous invasions over the years and has become a symbol of openness and humanism. The term "religion" may have an enduring quality. The value of "religion" is, however, gradually being undermined by the secularization process. According to noted sociologist Ashis Nandy, "there is now a curious double-bind in Indian politics: the problems of religion have found political expression but the strengths of it have not been accessible to control corruption and violence in public life."[60] The various separationists' movements, caste assertions, Hindus nationalism and majority-minority schism on cultural identities- all such incidents have put Indian secularism at question, and all these are often inspired by political parties for personal gain. The hatred between the religious communities mainly, Hindu and Muslims have surged to such a level that the cases of communal mob lynching, the cases of hate speech against each other have increased exponentially in the contemporary times.

India is essentially a plural nation with multivarious diversity and cultural regimes, the founding fathers of the Constitutional Assembly should have understood it long back. As discussed in previous parts, it is high time for India to adopt a Uniform Civil Code (UCC) irrespective of religion, caste, language, creed and so on.

In conclusion, I would like to discuss the evident viewpoints of two notable scholars, political scientist and sociologist, T.N Madan and Ashish Nandy. Ashish Nandy instantly rejects the idea of 'secularism' which India has borrowed from the West. The claim is that India's secularism is a foreign idea thrust upon a people who have never desired to separate religion from politics in their daily lives and thoughts.[61] And in practice too, Indian secularism doesn't advocate separation of State from religious matters; which results in a series of communal violence. According to him, in order to preserve and protect democracy, India needs to maintain a 'pluralistic' society, which is actually in existence. T.N Madan, too is regarded as an anti-secularist pertaining to his rejection of the idea of 'secularism.' According to him, secularism has failed in countering religious fundamentalism and can never succeed in India. India needs to revive in practice its 'Unity in Diversity' and get away with these negative connotations of 'pseudo- secularism.'

[60] *Supra* note 39.

[61] Arif Rashid Malik, *Crisis in Indian secularism,* THE ARMCHAIR JOURNAL (Sept. 25, 2020), https://armchairjournal.com/crisis-in-indian-secularism.html

Indeed, I agree with these two eminent scholars as I have already put forward in other parts of this paper. Why to keep such a term in a 'Holy book' (*as I regard the Indian Constitution to be*) which has no essence in Indian context. Still a long way off, the UCC. In order to fulfil the goal of "*Sarva Dharma Sambhava*," sufficient efforts should be taken to foster equality while maintaining the social, cultural, linguistic, and religious pluralism. To ensure that every person, regardless of their religious affiliation, is accorded equal standing before the law and is treated with respect and dignity, legal pluralism should serve as the standard. This makes it possible to fulfil the constitutional mandate to "promote harmony and the spirit of common brotherhood among all the people of India transcending religious, linguistic, and regional or sectional diversities." The process should involve consultation, dialogue, and a focus on social harmony, ensuring that the rights and traditions of all communities are respected while upholding the principles of equality and secularism.

DEMYSTIFYING FIGURATIVE LANGUAGE IN COURT VERDICTS

Dr. Shivender Rahul[*] *and Ms. Riya Kumar*[**]

Abstract: *A modern state governed by the rule of law, like all others, is founded on written law. In this respect, the court verdicts are seen to be loaded with literary references and quotations in the process of delivery of justice. The form of expression changes the interpretation of a particular text and using figures of speech is not only a way of beautifying language but also of changing the way it is perceived. There are many positive and negative effects of the same on court verdicts. To summarize, figurative language in judgement is a diverse technique that, while it has its drawbacks, when used sparingly and with care, may enhance a decision. The examples in this paper give adequate evidence to support the claim that literary and figurative language may be employed as a strong tool in judgement writing to infuse empathy and creativity to otherwise tedious legal jargon that may turn off a lay reader.*

Keywords: Court Verdicts, Figurative Language, Indian Judiciary, Law and Language.

I. INTRODUCTION

Law and literature are not new fields. Shakespeare, Dickens, and other prominent writers' representations of the legal system influenced nineteenth-century English attorneys. Wigmore believed that great writers should be studied by lawyers in order to understand about human nature. A modern state governed by the rule of law, like all others, is founded on written law. As a result, it is critical for a lawyer to be able to analyze and interpret a document, connect it with reality, and, in certain situations, translate it into action. That he be able to work well with text. The fundamental contents of the legislation are communicated through writing. In this respect, the court verdicts are seen to be loaded with literary references and quotations in the process of delivery of justice. As literature is a beautiful means to express the emotions and feelings of the general public, its role cannot be neglected in the field of social sciences and essentially law. This study itself aims to study such citations in judgements and analyze them to find the effects they have on the acceptability of the judgements in the general public.

II. INTERDISCIPLINARY NATURE OF LAW AND LANGUAGE

For both institutional and substantive grounds, the discipline of law and literature has flourished in recent years. Law can be found at the junction of numerous planes. The normative plane (or dimension) is the most important of these planes (or dimensions).

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aw is a type of norm — a set of rules that govern human behavior. The dimension of ethics is another notable component that eventually shapes the construction of legislation. Moral contents, values, or ideals that society thinks proper are included in legal standards. Law would be meaningless without values. Aesthetics, on the other hand, have an impact on the law. Emotions must invariably have an impact on the law, as they allow the inclusion of humanistic angle to the studies, which is as related to the human beings at a psychological level as any field could be.

A. Relationship between Law and Language

We will not, of course, assert that law cannot exist without literature; rather, we will attempt to demonstrate how literature may aid, or at the very least foster, law. Jeanne Gaakeer[1] emphasizes this ability of literature, claiming that the initial intention of the Law and Literature movement was rather simple: to attain intellectual and aesthetic goals, to develop the ability to understand and perceive things from someone else's perspective. None of the foregoing is an inherent component of the law. Nonetheless, these features can assist the law in establishing a stronger connection with the culture in which it is represented. The idea that law may be seen as a sort of language serves as the backdrop against which the relationship between law and literary approach will be set.

Ferdinand de Saussure, a Swiss linguist, saw law as a social product tied to the ability to talk. [2]He saw it as a collection of social rules that civilization had established in order to truly actualize this capacity. Language, on the other hand, may be thought of as a traditional system of signs that expresses specific ideas. Law, too, may be viewed as a traditional system that reflects values and ideas, as well as the resulting standards of appropriate behavior. It accomplishes this by employing a specified collection of components that have established mutual relationships.[3]

The relationship between law and language has been analyzed and highlighted in many different publications. For example, in *"Law and Literature" by Cardozo, 1988*[4], Cardozo examined the literary style of court rulings and studied how the various writing styles affected

[1]Jeanne Gaakeer, *The Future of Literary-Legal Jurisprudence: Mere Theory or Just Practice*, 5 Law and Humanities, 1 (2011).
[2] Ferdinand De Saussure, *Course in General Linguistics*, transl. Wade Baskin, Philosophical Library, New York (1959).
[3] Martin Škop, *Law and Literature – A Meaningful Connection*, Filozofia Publiczna I Edukacja Demokratyczna (2015).
[4] Cardozo, *Law and Literature*, Journal for Law and Literature Movement (1988) p.10.

the impact of rulings and judgements. Furthermore, in the book, *"The Legal Imagination" by James Boyd White, 1973* [5], James Boyd White questioned: has a unique, self-conscious legal and literary area emerged, where the interdisciplinary nature of law and literature is more prominent?

Some other prominent examples include *"Law and Literature: A Relation Reargued" by Richard A. Posner,1986*[6], where Richard A. Posner questioned the growing attachment to the field of literature and its appreciation by legal practitioners, and argued that literature is only one of the interdisciplinary areas and not the most significant one. In addition to the previous publication, *"Law and Literature – a Meaningful Connection" by Martin Škop, 2015*[7]**,** provides an overview of the classical techniques that connect law and literature, as well as the reasons for this relationship, such as the development of law and attorneys, the enhancement of judicial decisions, or the advancement of legal interpretation Some of the outcomes of the law-literature collaboration can be put into practise and transcend beyond "mere" theory.

B. Law and Literature Movement

The law and literature movement are concerned with the intersections between law and literature. This field's origins may be traced back to two milestones in the intellectual history of law. First, there is rising skepticism about whether legislation, on its own, can provide value and purpose, or if it must be embedded in a larger cultural, philosophical, or social-science framework to do so. Second, there is a rising emphasis on the mutability of meaning in all works, literary or legal. Work in the field entails two opposing viewpoints.

- **Law in Literature**: Understanding concerns as they are explored in literary writings is the focus of law in literature.
- **Law as literature**: It is concerned with interpreting, analysing, and criticizing legal writings via literary interpretation, analysis, and critique.

C. Criticism of the Interdisciplinary Study of Law and Language

Richard A. Posner, an eminent jurist and judge is a major critique of the interdisciplinary movement of Law and Language. In his work, Law and Literature; A Misunderstood Relation,

[5] James Boyd White, *The New Imagination*, University of Oxford Publication (1973).
[6] *Supra* note 1.
[7] Martin Škop, *Law and Literature – A Meaningful Connection*, Filozofia Publiczna I Edukacja Demokratyczna (2015).

he says that literature is taken too seriously and is given an unnecessary level of relevance in the advancement of law, legal knowledge, and legal or philosophical arguments. Further, in his work, Law and Literature: A Relation Reargued, he says that literature has nothing to add to law but the interpretation of statutes and constitution.

However, he argues that literature has the ability to contribute enormously to the way we perceive and improve judicial opinions. He says literature may indeed assist in the understanding of judicial opinions and urges readers to note the source of such analysis. He further states that as most judgements are by a newly graduated student with minimal knowledge of literature, they are not strong literary analysis.

III. HISTORY OF LITERATURE IN COURTS: ANCIENT GREECE AND RHETORIC

A. Introduction to Rhetoric

Rhetoric is the study of the tactics used by speakers or virtually any human being possible, to inform, persuade, or motivate certain audiences in specific situations. It is the ancient kind of persuasion and one of the three ancient arts of speech, alongside logic and grammar. Aristotle's three persuasive public appeals: logos, pathos, and ethos, are examples of rhetorical heuristics for comprehending, discovering, and formulating arguments for specific circumstances. Classical Rome developed the five canons of rhetoric, or aspects of crafting a compelling speech: invention, organization, style, memory, and delivery.

B. The Role of Ancient Greece in the Origin of Rhetoric

Traditional rhetoric is restricted to the insights and terms developed by rhetors, or rhetoricians, in the Classical times of ancient Greece, around the 5th century BC, to educate the skill of speaking in public to their fellow countrymen in Greek republics and, subsequently, to the offspring of the privileged under the Roman Empire. For over 2,000 years, public performance was regarded as the highest form of education, and rhetoric was fundamental to the learning system in Western Europe.

It has been common practise since Plato's day to assert a correlative, if not causative, link between rhetoric and democracy. Plato traced the origins of rhetoric to the 5th century BC establishment of democracy at Syracuse. Exiles returning to Syracuse filed a lawsuit to reclaim their lands, which had been taken from them by the deposed dictatorial regime. Claims were

decided in a freshly established democratic judicial system in the absence of written records. Certain lecturers began to give something resembling systematic rhetorical coaching to help litigants enhance their persuasiveness.

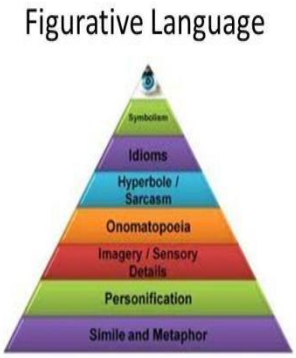
Aristotle is often recognized for developing the fundamentals of the rhetorical system, which "subsequently functioned as its touchstone," influencing the development of rhetorical thought from ancient to modern times. Most rhetoricians consider The Rhetoric to be *"the most significant single treatise on persuasion ever published."*

C. Shift in the Nature of Court Proceedings

Rhetoric was originally intended to be used in court to present arguments, as its origin in Greece is a clear indication of the same. The law that required all the citizens to be their own advocates meant that law was a part of general knowledge and the court proceedings were not as professional as they seem in the present. However, with the shift from legal proceedings being layman-friendly to them becoming more professional, rhetoric became more isolated from the law. Rhetoric being an art of language and communication, its separation ultimately meant the separation of law and language. Thus, law and language have evolved in different directions altogether- as literature became more synonymous and increasingly concerned about the emotional aspects of human life and feelings and law became a tool for social order, with strict boundaries. This led to law being objective, as compared to rhetoric being subjective and hence, the art of rhetoric somehow died.

However, it is still a skill for persuasion that is majorly seen in today's court proceedings as well, although the court intends to entirely depend upon the facts and the legislature in place.

IV. EFFECTIVENESS OF FIGURATIVE LANGUAGE IN SPEECH AND EXPRESSION



A. Introduction to Figurative Language

Figurative language is the expression of a nuanced meaning, colourful writing, precision, or emotional contrast via the use of words in a manner that departs from their usual sequencing and meaning.

It uses a common language to allude to something without outright expressing it. Fiction authors employ figurative language to engage their readers in a more imaginative tone that stimulates thought and, at times, comedy.

It adds more excitement and drama to fiction writing than literal language, which employs terms to allude to claims of reality.[8] In 1769, Frances Brooke's novel The History of Emily Montague was cited in the first Oxford English Dictionary citation for the figurative sense of literally; the sentence from the novel used was, "*He is a fortunate man to be introduced to such a party of fine women at his arrival; it is literally to feed among the lilies."*[9]

B. Role of Figurative Language in Speech and Expression

We usually believe that it is easier for us to grasp the simple language, that is the reason figurative language is taught mostly at higher levels of study than the simple form of language. However, this is not always true. If we come to think of it, the basic motivation being using figurative language is not to make the text complex, but to simplify it. Writers and poets often employ this form of language to convey ideas that cannot be understood had they been said in the simple form.

Thus, the primary purpose of figurative language is to convey the writer's point as clearly as possible. That might be done by translating a foreign topic into simple language that a reader or listener can understand, or by providing vivid and emotional images. Some varieties of figurative language are also used for purposes other than producing picture. Writers, for example, utilize alliteration, consonance, and assonance in addition to rhyme to give text rhythm and musicality.

V. FIGURATIVE LANGUAGE AND LEGAL DISCOURSE

A. Introduction to Legal Discourse

Legal discourse, simply speaking, refers to the language used in the legal field, i.e., the law. In legal language, the meaning is defined by justice and fairness. This is because the primary role of the law is to govern human conduct and maintain social order.[10] Furthermore, the ideational meaning of the legislation is added to the language's 'common-core meaning.' The significance

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[8] James L. Hookie, *Figurative Language and its Introduction*, (2015) https://corporatefinanceinstitute.com/resources/knowledge/other/figurative-language.html
[9] Frances Brooke, *The History of Emily Montague,* Book Jungle (1769).
[10] Wang Zhenhua, *Legal Discourse: An Introduction*, Routledge Handbook of Forensic Linguistics. London and New York (2009).

of legal discourse is also tied to the individuals who write the law, those who execute the law, those who read the law, and those who alter the law. People engage in these activities, thus their language skill, professional level, values, views, position, viewpoint, aim, and so on are represented in the legal discourse. These elements provide interpersonal meaning to the 'common-core meaning' of legal language.

B. Role of Figurative language in Legal Discourse[11]

In legal discourse and contexts, figurative language is vital. Such phrases can be found not just in traffic signs or other symbols with a direct normative significance, but also in more subtle, established behavior and terminology of attorneys, which are frequently utilized without much ado or consideration. In this sense, metaphors play an important role, as evidenced by legislative texts, judicial judgments, legal literature, and legal rhetoric. The effect of analogies on legal language extends beyond the inclusion and exclusion of various categories of subjects via personification. Metaphors also influence our perceptions of law and legal procedures. Prominent law and philosophy researchers, notably Thomas Hobbes, Jeremy Bentham, Axel Hägerström, and Lon Fullers, have attempted to demystify the law for instance, by uncovering fictions or metaphorical components.

C. **Analysis of the use of Literary elements in legal proceedings and discourse**

Advantages	Disadvantages
Fresh, persuasive metaphors can offer a new meaning to a problem and a new interpretation of our experience Metaphors also contribute to the validity and legitimacy of court decisions, legal institutions and the legal system as a whole, making them even more essential.	Metaphors can help us see and comprehend the world but they can also mislead us and lead us astray. They cause us to form good or negative associations and accept comparisons without further contemplation or critical thinking Metaphors are excellent rhetorical techniques because they stress certain features of an idea while disguising others. Having a metaphor accepted may influence the outcome of a negotiation, a judicial proceeding or an academic legal discussion

[11] Jonas Ebbesson, *Law, Power and Language: Beware of Metaphors,* Scandinavian Studies in Law (2008).

VI. USE OF FIGURATIVE LANGUAGE IN COURT VERDICTS

Reason why understanding literature is vital, according to Benjamin Cardozo[12], is the intended persuasiveness of a choice. A decision's logic must be compelling and symbolic in order to be effective. In their decisions, judges cite a wide range of reference documents, including dictionaries, legal textbooks, historical narratives, and popular literary works. Popular literature may be the most contentious of these resources. Though the use of popular literature is uncommon, some Judges have been observed to use it to achieve various aims such as the interpretation of a specific phrase or idea or to elicit an emotional response in the mind of the reader.[13]

VII. FIGURATIVE LANGUAGE IN INDIAN COURT VERDICTS AND ITS EFFECTS

There is a plethora of judgements where literature, particularly poetry, is utilized to clarify facts or highlight the legal quandary that a judge is facing.

A. Instances of the use of figurative languages in Court verdicts

In *Gopal Dass through Brother Anand v. Union of India*, a case involving an Indian government employee detained by the Pakistani Border Security Force while entering Pakistan, Justice Markandey Katju began his decision by invoking Faiz Ahmed Faiz. "*Qafas udaas hai yaaron sabaa se kuch to kaho Kaheen to beher-e-khuda aaj zikr-e-yaar chale*" wonderfully highlighted the intricacies of human feeling and the capacity of Urdu poetry to convey them."[14] Justice V.R. Krishna Iyer is a judicial eminence whose name must be addressed while discussing literary flare. "A procession of 'life convicts' well over two thousand strong, with more joining the march even as the arguments were on, has vicariously mobbed this court, through the learned counsel, carrying constitutional missiles in hand and demanding liberty beyond the bars," he wrote in his famous judgement on the issue of remission of life convicts in ***Maru Ram v. Union of India***.[15][16] Their anguish is best portrayed in Oscar Wilde's harsh lines: "*I know not whether Laws be right, or Laws be wrong, All that we know who lie in goal, Is that*

[12] *Supra* note 6.
[13] Chanima Wijebandaran, *Fiction and Poetry in Judgments*, JSA Law Journal, Volume 1 A (2013).
[14] Jogan Singh, *The Symbiotic Association Between Law and Literature*, (2019) (last visited Oct. 21, 2023). https://www.theweek.in/news/india/2020/01/12/opinion-the-symbiotic-association-between-law-and-literature.html
[15] Maru Ram v. Union of India, (1980) AIR SC 2147.
[16] A. P. Shah, *The Links Between Law and Literature*, *THE HINDU*, (Oct. 31, 2017), (last visited Oct. 21, 2023). https://www.thehindu.com/ opinion/op-ed/the-links-between-law-and-literature/article19951335.ece.html

the wall is strong; And that each day is like a year, A year whose days are long."[17] Another landmark case in which literature can be found is ***Navtej Singh Johar and Ors v. Union of India***[18], which decriminalized consensual sex between consenting adults of the same gender—the then Chief Justice Deepak Misra quoted German thinker Johann Wolfgang von Goethe, who said, "I am what I am, so take me as I am". This decision cited Arthur Schopenhauer's statement, "*No one can escape from their individuality,"* as well as John Stuart Mill's statement, "*But society has now fairly gotten the better of individuality; and the danger which threatens human nature is not excess, but deficiency of personal impulses and preferences."*[19] Judges have frequently referenced passages from literature, whether Urdu poetry or song lyrics, to bring their decisions to life.

Babu pleading for his bail;
State opposing tooth and nail.
Summers bygone, winters have arrived;
But crime you did, and Rahul cried.
I am not the one, I am not the one;
Too grave the charge, don't pretend.
Whom did I attack, where is he;
Oh! That we know, in the trial we will see.
You say I have said & I deny from the first blush;
Rahul may be gone yet Satish said.
Didn't we say; don't rush;
Let me go, let me go, even Imran is on bail.
Even then, even then;
it wouldn't be a smooth sail.
Stop! Stop! Stop! Stop;
I have heard, heard a lot.
Mind is clear, with claims tall;
Its my time to take a call.
Babu has a sordid past;
proof is scant, which may not last.
His omnipotence can't be assumed;
Peril to vanished Rahul, is legally fumed.

However, in the recent case of State vs. Babu[20], Justice Amitabh Rawat of Delhi's Karkardooma Court wrote a lengthy poem on the facts before him and his rationale. "The current application has virtues," he remarked, "to put it another way."

On June 6, 2021, another Delhi judge, Ajay Goel, was hearing a case in which a remark by Chief of the Indian Medical Association (IMA) Johnrose Austin Jayalal was brought to the Court's attention through a petition. Jayalal was accused of offending Hindu religious sensitivities with his statement. The edict emphasized the renowned words of poet Muhammad Iqbal, who remarked,

"*Apas Mein Bair Rakhna Mazhab Nahi Sikhata...Watan Hai Hindustan Humara... Hindi Hai Hum Watan Hai Hindustan Humara..."* (Religion does not encourage us to harbour grudges against one another. We are from Hind, and our motherland is Hindustan... Our Hindustan is better than the entire globe.)

[17] State v. Babu, Case no. Bail Application No.1623 of 2020.
[18] Navtej Singh Johar v. Union of India, (2018) AIR SC 4321.
[19] J. W. Parker and Son, Stuart Mill, *On Liberty*, (1859).
[20] State v. Babu, Bail Application No.1623 of 2020.

B. Effects of citation of figurative language and literary examples in judgements

Bharat Chugh, former judge and attorney, was complimented for penning a poem at the Delhi Judicial Academy after working as a Railway Magistrate during Justice Muralidhar's speech at a public meeting in 2018. Chugh explained[21] that the legislation just provided a framework for judges to draught judgements, and that judges were not prohibited from using literary allusions in their decisions.

"How you write it is entirely up to you. There is nothing in the law that prevents you from referencing a couplet, a historical background, philosophy, or literature. You can do it all as long as you make those points", he said. Chugh contended that the fundamental goal of poetry was to be abstract and to conceal rather than disclose facts. "That won't work in a court of law because you have to be precise. "However, while analysing a case, he said that he didn't mind employing a metaphor or symbolism to make a point and to have the verdict "come out alive."

"*That is sufficient. However, there is a narrow line that some individuals cross. I don't think it's ethical to write the entire verdict in verse, for example. Despite the fact that judges from across the world have done it successfully*."

VIII. ANALYSIS OF THE IMPACT OF FIGURATIVE LANGUAGE IN COURT VERDICTS

The impact of the use of figurative language cannot be negated. The form of expression changes the interpretation of a particular text and using figures of speech is not only a way of beautifying language but also of changing the way it is perceived. There are many positive and negative effects of the same on court verdicts.

A. Positive aspects of using figurative language in court verdicts

1. Inclusion of Humane aspect

The use of figurative, especially with respect to poetry, appeals to the emotional side of the brain. A poetic verse is much better at comprehending the depth and range of the emotions that occur in the human mind. It is difficult to even come close to expressing such emotions using simple language. Furthermore, inclusion of such emotional aspects guarantees a humane aspect to the otherwise objective verdicts that the court gives. Since the judgements are ultimately in

[21]Harendra Chowdary, *Poetic Justice When Judges Referred To Literary Works*, (2020) (last visited Oct. 21, 2023).https://www.barandbench.com/columns/poetic-justice-when-judges-referred-to-literary-works-and-famous-quotes-in-their-verdicts.html

the process of delivery of justice, they should consider all the aspects related to the issue and not just the prima facie facts of the case. Thereby, use of figurative language will make the judgement delivery more effective and useful.

2. **Language made easy to understand**

Also, the use of figurative language will provide an easier understanding for the general public as to the complexities involved in a particular case. For example, the use of metaphors may allow the comparison of a complex legal process to an easier counterpart and thus, make the language of the judgements easier to understand. The legal language is filled with such metaphors and similes, the most common example being the consideration where the public organization and/or companies are regarded as an individual.

B. Negative aspects of using figurative language in court verdicts

1. **Ambiguity**

However, the use of figurative language may raise many concerns about ambiguity. Just like any other literary work enriched with figurative elements of the language, the judgement of the court in any particular case also falls prey to numerous interpretations, which might even be divisive. The works of poetry are often symbolic in nature and might refer to more than one interpretation at a time. However, if that happens in court verdicts, the result would not be favorable to the general interest of the public.

2. **Language being difficult to comprehend**

Although the use of figurative language may make the judgement and complex legal concepts easier to understand, it also confuses a layman. If figurative elements and pompous language is used in courts, something that can often be said with minimal words is made to go on for pages and pages. This leads to difficulty in the comprehension of such judgements, as happened with the judgements of several judgements of the Uttarakhand High Court.

IX. CONCLUSION

Literature may improve one's capacity to perceive a text and, as a result, improve the understanding and writing of legal materials. The reader's role, or the public's role in general, actualism, originalism, and narrative mechanisms are only a handful of the methods researched extensively by literary critics and found in law. Literature may help defend against

misinterpretation. According to Robert F. Blomquist,[22] overinterpretation is produced by the large number of criteria developed by courts to analyse each individual thought employed in a legal regulation and assign it a meaning that is significantly different from customary and typical interpretation." Creative Literature has long been regarded as an essential, albeit atypical, source that may be employed in court judgement in the same way that legal texts, dictionaries, and other official reports are. According to studies, literature has a significantly greater power than traditional media to create meaning and emotional reactions. Despite the controversy surrounding this practise, judges in many nations have effectively used popular fiction and poetry for a number of objectives.

[22] Robert F. Blomquist, *Overinterpreting Law*, Valparaiso University Legal Studies Research Paper (2011).

CONUNDRUM REGARDING LEGALITY OF UNSTAMPED ARBITRATION AGREEMENT

Anurag Sinha [*] ***and Swaraj*** [**]

Abstract: *In the vast realm of Alternative Dispute Resolution (ADR), arbitration quite profoundly stands out as an expeditious tool to untangle knotty litigations that traditionally shatter through our court corridors. One shall and must be reminded of the profound and imperative implications of the Arbitration and Conciliation Act, 1996, which, in its wisdom, heralded an era where courts would step back, letting arbitration flourish. Yet, it's impossible to overlook a peculiar quandary that seems to exist in every arena, this paper revolves around scenario, what happens when an arbitration agreement is tarnished by the blot of being unstamped or inadequately stamped? While one must not overlook the tip of the iceberg of the honoured Indian Stamp Act of 1899, which meticulously deals with the stamp duty and penalty mechanism, one cannot shy away from noting its intricate, occasional, and cumbersome pathways. It is within the helm of possibilities, that the winds of legislative change might soon bring forth modifications, ensuring the two regimes – of arbitration and stamp duty – exist in a more harmonious ballet, free from unnecessary interruptions, and conundrums in the statutory matrix. This inquiry in this very paper seeks to delve deep, not just into the literal provisions, but also into the very spirit and ethos behind them, by channelling the judicial pulse and understanding the rich tapestry of judgments that have grappled with this question.*

Keywords: Arbitration, Expeditious Tool, Unstamped Stamped, Indian Stamp Act, Harmonious.

I. INTRODUCTION

'*I can imagine no society which does not embody some method of arbitration*.'

- Herbert Read.

That being said the societal notion of India has meticulously developed and nurtured the very idea of arbitration that has been delicately woven, nurtured, and cherished over time. This ancient land, with its traditions steeped in dialogue and resolution, has recently rediscovered and embraced arbitration with renewed vigour. The increasing popularity of this mode of dispute resolution, in this contemporary era, can be attributed to the myriad benefits it unfurls. One witnesses a confluence of time-honoured wisdom and modern pragmatism in India's approach to arbitration.

"The Arbitration and Conciliation Act, 1996 ("the Act" for brevity) is the statute which in the contemporary time regulates arbitration in India and pragmatically embrace and lays down

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the procedure of arbitration. The Act is a special legislation and is not bound by the tiresome and exhaustive process of the Civil Procedure Code, 1908.

The Arbitration and Conciliation Act of 1996 was enacted by Parliament to fall in line with the "UNCITRAL model law on international commercial arbitration", adopted by the UN in 1985, which recommended that all countries give due consideration to the said Model Law, given the desirability of uniformity of the law of arbitral procedure and the specific needs of international commercial arbitration law of practice.[1] Further to stay in the eye of the cyclone called globalization and to rank up in the ease of doing business this commercial practice of arbitration was crystallized by the enactment of the "Act".

According to the Oxford Dictionary, "arbitration" means the settlement of a question at issue by one to whom the parties agree to refer their claims to obtain an equitable decision[2]. Section 7 of the Arbitration and Conciliation Act, 1996 delineates the nature and form of an 'arbitration agreement.' It emphasizes that such an agreement refers to a consensus between parties to submit present or potential disputes, arising from a specified legal relationship to arbitration.

This agreement can either be a specific clause within a contract or a standalone agreement. Essential to its validity is its written form, which can be a signed document, an exchange of written communications confirming its content, or an exchange of statements where its existence is claimed by one party and not refuted by the other. Additionally, a contract's reference to a document with an arbitration clause can be deemed as an arbitration agreement if the reference effectively integrates the clause into the contract."[3]

"Under the ambit of the said Act, the jurisdiction to adjudicate upon such matters lies singularly and unequivocally with the Arbitral Tribunal. Parallelly, the venerable Indian Stamp Act of 1899 underscores the imperative that instruments must bear the appropriate stamp, as a testament to their validity, and to be executed in the manner ordained by our laws. An instrument devoid of this requisite stamping stands outside the precincts of evidentiary acceptance within the hallowed halls of the Indian Evidence Act and the courts of Law."

In the structured realm of legal instruments, it is of paramount importance that stamp fees are settled in their entirety before the instrument's execution. Only then does the agreement don

[1] G. Subba Rao, *Applicability of the Civil Procedure Code to Matters Before the Civil Courts Under the Arbitration and Conciliation Act, 1996*, (last visited 3 Oct. 2023, 4:20 PM). https://shorturl.at/ajWXZ.html
[2] Oxford Learner's Dictionaries, (last visited Oct. 25, 2023). www.oxfordlearnersdictionaries.com
[3] Arbitration and Conciliation Act, 1996, § 7, No. 26, Acts of Parliament, 1996 (India).

the robe of legal enforceability. In the case of N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., it was held by their Lordships Dr. Justice D.Y. Chandrachud, Justice Indu Malhotra, and Justice Indira Banerjee, forming the Bench, that Arbitration clause in an agreement, held, need not be stamped thus the very contention challenging the maintainability of the suit stands futile.[4]

Thus, in the great theatre of legal instruments, there lies an often-misunderstood protagonist: the arbitration clause. This clause, when woven into the fabric of any lawful instrument or contract, stands apart, not as a mere shadow of the document, but as an entity with its own distinct character. Thus, when the contract, is rendered null or void, it does not spell the end of the arbitration clause. The demise of the contract does not, by any means, signal the downfall of the arbitration clause housed within it.

II. GRASPING THE ENFORCEABILITY OF THE AGREEMENT

In the nuanced labyrinth of contractual jurisprudence, the 'proper law of contract' emerges as a touchstone, judiciously chosen by the courts to dictate its multifarious dimensions. In instances where the confluence of the parties' intentions remains enigmatic, this law is invariably the one that shares the most intimate and genuine nexus with the contract in question. The courts, however, depend on several tests and presumptions for ascertaining the proper law; many of them are rebuttable.[5]

In the crafted contours of a contract, the arbitration clause stands as a beacon of mutual consensus. When shadows of divergence or transgressions against the covenant's terms emerge, this very clause, dedicated to the resolution of disputes, awakens to its role. Notably, the expiration of a contract doesn't signify the end of all its provisions. Within this intricate legal framework, we find ourselves greeted by the Doctrine of Separability[6], highlighting the resilience of certain clauses. It means that the Arbitration clause in the contract is completely different, autonomous, and has a distinct existence from the other clauses or terms laid under the agreement.

This Doctrine is the foundation of the jurisprudential development of the International Arbitration Regime. Furthermore, in the case of the National Agricultural Coop. Marketing

[4] N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379.
[5] CR Rao, Proper Law of Contracts with Arbitration Clauses, 29 JILI (1987) 60.
[6] Indian Const. art. 7.

Federation India Ltd. v. Gains Trading Ltd., (2007)[7] In the nuanced expanse of contractual relationships, an arbitration clause elegantly carves its distinct identity. Rather than dovetailing with the performance aspects of a contract, this clause predominantly concerns itself with the contours of dispute resolution. The cessation of a contract's performance, be it due to repudiation, inherent frustration, or a breach, doesn't cast a shadow on the vitality of the arbitration agreement. Instead, it remains as a beacon, illuminating the path for dispute redressal stemming from or linked to the contract.

This understanding isn't merely doctrinal but finds its firm grounding in the statutory fabric, as crystallized in Section 16(1)[8]. The said section emphasizes the autonomy of the arbitration clause, ensuring its insulation even if the overarching contract is deemed null and void. In essence, the demise of a contract doesn't, by default, spell the end for the arbitration agreement enshrined within. In the nuanced framework of an agreement, the arbitration clause serves a pivotal role, offering parties a pathway toward a judicious, streamlined, and prompt alternative to conventional courtroom battles.

This mechanism not only facilitates resolution but eases the strain on our judiciary. It charts a course for parties to find common ground in a secluded enclave, distinct from the public gaze of traditional courts. Predominantly, such clauses are anchored in the foundational principles of a legally binding contract. In many jurisdictions, notably India, the infusion of an arbitration clause in contracts necessitates the shared assent of the involved parties, paving the way for a mechanism to resolve disputes that may arise between them.

Certain jurisdictions go a step further, mandating 'consideration' to reinforce the legal sanctity of the arbitration clause within the contract. It's rare for courts to enforce a waiver of such a clause. Should either party find the Arbitrator's decision disagreeable, the law grants them the prerogative to appeal. However, this right isn't indefinite; legal provisions prescribe a stipulated timeframe for lodging such appeals.

For an agreement to wear the cloak of enforceability, it shall and must pass the touchstone contemplated under section 10 of the Indian Contract Act[9] which states for an agreement to attain the status of a contract, it necessitates the uncoerced consensus of parties possessing the legal capacity to enter into such an arrangement. Further, the foundation of the agreement

[7] National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd., (2007) 5 SCC 692.
[8] *Supra* note 3 § 16(1).
[9] Indian Contract Act, 1872, § 10, No. 7, Acts of Parliament, 1872.

should rest on legitimate consideration and a lawful objective, provided it isn't expressly rendered void by the law, per-contra those agreements to have an arbitral clause then it must be according to the legislative mandate of section 7(4)[10] of "the Act" which contemplates that, the term "arbitration agreement" is delineated as a consensus reached by parties to direct all or specific disputes, whether already manifested or potentially arising, stemming from a particular legal bond to arbitration.

This could be irrespective of its contractual nature. An arbitration agreement takes written form when it is: (a) Embodied in a document bearing the signatures of the involved parties; (b) Reflected through exchanged correspondences, be it letters, telex, telegrams, or any telecommunication modality, including electronic mediums, which chronicle the agreed terms; or (c) Manifest in exchanged submissions of claims and defenses where one party proclaims the agreement's existence and meets with no refutation from the other side.

The division bench of the Supreme Court comprising of Tarun Chatterjee and Dalveer Bhandari, JJ. In the case of Shakti Bhog Foods Limited vs. Kola Shipping Limited held that The existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provides a record of the agreement. By virtue of Section 7[11], in the intricate maze of contract law, it emerges with clarity that a Charter Party Agreement doesn't mandatorily demand a formal written endorsement bearing signatures from the concerned parties.

The nuances of modern communication – be it through exchanged letters or digital avenues such as faxes and emails – are sufficiently eloquent. These seemingly ephemeral exchanges, when viewed in the crucible of intent and understanding, often crystallize into tangible evidence of mutual agreement and assent.[12]

III. JURISPRUDENTIAL DEVELOPMENT VIS-À-VIS JUDICIAL DICTUMS OF THE INDIAN COURT OF LAW

In its neonate stance, the esteemed Supreme Court maintained a stringent and unwavering view concerning the enforceability of arbitration agreements that were either unstamped or inadequately stamped, arguably sidelining broader objectivity but in the contemporary period, there stands a shift in the doctorial approach of the Supreme Court. Like, in the case of

[10] *Supra* note 3 § 7(4).
[11] *Supra* note, 3 § 7.
[12] Shakti Bhog Foods Limited v. Kola Shipping Limited, MANU/SC/4185/2008.

Hindustan Steel Ltd. v Dilip Construction Co. (1969) Upon reflection, the Supreme Court's deliberations seemed to overlook Section 17 of the Stamp Act[13], which meticulously outlines the stipulated timeline for an instrument's appropriate stamping as per the Act's provisions.

The Court, recognizing an award as an 'instrument' within the ambit of the Stamp Act, reasoned that it necessitates proper stamping. An unstamped award, in such a scenario, cannot be admitted as evidence or acted upon. Nevertheless, the Court retains the authority to seize such an instrument and forward it to the Collector, duly indicating the due stamp duty and any consequent penalty. Moreover, it's pertinent to note that Section 36 of the Act doesn't proscribe the enforcement of an inadequately stamped instrument, provided the requisite stamp duty and penalty are settled in the manner detailed by the Act.[14]

Further in the case of SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) In instances where an arbitration agreement is encapsulated within a contract, one must perceive it as a collateral provision tailored specifically for dispute resolution, and it stands apart from the contract's core execution. Effectively, it's as though the court has been presented with two distinct agreements: the primary outlining the substantive terms, and the second dedicated solely to settling disputes.

They are, for simplicity's sake, integrated into one document. In its judicial wisdom, the Court elucidated that, those instruments not duly stamped fall short of gaining admissibility in the courtroom's evidentiary purview. An imperative scrutiny of such instruments is mandated, leading to their impounding in instances of insufficient stamping. Further, the Court opined that an agreement, albeit housing an arbitration clause, when devoid of the requisite stamp[15] and emanating as an instrument necessitating registration, cannot lay the groundwork for the appointment of an arbitrator. Notably, the apex court's perspective appeared to cast a shadow over the esteemed Doctrine of Separability concerning the registration of the instrument in question.[16]

In the matter of Garware Wall Ropes Ltd. v Coastal Marine Constructions and Engineering Ltd.[17], the Bench, with judicial wisdom and understanding, reaffirmed the tenets enshrined in the landmark SMS Tea[18] judgment. The Court opined that the introduction of Section 1(6A)

[13] Indian Stamp Act, 1899, § 17, No. 2, Acts of Parliament, 1899 (India).
[14] Hindustan Steel Ltd. v. Dilip Construction Co., (1969) 1 SCC 597.
[15] *Supra* note 13, § 33 & 35.
[16] SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66.
[17] Wall Ropes Ltd. v. Coastal Marine Constructions and Engineering Ltd., (2019) 9 SCC 209.
[18] *Supra* note 15.

through the Arbitration and Conciliation (Amendment) Act of 2015[19] does not in any manner alter or overshadow the legal position crystallized in the aforementioned precedent.

Furthermore, in a trajectory of legal deliberations, the principles were echoed in both Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v Bhaskar Raju[20] and Bros. and Vidya Drolia & Ors. v Durga Trading Corporation[21]. The Supreme Court, with its judicious acumen, reinforced the findings and rationale manifested in the Garware judgment. It was elucidated that delving into the foundational elements of an agreement inevitably beckons an examination of its validity.

Such scrutiny undeniably encompasses, ensuring that the agreement's foundational dimensions are met, stamping being paramount among them. In synthesizing the rulings of these cases, it became evident that the mere termination of a contract or its severability does not cloak the Arbitration Agreement, or a related clause, in immunity, especially when it stands as a segment of the very instrument.

IV. CASE STUDY

M/S N.N. Global Mercantile Private Limited V M/S Indo Unique Flame Ltd. & Ors.[22]

In a pivotal appeal that descended from the full bench verdict in the matter of N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.[23], prima, the focus was sharply set on the admissibility of unstamped arbitration agreements and the ambit of judicial intervention within the domain of arbitration. Before a five-judge bench, constituted by Justices K.M. Joseph, Ajay Rastogi, Aniruddha Bose, Hrishikesh Roy, and C.T. Ravikumar, the decision unfolded in a 3:2 ratio. With the majority verdict, delivered by Justices K.M. Joseph, Aniruddha Bose, and C.T. Ravikumar, it was determined that an unstamped arbitration agreement does not find its footing in law. In contrast, Justices Ajay Rastogi and Hrishikesh Roy, charting a divergent path in their dissent, postulated the validity of such unstamped arbitration agreements, particularly during the pre-referral phase.

The issue formed by the constitutional bench was does the statutory bar delineated in Section 35 of the Stamp Act, 1899[24], when applied to documents necessitating a stamp duty as per

[19] Arbitration and Conciliation (Amendment) Act, 2015, § 11(6A), No.3, Acts of Parliament, 2016.
[20] Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v. Bhaskar Raju and Bros, (2020) 4 SCC 612.
[21] Vidya Drolia v. Durga Trading Corpn., (2019) 20 SCC 406.
[22] N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379.
[23] *Id.*
[24] *Supra* note 15.

Section 3[25], coupled with the Schedule of the Arbitration and Conciliation Act, 1996, lead us to infer that an arbitration agreement embedded within such a document (not itself requiring the stamp duty) is rendered nugatory or unenforceable until the substantive contract is dutifully stamped?"

In the realm of jurisprudential analysis, Justices Joseph, Bose, and Ravikumar have, in their collective wisdom, elucidated a nuanced interpretation of instruments subjected to stamp duty. An instrument that beckons the necessity for stamp duty and encompasses an arbitration clause, but remains unstamped, finds itself perilously poised. Such an instrument, they opined, cannot claim the sanctity of being an 'enforceable contract' as envisaged under Section 2(h)[26] of the Contract Act. Furthermore, its legitimacy remains equally challenged under Section 2(g)[27] of the said Act. The intersection of these statutory provisions casts a discerning light on the essential characteristics that breathe life into a contract and the discerning opinion of Justices Rastogi and Justice Roy, the absence or inadequacy of stamping on the principal instrument does not rob the embedded arbitration agreement of its enforceability.

The minority view underscored that a deficiency in stamping, being a rectifiable shortcoming, cannot possibly vitiate the arbitration clause into nullity. The majority further concluded that - In the jural co-relationship of obligations and duties, the Act unequivocally demands its due in the form of stamp duty. An instrument that has either escaped this duty or borne it inadequately stands crippled by the iron-clad edict of Section 35[28] of the Stamp Act. Until such time it is rectified through impounding and proper duty is meted out, the instrument languishes in a state of liminality.

The dictates of Section 33[29], coupled with the formidable embargo set by Section 35[30] of the Stamp Act, cast the arbitration agreement within such an instrument into a shadow, rendering it virtually ethereal in the eyes of the law. Only when the instrument gains redemption under the Stamp Act does this agreement resurface with legal life.

Furthermore, the prevailing view held that during the scrutiny under Section 11[31] of the Arbitration and Conciliation Act, the Court is duty-bound to meticulously inspect the

[25] *Supra* note 3, § 3.
[26] *Supra* note 9, § 2(h).
[27] *Supra* note 9, § 2(g).
[28] *Supra* note 13, § 35.
[29] *Supra* note 13, § 33.
[30] *Supra* note 13, § 35.
[31] *Supra* note 3, § 11.

document. Should it discover that the instrument is either not stamped or inadequately stamped, it ought to impound the same forthwith. Yet, in a nuanced dissent, the minority opined that the rigors of examining and impounding ought not to be undertaken at the nascent stage, notably under Section 11's[32] purview.

According to this minority perspective, whether unstamped or inadequately so, the copy or authenticated replica of the arbitration agreement remains a legally binding instrument for initiating the arbitrator's appointment. It further underscored that a premature foray into stamp duty considerations introduces needless procedural intricacies, culminating in protracted litigations before the Courts. In a more elucidated stance, the majority contended that a certified copy is admissible during the Section 11[33] deliberations solely if it unequivocally marks the stamp duty paid. Absent such a clear indication, the Court, they opine, should desist from acting upon that particular certified copy.

V. POSITION IN OTHER JURISDICTIONS

A perusal of jurisprudential forays in varied jurisdictions may illuminate how other nations grapple with the conundrum of upholding an unstamped arbitration agreement. The imperative inquiry is whether the sanctity of the arbitration clause remains untarnished even when the very fabric of the contract is deemed null and void in the legal theatre.

A. United Kingdom

Section 7[34] of the Arbitration Act, 1996 of the United Kingdom elegantly posits that an arbitration accord, either embedded within or intended to be part of another pact (irrespective of its written form), remains unassailed in its validity even if the primary contract is rendered nugatory, never materialized, or lost its efficacy. This provision, while resonating with the spirit of Section 16[35] of our Act, is draped in a more expansive linguistic canvas. Such phrasing underscores that the sanctity of the arbitration clause remains intact, even if the principal agreement, within which it is enshrined, stands on shaky legal grounds or is non-existent.

B. United States of America

[32] *Id.*
[33] *Supra* note 3, § 11.
[34] Arbitration Act, 1996, § 7, No. 23, Acts of Parliament, 1996 (UK).
[35] *Supra* note 3, § 16.

In the chamfered development of American jurisprudence, the esteemed Supreme Court, when confronted with 'Buckeye Check Cashing, Inc v. Cardegna et al.'[36], anchored its deliberation upon seminal precedents - 'Prima Paint'[37] and 'Southland Corp[38].' At the heart of this discourse was a poignant reiteration: under the aegis of federal arbitration jurisprudence, an arbitration clause stands distinguished, almost in a sanctified silo, from the contractual tapestry it is woven into. Consequently, should clouds of contention hover over the validity of the contract, save for the arbitration clause, it is the arbitrator's mantle to first dispel or confirm these clouds

In the grand ambit of American legal discourse, the esteemed Supreme Court, when deliberating upon 'Rent-A-Center, West, Inc. v. Jackson[39]', astutely dissected the nature and character of challenges one might level against an arbitration agreement. The Court, with its customary sagacity, decreed that an objection to another clause or even to the contract in its entirety, should not stymie a court from lending its weight to the enforcement of a specific arbitration provision.

C. Singapore

In the throes of a dispute, wherein the challenge was directed at the constitution of an arbitration panel premised on the belief that the contract's governing law would preside over the arbitration too, the venerable High Court of Singapore, in its judgment in BNA v. BNB and BNC[40], opined with a certain gravitas. The Court underscored that the celebrated doctrine of separability should extend only as far as reasonably required to honour the parties' manifest intent to arbitrate their disagreements.

Elaborating further, the Court articulated that the doctrine's cardinal objective is to fortify a robust arbitration agreement, which lucidly mirrors the parties' aspiration to navigate their disputes through the arbitration channel. Such a safeguard ensures that the arbitration agreement retains its sanctity even if the foundational contract finds itself mired in invalidity on other fronts.

[36] Buckeye Check Cashing, Inc v Cardegna et al. (2006) US SC 440.
[37] Prima Paint Corporation v. Flood & Conklin MFG. CO., 388 US 395 (1967).
[38] Southland Corp. v. Keating, 79 L Ed 2d: 465 US 1 (1984).
[39] Rent-A- Center, West, Inc. v. Jackon, 561 US 63 (2010).
[40] BNA v. BNB and BNC [2019] SGHC 142.

VI. CONCLUSION

In the constellation of Alternate Dispute Resolution (ADR), with Arbitration as its stellar component, has profoundly reimagined India's juristic landscape. Aspiring to be recognized as an epicenter for Arbitration proceedings, India has recalibrated its arbitration edifice with a blend of courageous changes and a forward-leaning approach. Such a proactive and invigorated framework of Arbitration not only aligns with the global investment climate but also augments the labyrinth of international business transactions.

The recent jurisprudential intervention by the Supreme Court in the case of N. N. Global Mercantile[41] is a testament to the Court's commitment to clearing the murky waters stirred by antecedent, and at times, discordant verdicts. Such resolute strides, clearing the ambiguity, promise to cast a transformative shadow over the tapestry of Arbitration proceedings that unfurl across the Indian subcontinent. Moreover, the enactment of statutes like the Arbitration and Conciliation Act of 1996 is emblematic of India's concerted endeavor to champion ADR, placing Arbitration at the forefront as the preferred crucible for dispute resolution.

Delving deeper, it's often the nuanced intricacies woven within an agreement that lay bare the unambiguous intention of the involved entities to cast their lot with Arbitration. Such articulations, often found within the four corners of an agreement, stand as silent but compelling testaments to the parties' unequivocal faith in this non-litigious mode of dispute redressal.

In the majestic chronological cannons of our jurisprudential landscape, the Hon'ble Supreme Court has, with its recent dictum, gracefully closed a chapter on the longstanding puzzle of enforceability concerning unstamped or inadequately stamped Arbitration Agreements. However, a discerning eye might perceive a subtle deviation from the Court's time-honoured philosophy of restrained judicial interference. Introducing an additional tier of examination to this already intricate process could, perhaps unintentionally, pave the way for potential delays in the consecration of arbitrators.

[41] N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379.

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UNVEILING THE LAYERS: A SCRUTINY OF DEFAMATION JURISPRUDENCE IN THE INDIAN LEGAL LANDSCAPE

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Abstract: *This research article critically analyses the existing defamation laws in India and explores their implications on the cherished value of free speech. Defamation, as a multifaceted legal concept, plays a pivotal role in safeguarding individual reputation within the realm of freedom of speech. The delicate interplay between the right to express oneself and the need to protect one's reputation is crucial for maintaining a just and harmonious society. Through a comprehensive examination of defamation laws in India, this article delves into their intricate implications on freedom of speech, highlighting the potential chilling effect they may have on robust public discourse. It also explores the historical evolution of defamation laws in India, their relationship with constitutional rights, and compares them with defamation laws in other jurisdictions such as the United States and the United Kingdom. Furthermore, the article proposes measures to prevent the misuse of defamation laws as a tool to suppress dissent, including clear definitions of defamation, alternative dispute resolution mechanisms, and the consideration of anti-SLAPP legislation. By incorporating these reforms and recommendations, India can strive to establish a defamation framework that upholds the values of justice, fairness, and intellectual integrity while striking a delicate balance between protecting reputation and ensuring freedom of expression. Taking inspiration from international standards and comparative analysis with other jurisdictions, a more balanced defamation jurisprudence can be achieved, fostering a just and vibrant democratic society.*

Keywords: Defamation, Chilling effect, Freedom of Speech, anti-SLAPP, Section 499

I. INTRODUCTION

Defamation, a multifaceted legal concept, plays a pivotal role in safeguarding individual reputation within the realm of freedom of speech. Striking a delicate balance between the right to express oneself and the need to protect one's reputation is crucial for maintaining a just and harmonious society. This article aims to embark on a critical analysis of the existing defamation laws in India, exploring their intricate implications on the cherished value of free speech. In a vibrant democracy like India, freedom of speech stands as a cornerstone, empowering individuals to voice their opinions and participate in the democratic discourse. However, an unrestrained exercise of this right could lead to irreparable harm to a person's reputation. Recognizing this delicate interplay, defamation laws serve as a safeguard against malicious falsehoods while maintaining the integrity of public discourse.[1]

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[1] Jstor, *Torts. Defamation. Truth as a Defense. Right of Privacy*, 37(6) YALE LAW J, pp. 835-836 (1928), https://www.jstor.org/stable/789695.html

With the objective of critically analysing the current state of defamation laws in India, this article ventures into uncharted territory. By unravelling the legal intricacies, we strive to shed light on the potential implications of these laws on the cherished value of free speech.[2] Delving deep into the jurisprudence surrounding defamation, we aim to unravel the perplexing layers that shape its application in the Indian legal system. *M.K. Parameswara Kurup v. N. Krishna Pillai (1966)*[3]*:* The Supreme Court of India acknowledged the intricate interplay between freedom of speech and the right to reputation, emphasising responsible exercise of speech. Protecting reputation as a fundamental right, a delicate balance was upheld, preventing false and defamatory statements from tarnishing an individual's standing. This case profoundly influences India's defamation jurisprudence.

II. THE JIGSAW PUZZLE OF DEFAMATION LAWS

Defamation laws in India can be compared to a complex puzzle. This puzzle is made up of different pieces, including rules written in the law books, decisions made by courts in the past, and the way lawyers and judges understand and use these rules. The main idea behind these laws is to find a fair balance between two important things: protecting a person's reputation and allowing people to express their opinions freely.

But, in reality, things can get tricky. It's like trying to figure out the edges and corners of this puzzle. One challenge is knowing what you can say about someone without crossing the line into saying something harmful or false about them. That's where defamation laws come into play. In essence, defamation laws in India aim to maintain harmony between respecting someone's reputation and safeguarding the right to express opinions. However, in practice, it can be quite challenging to determine exactly where that line is drawn, making it a complex and ever-evolving area of law.

III. IMPLICATIONS FOR FREE SPEECH: NAVIGATING THE GREY AREAS AND THE QUEST FOR A BALANCED DEFAMATION JURISPRUDENCE

The implications of defamation laws on free speech cannot be underestimated. In the pursuit of maintaining social harmony and protecting reputations, there is a risk of inadvertently stifling dissent, curbing investigative journalism[4], or hindering whistleblowing. As we delve

[2] Andrew T. *Kenyon, What Conversation? Free Speech and Defamation Law*, 73 (5) MOD LAW REV, pp. 697-720 (2010), https://www.jstor.org/stable/40865580.html
[3] M.K. Parameswara Kurup v. N. Krishna Pillai, AIR 1966 SC 1938.
[4] Dayanand Garg, *Freedom of the Press and the Law of Defamation*, 1 NIRMA U.L.J. 167 (2011).

deeper, we examine the potential chilling effect that defamation laws may have on the robust exchange of ideas and opinions in the public domain.

In light of the complexities surrounding defamation laws in India, the need for a balanced jurisprudence becomes paramount. Striking a delicate equilibrium that respects both freedom of speech and the right to reputation is a formidable challenge. This article aims to explore potential avenues for reform and propose measures that can enhance the coherence and fairness of defamation laws, ensuring a just and vibrant democratic society.[5]

IV. THE ENIGMATIC CONUNDRUM OF DEFAMATION AND ITS HISTORICAL EVOLUTION IN INDIA

Defamation laws in India have a deep-rooted historical background rooted in British common law. These laws safeguard individuals from false statements that could harm their reputation. The Indian Penal Code (IPC) enacted in 1860 played a crucial role in shaping defamation laws, defining defamation and its punishment. Notably, Section 499[6] and Section 500[7] established the foundation of defamation laws for years to come. As technology advanced, the legal system adapted to address defamation challenges in the digital age. Courts have played a pivotal role in interpreting and applying defamation laws, ensuring a delicate balance between freedom of speech and protecting reputations. These ongoing developments reflect the dynamic nature of defamation laws in India.[8]

A. Defamation Laws and Constitutional Rights: Analysing the Intersection

Defamation laws and their implications on constitutional rights, specifically the freedom of speech and expression as enshrined in Article 19(1)(a) of the Indian Constitution[9], and the right to Life protected under Article 21[10], have long been subjects of rigorous examination within the Indian legal landscape. In the relationship between defamation laws and constitutional rights, it becomes apparent that a delicate balance must be struck. On one hand, the Constitution guarantees the fundamental freedom of speech and expression, ensuring that individuals have

[5] Devashri Mishra & Muskan Arora, *The Movement against Criminal Defamation: Lessons for a Postcolonial India*, 9 INDIAN J. CONST. L. 62 (2020).
[6] The Indian Penal Code, 1860, § 499, No. 45, Acts of Parliament, 1860 (India).
[7] The Indian Penal Code, 1860, § 500, No. 45, Acts of Parliament, 1860 (India).
[8] John P. Borger, et.al., *Recent Developments in Media, Privacy and Defamation Law*, 46(2) American Bar Association, pp. 483-515 (2011), https://www.jstor.org/stable/23210511.html
[9] Indian Const. art. 19.
[10] Indian Const. art. 21.

the right to voice their opinions and ideas freely. This provision plays a crucial role in fostering a democratic society where diverse viewpoints can coexist and flourish.[11]

B. Analysing Constitutional Validity of Section 499

It is claimed that it infringes on the constitutional right to freedom of speech and expression guaranteed by Article 19(1) of the Indian Constitution. Is defamation subject to the state's fair restrictions levied under Article 19(2) of the Constitution? The Court must determine if this limitation is appropriate.

There are no straightforward comparisons: on the one hand, there is no question that a criminal case, regardless of its final result, is much more difficult for an individual convicted of defamation to contend with than a civil case, which is often left almost entirely in the hands of lawyers. On the other hand, the burdens of proof vary, and the standard of proof imposed in civil court is lower than that required in criminal court if the goal is to protect a reputation. If subjective evidence is any indication, criminal defamation is not exclusively used to protect people's reputations.

It is highly vulnerable to being used as a 'matter of tactics' to suppress individual speech: for example, accusations of rape may be countered by filing a defamation FIR with the police. There appears to be no mention of misuse in the arguments against criminal defamation, or indeed any data-based statements about the effects of criminal defamation. Alternatively, it appears that the risk of misuse was raised in favour of Section 499's continued existence: presumption of constitutionality. This Court has also held that in determining the reasonableness of limitations, the Court has full authority to consider matters of common report, historical context, common knowledge, and the circumstances that existed at the time of legislation. The term fair restriction implies that restrictions should not be arbitrary or disproportionate. The very fact that criminal defamation laws are misapplied or violated does not render the provisions invalid if they are otherwise fair."[12]

Subramanian Swamy vs. Union of India (2016)[13]*:* The Supreme Court of India, in a landmark ruling, upheld the constitutional validity of defamation provisions (Sections 499 and 500)[14] of

[11] Arvind Kumar Singh, *A Study on Position of Defamation in India*, 2 BAYAN COLLAGE INTERNATIONAL JOURNAL OF MULTI-DISCIPLINARY RESEARCH (2022).
[12] Ayushi Singh, *Critical Analysis of Defamation Laws in India*, (last visited Aug 26, 2023), https://legalserviceindia.com/legal/article-6886-critical-analysis-of-defamation-laws-in-india.html.
[13] Subramanian Swamy v. Union of India, Ministry of Law, AIR 2016 SC 2728 ("199. In view of the aforesaid analysis, we uphold the constitutional validity of Sections 499 and 500 of the Indian Penal Code and Section 199 of the Code of Criminal Procedure").
[14] The Indian Penal Code, 1860, § 499, 500, No. 45, Acts of Parliament, 1860 (India).

the Indian Penal Code. It stressed the importance of safeguarding individual reputation and social harmony, while acknowledging responsible exercise of freedom of speech. This nuanced approach demonstrates the court's commitment to balancing fundamental rights and preserving dignity and reputation.

C. The Chilling Effect on Freedom of Speech

Freedom of speech constitutes a fundamental right in India, safeguarded by Article 19(1)(a) of the Constitution.[15] However, this right is not absolute, and reasonable restrictions can be imposed in the interest of various factors, including public order, decency, morality, security, defamation, or incitement to an offence.[16] Defamation represents one such reasonable restriction on freedom of speech. Its purpose lies in striking a balance between protecting an individual's reputation and guaranteeing the right to free expression. Indian defamation laws are predominantly governed by the Indian Penal Code (IPC) and the principles of civil law. In order to mitigate the chilling effect, some argue for the reform of defamation laws to incorporate a stronger public interest defence. This defence would provide greater protection for those engaging in responsible journalism and legitimate criticism while ensuring that false statements made with malicious intent remain actionable. By embracing a nuanced approach, defamation laws can better serve their intended purpose without unduly inhibiting free speech.

Jawaharlal Darda v. Manoharro Ganpatrao Kapiskar (1998)[17] **:** The court analysed the defence of qualified privilege in defamation cases involving public servants, upholding its significance in protecting their freedom of speech within official duties. The ruling safeguards open discussion on public matters while balancing against defamation liability. *Mohammad Abdulla Khan v. Prakash K (2018)*[18] **:** The court highlighted the importance of responsible social media use, preserving freedom of speech while ensuring accountability and reputation protection. It declared defamatory posts on social platforms unacceptable, making the offender legally responsible. This landmark ruling establishes a precedent for ethical online communication.

Chaman Lal v. State of Punjab (1970)[19] **:** The Supreme Court of India upheld criminal defamation laws, emphasising the fundamental nature of free speech while recognizing its

[15] India Const. art. 19.
[16] Gary Chan Kok Yew, Internet Defamation and Choice of Law in Dow Jones & Company inc. V. Gutnick, NUS Law, pp. 483- 518 (2003), https://www.jstor.org/stable/24869511.html
[17] Jawaharlal Darda v. Manoharro Ganpatrao Kapiskar, AIR 1998 Bom 213.
[18] Mohammad Abdulla Khan v. Prakash K, (2018) 2 SCC 541.
[19] Chaman Lal v. State of Punjab, AIR 1971 SC 1390.

reasonable limitations. It stressed responsible exercise of speech, ensuring a balance between the right to criticise and the duty to protect individual reputations *G. Narasimhan & Ors. etc. v. T.V. Chokappa (1972)*[20] *:* The Supreme Court of India established guidelines for fair comment defence in defamation cases, requiring it to be rooted in truth, driven by public interest, and not influenced by personal grudges. The judgement upholds the significance of differentiating fair comment from personal attacks, serving as a vital reference for defining the limits of free speech in Indian defamation cases.

MP Pillai v. MP Chacko (1986)[21]*:* The court's landmark judgement stressed the need for thorough examination of published material in defamation cases, giving weight to context, individual targeting, and clear connection between statements and defamation claims. The judgement establishes a precedent for balancing freedom of expression and reputation protection through comprehensive analysis. *Kanwar Lal v. State of Punjab (1963)*[22] **:** In this case, the apex court outlined the criteria for defamation claims, emphasising harm to reputation. Mere unpleasant remarks are insufficient, and defamatory imputations must be taken at face value. The ruling sets a precedent, stressing the importance of actual harm and meaning in defamation cases.

Dogar Singh and Anr. v. Shobha Gupta and Anr.(1998)[23] *:* The court emphasised truth as a valid defence in a defamation case. The court found the statements to be true and supported by evidence, dismissing the claim, reaffirming truth's significance in defamation cases. *MC Verghese v. TJ Ponnan (1970)*[24] **:** The court reasoned, fair comment protects opinions based on true facts and reasonable criticism. Plaintiff's statements fell within these limits, leading to dismissal of the defendant's suit. The case underscores the defence of fair comment, highlighting the right to express opinions with accurate facts and reasonable criticism, setting parameters for defamation claims and upholding freedom of expression.

D. Safeguards to Prevent Misuse of Defamation Laws as a Tool to Suppress Dissent

Defamation laws should not be susceptible to misuse as a means to suppress dissent or curtail freedom of expression. To address this concern, it is essential to introduce safeguards that promote the proper use of defamation laws while preventing their abuse.

[20] G. Narasimhan v. T.V. Chokappa, 1972 SCC (2) 680.
[21] MP Pillai v. MP Chacko, AIR 1986 SC 117.
[22] Kanwar Lal v. State of Punjab, AIR 1964 SC 72.
[23] Dogar Singh v. Shobha Gupta, AIR 1998 Del 57.
[24] MC Verghese v. TJ Ponnan, AIR 1970 Ker 152.

Firstly, clear and unambiguous definitions of defamation should be established, ensuring that they are narrowly tailored and focused on protecting genuine reputational harm. This will help avoid frivolous or malicious claims that are intended solely to intimidate or silence individuals with dissenting views.

Secondly, the law should encourage the use of alternative dispute resolution mechanisms, such as mediation or arbitration, for resolving defamation disputes. This would promote dialogue and compromise, allowing parties to resolve their differences without resorting to protracted and costly litigation. *Furthermore*, alternative dispute resolution can facilitate a more nuanced understanding of the context in which alleged defamatory statements were made, leading to fairer outcomes.

Lastly, provisions for anti-SLAPP (Strategic Lawsuit Against Public Participation) legislation could be considered. Anti-SLAPP laws provide protection against meritless defamation claims filed with the intention of harassing or silencing individuals engaged in public discourse. These laws often include provisions for early dismissal of such claims and the possibility of awarding costs and attorney fees to the defendant, acting as a deterrent against misuse of defamation laws.

By implementing these reforms and recommendations, India can aspire to strike a more balanced defamation jurisprudence that safeguards both reputation protection and free speech. Taking inspiration from international standards and drawing from the experiences of other jurisdictions, it is possible to establish a defamation framework that upholds the values of justice, fairness, and intellectual integrity.

V. COMPARISONS WITH OTHER JURISDICTIONS

A. Defamation Laws in the India

Burden of Proof: In Indian defamation law, the burden of proof lies with the plaintiff who claims to have been defamed. The plaintiff must establish various elements, including the existence of a defamatory statement, its reference to them, and its communication to a third party. The burden then shifts to the defendant, who can raise defences such as truth, fair comment, or privilege.

Distinguishing Public and Private Figures: Indian defamation laws differentiate between public and private figures. Public figures, such as government officials, politicians, and celebrities, face a higher standard in proving defamation. They must show that the defendant acted with actual malice or knowledge of falsity, indicating reckless disregard for the truth.

Private figures generally need to prove that the defendant acted negligently in making the defamatory statement, with the level of fault varying based on circumstances and jurisdiction.

Defence of Public Interest: The defence of truth and public interest holds importance in Indian defamation cases. It allows defendants to justify their statements by demonstrating that the published information was true and served the public interest. However, this defence must be balanced against the rights and reputation of the individual. Courts evaluate whether the statement was made in good faith, based on accurate information, and served a legitimate public interest purpose.

B. Defamation Laws in the United States

Defamation laws in the United States are governed by a combination of federal and state laws, exhibiting variations across jurisdictions. Key aspects of US defamation law include the following:

Burden of Proof: Within the United States, the burden of proof lies with the plaintiff, who must demonstrate that the defendant made false statements of fact with actual malice or negligence.

Distinguishing Public and Private Figures: Distinct standards apply to defamation cases involving public figures and private individuals. Public figures are required to prove actual malice, signifying knowledge of falsity or reckless disregard for the truth, whereas private individuals only need to establish negligence.[25]

Freedom of Speech: The First Amendment of the US Constitution offers robust protection for freedom of speech, rendering it more challenging to succeed in defamation claims.

Public Interest Defence: The United States recognizes various defences, including truth, opinion, fair comment, and substantial truth, which depend on the jurisdiction.

Statute of Limitations: The statute of limitations for defamation varies from state to state but generally falls between one and three years.

C. Defamation Laws in the United Kingdom

Defamation laws in the United Kingdom are primarily governed by the Defamation Act 2013[26]. Key features of UK defamation law include the following:

[25] Shweta Chhetri, *The Defamation in the Internet Age: Cyber Defamation*, 4 INT'L J.L. MGMT. & HUMAN. 1981 (2021).
[26] Defamation Act of 2013 (2013 c 26).

Burden of Proof: In the UK, the burden of proof lies with the defendant, who must establish the truth of their statements or present a valid defence.

Single Publication Rule: The UK adheres to the single publication rule, whereby the cause of action arises with the initial publication of defamatory material, irrespective of subsequent re-publications.[27]

Libel Tourism: The UK has faced criticism for being an attractive jurisdiction for libel tourism, wherein claimants from other countries file defamation cases in UK courts due to its claimant-friendly laws.[28]

Multiple Defences: The Defamation Act 2013 introduced new defences, such as truth, honest opinion, publication on a matter of public interest, and the defence of responsible journalism.

Limitation Period: The limitation period for defamation claims in the UK is one year from the date of publication.

VI. CONCLUSION

In conclusion, this article provides a comprehensive analysis of defamation laws in India and their implications on freedom of speech. It emphasises the delicate balance required between protecting reputation and preserving the fundamental right to express oneself in a democratic society. Throughout the article, key Supreme Court judgments and landmark cases have been discussed, highlighting the evolving jurisprudence surrounding defamation laws.

The article acknowledges the potential chilling effect of defamation laws on freedom of speech, as they can inadvertently stifle dissent, curtail investigative journalism, and hinder whistleblowing. To address these concerns, the article proposes the incorporation of a stronger public interest defence within defamation laws, which would protect responsible journalism and legitimate criticism while holding individuals accountable for false statements made with malicious intent.

Furthermore, the article recommends the establishment of clear and unambiguous definitions of defamation, the encouragement of alternative dispute resolution mechanisms, and the consideration of anti-SLAPP legislation to prevent the misuse of defamation laws as a means to suppress dissent. Drawing comparisons with defamation laws in the United States and the

[27] Thomas D. Jones, *Group Defamation under British, Canadian, Indian and Nigerian Law*, 5(3) BRILL, pp. 281-335 (1997/98), https://www.jstor.org/stable/24674598.html
[28] David Reisman, *Democracy and Defamation: Control of Group Libel*, 42(5) COLUMBIA LAW REV, pp. 727-780 (1942), https://www.jstor.org/stable/1117690.html

United Kingdom, the article provides a broader perspective on different approaches to defamation jurisprudence.

In essence, the article underscores the need for a comprehensive re-evaluation of defamation jurisprudence in India, suggesting reforms and measures that can enhance the coherence, fairness, and intellectual integrity of defamation laws. By striking a balance between protecting reputation and upholding freedom of speech, India can aspire to create a legal framework that fosters a just and vibrant democratic society.

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ANIL KAPOOR'S JHAKAAS AND BEYOND: UNVEILING THE LANDSCAPE OF PERSONALITY RIGHTS

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Abstract: *The ease of digital mediums, which has helped many celebrities showcase their work of art more to audiences in order to become likable and popular, has made today's celebrities gain more fame than ever. The fame of celebrities, or for that matter, any artist, always comes with its own set of pros and cons. People tend to imitate an actor's voice tone, personality, famous dialogues, etc., without their permission to satiate their monetary needs. With generative artificial intelligence coming into the picture, infringing a celebrity's personality rights has become more prominent day by day.*

So, this paper delves into the background of personality rights and how they are getting infringed substantively through generative artificial intelligence. From there, it discusses India's current jurisprudential stand on this issue and whether it is a holistic approach in handling this issue at hand when compared to the international stance on the same. It then aims to recommend certain suggestions by which the infringement of personality rights can be handled better, at least in the context of India. This paper also aims to answer whether any particular dialogue or act that an actor performs makes him liable to have exclusive ownership over it or whether it is owed to all the writers, directors, producers, scriptwriters, and the audiences as well who bring that dialogue or act to success.

Keywords: Generative AI, Celebrity Personality Rights, Intellectual Property Rights, Global Context etc.

I. INTRODUCTION

In the modern, rapidly evolving world, where technological progress happens on a daily basis, we have access to a wide range of entertainment choices. Whether we choose to watch the latest blockbuster on a state-of-the-art PVR screen or relax on our own sofas, enjoying web series from a multitude of Over-The-Top (OTT) platforms, we have an abundance of choices at our fingertips. It's within this dynamic media landscape that artists find themselves with more avenues to display their talents and connect with audiences. These evolving platforms offer them the opportunity to reach wider and more diverse viewership, which can lead to increased popularity and a stronger connection with their fans.

However, as with any level of fame, there are both advantages and disadvantages. The heightened visibility of celebrities often prompts fans and even opportunistic individuals to imitate their favourite actors. This imitation can encompass various aspects, from mimicking the actor's distinctive voice tone to adopting elements of their personality or reciting famous

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dialogues. Unfortunately, these imitations often occur without the artists' consent, driven by individuals seeking financial gains.

In this evolving media landscape, the emergence of generative artificial intelligence has intensified the issue of infringing on a celebrity's personality rights. Such technologies have made it even easier for individuals to exploit the likeness, image, and persona of celebrities without obtaining proper authorization. This growing concern has brought the matter of protecting personality rights to the forefront of discussions on the intersection of technology, entertainment, and intellectual property. It's also crucial to address the question of whether a specific dialogue or performance by an actor warrants exclusive ownership, or if it should be attributed to all the contributors, including writers, directors, producers, scriptwriters, and even the audiences who played a part in making that dialogue or performance a success.

II. BACKGROUND OF PERSONALITY RIGHTS

Personality rights essentially encompass an individual's capacity to safeguard their personal identity concerning property and privacy rights. Celebrities, in particular, place great importance on these rights as their names, images, or even voices can be exploited by different enterprises for financial gain. These rights can be categorized into two main groups:

A. Right to Privacy

Personality rights serve to shield individuals from the unauthorized commercial utilization of their likeness or image, ensuring they have a say in such usage or receive due financial compensation. The right to privacy comprises four distinct interests, each corresponding to a different category of invasion of privacy:[1]

1. **Intrusion:** This pertains to an encroachment on an individual's physical privacy or seclusion.
2. **Revelation of Private Information:** This refers to the revelation of personal information, even if it's true, in a manner that a reasonable person would consider offensive. For example, revealing a former prostitute's history.

[1] William L. Prosser, Privacy, 48 CAL. L. REV. 383 (1960).

3. **False Light:** This occurs when information is published that portrays the plaintiff in a misleading or inaccurate manner. For instance, using someone's image in connection with an article where no reasonable connection exists, while implying such a connection.
4. **Appropriation:** This encompasses the utilization of the name or image without securing authorization.

B. Right to Publicity

The right of publicity acts as a preventative measure against the unauthorized commercial utilization of an individual's name, image, or other distinctive facets of their identity. It bestows upon individuals the exclusive authority to license and safeguard their identity for commercial utilization. This right is commonly categorized into five distinct interests:[2]

1. **Performance:** This pertains to the exclusive entitlement to engage in activities that constitute an individual's primary source of income.
2. **Adaptation:** This involves the exclusive right to grant permission for the creation of derivative works that represent the individual's performance, whether produced by the individual or by others.
3. **Personality Products:** This encompasses the exclusive exploitation of merchandise derived from an individual's name, appearance, or likeness.
4. **Endorsement:** This pertains to the use of an individual's name, appearance, image, and standing in connection with the advertising of goods or services.
5. **Reputation:** This safeguards an individual's standing from inappropriate use, even when such use was previously authorized. This right acknowledges that an artist's past performances can have an enduring impact on their future creative works.

III. PERSONALITY RIGHTS AND THEIR ADVERSE RELATION WITH AI

The invention of AI, which is prompt-based, has indeed helped to conserve a substantial amount of human energy for tasks that typically require a lot of time and effort. This feature facilitates the efficient and smooth completion of various tasks. However, it is this very aspect of generative AI that can work in contradiction to the interests of personality rights. Recently, there was news of a college student who provided a prompt to a generative AI application called

[2] *Id.*

'chat-gpt,' asking it to compose a sick leave application in the style of Shashi Tharoor's language. The AI's response was posted on Twitter and garnered numerous responses, including one from Mr Tharoor himself, who expressed his disagreement with the AI's output.[3]

The concern is not that AI generated a response that wasn't in line with Mr Tharoor's style. The major concern is that, at this pace, artificial intelligence could potentially advance to the point of effectively imitating and producing content in the same manner as any other famous personality. These outputs could then be exploited for malicious purposes by individuals with ill intentions. Every artist who showcases their work, whether it's M.F. Hussain's portrayal of Mother Teresa, Prem Chand's 'Godan,' or Gabbar's iconic line 'Ye haath mujhe de de, Thakur' from 'Sholay,' creates a unique and invaluable piece of art. Such creations deserve protection to ensure they are cherished in the same manner as the artist intended.

When it comes to actors, their work of art encompasses their voice tone, dialogues, dressing style, and, essentially, their entire personality. These elements must be legally safeguarded to prevent any form of misuse or impersonation for monetary gain by any other party. The convenience of contemporary times sometimes poses a threat to the essence of art. For an actor, their personality is the sole work of art they own. It's their personality that they strive to protect, and rightfully do so by exercising their rights.

IV. INDIA'S STANCE ON PERSONALITY RIGHTS

A. Provisions under the Constitution

1. Right to Privacy - Article 21

In India, the primary legal provision safeguarding personality rights is Article 21 of the Constitution. While it may initially appear that the existing laws adequately cover the protection of personality rights, a more in-depth examination uncovers the shortcomings in the current mechanism for pursuing remedies within the right to privacy. For instance, the Supreme Court in Raja Gopal vs. State of Tamil Nadu[4] held that the right to privacy is inherent in Article 21, which guarantees the citizens of this nation the right to life and liberty. It is essentially a right to be free from intrusion. A citizen holds the privilege to protect the privacy of various aspects such as personal life, family, marriage, procreation, motherhood, childbearing, and

[3] Quint Neon, *Shashi Tharoor Reacts To Man Asking AI Bot To Write Leave Of Absence Like Him,* THE QUINT (Jan. 17, 2023, 2:14 IST), https://www.thequint.com/neon/social-buzz/shashi-tharoor-reacts-to-man-asking-ai-bot-to-write-leave-of-absence-like-him-chatgpt-viral-tweet.html
[4] R. Rajagopal v. State of Tamil Nadu, (1994) SCC (6) 632.

education, among others. No one can disclose information related to these matters without the individual's consent, regardless of whether it is accurate, complimentary, or critical. If someone does so, they would be infringing upon the person's right to privacy and may be liable for damages. However, the situation may vary if an individual willingly becomes embroiled in a dispute or intentionally initiates or engages in a controversy.[5]

This scenario highlights the challenges a celebrity may encounter when pursuing damages through a privacy-based tort claim. When this right is limited to celebrities and is established within the framework of privacy, our legal system demonstrates that the tort becomes self-defeating, as celebrities cannot file claims based on privacy rights. This is a complexity that is often overlooked by the Indian courts.

Nonetheless, in certain cases, the courts have overlooked these apprehensions and offered solutions. In the process, they have overlooked the more comprehensive notion of personality, which should encompass all elements safeguarded by the country's existing intellectual property laws.[6]

2. Upholding the Freedom under Article 19(1)(a)

The freedom of speech and expression is a vitally important fundamental right within the constitutional framework, assured by Article 19(1)(a).

The American Doctrine of the Public Figure received approval in India in the R. Rajagopal Case.[7] The concept of the public figure doctrine raises a concern related to freedom of speech and sets a more stringent standard in defamation cases for individuals in the public eye. To prevail in a libel case, public figures must demonstrate that the defendant acted with deliberate falsehood or reckless disregard for the truth. The reasoning behind this doctrine is evident—it upholds the media's free speech rights when reporting on subjects of public significance.

However, Article 19(1)(a) inherently emphasizes the need for an unrestricted flow of ideas in the public sphere, and it suggests that public figures shouldn't be able to use publicity rights as a shield. It's essential to acknowledge that the freedom protected by Article 19(1)(a) should not be undermined by the notion of publicity rights. For instance, Article 19(1)(a) would conflict with any effort by a celebrity to employ publicity rights to prevent the development of a biography or a play based on publicly accessible information about them. Consequently, Article

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[5] *Id.*
[6] The Trademarks Act, 1999, § 2(m), No. 47, Acts of Parliament, 1999.
[7] R. Rajagopal, *Supra* note 4.

19(1)(a) serves as the foundation for constructing a strong defence against a publicity rights claim.

B. Grounds for protection under existing Intellectual Property Laws

1. Under the Copyrights Act, 1957

Although trademarks, as seen in the above-mentioned paragraphs, have been a good example for comprehending the concept of personality rights, copyrights can also be considered to understand personality rights, even though the act does not explicitly protect personality rights on a prima facie basis.

i. *Section 2(qq):* outlining the scope of performers' rights, potentially encompassing personality rights.
ii. *Section 38:* a provision allowing performers to assert their rights and thwart the unauthorized exploitation of their performances.
iii. *Section 57:* granting safeguarding of moral rights as a legal safeguard.
iv. *Section 17(b)*: establishing the initial copyright holder of a creative work.

In the case of Titan Industries Ltd. v. Ramkumar Jewellers,[8] the central issue involved the defendant erecting billboards featuring the prominent Indian stars Amitabh and Jaya Bachchan, who endorsed the defendant's jewellery store. The plaintiff alleged a breach of personality rights based on a contractual agreement in which these public figures had transferred their personality rights to the plaintiff. Furthermore, the plaintiff initiated legal action to secure an injunction against copyright infringement, put a stop to the unlawful utilization of personality rights, and obtain compensation for the deceptive use of their image. The court ruled that, in accordance with Section 17(b)[9] of the Copyright Act of 1957, the plaintiff was the rightful owner of the copyright in the mentioned advertisement. This ownership was confirmed by the endorsement agreements, which explicitly indicated copyright ownership belonging to the plaintiff. As a result, the defendant's unauthorized utilization of a similar advertisement for their products on billboards and the replication of the celebrities' images in the same context as the plaintiff's constituted a violation of copyright rights.

In the latest Delhi High Court judgment of Anil Kapoor vs. Simply Life India & Ors.,[10] plaintiff's likeness, image, voice tone, and personality were used on various platforms. Some

[8] Titan Industries Ltd. v. Ramkumar Jewellers, (2012) SCC OnLine Del 2382.
[9] The Copyrights Act, 1957, § 17(b), No. 14, Acts of Parliament, 1957.
[10] Anil Kapoor v. Simply Life India & Ors., (2023) LiveLaw (Del) 857.

created a website named after him, like www.anilkapoor.com, and even came up with merchandise featuring his famous dialogue "Jhakaas" without the plaintiff's permission. The court observed that such activities can significantly harm a celebrity's right to endorsement and hence issued an injunction against the defendants.

2. Under the Trademarks Act, 1999

In certain instances, even trademark laws have been applied to regulate the unauthorized utilization of personal attributes. An illustrative case is D.M. Entertainment[11] which marked the first Indian instance addressing the commercial facet of personality rights. In 1996, the plaintiff, Indian artist Daler Mahendi, established a venture named D.M. Entertainment Pvt. Ltd., where they secured a registered trademark for the initials DM, signifying their name. All rights, encompassing the right of publicity, commercial endorsements, and related entitlements, were vested in the company.

The defendants, who owned and operated toy and gift stores in the vicinity of Delhi, became embroiled in a dispute regarding the sale of dolls inspired by Daler Mehndi, one of which sang a few lines from his songs, and was created by the defendant. The plaintiffs claimed false endorsement, passing off, and the violation of the right to publicity. In the absence of specific legislation safeguarding personality rights, the court provided a remedy by invoking provisions within trademark law, specifically addressing issues like passing off and false endorsement.

3. Use of Identifiability as the foundation for the Right to Publicity tort

The criteria for this test stipulates that the individual's persona should be easily recognizable by name or identity to the general public.[12] In a notable case at the Madras High Court, Shivaji Rao Gaikwad vs. Varsha Production,[13] The court emphasized the requirement for the individual to be a celebrity, meaning widely recognized by the public, for the right to publicity tort to be applicable. A significant aspect in this case was the defendant's decision to promote the movie with a title that was almost defamatory, namely, 'Hot Kavita Radheshyam as Sex Worker for Rajinikanth,' which introduced an aspect of the right to privacy to the case.

It's worth highlighting that the case did not primarily concern the privacy of the plaintiff, Shivaji Rao Gaikwad, but rather, it cantered on the usage of the stage name 'Rajinikanth' as the

[11] D.M. Entertainment (P) Ltd. v. Baby Gift House, CS (OS) No. 893 of 2002 (2010).
[12] Nina R. Nariman, *A Cause Célébre: Publicity Rights in India*, SCC ONLINE BLOG (Jan. 24, 2022), https://www.scconline.com/blog/post/2022/01/24/a-cause-celebre-publicity-rights-in-india.html
[13] Shivaji Rao Gaikwad v. Varsha Production, (2015) SCC OnLine Mad 158.

'identifiable' name protected by the right to publicity. In this scenario, it becomes apparent that the judgment supports positioning the right to publicity within the realm of property rights, emphasizing the preservation of the economic value associated with the pseudonym 'Rajinikanth,' as opposed to addressing the personal privacy of the individual, Shivaji Rao Gaikwad.

V. INADEQUACY OF EXISTING LAWS

A. Trademarks Act, 1999

1. Scope of Protection

The Trademarks Act of 1999 and personality rights have different scopes of protection. Personality rights pertain to the safeguarding of the commercial exploitation of attributes associated with an individual's persona, whereas trademarks ensure the exclusive rights of the trademark owner to employ the mark in association with commercial products or services. Therefore, it can be inferred that the subject matter of the Trademarks Act, concerning personality rights, currently remains inadequate.

2. Element of 'Distinctiveness'

With regard to trademarks, registration is required, which can be based on distinctive signatures or product names. However, in the case of personality rights, every individual is unique and distinctive in their own way, and they cannot be asked to be registered solely based on a signature. This is a major inadequacy in trademark law.

B. Copyrights Act, 1999

Not all performers can meet the requirements of being recognized figures, which demonstrates that the protection under the category of 'performers' is inadequate. On the contrary, personality rights are regarded as an inherent entitlement of every individual without making distinctions between celebrities and non-celebrities, as established by the statute. However, Indian courts often appear to interpret personality rights as an exclusive privilege of celebrities, a perspective that contradicts the fundamental essence of personality rights.

On the other hand, copyright primarily protects original literary, theatrical, musical, and artistic works, encompassing cinematograph films, sound recordings, and other creative expressions, to guarantee creators exclusive rights to their creations. Personality rights, on the other hand, empower individuals with exclusive authority over their names, appearances, and personal

attributes. Therefore, as previously mentioned, the subject matter of copyright and personality rights differ significantly. Copyright stimulates creativity by providing creators with financial incentives for their creative works, whereas personality rights grant individuals control over their personal identity rather than their specific forms of creative expression.

C. The 'Passing Off' Remedy

The legal remedy of passing off is another method employed by the courts to protect personality rights, although it may not be entirely suitable for this purpose. In passing off cases, there are three fundamental criteria that must be satisfied to make a claim based on these rights: reputation, misrepresentation, and harm to goodwill or reputation. In instances involving the unauthorized exploitation of personality rights, misappropriation often occurs, and in some cases, the individual's reputation may remain unharmed, but unauthorized usage can still transpire. If the reputation remains intact, a remedy under passing off may not be applicable. As a result, these elements of passing off can present challenges when seeking remedies for the violation of personality rights.

VI. RECOGNITION OF PERSONALITY RIGHTS ACROSS BORDERS

A. Germany

German law serves as one of the best examples by acknowledging a broad right to individual personality, which forms the foundation for the comprehensive protection of personal rights.[14] German law clearly recognizes the right to personal identity and provides specific legal protections against the unauthorized commercial use of an individual's image.[15] Pop stars, television personalities, and celebrated athletes have all sought legal protection to prevent the unauthorized commercial exploitation of their likenesses.[16] Since 1954, Germany has recognized the fundamental right to personal identity through rulings by the German Federal Court of Justice (Bundesgerichtshof). This right is constitutionally guaranteed under Articles 1 and 2 of the Basic Law (Grundgesetz) and is legally protected in civil law under Sections 823(1) and 1004 of the German Civil Code (Buergerliches Gesetzbuch).[17] This legal framework

[14] Johann Neethling, Personality Rights: A Comparative Overview, 38 COMP. & INT'l L.J. S. AFR. 210 (2005).
[15] Corinna Coors, Image Rights of Celebrities vs. Public Interest – Striking the Right Balance Under German Law (March 30, 2014) JIPLP (2014) 9 (10): 835-840.
[16] *Id.*
[17] Constant case law since BGH of 25 May 1954, I ZR 211/53 - Schacht-Brief - BGHZ 13, 334.

ensures the protection of human dignity and the freedom of personal development, providing a shield against the unauthorized use of specific aspects of an individual's character.[18]

In the legal dispute involving former German goalkeeper Oliver Kahn and EA-Sports, the Hamburg Court of Appeal concluded that Oliver Kahn's consent was necessary for the inclusion of his name and likeness in a video game. This requirement stemmed from the utilization of Mr. Kahn's image for commercial gain, and there was no discernible public interest justifying the use of his name or likeness.[19] The case cantered on Mr. Kahn's objection to the defendant's utilization of his likeness and name in the video game "FIFA Soccer Championship 2002" and the related promotional activities.

B. Canada

The foundation of personality rights in Canada is based on a combination of statutory provisions and tort law. It's important to note that each province in Canada has its variations in handling these rights, leading to some differences in the way they are addressed.[20] When it comes to the elements encompassed by the "personality" category, the Canadian provinces of Manitoba, Newfoundland, and Saskatchewan have explicitly incorporated the use of a person's name, likeness, or voice as potential forms of personality appropriation into their statutes. In contrast, the statute in British Columbia specifically mentions only the use of a person's name or portrait.[21]

In Canadian common law, the acknowledgement of personality rights is relatively restricted. The initial acknowledgement of these rights took place in the case of Krouse v Chrysler Canada Ltd.[22] In this particular case, the court established that when an individual's likeness possesses commercial value and is employed in a manner that suggests an endorsement of a product, there are legal grounds for a claim concerning the appropriation of personality. This concept was further refined and expanded upon in the case of Athans v Canadian Adventure Camps,[23] where the court ruled that personality rights encompass both an individual's image and their name. As these two cases revolved around celebrities, it seems that the scope of common law personality rights is confined to celebrities, considering that the requirement of exclusive marketing for profit typically applies primarily to celebrities, rather than extending to ordinary

[18] BGH of 14 February 1958 - Herrenreiter - BGHZ 26, 349.
[19] Unreported, 13 January 2004, OLG Hamburg.
[20] See generally, Amy Conroy, "Personality Rights".
[21] 2 William Blackstone, Commentaries on the Laws of England (1809).
[22] Krouse v. Chrysler Canada Ltd (1971), 5 C P R (2d) 30.
[23] Athans v. Canadian Adventure Camps, (1977), 17 O.R. (2d) 425.

individuals. This is in spite of assertions that it is a common law tort with broader applicability. In areas like Ontario, the development of celebrity rights revolves around the legal principle of appropriation. Conversely, in provinces like Quebec, the emphasis has been on the protection of privacy as a Charter[24] right, as demonstrated in the case of Aubry v. Éditions Vice-Versa Inc. (1998).[25]

C. France

In civil law jurisdictions, in contrast to common law systems, there are dedicated statutory regulations designed to safeguard an individual's image, personal data, and other confidential information. For example, in France, personality rights are rooted in Article 9 of the French Civil Code. France acknowledges and safeguards a right known as "droit à l'image," which encompasses elements like similarity, voice, photographs, portraits, and video reproductions.[26] French law allows legal action in cases where someone's image or personal history is exploited without permission. The right to image has evolved from its original role in protecting privacy-related principles to also encompass economic aspects. As a result, it is frequently perceived as a combination of personality rights, encompassing moral rights of authors, the right to privacy, the right to safeguard one's reputation and integrity, and the right to govern the utilization of one's likeness.

D. United Kingdom

English law has historically been reluctant to embrace the notion of publicity rights. The concept of publicity rights and other rights about celebrities is seen as benefiting only a select portion of the population, with limited tangible advantages for the broader public. The United Kingdom lacks dedicated legislation for personality rights, as some other nations have in place. In the UK, a combination of existing laws and common law principles is used to handle matters concerning personality rights, particularly in cases involving celebrities.

In British cases involving personality rights, the most commonly employed legal concept for seeking redress is the "passing off" tort, which bears similarities to trademark infringement in the United States. In cases falling under this legal category, the plaintiff must establish that the defendant's unapproved use of their name, image, or likeness creates a likelihood of confusion

[24] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).
[25] Aubry v. Éditions Vice-Versa Ine, 78CPR (3d) 289 (SCC) (1998).
[26] Elisabeth Logeais & Jean-Baptiste Schroeder, The French Right of Image: An Ambiguous Concept Protecting the Human Persona, 18 L.A. ENT. L.J. 511,(1998).

concerning the source of products or services, leading to damage to the plaintiff's well-established reputation or goodwill.

E. Jamaica

The issue of celebrity rights was examined in Jamaica in 1994 through a Supreme Court decision commonly referred to as The Dino Michelle Case.[27] In this particular case, the defendant illicitly marketed T-shirts that prominently displayed Bob Marley's name and image, all without obtaining the necessary authorization from the estate's license holders. The judge in the case recognized "passing off" and "appropriation of personality" as the legal grounds for safeguarding Bob Marley's name and image in this particular situation. Upon a thorough review of the case's particulars, the knowledgeable judge concluded that the defendant's actions created a misleading impression among the public. This situation gave rise to the misconception that there was some form of connection, whether of a commercial nature or otherwise, between the plaintiff and the T-shirts sold by the defendant. Clarke J emphasized that the legal doctrine of passing off was created to safeguard established reputations, and in this case, there was no question that Bob Marley's name and image carried substantial reputation value. When dealing with the matter of appropriation of personality, the judge emphasized that Jamaican law acknowledges the property rights linked to the reputation built by a celebrity's persona. The judge stated that these rights could be infringed upon if elements of a celebrity's persona were used for commercial gain in a way that unjustly enriched another individual.[28]

F. Spain

Spain provides robust protections for personality rights.[29] Article 18 of the Spanish Constitution ensures the protection of the right to honour, personal and familial privacy, and one's own image. Article 1 of the Organic Law enacted on May 5, 1982, officially categorizes these rights as fundamental. Additionally, Articles 7.5 and 7.6 establish broad prohibitions against the capture, reproduction, or dissemination of a person's image in private settings or beyond, whether through photography, filming, or any other means. These provisions also

[27] The Robert Marley Foundation v. Dino Michelle Limited, CL R115/1992 (Supreme Court of Jamaica 1994). JM 1994 SC 032

[28] Pusey, Ingrid, and Marc Morgan, Celebrity Personality Rights in Jamaica: A Path for Development, *Social and Economic Studies,* vol. 61, no. 2, 2012, pp. 99–125. (last visited 30 Oct. 2023) JSTOR, http://www.jstor.org/stable/41803755.html

[29] Lowenstein Sandler, *A COMPARATIVE EXAMINATION OF PUBLICITY RIGHTS IN US AND EUROPE,* (last visited Oct. 28, 2023). https://www.lowenstein.com/media/4712/publicity-rights.pdf.

restrict the use of an individual's name, voice, or likeness for purposes related to advertising, commerce, or similar activities.

G. Australia

In Australia, similar to the U.K., there is no distinct legal framework for image or publicity rights related to an individual's name or image. The Courts of Australia have instead advanced a legal concept resembling the right of image or personality through the doctrine of passing off. A prominent case involved Paul Hogan.[30] In this specific case, a footwear manufacturer, Pacific Dunlop, showcased a character donning an outfit reminiscent of Hogan's film character in their advertisements. The court sided with Hogan, accepting his passing off claim, as it was determined that the public might reasonably infer that Hogan had granted his permission or endorsed Pacific Dunlop to use the image of his character Crocodile Dundee.[31]

VII. RECOMMENDATIONS AND FUTURE IMPLICATIONS

In the age of Artificial Intelligence, the protection of personality rights for celebrities is of paramount importance due to the proliferation of deepfake technology, privacy concerns stemming from data mining, the potential for commercial exploitation without consent, misinformation facilitated by AI, and the ethical challenges posed by this technology. Establishing robust legal frameworks to safeguard personality rights in the context of AI is crucial to protect celebrities from reputation damage, privacy infringements, and unauthorized use of their likeness and voice in a rapidly evolving digital landscape.

In numerous jurisdictions, a blend of laws is employed, encompassing contract law, regulations related to trademarks, copyright, privacy, and data protection. These legal instruments have been utilized to protect celebrities, but together, they provide only partial protection. While it's recognized that the common law system is flexible enough to remain pertinent and effective, there is a concern that the efforts to establish and protect celebrity personality rights might potentially result in the courts overreaching the original intentions of the existing laws. This could result in unanticipated and possibly unintended consequences. In contemporary times, public figures invest substantial sums of money in

[30] Hogan v. Koala Dundee Pty, (1988) 20 F.C.R. 314.
[31] Mary LaFrance & Gail H. Cline, Identical Cousins: On the Road with Dilution and the Right of Publicity, 24 SANTA CLARA COMPUTER & H.T. L*J*. 641 (2007).

their public image, which holds significant value. Recognizing this valuable asset as a form of property suggests that it may be subject to taxation as a capital asset, akin to other forms of intellectual property.[32] This recognition may contribute to government revenue while protecting celebrities' interests and preserving their ability to capitalize on their public personas.

Decisions like those in the cases of Anil Kapoor and Amitabh Bachchan carry profound future implications and recommendations. On the positive side, these rulings signify a growing legal awareness and recognition of the critical need to protect the personality rights of celebrities in an age of advanced technology, AI, and deepfake threats. Such judgments reinforce the significance of safeguarding a celebrity's image, identity, and personal brand, discouraging unauthorized and potentially damaging exploitation. These decisions provide a legal precedent that can serve as a deterrent against the misuse of technological tools for financial gain, reinforcing the principle of informed consent and ethical AI usage.

However, on the negative side, they may also raise concerns regarding potential overreach, as they could be seen as limiting free speech and artistic expression as can be seen in Anil Kapoor's case where the court went a bit far in restricting the use of the word "Jhakaas" as asserted that he brought widespread recognition to this term through his appearance in the Hindi film Yudh. Nevertheless, the term had been in use by countless individuals prior to his acting career. Publicity rights should not enable the wealthy and well-known to maintain exclusive control over language in a world that is becoming increasingly commercialized.[33] Striking a balance between protecting personality rights and safeguarding fundamental rights like freedom of speech and creativity remains a challenge. Furthermore, enforcing these judgments effectively, especially across digital platforms, can be intricate. The global nature of the internet and AI makes it challenging to ensure consistent and standardized implementation of such rulings. Consequently, while these decisions are a vital step towards preserving celebrity personality rights, they highlight the need for comprehensive, well-defined legal frameworks, global cooperation, and ongoing ethical discussions to navigate the complexities of the digital age.

[32] Zacchini v. Scripps-Howard Broad. Co., (1977) 433 U.S. 562, 578.
[33] Anupriya Dhonchak, *Why Anil Kapoor Shouldn't Own Jhakaas,* THE INDIAN EXPRESS (Sep. 30, 2023, 12:38 IST), https://indianexpress.com/article/opinion/columns/anil-kapoor-and-the-overzealous-defence-of-jhakaas-8960571/.html

VIII. CONCLUSION

The visual representation, name, and distinctive attributes of an individual have historically been subject to commercial exploitation, notably for advertising purposes. However, over the last few decades, advancements in technology have significantly expanded the economic potential of these personality features beyond what was previously possible. The recent ruling in the Anil Kapoor case represents a positive stride in the right direction. The rights of celebrities constitute an essential aspect of an artist's or an individual's identity and are also situated within the domain of Intellectual Property Rights. Given the substantial impact that celebrities wield on the lives of ordinary people and the evolving legal landscape in our nation, it is opportune for legislators to enact dedicated legislation concerning celebrity rights. Such a law could define, elucidate, and offer safeguards against the exploitation of rights linked to celebrities while concurrently ensuring their privacy.

It is of utmost importance to delicately balance the preservation of personality rights with fundamental liberties, while also fostering international cooperation to ensure a consistent approach. Strengthening enforcement mechanisms is crucial, and advocating for the ethical use of AI in this context is essential. Additionally, educating both celebrities and the general public about this evolving landscape is pivotal. The legal framework must remain flexible to adapt to technological advancements, and recognizing the economic implications, such as the potential taxation of these rights, is a significant consideration. As we move forward, successfully navigating these complexities is imperative to safeguard the integrity and identity of celebrities in an increasingly digital and AI-driven world.

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Håkan Hydén, Roger Cotterrell, David Nelken and Ulrike Schultz, *'Combining the Legal and the Social in Sociology of Law: An Homage to Reza Banakar,' (Ed.),* Hart Publishing, U.K., 2023, Rs. 9,450/- (INR)

Reviewed by Shailesh Kumar Rajora*

The sociology of law is an area that looks at how laws and society interact. It explores how laws are shaped by social factors like culture and history and, in turn, how they shape society. This involves studying the legal rules arising from social interactions; their impact on people and communities, and societal changes influencing the development of laws. The focus is on legal institutions like courts contributing to maintaining public order and reflecting societal values. This subject area is often taken under a global perspective, comparing legal systems across different societies, and found interdisciplinary, drawing from sociology, anthropology, and political science to gain a comprehensive understanding of the relationship between law and society. With this background, "Combining the Legal and the Social in Sociology of Law: An Homage to Reza Banakar" honours the significant contributions of Reza Banakar while delving deeply into the complex interrelationship between society and law. This extensive anthology, edited by Håkan Hydén, Roger Cotterrell, David Nelken, and Ulrike Schultz, explores the various fields of socio-legal studies and highlights its multidisciplinary nature and useful applications. The book begins with a synopsis of his career and describes how he ignited a discussion about the goals and identity of legal sociology. The book is then divided into five sections with thirty-four chapters, each of which examines a different topic: applied sociology of law, legal culture, law and sociology of law, theory, techniques, and inter-disciplinarity. The book attempts to promote the sociology of law by highlighting the connections between the legal and the social from different angles, in addition to paying tribute to Reza Banakar's memory and original thought.

The book in its first part begins with *an introduction* of the book by Haken Hyden followed with Mariana Vivian's insightful biography of Reza Banakar, highlighting his significant contribution to developing the sociology of law into a distinct discipline that unites social and legal viewpoints. Vivian explores Banakar's analytical framework, highlighting his unique methodology that functions on the levels of empirical, theoretical-methodological, and meta-theoretical thought. This prepares the groundwork for a careful examination of Banakar's contributions and the larger conversation on the nature and goal of legal sociology at large. Further, Max Travers engages with the life and thoughts of Reza Banakar in this part.

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In Part Two with eight chapters, the main topic revolves around *legal theory, legal pluralism, and sociology of law theory*. Comprehensive assessments of legal pluralism, normativity, and the historical change of constitutional formulations are given in the chapters by Isabel Schoultz, Mauro Zamboni, Martin Ramstedt, Roger Cotterrell, Peter Bergwall, Håkan Hydén, Chris Thornhill, and Martin Ramstedt. Rich layers to the discussions are added by the examination of soft law, how multinational firms manage legal plurality, and the difficulties of normative pluralism in an Egyptian paternity case.

Part three again with eight chapters delves into *the sociology of law methods and interdisciplinarity*, contributed by Ulrike Schultz, Balázs Fekete, Linda Mulcahy, Karl Dahlstrand, Mikael Furugärde, Pierre Guibentif, Peter Wahlgren, Stine Piilgaard Porner Nielsen, and Seda Kalem. These chapters address the importance of law-related education, the limitations of knowledge of the law surveys, questions about theory and methodology, and alternative approaches to studying law, including through literature. The quest for scientific methods, the value of combining top-down and bottom-up approaches, and the challenges of empirical research in legal settings are also thoroughly examined.

Part four explores *comparative legal cultures*, featuring chapters by Marina Kurkchiyan, Carlo Pennisi, Lawrence M Friedman, Marc Hertogh, Mathieu Deflem, and Hanne Petersen. These chapters offer insights into legal culture as a concept, the repeated patterns of legal behaviour, reflections on reckless driving in Iran, and the consequences of revolutions for legal cultures. The examination of legal legitimacy, compliance, and the role of pre-modern conceptions in modern Iran adds depth to the comparative analysis.

Part five, focusing on *the sociology of law as a science* in four chapters, highlights Banakar's contributions to incorporating insights from dichotomies into a comprehensive socio-legal research methodology. Chapters by David Nelken, John Woodlock, and Nicolás Serrano explore diverse topics such as the use of Covid-19 indicators, risk management strategies in aviation, and interlegal evocation of peace in Colombia.

Finally, part six in four chapters delves into *the applied sociology of law*, featuring chapters by Ann-Christine Hartzén, Jiří Přibáň, Peter Scharf Smith, Anne Griffiths, and Hildur Fjóla Antonsdóttir. These chapters address issues on minimum wage regulation, constitutional imaginaries, public sentiments on justice, discourses over land tenure, and evidentiary standards in cases of sexual violence. The discussions offer practical insights into trade union solidarity, constitutional symbols, marginalized positions in the legal system, challenges to legal orthodoxy, and the tension between legal rules and human sentiments.

Offering a thorough and multidisciplinary examination of the intricate interactions between law and society, "Combining the Legal and the Social in Sociology of Law" is a magnificent homage to Reza Banakar's legacy. This book is a priceless tool for academics, researchers, and practitioners interested in comprehending and tackling social and legal concerns in modern society because of its wide range of themes and useful applications in socio-legal studies.

This book's price is its only drawback. The majority of students cannot afford the over Rs. 10,000 Price of the book. For individuals who prefer reading books on their devices, there is an option nonetheless, as an e-copy may be found by clicking this link. People of all backgrounds will find the remaining portions of the book interesting and updated with the current socio-legal conversation.

With writings such as "Sociological Jurisprudence: Juristic Thought and Social Inquiry," Roger Cotterrell, the Anniversary Professor of Legal Theory at Queen Mary University of London, UK, and a Fellow of prominent academies, has had a significant impact (2018). Håkan Hydén, a Senior Professor in Sociology of Law at Lund University, Sweden, is dedicated to developing Sociology of Law as a Norm Science, as seen in his latest paper "Sociology of Law as the Science of Norms" (2022). David Nelken, Professor of Comparative and Transnational Law at King's College, London, is noted for his major contributions to sociology of law and criminology, epitomised in "Comparative Criminal Justice: Making Sense of Difference" (2010). Ulrike Schultz is a distinguished specialist who is a retired Senior Academic from FernUniversität in Hagen, Germany.

In conclusion, "Combining the Legal and the Social in Sociology of Law: An Homage to Reza Banakar" serves as a significant and well-crafted exploration of the intricate dynamics between law and society. Edited by Håkan Hydén, Roger Cotterrell, David Nelken, and Ulrike Schultz, the anthology pays homage to Reza Banakar while offering a comprehensive, multidisciplinary perspective on socio-legal studies. Despite the book's commendable contributions and insights from esteemed scholars, its high cost may pose a barrier to student accessibility. However, the availability of an electronic version mitigates this concern, making this resource more widely accessible. Overall, the anthology stands as a crucial read for those in academia, research, and practice seeking a nuanced understanding of the interplay between legal institutions and societal forces in contemporary context.

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Sriram Panchu, MEDIATION- Practice and Law, The Path to Successful Dispute Resolution, Third Edition, 2022, LexisNexis, Gurgaon (2022), Rs 1895/- (INR)

Reviewed by Pulkit Dahiya[*]

Mediation is a traditional and ancient practice in India, where elders of the society would help resolve disputes through dialogue and consultation. Hindu mythology also depicts mediation as a way of settling conflicts peacefully and harmoniously. In the modern era, mediation has regained its significance as a vital aspect of alternative dispute resolution, and it is evolving and expanding rapidly. Though the pandemic (COVID-19) has created several temporary difficulties and made us rely on remote communication and interaction, which pose significant obstacles to achieving the common grounds and resolution. This has resulted in major or even permanent changes in the ways and modes of resolving disputes, especially in mediation, one of which is Online Dispute Resolution (ODR).

Against this background, this book in hand has been updated literature on mediation with latest trends and legal developments in the field. The book titled "MEDIATION - Practice and Law, The Path to Successful Dispute Resolution" consists of twenty-two chapters. It covers topics such as online dispute resolution, the Singapore Convention on Mediation, the UNCITRAL Model Law on International Commercial Mediation and Conciliation, and recent judicial decisions that have shaped the practice and theory of Mediation.

The author begins with a basic introduction to the nature of the adversarial process and highlights the need for mediation. Then, the author gives an overview of the different methods of ADR (Alternative Dispute Resolution), with a focus on mediation. The author describes the mediation process, its advantages and disadvantages, and its applicability in different matters. The author also tries to illustrate the main features of mediation through various examples. The book is a comprehensive guide to the theory and practice of mediation. The author explores the concept of conflict and its resolution, and explains how negotiation skills can help mediators facilitate constructive dialogue. The author also emphasizes the importance of communication in mediation, and provides an overview of the different communication styles and techniques that can be used. The author then presents a detailed description of the mediation process, from

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preparation to closure, and illustrates it with a case study of a real mediation session under the chapter titled "Walking Through a Mediation".

After giving the overview to the whole process of Mediation, the author explores some strategies and tips for mediators and provides advice for the Mediators, and addresses the ethical principles and confidentiality issues that mediators must adhere to, and the dilemmas that may arise in relation to them. Author also has given suggestions for the parties to understand the process of mediation, how they can select a better mediator for their dispute, what they can expect from a Good Mediator, the author also has given some guidance for mediators, what are the things they should focus on, what they need to know, how to prepare for a mediation session and how to appear for a mediation. To illustrate the applicability, advisability and suitability of mediation in different contexts, the author has presented various scenarios and situations. The author has also given examples of how mediation can be used to resolve matrimonial and commercial disputes, showing the benefits and challenges of this alternative dispute resolution method.

The author has presented a comparative study of the mediation laws in India and their applicability in various legal contexts, such as the Insolvency and Bankruptcy Code, 2016. The author has also explored the case laws related to mediation, both from India and other jurisdictions. There are 3 annexures at the end of the book which prove to be really helpful and useful for the readers, where Annexure 1 and 2 consists of Indian and International Statutes respectively, and Annexure 3 consists of various sample agreements and clauses.

Sriram Panchu, the author of this book, is a renowned Senior Advocate and Mediator with a wealth of experience and expertise. He has been entrusted by the Supreme Court of India with several high-profile disputes, such as the Ayodhya Babri Masjid Ram Janambhoomi dispute, where he is a member of the three-person Mediation Committee along with Mr Justice Ibrahim Kalifulla and Sri Sri Ravi Shankar. In this book, he draws on his firsthand knowledge of mediating the dispute and aims to provide a lucid and insightful analysis of the issues. The book is written in a clear and engaging style that appeals to the readers. The authors have updated the book with the recent rulings on the topic and have also provided their insights based on their extensive experience, knowledge and expertise in the field which would benefit the students, practitioners, and researchers who are interested in the field of mediation.

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