NLIU LAW REVIEW

VOLUME – XIII **ISSUE – II**

JUNE 2024

NATIONAL LAW INSTITUTE UNIVERSITY

KERWA DAM ROAD, BHOPAL - 462 044 (M.P.)

The NLIU Law Review is published by the students of National Law Institute University, Bhopal, India.

The NLIU Law Review publishes material on subjects of interest to the legal profession. It invites unsolicited manuscripts for publication. Such manuscripts should be sent in MS Word (.docs format) to lawreview@nliu.ac.in All citations and text generally conform to the Oxford University Standard for the Citation of Legal Authorities (OSCOLA) (4th ed. 2012).

All rights reserved. No article or part thereof published herein may be reproduced without the prior permission of the NLIU Law Review. For all matters concerning rights and permission, please contact NLIU Law Review at lawreview@nliu.ac.in

The views expressed in the articles published in this issue of NLIU Law Review are those of the authors and in no way do they reflect the opinion of the NLIU Law Review, its editors or National Law Institute University, Bhopal.

Recommended form of citation:

(2024) 1 NLIU L. Rev. <page number>

PATRON-IN-CHIEF

Hon'ble Justice Ravi Malimath

Chief Justice, High Court of Madhya Pradesh, India

PATRON

Prof. (Dr.) S. Surya Prakash

Vice Chancellor

National Law Institute University, Bhopal

FACULTY ADVISOR

Prof. (Dr.) Ghayur Alam

Ministry of HRD Chair Professor of IP Law,

National Law Institute University, Bhopal

ADVISORY PANEL

Hon'ble Justice Hemant Gupta
Former Judge, Supreme Court of India

Hon'ble Justice P.P. Naolekar
Former Judge, Supreme Court of India
Former Lokayukt, Bhopal, Government of Madhya Pradesh, India

Hon'ble Justice Randall R. Rader
Former Chief Judge, United States Court of Appeals for the Federal Circuit, Washington DC

Hon'ble Justice Ajit Singh
Former Chief Justice, High Court of Guwahati, India
Currently appointed as the first Lokayukta of Odisha

Hon'ble Justice Satish C. Sharma
Judge, Supreme Court of India

Prof. Ranbir Singh
Founder and Former Vice-Chacellor, National Law University, New Delhi, India

Prof. Timothy Lomperis
Professor Emeritus of the Department of Political Science, Saint Louis University

PEER REVIEW PANEL

Abhishek Tewari
Partner at S&R Associates

Anjali Chawla
Associate Professor of Law and Assistant Dean (Office of Student Affairs and Initiatives), Jindal Global Law School

Ankit Gupta
Advocate at Chambers of Advocate Manav Gupta

Anoushka Ishwar
Associate at Cyril Amarchand Mangaldas

Deeksha Malik
Principal Associate at Khaitan & Co.

Deeksha Manchanda
Partner at Chandhiok & Mahajan, Advocates and Solicitors

Harshdeep Singh Bedi
Associate at S&R Associates

Hrishikesh Bhise
Associate at Cyril Amarchand Mangaldas

Nikita Singhi
Senior Associate at Cyril Amarchand Mangaldas

Parag Singhal
Associate at Ahlawat & Associates

Prabal de
Senior Associate at Trilegal

Raghavi Viswanath
PhD Researcher at the European University Institute

Saavni Kamath
Law Clerk cum Research Associate, Supreme Court of India

Shubham Joshi
Independent Consultant

Syamantak Sen
Associate at Saraf & Partners

Tanvi Prabhu
Associate at Shardul Amarchand Mangaldas & Co.

Utsav Garg
Advocate, New Delhi

General Student Body of NLIU Law Review 2023-24

EDITOR-IN-CHIEF

Akshat Shukla

DEPUTY EDITOR-IN-CHIEF

Pooja V.

CONTENT REVIEW BOARD

Content Board Heads – **Anjali Catherine Varghese and Tarushi Solanki**

Fifth Year Member

Aditi Sannidhi

Fourth Year Members

Avikalp Mishra, Nikhil Bhargava, Saket Sharma, Shriyadita Srivastava

Third Year Members

Aditi Shreya, Akhila Hebbar, Rashi Upadhyay, Swadha Chandra, Tanishka Tomar

TECHNICAL REVIEW BOARD

Technical Board Heads – **Komal Ray and Shvena Neendoor**

Third Year Members

Disha Kothawade, Divyanshi Shukla, Gauri Agarwal, Manasvita Raj, Purava Rathi, Samyak Jain

EDITORIAL POOL

Third Year Members

Pragya Somkunwar, Anushka Ajay, Ashita Mathur, Lavisha Agarwal, Hansika Kumari

Second Year Members

Lavya Bhasin, Swati Giri, Vivek Rajurkar, Jyotsna Sood, Himanshu Mishra, Ananya Gupta, Khushi Pandey

First Year Members

Avani Raj, Khushi Krishania, Harsh Jain, Palak Sharda, Shivansh Pathak, Tamanna A, Yashvi Bansal

MANAGERIAL BOARD

Managerial Board Heads – **Saksham Sharma and Tanvi Agrawal**

Fifth Year Members

Divya Pahade, Shruti Gupta

Fourth Year Members

Mahak Saxena, Tarun Barskar

Third Year Members

Anoushka Naveen, Prakhar Mehrotra, Arushi Jha, Swastika Ganguly

Second Year Members

Samyak Raj Nema, Milan Sharma, Harshit Madaan, Ayush Agrawal, Rohit Kadian, Shehvar Saleem, Samarth Udasin

First Year Members

Alisha Pranju, Anagh Dixit, Gati Jhamb, Mihir Tej Kalle, Tushar Arora, Anisha Giri Goswami

TABLE OF CONTENTS

EDITORIAL NOTE I

ARTICLES

MERGER CONTROL & COMPETITION (AMENDMENT) ACT, 2023: ANALYSING THE AMENDMENT & ADVANCING POST-AMENDMENT CONSIDERATIONS FOR THE COMMISSION FOR AN IMMACULATE COMBINATION REGIME 1

Ayush Raj

A 'MATERIAL' SOLUTION: MATERIAL INFLUENCE AS A STANDARD TO COMBAT COMMON OWNERSHIP CONCERNS 30

Archita Satish

DETERMINING URGENCY IN COMPULSORY PRE-LITIGATION COMMERCIAL MEDIATION...................................49

Aravind Sundar

HORIZONTAL AND VERTICAL PROTECTION OF COPYRIGHT IN STAND-UP COMEDY 71

Chetan R.

THE DISJUNCTION BETWEEN CUSTOM AND FORMAL LAW: EROSION OF MATRILINEAL SUCCESSION IN INDIA..............93

Devangi Dube and Avi Kapoor

EXPLORING THE ROLE OF MOTIVE IN INSIDER TRADING: A CASE STUDY OF *SEBI V. ABHIJIT RAJAN* AND ITS IMPLICATIONS FOR INDIA'S LEGAL FRAMEWORK............ 112

Arnav Gulati

THE STRUCTURAL ROLE OF PRIVATE ENFORCEMENT IN DIGITAL MARKETS: AN INDIAN COMPETITION LAW PERSPECTIVE 126

Neelanjana Ghosh and Ranjul Malik

ASSAILING THE TENABILITY OF SECTION 122 OF THE INDIAN EVIDENCE ACT: TRAVERSING THROUGH THE TROUBLED WATERS 155

Saumya Ranjan Dixit and Bhabesh Satapathy

EDITORIAL NOTE

As the academic year draws to a close, the editorial team of the NLIU Law Review takes great pride in having successfully navigated another productive year for the Journal. Guided by the vibrant spirit of legal discourse, we are delighted to present the latest instalment, Volume XIII Issue II. Each article has been meticulously chosen to encapsulate the contemporary legal landscape of the country, serving as a testament to the remarkable intellect within our academic community. It is our enduring commitment to foster stimulating legal learning and facilitate meaningful discussions, thus reaffirming our Journal's position as a steadfast bastion of scholarly excellence.

In our first article titled, "*Merger Control & Competition (Amendment) Act, 2023: Analysing the Amendment & Advancing Post-Amendment Considerations for the Commission for an Immaculate Combination Regime*," the author examines the significant changes brought about by the Competition (Amendment) Act, 2023, particularly from the perspective of mergers and acquisitions ("**M&A**"). These amendments mark a new era in India's competition law regime, increasing the role of the regulator and the transaction costs for involved parties. The paper identifies practical challenges in implementing the deal value threshold ("**DVT**"), such as its efficacy and the additional administrative burden on the CCI. The author argues that while the overhaul of the merger control regime is a positive step, there are ambiguities in the implementation of new definitions and provisions. The paper conducts a multi-jurisdictional analysis and reviews CCI's decisional practices to propose a future roadmap for regulating combinations. Additionally, the paper discusses the Draft Regulations on Combinations, 2023, to anticipate the final combination framework. The author emphasizes the need to tailor regulations to the Indian market, while incorporating international antitrust best practices to promote fair competition and ease of doing business.

In the article titled, "*A 'Material' Solution: Material Influence as a Standard to Combat Common Ownership Concerns*," the author examines the introduction of the "material influence" standard codified by the 2023 Amendment to the Competition Act, 2002, particularly focusing on its potential to address concerns regarding common ownership. Common ownership, the practice where an entity holds investments in multiple rival firms purely for non-strategic purposes, has raised concerns about reduced competition and tacit collusion. The paper proposes that with suitable modifications and notification of delegated legislation under the new provision of the 2023 Amendment Act, the material influence standard can effectively address these concerns in India.

Next, in the article titled, "*Determining Urgency in Compulsory Pre-litigation Commercial Mediation*," the author delves into the intricacies of determining urgency in compulsory pre-litigation commercial mediation, as mandated by Section 12A of the Commercial Courts Act. While the Act requires litigants to attempt settlement through mediation before initiating a lawsuit, it provides an exception for suits seeking urgent interim relief. The author identifies and critically analyses three conflicting approaches adopted by various High Courts regarding the interpretation and application of this exception. Drawing from the landmark judgment of *Patil Automation v. Rakheja Engineers*, which affirmed the mandatory nature of pre-litigation mediation under Section 12A, the article emphasizes the importance of courts adhering to the intent of reducing judicial workload and docket explosion by directing suits to mediation. The author advocates for a rigorous assessment of urgency claims, an approach that aims to prevent litigants from misusing the exception and undermining the mandatory nature of pre-litigation mediation, as upheld by the *Patil Automation* ruling.

In the article titled, "*Horizontal and Vertical Protection of Copyright in Stand-up Comedy*," the author delves into the intricate landscape of

copyright protection in stand-up comedy, addressing the burgeoning popularity of the genre on streaming platforms and live performances. Despite its widespread appeal, stand-up comedy lacks specific legal safeguards, necessitating reliance on India's Copyright Act, 1957, and its jurisprudence. The article explores how stand-up comedy fits within this legal framework, examining two key dimensions: horizontal protection, dealing with copyright issues among comedians, and vertical protection, focusing on conflicts between comedians and producers. Highlighted by the recent controversy involving comedian Vir Das, the author provides a comparative analysis with US precedents and proposes future directions for the industry.

Further, in the article titled, "*The Disjunction Between Custom and Formal Law: Erosion of Matrilineal Succession in India*," the authors investigate the clash between traditional customs and formal law, specifically focusing on the erosion of matrilineal succession in India. Tribal communities, often isolated and self-sustaining, maintain unique cultural practices like matrilineal succession, where ancestral resources pass to female descendants, and identity is inherited through the mother. Focusing on the Khasi and Garo societies in Meghalaya, the paper argues that the limited power women gain through matriliny is undermined by the Indian courts' colonial interpretation of customary laws, requiring them to be 'ancient, certain, and reasonable.' This interpretation, along with interactions with formal legal structures like land reforms and codified personal laws, further weakens these tribal customs and imposes external gender norms.

In our next article titled, "*Exploring the Role of Motive in Insider Trading: A Case Study of SEBI v. Abhijit Rajan and Its Implications for India's Legal Framework*," the author examines the role of profit motive in insider trading within the Indian legal context, focusing on the landmark case, *SEBI v. Abhijit Rajan*. This case has significantly influenced insider trading law in India, highlighting the challenges of the current legal framework, particularly the Prohibition of Insider

Trading Regulations, 2015. The *SEBI v. Abhijit Rajan* case introduced the motive of financial gain as a critical element, prompting a re-evaluation of the legal approach to insider trading. The paper analyses legal precedents to understand the complexities of profit-driven intent and the stringent criteria for defining sensitive information. The author argues for updated regulations to balance market integrity with fair treatment of business practices, calling for clear guidelines to assess profit motives and avoid unjust penalization.

Next, in the article titled, "*The Structural Role of Private Enforcement in Digital Markets: An Indian Competition Law Perspective*," the authors analyse the role of private enforcement in India's digital markets, particularly concerning consumer data and privacy within competition law. As Big Tech's influence grows, regions like the EU, UK, and US have introduced new legislation, leading India to consider the Digital Competition Act. However, India has largely ignored private enforcement for consumer compensation claims. This article argues for the inclusion of mechanisms for antitrust damages in the upcoming Act. It reviews current provisions, identifies their shortcomings, and suggests structural improvements. The authors herein propose increasing legal guidance and expanding avenues for compensation to deter Big Tech's abusive practices, aiming to enhance private enforcement without undermining public systems.

Finally, in the article titled, "*Assailing the Tenability of Section 122 of the Indian Evidence Act: Traversing Through the Troubled Waters*," the authors examine Section 122 of the Indian Evidence Act, 1872, which provides marital communication privilege to protect marital privacy and uphold marriage as an institution. The article discusses various deficiencies within the provision and proposes addressing these issues by introducing additional exceptions inspired by foreign jurisdictions. By critiquing case law from the UK, USA and India, the authors provide a comparative analysis and suggest adopting progressive developments from other countries. The article emphasizes

limiting the privilege's impact on judicial information-seeking rather than advocating for its complete removal.

Editorial Board

MERGER CONTROL & COMPETITION (AMENDMENT) ACT, 2023: ANALYSING THE AMENDMENT & ADVANCING POST-AMENDMENT CONSIDERATIONS FOR THE COMMISSION FOR AN IMMACULATE COMBINATION REGIME

Ayush Raj[*]

ABSTRACT

*The Competition (Amendment) Act, 2023 ("**Amendment Act**") brings prominent changes to the competition law regime in India; however, from a merger and acquisition ("**M&A**") viewpoint, it appears that the changes introduced are the beginning of a new dawn. Prima facie, amendments to the legislative framework of combinations will increase the role of the regulator as well as the transaction costs for the parties. This is aimed towards maintaining a balance between competition, innovation and concentration. This article discusses the possible implications of these amendments on the competition framework and suggests ways to further refine these changes for a nuanced combination framework. Introducing the deal value*

[*]Ayush is a fourth-year B.A. LLB. (Hons.) student at the National Law University, Nagpur. The author may be reached at reach.ayushraj@gmail.com.

*threshold ("**DVT**") in the notifiability assessment procedure shall bestow the opportunity on the Competition Commission of India ("**Commission/CCI**") to consider the monetary impact of non-price considerations in M&A. However, a close inspection of the amendment also highlights practical hurdles in its implementation, including the efficacy of DVT and the administrative burden on the CCI. In this paper, the author argues that overhauling the merger control regime is indeed a welcome move; although, there are many ambiguities regarding the implementation of the new definitions and provisions. This paper provides a multi-jurisdictional analysis along with examining the decisional practice of the CCI to suggest the future roadmap for regulating combinations. It also identifies certain loopholes of DVT and provides critical suggestions to improve the efficacy of the same in the Indian market. Moreover, the paper also emphasizes on the relevant provisions of the Draft Regulations on Combinations, 2023 ("**Draft Regulations**") to gauge the final combination framework. Lastly, the author suggests that it is imperative to capture the needs of the Indian market and accommodate the best international antitrust measures to satisfy the legislative objectives that would promote fair competition and ease of doing business.*

Keywords: *The Competition (Amendment) Act, 2023, Deal Value Threshold, Merger Control, Killer Acquisitions, Big Data Mergers, Draft Combination Regulations*

I. INTRODUCTION

Competition law is premised on market regulation and consumer welfare. In the present times when businesses are evolving and transitioning, it becomes paramount to keep a continuous check on the above two mottos of competition law. The Amendment Act that revamps the existing Competition Act, 2002 ("**the Act**")[1] is a filtered product of the extensive exercise done by the Competition Law Review Committee ("**CLRC**")[2] and the Standing Committee on Finance ("**Finance Committee**").[3] Some of the amendments made to the Act are already effectuated,[4] while some provisions require clarifications and will be brought into force once the final Regulations are issued by the CCI.

Against this backdrop, in this article, the author discusses the changes in the combination regime with the introduction of DVT. Competition law rests on the principle that businesses must provide equal opportunities to every entity[5] in the market and thus, it restricts those actions or behaviour that cause or are likely to cause any harm to fair

[1]The Competition Act, 2002 (12 of 2003).
[2]Ministry of Corporate Affairs, 'Report of the Competition Law Review Committee' (July 2023).
[3]Standing Committee on Finance, 'Fifty Second Report on the Competition (Amendment) Bill 2022' (2022).
[4]'Ministry of Corporate Affairs Notifies Some Provisions of the Competition (Amendment) Act, 2023' (*AZB & Partners*, 22 May 2023) <https://www.azbpartners.com/bank/ministry-of-corporate-affairs-partially-notifies-some-provisions-of-the-competition-amendment-act-2023/> accessed 3 November 2023.
[5]SM Duggar, *Guide to Competition Law 2002* (8th edn, Lexis Nexis 2020).

competition in the market. In India, the Act provides some criteria to scan those transactions that attack the basic premise of competition law. However, with the changing nature of the market, there was a need to re-evaluate these parameters as the existing ones proved to be inadequate and substandard. Therefore, these changes brought by the legislature seek to equip the market regulator with the necessary tools to combat any anti-competitive measure adopted by the companies.

This paper adapts a holistic approach while dealing with the R*egulation of Combinations* provisions of the Amendment Act and describes the implications of the same. Primarily, it outlines the concept of DVT and its requirement in the prevailing market conditions. The author undertakes a multi-jurisdictional comparative analysis of the laws governing combinations in order to propose a comprehensive structure for India. The author further emphasizes that the Commission needs to step in quite carefully so as to ensure that overregulation for DVT does not hurt innovation and does not become detrimental to the funding of startups. In subsequent subsections, the paper also highlights that while foreign jurisdictions provide very useful directions for India to define the intricacies of DVT, adopting such measures must conform to the Indian market requirements and aid the legal landscape without overburdening the CCI. Going ahead, the author delves into the discussion of killer acquisitions and data-driven mergers. Pertinently, they weigh the conflicting arguments concerning DVT in India, that is the need to implement DVT versus whether DVT is needed. Based on the cross-jurisdictional analysis and increasing number of acquisitions by big tech, the author proposes to argue that although not perfect, DVT with certain modifications, as suggested, would empower the CCI to look at the questionable transactions before any harm is done. Therefore, it might prevent the occurrence of harm rather than providing relief after the harm occurs. The former would be an obvious choice for any developing economy that would want businesses to thrive, and would also give multiple alternatives to consumers.

In the next part, the paper adopts a two-fold approach wherein it identifies some concerns regarding the efficacy of DVT as an efficient merger control tool and also rebuts those concerns by way of additional pro-DVT arguments. Lastly, the paper examines the Draft Regulations to contend that the success of DVT essentially depends on the nuanced ingredients of the Regulations and the decisional practice of the CCI. Therefore, the concluding remarks of the paper highlight the way forward for the Commission.

II. DECRYPTING THE DEAL VALUE THRESHOLD: A WELL-PLACED PROVISION OR A MISFIT?

A peculiar amendment made in the Act is the inclusion of the 'deal value' threshold under Combinations.[6] DVT is likely to be implemented when the final Combination Regulations ("**the Regulations**") are issued by the CCI. The publication of Draft Regulations for public consultations is the first step that roughly gives an idea of DVT and its calculation. At present, the merger control thresholds in India are based on the value of the assets and turnover of the parties involved in the transaction. These merger control provisions were notified in 2011 and have been in effect for more than a decade.[7] Given the dynamic nature of the digital markets which have transitioned very fast from *emerging* to *established*, there was a serious need to re-examine the effectiveness of these provisions. As most of the digital players have very few assets, they easily managed to escape the competition scrutiny and due to statutory incapability, the CCI was left with no option to tackle these data-rich entities. There have been multiple mergers and acquisitions in the past in this area that has raised questions on the appropriateness of the Indian competition law.

[6]The Competition (Amendment) Act, 2023 (9 of 2023) s 6(B)(d).

[7]The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, No. 3/2011.

A. Deciphering the statutory concept of DVT

As included in the Amendment Act, DVT is a standalone parameter that will trigger a notification to the CCI. It stands on the size of the transaction, that is, the monetary consideration of the deal. In simpler words, DVT obligates the transacting parties to notify the Commission of the deal value, that is, the amount that the proposed acquirer is willing to pay for the deal when it exceeds the limits prescribed by the Commission or the government, as the case may be. In this regard, the Amendment Act provides that a notification to the CCI shall be a must "if the value of any transaction, in connection with the acquisition of any control, shares, voting rights, or assets of an enterprise, merger, or amalgamation exceeds rupees two thousand crores."[8] Furthermore, the provisions of the DVT shall override the *de minimis* exemption[9] which is granted to such deals where their value of assets and their revenue in India do not exceed 350 crores and 1000 crores respectively.[10]

Be that as it may, digital platforms invite shared concern among antitrust regulators across jurisdictions; this concern stems from the insufficiency of existing merger control provisions[11] and it is leading to consensus among the regulators to come up with DVT. By including DVT in the legislation, India has followed the steps of some of the more mature competition legislations of the world. The insertion of DVT is aimed to protect *nascent competition* and check *killer acquisitions* and currently it is capped at INR 2000 crore.[12] However, there are several concerns attached to the application of DVT and its effective implementation is not free from encumbrances. It is to be noted that the

[8]The Competition (Amendment) Act, 2023 (9 of 2023) s 6(B)(d).
[9]Notification regarding (a) de minimis exemption; (b) relevant assets and turnover in case a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, 2017, Competition Commission of India, No. 881/2017.
[10]ibid.
[11]International Competition Network, 'Recommended Procedure for Merger Notification and Review Procedures, Working Group Comments' (2017).
[12]In consultation with the CCI, the Government may revise it every 2 years.

Ministry of Corporate Affairs submitted before the Standing Committee that DVT is majorly intended for digital and tech players,[13] however, the Amendment Act does not denote any specific applicability for the DVT and there is no sectorial restriction on its application.

B. From conceptualisation to implementation of DVT: Lessons from other jurisdictions

The Regulations covering DVT must address whether, in case of a multi-national transaction, will the global deal value be considered. Additionally, the method of calculating the amount of the deal should also be clarified keeping the intricacies of mergers and acquisitions ("**M&A**") into consideration. These calculations might replicate or show similarities with the principles adopted in Germany[14] and Austria.[15] Another key aspect that needs to be properly dealt with in the Regulations is the statutory mechanism of dealing with transactions having post-closing obligations, cash-free transactions, and the like. The Joint Guidance Paper issued jointly by Austria and Germany has explained the contours of the deal value[16] which the Commission must take into cognizance while defining the nitty-gritty of DVT. Moreover, the Commission must also determine whether the global transaction value is to be taken into consideration, or, only the domestic transaction value will be relevant. At this juncture, it is to be noted that the Amendment Act mandates taking the global turnover of the entity to impose penalties under Section 27 of the Act.[17] Curiously, merger control provisions are quite distinct from the laws prohibiting anti-competitive practices and abuse of dominance, yet it will be interesting

[13]Standing Committee on Finance, 'Fifty Second Report on the Competition (Amendment) Bill 2022' (2022) para 3.3.
[14]Competition Act, 2013 (Germany) Ch 7.
[15]Federal Cartel Act, 2005 (Austria) Ch 3.
[16]Bundeskartellamt, 'Guidance on Transaction Value Thresholds for Mandatory Pre-Merger Notification (s 35(1a) GWB and s 9(4) KartG)' (2018).
[17]The Competition Act, 2002 (12 of 2003) s 27.

to see whether the CCI chooses to attack the global deal amount or restricts itself to India. Again, it is equally important to mention that preferring global turnover instead of Indian turnover under Section 27 itself contradicts the settled jurisprudence that penalties are levied for the violation of the Act and against any appreciable adverse effect on competition in India. The Supreme Court has also clarified that CCI must be cognizant of the doctrine of proportionality.[18] Hence, it should be reasonable to limit the deal value evaluation to the domestic level since any M&A activity and turnover should be examined at the domestic level.

Other countries contain similar provisions in their competition law. The USA also has a similar but expanded version of DVT known as the *size of the transaction*[19] threshold that contains twin provisions, that is, evaluation of the transaction value coupled with the size of the parties. The European Union's ("**EU**") competition law though does not contain an express mention of DVT in competition law; nevertheless, the European Commission ("**EC**") is empowered to scrutinize non-notifiable mergers.[20] In addition to the EU, the UK also follows this trend of investigating specific non-notifiable mergers. It is guided by the *share of supply test* wherein a merger can be investigated by the Competition and Markets Authority ("**CMA**") as one-fourth of the supply of goods or services is controlled by the merged entity.[21] Likewise, France has specific Regulations on ex-ante and ex-post-merger control.[22] Lastly, South Korea has also enforced the transaction value threshold by bringing amendments to the existing law.[23] The

[18]*Excel Crop Care Limited v Competition Commission of India and Another (2017) 8 SCC 47.*
[19]Clayton Antitrust Act, 1914 (United States of America) s 7A.
[20]Council Regulation (EC) 139/2004 on the control of concentrations between undertakings, OJ L24/1 (29 January 2004) art 22.
[21]The Enterprise Act, 2002 (United Kingdom) s 23(3) and s 23(4).
[22]OECD Secretariat, 'Start-ups, Killer Acquisitions and Merger Control - Background Note' (2020) Ch 3.
[23]Hong Ki Kim and Kee Won Shin, 'South Korea: KFTC boosts antitrust laws with stronger laws and pivotal amendments' (*Global Competition Review*, 10 March 2023)

purpose of introducing these jurisdictions in the course of the discussion is to highlight that regardless of whether DVT is in practice or not, several antitrust regulators have the power to check non-notifiable mergers, however, the Indian competition watchdog lacks such equivalent power.

Therefore, in the given context, the CCI must take care of the concerns of the stakeholders otherwise the confusion on computing DVT shall lead to a slew of unnecessary combinations being notified to the Commission, thereby increasing the burden of the parties and hampering the spirit of India's efforts towards ease of doing business.

III. ANALYSING THE UTILITY OF DVT IN TACKLING KILLER ACQUISITIONS AND BIG DATA MERGERS

One illustration exhibiting the pressing need to implement DVT provisions in the Act is to control killer acquisitions. The issue which the Commission grapples with is that though these digital platforms do not breach the asset and turnover limit, the consideration for the deal speaks volumes of their market presence and deep penetration in the relevant market. Despite these deals encouraging monopolistic behaviour, the Commission has not been able to regulate such transactions due to the absence of any such legal mechanism, for example, the acquisition of WhatsApp by Facebook which was valued at around US $19 Billion. This was a clear exhibition of the inadequacy of competition laws across most jurisdictions.[24] There have been many

<https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2023/article/south-korea-kftc-boosts-antitrust-laws-stronger-regulation-and-pivotal-amendments#:~:text=Under%20the%20amended%20MRFTA%20and,local%20nexus%20is%20deemed%20sufficient> accessed 3 November 2023.

[24] Avirup Bose, 'Why India's antitrust body should scrutinise the WhatsApp buy' *Business Standard* (2 March 2014) <https://www.business-standard.com/article/opinion/avirup-bose-why-india-s-antitrust-body-should-scrutinise-the-whatsapp-buy-114030200719_1.html> accessed 3 November 2023.

other instances of mergers between tech players that escaped antitrust scrutiny: the acquisition of LinkedIn by Microsoft[25] and Myntra by Flipkart, to name a few. Interestingly, most of the so-called killer acquisitions in the recent past have involved big tech and data-heavy entities.[26] It can be said that data banks possessed by smaller and new firms are quite rewarding for big tech companies as it serves multiple purposes for them, *firstly*, they get the data which adds to their already existing data wealth and helps them to create a data monopoly; *secondly*, they eliminate competition and acquire control of the potential competitor; and *thirdly*, they get the advantage of the innovation that the startup or a new entrant brings with itself.[27] Hence, in this section, the author discusses how DVT can be employed to tackle the problems advanced by big data mergers and killer acquisitions and examines the suitability of DVT in combating the same.

A. *Killer acquisitions and DVT: Can DVT kill killer acquisitions?*

Killer acquisition denotes a situation where an established entity acquires a relatively newer entity in its nascent stage with a desire to eliminate competition and capture the innovation that the latter carries.[28] It is a theory of harm wherein a firm acquires the target to "discontinue the development of the target's innovative projects and pre-empt future competition."[29] These early-stage startups usually

[25]*Case M. 8124 Microsoft/LinkedIn* (2016) EC.
[26]Akhil Bhardwaj, 'If Data is the New Oil, Indian Competition Law Needs an Urgent Update' *The Wire* (25 June 2020) <https://thewire.in/tech/data-oil-competition-commission-india-facebook-whatsapp> accessed 3 November 2023.
[27]Shreya Mukherjee and Damodar Hake, 'Big Data Mergers: An Analysis of European and Indian Competition Law Regime' (2001) 24 Cardiometry, Moscow 762, 767.
[28]Richard Whish, 'Killer Acquisitions and Competition Law: Is there a gap and how should it be filled?' (2022) 34(1) NLSLR 1-4.
[29]Cunningham, Ederer and Ma, 'Killer Acquisitions' (2021) 129(3) JPE Chicago 649-702.

escape the regulatory radar because there is no breach of traditional jurisdictional thresholds.[30] These killer acquisitions result in concentration of market power and by the very nature of killer acquisitions, they are intended to eliminate potential competition.[31] The major problem that these killer acquisitions pose is that often they remain below the radar and therefore, do not invite any kind of regulatory oversight.[32]

The problem killer acquisitions demonstrate however to antitrust regulators is that it is significantly difficult to evaluate whether the entity that is being acquired is significant enough to create a competition issue in the market.[33] The evidence and reasons warranting that the proposed combination should be rejected must be sound enough to be protected in any court of law that is tasked to review the regulator's decision. With the emergence and thereafter the rapid expansion of digital markets, it seems prudent to question whether the underlying objective behind the large number of acquisitions[34] made by big tech is to wash out credible competition from the market. There have been numerous examples wherein competition regulators failed to identify a potential threat to competition, similarly, there are also recent examples where the regulators appeared more vigilant and their

[30]Amy C Madl, 'Killing Innovation?: Antitrust Implications of Killer Acquisitions' (2020) 38(28) Yale LR 1,6.
[31]Furman Review, 'Report of the Digital Competition Expert Panel on Unlocking digital competition' (2019) para 3.43.
[32]Adarsh Vijayakumaran and H Anantha Sankar, 'Putting a Knot on Killer Acquisitions in India: Lessons from EU New Merger Control Policy 2021' (*Jurist*, 27 August 2021) <https://www.jurist.org/commentary/2021/08/vijayakumaran-sankar-merger-control/> accessed 5 November 2023.
[33]Tânia Luísa Faria, Margot Lopes Martins and Raquel Marques Nunes, 'New trends in merger control: capturing the so-called killer acquisitions… and everything else' (*Uría Menéndez*, 2021) <https://www.uria.com/documentos/publicaciones/7846/documento/art02.pdf?id=12771&forceDownload=tru> accessed 11 November 2023.
[34]Cunningham, Ederer and Ma, 'Killer Acquisitions' (2021) 129(3) JPE Chicago 649-702.

timely intervention led to the termination of the proposed acquisition.[35] One popular example is the Facebook-Giphy deal[36] wherein Facebook was ordered to sell Giphy to an approved purchaser. The CMA identified dual issues in this deal, *firstly*, a merged Facebook/Giphy could deny access to GIFs to other social platforms, and this would drive even more traffic to the Meta-controlled entities which would also lead to unilateral terms of agreement between Meta and other platforms willing to use the Giphy services and therefore, undeniably, data would be the consideration of those agreements. *Secondly*, the CMA interestingly tried to delve into the question of whether it can be termed a killer acquisition aiming to eliminate competition. Resultantly, CMA denied the acquisition and ordered the divestiture of Giphy by Facebook, a landmark decision in EU merger control jurisprudence.

However, to cement the provisions of merger control relating to killer acquisitions and to address the regulatory gaps, there needs to be an unambiguous legislative framework. At this juncture, DVT presents a possible alternative to ease the situation of regulators. The adoption of DVT was also discussed by the EU where they noted that this may be an alternative to the existing thresholds but at the same time, this would cause extra administrative burden on the CMA.[37] Therefore, the EU has not included the value-based threshold in its jurisdiction.[38] The problems that DVT can create have already been discussed in detail in this article. In India's context, it will be interesting to see how DVT unfolds in its objective of combating killer acquisitions; however, it is

[35]Reeya Rakchhandha, 'The Digital Economy and Killer Acquisitions: A Comparative Analysis of the CCI's Merger Thresholds for Digital Markets' (2022) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4193065> accessed 12 November 2023.

[36]*Meta Platforms, Inc./Giphy, Inc. Final Order*, CMA, 18 November 2022.

[37]Martin Gassler, 'Why the introduction of a new transaction-value jurisdictional threshold for EUMR has been postponed, atleast for now' (*Oxford Competition Law*, 28 June 2019) <https://oxcat.ouplaw.com/page/775> accessed 7 November 2023.

[38]ibid.

safe to say that despite the challenges that it brings, it will at least provide a mechanism for the CCI to look into killer acquisitions which were not present until the latest amendment.

B. The big becoming bigger: Role of DVT in regulating big data mergers

Big Data means digital data from any digital source. The types of big data include texts, images, videos, geometries, sounds and their combinations.[39] It usually entails value creation through use of such collected data. The primary competition concern with big data mergers is its unique ability to escape competition scrutiny by the regulators because big tech firms do not play with assets and turnover; rather consumer data becomes a huge asset for them.[40] This leads to a path that facilitates combinations as they remain well within the jurisdictional thresholds of assets and turnovers especially when any big entity acquires another entity at a relatively nascent stage that consequently appears to pose no AAEC to the market at that time. However, these big data mergers germinate monopolistic behaviour and the gradual accumulation of consumer data helps them to create entry barriers in the market. This is because access to personal data assists big tech firms to analyse the same and respond to consumer needs and preferences- a hurdle specific to potential entrants which entities without data access find quite difficult to tackle. This essentially leads to foreclosure of competition and allows big tech to act as a monopolist. Facebook's acquisition of WhatsApp can be cited as a contemporary example at a time when Meta is facing antitrust investigations from multiple jurisdictions. Due to their powerful

[39]Yun Li, 'Big Data and Cloud Computing' in Huadong Guo, Michael F. Goodchild and Alessandro Annoni (ed), *Manual of Digital Earth* (1st edn, Springer 2020).
[40]Adarsh Vijayakumaran and H Anantha Sankar, 'Putting a Knot on Killer Acquisitions in India: Lessons from EU New Merger Control Policy 2021' (*Jurist*, 27 August 2021) <https://www.jurist.org/commentary/2021/08/vijayakumaran-sankar-merger-control/> accessed 5 November 2023.

market presence, huge user base, and encashment of data, these big data mergers run into millions and billions. Hence, effective enforcement of DVT can act as an effective ex-ante tool to envision the potential threats to competition and to accordingly, modify or reject the scheme of the proposed combination.

In digital markets, minimal assets and turnover lead to inefficacy in the traditional thresholds which are assessed quite objectively. The digital market is fuelled by network effects and user data and these parameters are not included in the traditional thresholds. Primarily, digital markets offer their services at a very minimal cost or free of cost, thus, they are also called zero-price markets.[41] They prioritize increasing their user base and data collection, thereby banking upon economies of scale.[42] As these non-price resources do not appropriately translate into the traditional asset and turnover framework, competition authorities find it difficult to get a hold of such transactions involving big tech irrespective of the fact that the non-price resources make them highly valuable and the consideration for such a proposed transaction shoots up.

As opposed to the traditional thresholds,[43] DVT is based on the subjective assessment of monetary consideration taking into account

[41]Anoop George and Shreya Bambulkar, 'A Need to Relook the Merger Control in the Digital Economy – An Analysis' (2019) Emerging Trends in Corporate and Commercial Laws of India 3-23, 3 <https://cbcl.nliu.ac.in/wp-content/uploads/2019/11/Emerging-Trends-in-Corporate-and-Commercial-Laws-of-India.pdf> accessed 8 November 2023.

[42]Bhargavi G Iyer and Ojaswi Bhagat, 'Data Concentration as an Invisible Fosse: A Comprehensive Analysis of the Role of Data in Facilitating Anti-Competitive Practices' (2022) Contemporary Developments in Corporate and Commercial Laws in India 1-18 <https://cbcl.nliu.ac.in/wp-content/uploads/2023/02/7th-NLIU-Trilegal-Summit-Book.pdf> accessed 6 November 2023.

[43]Rahul Bajaj, 'Towards a Framework for Scrutinizing Combinations in the Digital Market - A Roadmap for Reform' (*Vidhi Centre for Legal Policy*, 2022) <https://vidhilegalpolicy.in/research/towards-a-framework-for-scrutinizing-combinations-in-the-digital-market-a-roadmap-for-reform/> accessed 3 November 2023.

the relevant non-price parameters. Apart from the above factor, acquisitions in digital space are not always carried out to acquire the assets of the target, on the contrary, they are often done to exploit the target's potential and capture their user base.[44] These factors influence the deal value and it can be inferred that the higher the deal value, the more will be the chances for the acquirer to create AAEC in the market, post-combination. The objective behind enacting DVT is to bring all those notorious and mammoth deals under the purview of the Commission that strategically eliminates competition and strengthens market position. DVT has the potential to do away with all these concerns, however, much depends on how the Regulations are drafted and how pragmatic the CCI remains while dealing with combinations on a case-to-case basis.

IV. ADEQUACY OF DVT: IDENTIFYING THE GAPS

Despite all the promising aspects of DVT, the jurisdictions where DVT is in force cannot help us infer that it has increased fair competition in the market. Germany's contribution to an OECD paper[45] reveals that there have been only a few examples wherein the parties notified their regulator for breaching DVT.[46] Likewise, Austria is also yet to find an anti-competitive combination breaching DVT. Given the small sample size, it is premature to comment on the efficacy of DVT.[47] Another glaring example that casts some doubt on the efficacy of DVT is the approval of WhatsApp acquisition in the USA. Despite the USA having

[44]Akshat Pande, Mahima Cholera and Dipak Verma, 'Big Data Mergers in India: Changing Landscape and the Way Forward' (*Bar & Bench*, 5 August 2023) <https://www.barandbench.com/law-firms/view-point/big-data-mergers-in-india-changing-landscape-and-the-way-forward> accessed 3 November 2023.

[45]OECD Secretariat, 'Start-ups, Killer Acquisitions and Merger Control - Background Note' (2020) Ch 3.

[46]AZB & Partners, 'Deal Value Threshold: Is it a deal broker' (*Mondaq*, 1 August 2023) <https://www.mondaq.com/india/antitrust-eu-competition-/1271608/deal-value-threshold-is-it-a-deal-breaker> accessed 15 November 2023.

[47]OECD Secretariat, 'Start-ups, Killer Acquisitions and Merger Control - Background Note' (2020) Ch 3.

the provision *size of the transaction*, the Federal Trade Commission ("**FTC**") approved the merger.[48] Additionally, an antitrust suit brought by the FTC was dismissed by the District Court of California because Facebook's monopoly in *Personal Social Networking Services* could not be proved.[49] This gives the impression that the above-discussed merger apparently has no anti-competitive concerns and raises questions on the potency of DVT to challenge similar combinations.

Now, another question for our consideration is how the CCI would have responded if it was equipped with DVT. Looking at the Indian stance, CCI's approach in the PVR-INOX merger fairly answers our question. Despite being the combination of two of the largest multiplex chains, it remained outside the purview of the CCI. In a suit initiated by Consumer Unity and Trust Society, the CCI made dual observations, *firstly*, since the transaction had not been consummated at that time, there was no combined entity against which it could initiate an investigation and *secondly*, even if it is presumed that the combined entity is dominant, it is a settled law that dominance per se is not questionable.[50] When we decipher CCI's observations on dominance, it can be easily inferred that even though DVT would have been in force, CCI would have reached a similar conclusion. This is because even though the merger breached DVT, *ex-ante* provisions would have been of little avail, as the CCI highlighted the significance of conduct to attract any investigation. This essentially makes DVT appear redundant because even if *ex-ante* provisions apprehend that a proposed merger is likely to result in a dominant entity, the

[48]Federal Trade Commission, 'FTC Notifies Facebook, WhatsApp on Privacy Obligations in Light of Proposed Acquisition' (*FTC*, 10 April 2014) <https://www.ftc.gov/news-events/news/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed-acquisition> accessed 15 November 2023.
[49]*Federal Trade Commission v Facebook Inc.*, Civil Action No. 20-3590 (JEB), United States District Court for the District of Columbia.
[50]*Consumer Unity and Trust Society v PVR Limited & INOX Leisure Limited* 29/2012 (CCI).

fundamental principle that mere dominance without any questionable conduct is not prohibited shall still hold good.[51] This stance is further strengthened by a statutory provision that has already given *suo moto* powers to the CCI to examine whether a notifiable combination has caused or is likely to cause AAEC.[52] Indeed, the CCI does not have residuary powers to investigate non-notifiable mergers, however, going by the provisions of Section 20(1) of the Act, every combination that appears to indulge in anti-competitive behaviour is not outside the scope of the Act, which attacks the basic premise of introducing DVT.[53] This is because the CCI is already equipped with the conduct-based ex-post investigation that raises significant concerns regarding the utility of DVT. The mere triggering of notifications to the CCI without entering into an objective assessment of the proposed merger would do no good to the competition although it may overburden the Commission.

Without commotion, the author can identify other hurdles in the implementation of DVT. *Firstly*, as it has already been elaborated, deal value is an acquirer-specific subject and hence, it fails to contemplate the actual value of the target for the simple reason that the monetary consideration that each potential acquirer might be willing to pay is liable to fluctuate depending on the latter's analysis of risk and reward involved after the consideration.[54] *Secondly*, it is the cardinal principle of merger control to keep DVT plain and clear and derive the same

---

[51]Alaina Fatima, 'DVT: A Panacea or a Pandora's Box? Exploring Alternatives to a Deal Value Threshold' (*CBFL NLU Delhi*, 19 June 2023) <https://www.cbflnludelhi.in/post/dvt-a-panacea-or-a-pandora-s-box-exploring-alternatives-to-a-deal-value-threshold> accessed 21 November 2023.

[52]The Competition Act, 2002 (12 of 2003) s 20(1).

[53]*Consumer Unity and Trust Society v PVR Limited & INOX Leisure Limited* 29/2012 (CCI).

[54]Alexei Orescovic, 'Facebook closes WhatsApp acquisition at a new price tag of USD 22 billion' *Business Today* (San Francisco, 7 October 2014) <https://www.businesstoday.in/latest/deals/story/facebook-acquires-whatsapp-for-usd-22-billion-141173-2014-10-07> accessed 12 November 2023.

from an objective quantifiable parameter.[55] It is only time that will reveal what criterion the CCI will employ to frame such Regulations. Further, at the present stage, the Amendment Act provides that the Central Government may revise DVT in consultation with the CCI.[56] Now, the dilemma that arises is as to what will be the effective DVT in cases where the transaction witnesses a change in DVT. It will only get complex if the transaction involves deferred consideration after there has been a change in DVT. Lastly, DVT also creates an India-specific issue that relates to the funding of startups.[57] As India progresses rapidly towards more evolved digital markets, budding startups need more funds that come in the form of strategic investments by established players and private equity firms. With the definition of control being diluted and the inclusion of DVT, these investments will be prone to CCI's scrutiny and entangle them in lengthy procedural compliances that will affect the developing startup ecosystem of the country.[58]

[55]Avaantika Kakkar and Kirthi Srinivas, '2023 Amendments to Indian Competition Law: Implications for M&A' (*Kluwer Competition Law Blog,* 18 April 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/04/18/2023-amendments-to-indian-competition-law-implications-for-ma-part-1/> accessed 25 November 2023.

[56]Standing Committee on Finance, 'Fifty Second Report on the Competition (Amendment) Bill 2022' (2022).

[57]Surbhi Lahoti, 'Deal Value Threshold: Filling an Enforcement Gap or Overburdening the Enforcers' (*Jurist*, 7 May 2020) <https://www.jurist.org/commentary/2020/05/surbhi-lahoti-deal-value-threshold/> accessed 25 November 2020,

[58]Gauri Gupta, 'An Indian Perspective on Merger Control in Digital Markets: Looking Ahead by Looking Across' (*Kluwer Competition Law Blog*, 1 June 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/06/01/an-indian-perspective-on-merger-control-in-digital-markets-looking-ahead-by-looking-across/> accessed 9 December 2023.

V. WHY NEED DVT: ADVANCING PRO-DVT ARGUMENTS & FILLING THE GAPS

Having discussed the loopholes of DVT, this section attempts to address the regulatory gaps and rectify the errors that are associated with it to make DVT better suited in the Indian context. Let us take a recent example of Meta's (Then Facebook) acquisition of 9.99% in Reliance Jio.[59] This combination of two dominant players in their respective markets[60] managed to receive unconditional approval from the CCI.[61] Though the scheme of their combination is said to exclude data transfers,[62] it can be inferred as data comes as a common interest to both entities. Mergers driven by non-price parameters, in general, are problematic on many fronts because their valuation is contingent upon the quantity and quality of data that they hold, their contribution to network effects, and the potential of innovation that the target entity possesses.[63] However, none of these parameters are measurable under the traditional thresholds of assets and turnover.

---

[59]ET Bureau, 'CCI okays Facebook's investment of Rs 43,574 crore in Jio Platforms' *The Economic Times* (25 June 2020) <https://economictimes.indiatimes.com/tech/internet/cci-okays-facebooks-investment-in-jio-platforms/articleshow/76561345.cms?from=mdr> accessed 15 November 2023.

[60]Pankhudi Khandelwal, 'The Big Gets Bigger: The Need to Closely Monitor the Facebook-Jio Deal Through Competition Law' (2021) 7(1) RSRR 1-10.

[61]*Jaadhu/Jio Platforms*, Combination Registration No. C-2020/06/747 (24 June 2020).

[62]Angela Dua and Rashi Rawat, 'The Reliance-Facebook Deal: A Case for Data-Driven Mergers' (*RMLNLU LR Blog*, 6 June 2020) <https://rmlnlulawreview.com/2020/06/06/the-reliance-facebook-deal-a-case-for-data-driven-mergers/> accessed 9 December 2023.

[63]Anupriya Dhonchak, 'Facebook-Jio Deal: Big Data, Competition and Privacy' (*IndiaCorpLaw,* 8 May 2020) <https://indiacorplaw.in/2020/05/facebook-jio-deal-big-data-competition-and-privacy.html> accessed 11 December 2023; OECD, 'Non-price effects of mergers' (*OECD*) <https://www.oecd.org/competition/non-price-effects-of-mergers.htm> accessed 3 November 2023.

Furthermore, in the WhatsApp acquisition case as well,[64] though the existing thresholds were not met, in the author's opinion, this acquisition warranted the need for DVT to delve into the nuances of the deal. This is because, by virtue of it being a merger of two entities operating in the same horizontal market, the presumption that it may display anti-competitive behaviour shall hold true. This presumption is backed by the argument that their merger reduces competitive constraints in the relevant market as both of these entities were heavy competitors of each other.[65] Additionally, the consolidation of such a huge user base of WhatsApp and Facebook in a single controlling entity is also detrimental to consumer benefits. Lastly, it also aggravates the plight of the startups in the country who were already struggling to create an alternative to these entities. With the acquisition, the entry barrier caused by these entities is more dominant as both of these entities are zero-price platforms and the associated services provided by these entities make it difficult for new entrants to make users switch.

Unlike foreign jurisdictions like the EU and Brazil,[66] CCI has no power to assess transactions unless the notification thresholds are met. Therefore, the Act tied the hands of the CCI in cases where the jurisdictional thresholds are not met. As opposed to this, the EC is empowered to review those mergers by way of referral procedure if the jurisdictional thresholds are triggered in three of its member states.[67]

A few factors that the CCI must take into consideration in the computation of the value of a particular transaction are taking cognizance of earn-out clauses and payments made in lieu of non-

---

[64]*Facebook/WhatsApp* Case COMP/M.7217.

[65]Shilpi Bhattacharya and Mirium C Buiten, 'Privacy as a Competition Law Concern: Lessons from Facebook/WhatsApp' (2018) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785134> accessed 25 November 2023.

[66]OECD, 'OECD Competition Assement Reviews: Brazil' (2022).

[67]Council Regulation (EC) 139/2004 on the control of concentrations between undertakings, OJ L24/1 (29 January 2004) art 4(5) r/w art 22.

competition.[68] Simply put, the CCI should add the consideration amount promised to be made as an earn-out obligation if the target entity satisfies the conditions put forth in the clause. Furthermore, the CCI should also add up the consideration amount made by the acquiring entity to the target entity in the assurance of the latter not competing in the same relevant market for a specific period. Lastly, the CCI must be quite vigilant of any future payments promised as a part of the transaction and re-open the merger investigation accordingly.[69] In the author's opinion, the inclusion of these provisions in the Regulations will make the process transparent and streamlined for the industry and help the Commission to build its decisional practice.

The common problems often associated with DVT are overburdening of the Commission, halting innovations due to a chilling effect on investment, and also that conduct-based ex-post assessment makes it redundant.[70] However, these arguments can be nullified by citing the example of Germany where empirical evidence demonstrates that there was no significant rise in pre-merger filings.[71] Further, it is a common business understanding that strategic investments are more responsive to tax structures, return on investment, and gaining control over the target enterprise and mere notification to the CCI will not be a deterrent

---

[68]Yaman Verma, Ritwik Bhattacharya and Nicky Collins, 'Deal Value Thresholds: How Wide will the Net be Cast?' (*Mondaq*, 22 August 2022) <https://www.mondaq.com/india/antitrust-eu-competition-/1223600/deal-value-thresholds-> accessed 11 December 2023.

[69]Ishika Sharma and Ramasamy Santhakrishnan, 'Raising the Bar: Tightening the Thresholds of the Combination Regime of the Competition Commission of India' (*Mondaq,* 16 December 2022) <https://www.mondaq.com/india/antitrust-eu-competition-/1260440/raising-the-bar-tightening-the-thresholds-of-the-combination-regime-of-the-competition-commission-of-india> accessed 12 December 2023.

[70]Abdullah Hussain and Prerna Parashar, 'Merger Thresholds and Merger Thresholds in the Digital Economy' (2021) 7(1), NLSBLR 5 – 19.

[71]OECD Secretariat, 'Start-ups, Killer Acquisitions and Merger Control - Background Note' (2020) Ch 3.

for investors.[72] Lastly, the argument that a conduct-based assessment nullifies the need for having a transaction-based threshold suffers from a basic fallacy. DVT visualizes the concept of "prevention is better than cure," as the purpose is to predict an antitrust threat beforehand rather than acting after the harm has been done.

VI. IMPROVING DVT AND MERGER CONTROL LAWS: SOME ADDITIONAL SUGGESTIONS

It is crucial to understand that regulation of mergers and acquisitions in an emerging economy like India cannot be done through a *one size fits all* formula. Transaction value is essentially a function of the market, implying that the same amount can impact different sectors differently. While devising DVT for merger control, it is essential to consider all the industry sectors having diverse players and different needs. The quantum of competition, competing rivals, and the ability of customers to switch from one entity to another are all relevant factors that should be made a parameter to compute DVT. Therefore, a tailored and industry-specific approach to DVT might be more beneficial for promoting fair competition. Basis this approach, the CCI can easily come up with *categorical thresholds* which would be based on industry sector and business activity. One added advantage of this system will be that it will provide flexibility to the Commission in defining the boundaries of DVT on an individual basis relying on the business activity of the enterprise.[73]

Secondly, it seems more appropriate to broaden the concept of DVT so as to fill the loopholes that exist in the existing framework. The USA

---

[72]Cyril Amarchand Mangaldas, 'The Competition (Amendment) Bill, 2023: An analysis of key amendments and some unanswered questions' (*Lexology*, 10 April 2023) <https://www.lexology.com/library/detail.aspx?g=a9260741-e7ba-4f82-9916-aa6ec00aaf18> accessed 12 December 2023.

[73]Aryan Naagar, 'Deal Value Thresholds: Lessons from foreign jurisdictions' (*CBFL NLUD*, 7 July 2023) <https://www.cbflnludelhi.in/post/deal-value-thresholds-lessons-from-foreign-jurisdictions> accessed 20 December 2023.

approach to tackling competition threats in digital space through the *size of the transaction* threshold appears more pragmatic.[74] This mechanism was adopted in the USA through the Antitrust Improvements Act, 1976[75] and it provides a nuanced method to gauge the extent of control of the acquirer over the target after combination. It includes examining and evaluating the assets, voting interests, and membership rights of the acquirer to estimate the actual control that it would exercise post-acquisition. Hence, in the author's opinion, having a precise framework like the one adopted by the USA will make it easy for the CCI to analyse whether a concerned M&A activity would attract competition law or not. Likewise, in Canada, in addition to the asset and gross revenue threshold, the law stipulates the calculation of interest to decide whether any transaction comes under the ambit of merger control Regulations.[76] Therefore, it is suggested that these parameters be made applicable in the Indian regime to complement and narrow down the newly introduced concept of *material influence* which currently lacks any statutory definition or explanation.

Thirdly, the CCI should specifically delve into data-heavy M&A and consider gauging the value of the data being acquired or traded.[77] It is needless to mention that data is considered the new form of currency and is often referred to as "the new oil."[78] Therefore, it becomes quite important to evaluate the economic prospects of data and consider it as an asset for the purpose of merger control.[79] As India has also passed a

[74]FTC Premerger Notification Office, 'Introductory Guide II - To File or Not to File When You Must File a Premerger Notification Report Form' (September 2008).
[75]Hart-Sott-Radino Antitrust Improvements Act, 1976 (United States of America) s 18a.
[76]Competition Bureau Canada, 'Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act' (2022).
[77]Urshila Pandit and Sanah Javed, 'Antitrust and Privacy Concerns: A Dilemma Across Jurisdictions' (2022) 8(2) RFMLR 207-246.
[78]Vishal Rajvansh, 'The Interplay between Data Privacy and Competition Law in India' (2022) 13(4) Journal of European Competition Law & Practice 291-295.
[79]Anubhav Sinha and Nipun Kumar, 'Deal-Value Threshold: Revisiting Traditional Thresholds for Merger Control' (2022) 7(1) ICLR 69-80.

comprehensive data protection law,[80] it reflects how important it is to address data protection and privacy concerns. Therefore, the CCI should devise a method to deal with the economics of data and accordingly, it must combat extreme data harvesting and data concentration.

VII. DRAFT COMBINATION REGULATIONS: BRIDGING THE ENFORCEMENT GAPS UNDER THE AMENDMENT ACT?

In Part II of the paper, the author has discussed that the CCI should clarify DVT by way of Regulations. There are some issues that the Draft Regulations have addressed; nevertheless, there still exist a number of areas where suitable revisions or refinements are essential in order for the Draft Regulations to complement the amendments and to help the CCI build a strong jurisprudence on the new combination regime. In this section, the author evaluates the provisions concerning DVT in the Draft Regulations and examines their respective efficacies with respect to the concerns listed under the aforesaid sections.

A. Decoding DVT in the Draft Regulations

The Draft Regulations seek to repeal the Combination Regulations, 2011. These Draft Regulations substantiate the Amendment Act and contain provisions for calculating DVT. The Draft Regulations propose to provide that DVT shall include every transaction whether direct or indirect, immediate or deferred, cash or otherwise.[81] Furthermore, the Explanation to Regulation 4 of the Draft Regulations stipulates that the notifying parties must be cognizant of any future considerations and deem the value of the transaction to be exceeding the threshold in case

[80] The Digital Personal Data Protection Act, 2023 (22 of 2023).
[81] The Competition Commission of India (Combinations) Draft Regulations, 2023 cl 4(1).

of any uncertainties. Furthermore, Clause 4(2) of the Draft Regulations lists the proposed parameters for assessing the substantial business operations of any notifying entity.[82]

It is indeed laudable that the Draft Regulations capture the intent of the amendment and attempt to regulate the digital markets, however, the list provided for computing the value of a transaction is inclusive, and there exists suspense on several notable aspects such as the determination of any uncertain future events. Additionally, some provisions on the determination of the value of the transaction are quite capable of receiving wide interpretations: for example, the provision covering the non-compete clause has not been adequately covered in the Draft Regulations.[83] It needs to be emphasized that the mere mention of such broader terms without any explanation or guidance note shall only be onerous for the parties as it may lead to a slew of unnecessary notifications to the Commission and increase its burden.

In this respect, the *Joint Guidance Note* provides that payments pursuant to non-compete clauses are considered for calculating deal value if the deal value would have differed, absent the clause.[84] It also discusses future and contingent considerations. It states that any listed future payment should be included in the deal value despite it being satisfied post the merger. Therefore, in the current form, the Draft Regulations must clarify these aspects and make them more granular and nuanced. Moreover, the inclusion of any uncertain future event in the computation of deal value shakes the well-settled decisional practice emerging from the Reliance/Bharti AXA Combination Order wherein the Commission held that if a transaction is contingent on a

[82]The Competition Commission of India (Combinations) Draft Regulations, 2023 cl 4(2).

[83]A Mishra, B Agarwal and S Malik, 'Written Comments on Competition Commission of India's Draft Regulations on Combinations' (2023) The Dialogue 6-7.

[84]Bundeskartellamt, 'Guidance on Transaction Value Thresholds for Mandatory Pre-Merger Notification (s 35(1a) GWB and s 9(4) KartG)' (2018) para 11.

future uncertain event, then the acquiring party has an obligation to examine whether the transaction is notifiable at the time the uncertain event indeed takes place, and not any time prior.[85] Moreover, the catch-all flavour of the Draft Regulations requires that the parties must assume that DVT has been met in case of any uncertainty in calculations.[86] This provision will unjustifiably overburden the parties and the Commission alike and also lead to unnecessary filings.

Another important part of the Draft Regulations that requires scrutiny is the concept of incidental arrangements. The Draft Regulations mention that incidental arrangements within two years of the transaction would also be used to calculate the value of the transaction.[87] At this juncture, it is important to note that the Draft Regulation misses on a definite definition of what would constitute an *incidental arrangement*. There are dual difficulties that the CCI may encounter with this broad meaning ascribed to incidental arrangements. *Firstly*, it will not be in the *best commercial interest* of the transacting parties if the CCI starts considering every incidental arrangement as a strategic arrangement for the merger, rather it will harm the parties and the transaction would suffer unnecessary delay.[88] *Secondly*, it appears that the time limit of two years shall restrict the Commission's ability to review any strategic incidental arrangement beyond the stipulated time period.

---

[85]*Reliance/Bharti AXA*, Combination Registration No. C-2011/07/01 (26 July 2011).
[86]The Competition Commission of India (Combinations) Draft Regulations, 2023 cl 4 exp (g).
[87]The Competition Commission of India (Combinations) Draft Regulations, 2023 cl 4(1)(c).
[88]Anshuman Sakle and Anisha Chand, 'Sweeping Changes to Indian Merger Control Regime Imminent: Draft Regulations Published' (*Kluwer Competition Law Blog*, 8 September 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/09/08/sweeping-changes-to-indian-merger-control-regime-imminent-draft-regulations-published/> accessed 21 December 2023.

The author suggests that the CCI should offer greater clarity on the scope of incidental arrangements. Furthermore, rather than having a generalized approach to such arrangements, it will be more beneficial if they are examined on a case-to-case basis. Additionally, to reduce the burden on the Commission and the Parties, a suggestive list of excluded arrangements would be helpful.

B. Draft regulations: The way ahead

It is undeniable that the CCI's proactive approach regarding Combinations and killer acquisitions is adequately represented in the Draft Regulations. To that effect, it is appreciable that the CCI is mindful of both, the past as well as the future events of the transaction. This holistic approach is reflected in the Draft Regulations as it proposes to mandate that the parties to the transaction must look back and collate the previous transactions that have occurred within the past two years to assign any value to the transaction. Similarly, the Draft Regulations provide that the parties must also consider future contingencies to arrive at the deal value.

However, the author argues that contrary to the intention of the provisions, they may offer some incongruous ambiguities to the notifying parties. This is because, it may lead to the bundling of independent transactions which may have no connection with the other transactions. This problematic condition may be more visible in startup funding as it can witness multiple investments made by a single investor wherein the new investment is completely independent of the older one. However, as per the Draft Regulations, all these investments are per se deemed to be connected with each other and the investor will have to notify the Commission if the cumulative value of the investments adds to become 2000 crores. This case can be particularly repelling for venture capital and private equity investors as they will

unnecessarily be trapped in the Commission's compliance procedures which, in turn, could affect the startup ecosystem.[89]

Hence, it is pertinent to mention that the Draft Regulations require some refinements. The wide net cast for calculating the deal value shows the Commission's commitment to a competitive digital ecosystem, however, it is imperative to caution that in the quest to ensure fair competition, the Commission must not overstep and promote over-regulation that would do little good to the business community.

VIII. CONCLUSION

It is undeniable that the extant merger control regulations have proved to be outdated in the evolving digital market.[90] As discussed in this paper, although the Amendment Act seems to be a step in the right direction, much would depend on the Final Regulations promulgated by the CCI. At present, uncertainty surrounds the combination regime. The effectiveness of the Amendment Act and the satisfaction of the legislative intent are contingent upon the Regulations and the decisional practice of the CCI, hence, the CCI must be better equipped to handle the antitrust challenges posed by digital markets. It is imperative for the CCI to delve into the finer details of the pattern of antitrust enforcement engaged by foreign jurisdictions as well as to closely study the Indian market structure and dynamic market trends. The author submits that it is in the best interest of the customers and the industry that based on foreign experiences, the CCI devise its India-specific competition regime that is responsive to the needs of the Indian

[89]'Draft CCI Regulations on Merger Control: A Summary' (*Axiom 5 Law Chambers*, 12 September 2023) <https://drive.google.com/file/d/1XllFZcfHfumgeY7XlWmFNCxx-kbjyLpj/view> accessed 23 December 2023.

[90]Anupam Sanghi and Sakshi Saran Agarwal, 'Assessing M&As Based on the New Deal Value Threshold: A Comparative Analysis' (2022) 7(2) ICLR 44, 48-59.

market.[91] Lastly, the author argues that DVT requires the greatest extent of consideration by the Commission. The Commission needs to be continuously vigilant towards the dynamic nature of the e-market, sector-specific requirements, and the overall competitive forces in the market in order to keep DVT as per the market standards. It must be mindful of the non-price parameters and network effects to correctly gauge the transaction value. As discussed in the sections above, there is a lot of scope for refining the DVT regime in India and addressing the concerns that stand before the industry. Undoubtedly, taking the antitrust complications posed by the digital markets into consideration, the weight inclines toward pro-DVT arguments. Nonetheless, the CCI should be mindful that if the potential problems are not attended to, the whole exercise of incorporating DVT shall become futile. Ultimately, the gist of the amendments brought in the merger control laws can be stated as *some hits and some misses* and in light of the above discussion in the paper, it is crucial for the CCI to take appropriate measures to make the Indian merger control regime balanced to ensure fair competition and consumer welfare.

[91]Competition Commission of India, 'Market Study on E-Commerce in India: Key Findings and Observations' (2020).

A 'MATERIAL' SOLUTION: MATERIAL INFLUENCE AS A STANDARD TO COMBAT COMMON OWNERSHIP CONCERNS

Archita Satish[*]

ABSTRACT

The 2023 Amendment to the Competition Act, 2002 codifies the "material influence" standard developed by the Competition Commission of India to allow for broader ex-ante merger control review. The standard is the lowest level of control or influence granted by a proposed combination which triggers a requirement to notify the Commission. While the introduction of the material influence standard is an important step, its open-texture must be confined in order to walk the fine line of regulation. This paper is premised on the basis that a test case for the potential of this standard is seen against the growing concern of common ownership. Common ownership refers to the practice where an entity holds investments in multiple rival firms in a market purely for non-strategic purposes. In the age of investment firms and private equity, this type of investment is becoming increasingly prevalent. Microeconomics argues that common

[*]Archita is a fourth-year B.A. LLB. (Hons.) student at the NALSAR University of Law, Hyderabad. The author may be reached at archita.satish@nalsar.ac.in.

ownership can reduce the incentive to compete among rivals and allow for tacit collusion. This paper proposes that with suitable modifications and notifications of delegated legislation under the new provision of the 2023 Amendment Act, the material influence standard can address concerns about common ownership in India. For this purpose, the paper is presented in three main sections. While the first section lays down the development of the material influence standard in Indian jurisprudence, the second section analyses the issue of common ownership. While highlighting the nature of the concern as case specific, it also presents solutions which have been proposed for the issue. On this basis, the last section posits that through a better definition of situations which would amount to "material influence" provided through delegated legislation under the 2023 Amendment Act, common ownership can be tackled. In defining the same, due care must be given to industry concerns and minority investor rights to create an appropriate regime.

Keywords: *The Competition Act, 2002, The Competition (Amendment) Act, 2023, Control, Material Influence, ex-ante Merger Control Review, Common Ownership*

I. INTRODUCTION

In 2023, the Competition Act, 2002 ("**Act**") witnessed major reshaping, with the introduction of many new concepts such as settlement and commitments and deal value thresholds. It also led to the refinement of existing provisions.[1] Accordingly, an amendment was made to the explanation to Section 5 which defines "control." Crucially, the amendment codifies the "material influence" standard of determining the ability of an investing enterprise or group to control the management, affairs, or strategic commercial decisions of the invested entity.[2]

The understanding of "control" determines the trigger on the basis of which entities are obligated to notify the Competition Commission of India ("**CCI**") of a proposed combination under Section 6 of the Act.[3] However, over the years, the vague and open-ended nature of the provision combined with the shifting jurisprudence of the CCI has left it in an uneasy state.[4] This is especially crucial since failure to notify the CCI and proceeding with a proposed combination has severe consequences for entities. This practice, called "gun-jumping," not only invites inquiry into the transaction under Section 20[5] read with Regulation 8 of the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination**

[1]'News Details: The Competition (Amendment) Act, 2023' (*Nishith Desai Associates*, 5 May 2023) <https://nishithdesai.com/NewsDetails/9599> accessed 20 December 2023.
[2]The Competition (Amendment) Act, 2023 (9 of 2023) s 6.
[3]The Competition Act, 2002 (12 of 2003) s 6.
[4]Prateek Bhattacharya, 'Competition Commission of India's "control" conundrum – practice, precedent, and proposals' (2021) 17(2) European Competition Journal 473, 478.
[5]The Competition Act, 2002 (12 of 2003) s 20.

Regulations"),[6] but also a penalty under Section 43A of the Act. This penalty extends to the higher of one percent of the total assets or turnover of the infringing entity.[7]

Having a clear-cut understanding of this regime is particularly important for institutional investors, for whom acquisitions encompass the bread and butter of their trade. There is a growing debate and concern regarding the question of common ownership, which particularly affects this group of investors. Also called "horizontal shareholding," this refers to the practice of holding investments in numerous horizontally competitive entities in a given market.[8] With the increasing investment of funds and other institutional investors in the stock market, the practice has become a concern from a microeconomic perspective.

Economic theory suggests that the practice of common ownership gives rise to antitrust concerns such as coordination and lessening of competition in the market. In India, overall institutional investment has risen to about 34% in publicly traded entities.[9] In light of these concerns, the CCI has also undertaken to study the extent of common ownership by private equity firms in India.[10] While formal inclusion of

[6]The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (3 of 2011) reg 8.
[7]The Competition Act, 2002 (12 of 2003) s 43A.
[8]George S Dallas, 'Common Ownership: Do Institutional Investors Really Promote Anti-Competitive Behavior?' (*Harvard Law School Forum on Corporate Governance,* 2 December 2018) <https://corpgov.law.harvard.edu/2018/12/02/common-ownership-do-institutional-investors-really-promote-anti-competitive-behavior/> accessed 19 December 2023; Akanksha Agarwal and Anupriya Dhonchak, 'Relevance of Common Ownership in Competition Analysis in India' (2020) 6(1) National Law School Business Law Review 61, 62.
[9]OECD, 'Ownership structure of listed companies in India' (*OECD*, 2020) 19 <www.oecd.org/corporate/ownership-structure-listed-companies-india.pdf> accessed 18 December 2023.
[10]ENS Economic Bureau 'CCI to launch study into impact of multiple investments by PE firms in same sector' *The Indian Express* (New Delhi, 5 December 2020) <https://indianexpress.com/article/business/business-others/cci-to-launch-study-

"material influence" within the text of the Act is a welcome step towards clarity on the standard, this paper posits that this standard can prove to be a viable solution to deal with the issue of common ownership.

Part II of the paper provides a brief outline of the Act, standards of control and traces the evolution of the material influence standard in India so far. Part III explains the issues with common ownership as a growing phenomenon and how other jurisdictions have assessed the same, including assessing solutions proposed to address the issue. Part IV argues that the material influence standard, as currently developed in India and likely to be developed in the future under the Amendment, can be a fruitful approach. Additionally, the paper makes suggestions on how the standard must be defined to allow greater predictability and compliance.

II. MERGER CONTROL IN INDIA

A. *Understanding the provisions and the Amendment Act*

The Indian merger control regime is a mandatory, *ex-ante* mechanism. Entities forming proposed combinations which meet the specific asset or turnover threshold values in Section 5 of the Act are obliged to notify the CCI.[11] Sections 5 and 6 of the Act deal with the regulation of combinations in India. While Section 5 defines the thresholds for various mergers and acquisitions to amount to "combinations" for the purpose of regulation and notification, Section 6 prohibits and renders void any combination which results in appreciable adverse effects on competition ("**AAEC**") in India in the relevant product market. It also

into-impact-of-multiple-investments-by-pe-firms-in-same-sector-7092183/> accessed 15 December 2023.

[11]Nikhil Bedi et al, 'Rationale for proposed inclusion of material influence standard in the Indian Merger Control Regime–an expansive approach for determination of "control"' (*Deloitte*, 2020) 2 <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-material-influence-standard-noexp.pdf> accessed 10 December 2023.

provides for notification of combinations to the CCI within thirty days of the approval of the merger or acquisition by the relevant enterprises' Board of Directors.

The process of notification is itself governed by the Combination Regulations. Regulation 4 is particularly relevant since it carves out an exception for certain combinations that are deemed to not cause an AAEC in India and hence would *not normally* need to be notified. These scenarios are provided in Schedule I of the Regulations. Crucially however, most of these scenarios, including the acquisition of shares, voting rights, or assets "*solely as an investment*" or "*in the ordinary course of business*" are only exempt so long as control in the target entity is not acquired. This makes the understanding of control even more important.[12] This is significant because there has been a steady increase in the involvement of institutional investors in India,[13] for whom such an exemption would be relevant.

In its original form, the Explanation to Section 5 defined "control" as simply "c*ontrolling the affairs or management*." This gave rise to essentially a circular understanding of the term. The amendment changes this in a number of ways. *Firstly*, it replaces the above circular definition with the material influence standard. *Secondly*, this is made very broad with the inclusion of the phrase "*in any manner whatsoever*" contemplating a large range of acts, rights, and other mechanisms through which material influence may be granted. *Thirdly*, it adds "*strategic commercial decisions*" as another category of events over which control may be acquired.

All of these amendments are in that sense in line with the jurisprudence

[12]Avaantika Kakkar and Vijay Pratap Singh Chauhan, 'India: Merger Control' (*Global Competition Review,* 25 March 2022) <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2022/article/india-merger-control> accessed 12 December 2023.

[13]OECD, 'Ownership structure of listed companies in India' (*OECD*, 2020) 19 <www.oecd.org/corporate/ownership-structure-listed-companies-india.pdf> accessed 18 December 2023.

of the CCI which has in practice taken an expansive approach to control, more than other regulators like the Securities and Exchange Board of India[14] and under the Insolvency and Bankruptcy Code.[15] Both of these latter regulators have confined control to mean "positive control" over the actions of the target rather than negative actions which may only be able to reject, block, or veto any act. Questions such as what are the different kinds of control? and how does this lead to the emergence of the material influence standard? are answered in the following section.

B. Understanding 'control' and developing 'material influence'

There are primarily four kinds of control or influence within the Indian jurisprudence. The first is controlling interest or sole control where the investing company or holder owns more than 50% stake in the company. This means they can take all the decisions with respect to the day-to-day management of the target entity. Further, due to majority interest, they are able to veto any business decisions in director or shareholders' meetings.[16] As such, this form of influence or control is also called *de jure* control.

This is as opposed to *de facto* control where although the investor has less than 50% of the shares or voting rights, other special rights allow them to take decisions and be involved in the management of the company. This can often take the shape of negative control rights,

[14] *Securities and Exchange Board of India v Subhkam Ventures (I) Private Limited* AIR 2018 SC 5646.
[15] *Arcelor Mittal India Private Limited v Satish Kumar Gupta* (2018) SCC OnLine SC 1733 [48].
[16] Nandish Vyas and Geet Sawhney, 'Key concepts of GROUP and CONTROL under the Competition Act, 2002' (*Concurrences*, 12 July 2019) <https://awards.concurrences.com/IMG/pdf/11._key_concepts_of_group_and_control_under_the_competition_act_2002.pdf?56247/cd7744c6c3f2cab38ded999fc47f9d899569d0417ba042e9a6d1b6bf0f755052> accessed 12 December 2023; Prateek Bhattacharya, 'Competition Commission of India's "control" conundrum – practice, precedent, and proposals' (2021) 17(2) European Competition Journal 473, 478.

especially since any entity holding over 25% is conferred veto rights.[17] Related terms used by the CCI in the above cases include the concept of sole and joint control. While a scenario of controlling interest of 75% or more would confer sole control as an elevated form of *de jure* control,[18] when two or more entities together hold such control, although not equally, such a scenario amounts to one of joint control.[19]

These forms of control are also interlinked with the concept of "influence." Thirdly, is the standard of "decisional influence," as is also followed by the European Union (hereinafter, "EU").[20] In European jurisprudence, this forms the lowest threshold of control, where the mere *possibility* of control itself is considered.[21] Therefore, such control does not require the actual exercise of powers or rights over the management and other affairs. The CCI adopted this standard in the *Independent Media Trust* case.[22] It held that acquisition through Zero Coupon Optionally Convertible Debentures, which on conversion would give the acquirer a 99.9% stake over the entity on a fully diluted basis, would lead to such decisive control over the management and

[17]*FIH Mauritius Investments/ Fairfax* Case No. C-2015/07/296 (19 Aug, 2015) [5]; *Proceedings under Section 43A of the Competition Act, 2002 against Telenor ASA, Telenor (India) Communications Private Limited and Telenor South Asia Investments Pte Limited* (3 July, 2018) [15].

[18]Prateek Bhattacharya, 'Competition Commission of India's "control" conundrum – practice, precedent, and proposals' (2021) 17(2) European Competition Journal 473, 484-485.

[19]Prateek Bhattacharya, 'Competition Commission of India's "control" conundrum – practice, precedent, and proposals' (2021) 17(2) European Competition Journal 473, 485.

[20]Nikhil Bedi et al, 'Rationale for proposed inclusion of material influence standard in the Indian Merger Control Regime–an expansive approach for determination of "control"' (*Deloitte*, 2020) 2 <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-material-influence-standard-noexp.pdf> accessed 10 December 2023.

[21]Consolidated Jurisdictional Notice under Council Regulation (EC) 139/2004 on the control of concentrations between undertakings, 2008/C 95/01 (2008) [20].

[22]*RB Mediasoft Private Limited/ RRB Mediasoft Private Limited/ RB Media Holdings Private Limited/Adventure Marketing Private Limited/ Watermark Infratech Water Limited/ Colorful Media Private Limited/ Independent Media Trust* Combination Registration No. C-2012/03/47 (28 May 2012) [15].

affairs of the target. Similar to *de facto* control, even holding less than 50% of the stake in the company, can amount to decisive influence.[23]

The last of these and the focus of this paper is the "material influence" standard. There is no clear definition of what exactly constitutes material influence. Case laws have shed light on what circumstances the standard entails. The first such case was the *Ultra Tech/ Jaiprakash Associates Limited* ("***JAL***") decision.[24] The case concerned the transfer of two cement plants from JAL to Ultra Tech. While inquiring into the transaction under gun-jumping provisions, the CCI discovered that Ultra Tech had not disclosed the shareholding of Mr. Kumar Mangalam Birla and his family, who also had shareholdings in Century and Kesoram, two of Ultra Tech's competitors in the cement industry. Instead, when filing the initial notification, Ultra Tech had only disclosed the shareholding of its immediate parent company, Grasim. On this finding, the CCI dived into the various standards applicable, pronouncing: "*Material influence, the lowest level of control, implies presence of factors which give an enterprise ability to influence affairs and management of the other enterprise including factors such as shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements etc*."[25]

Citing the United Kingdom ("**UK**") guidance on standards, the Commission found that Mr. Birla would have such material influence on account of his Board seat across these entities combined with his expertise in the field, which is likely to give his word more weight than that of other directors on the respective Board. Confusingly, however, the CCI observes that even if there was no "material influence," the ability to be privy to sensitive information could facilitate tacit

[23]*UltraTech/ Jaiprakash* Combination Registration No. C-2015/02/246, Order under Section 44 (12 March 2018) [12.11 and 12.17(i)].
[24]ibid.
[25]*UltraTech/ Jaiprakash* Combination Registration No. C-2015/02/246, Order under Section 44 (12 March 2018) [12.10].

collusion between these entities. This is problematic because it seems to suggest an even lower standard than material influence in which the CCI might be interested. Further, it seems to confuse the *ex-ante* jurisprudence in merger control, with the standards of interference in *ex-post* analysis under cartelization provisions under Section 3 of the Act. Therefore, what appears from this judgment is that even a single Board seat across entities with competing or substitutable products is likely to raise competition concerns and must be notified to the CCI for it to assess if this would lead to an AAEC under the Act.

Within a year, another case knocked on CCI's doors enabling it to apply this newfound standard. In the case of *Agrium and Potash Corporation of Saskatchewan, Inc.* ("***PotashCorp***"),[26] the two entities were planning to create a jointly held third entity as a parent company for some subsidiaries, which would impact the shareholding of their subsidiaries in the potash market in India as well. The CCI observed that this would lead to further concentration in the market because the strengthening of structural ties would enable material influence and lead to coordinated effects in the market.[27] Therefore, here it appears that the CCI has extended the logic of *JAL* from the ability of an individual to influence the Board of the targets or subsidiaries, to the ability of a leading enterprise in the market to do the same.

The last of these cases highlights the major concern that this paper tries to address: the competition effects of common ownership by institutional investors like funds. This question arose *in re Meru Travels Solutions* ("***Meru***"), where it was alleged that common investment by the investment company, SoftBank in the mobile apps, Ola and Uber, amounted to control under a material influence standard. This raised competition concerns in the radio taxi service market. While the investments in this case were passive, being undertaken

[26]*Agrium Inc./ Potash Corporation of Saskatchewan, Inc.* Combination Registration No. C-2016/10/443 (27 October 2017).
[27]ibid [24-25].

purely for investment purposes by institutional investors, the CCI nevertheless noted that competition concerns such as horizontal effects may arise. Yet, due to a failure of any real evidence to prove such effects as occurring and a lack of global consensus on the effect common ownership has, the Commission did not find a *prima facie* case under Sections 3 or 4 of the Act in relation to anti-competitive agreements or abuse of dominant position. The *Meru* case thus raises an interesting question of whether material influence as a standard would be capable of capturing any such risks due to common ownership, especially when it might fall in a grey zone between active and passive investment.

Although what would fall under "material influence" under the amendment is yet to be notified, the Competition Law Review Committee's Report, which formed the basis for the 2023 Amendment provides some guidance. Drawing on CCI jurisprudence, it specifies some indicative factors for determining whether material influence exists including Board representation, special rights, status and expertise of an enterprise or person, and structural/financial arrangements.[28] The Report also noted why the *material influence standard* was chosen to be codified rather than the *decisive influence* one.[29]

It observed that the former captures a larger range of scenarios including acquisition not in the ordinary course of business, like in the case of SoftBank which, though primarily passive, seems to have some *active influence* over its investee companies, acquiring international rights, negative rights, etc. In particular, it observed that even the EU, which uses a decisive influence standard, has now taken cognizance of the gap the decisive influence standard creates, and is attempting to remedy the same. Thus, the adoption of a material influence standard

[28]'Report of the Competition Law Review Committee' (2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 10 December 2023.

[29]Ibid [117-119].

provides some contours to "control" but still leaves it open enough to capture a wide range of behaviours, perhaps including common ownership. The next part provides a brief introduction to the question of common ownership and how this has been globally tackled.

III. COMMON OWNERSHIP- A 'MATERIAL' CONCERN?

A. The Concerns of common ownership

Traditionally, the rationale behind common ownership as an investing strategy is to reduce the risk of fund investors by spreading it over multiple entities.[30] There is much academic debate on whether competition fears from this practice are justified. Economic theory suggests that if there is a group of overlapping shareholders between Firm X and Firm Y, even a minority interest in terms of shares or voting rights might influence Firm X to either raise their prices or reduce their output. This is because the net outcome from the increased sales to Firm Y by gaining Firm X's lost customers would benefit these investors. Thus, these horizontal effects make firms that provide substitutable goods less competitive, raising clear competition risks.[31] The other possibility is of coordinated effects, since a common shareholder may be privy to sensitive information of these rival firms and use the same to facilitate some form of tacit collusion in the market.[32]

However, this theoretical model needs to be tempered by the structural features and factors of the particular case and industry for analysis. As noted by the OECD in its report, factors like concentration in the market, entry conditions, degree of substitutability and homogeneity of

[30]ibid.
[31]Menesh S Patel, 'Common Ownership, Institutional Investors and Antitrust' (2018) 82 Antitrust Law Journal (Draft) 1, 9; Nikhil Bedi et al, 'Rationale for proposed inclusion of material influence standard in the Indian Merger Control Regime–an expansive approach for determination of "control"' (*Deloitte*, 2020) 3 <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-material-influence-standard-noexp.pdf> accessed 10 December 2023.
[32]ibid.

the goods or services concerned, and number of companies as well as internal matters such as costs to the entity, their market share etc., also play a role. Crucial to this analysis is, of course, the *actual* ability of the common owner to influence management decisions and capture control in any sense.[33] In particular, one cannot discount the information gap in the real world which influences the way business decisions are taken as well as the potential for the management of the firm to have conflicting goals to that of the minority interest.[34]

Additionally, many assert that such concerns may only be relevant in the case of so called *active* investments, where the common owner takes a more active role in terms of the management of the company, with certain strategic goals also in mind, as opposed to *passive* investment which is purely for the monetary or financial purpose of the investment itself. However, others contest that these concerns are equally valid for passive investments.[35] This is because a higher proportion of passive investment in entities, in comparison to active investors may not encourage as much competition or taking of high-risk, high pay-off decisions which could otherwise take their goods and services to a new level of innovation and consumer welfare.[36]

This also suggests that the extent to which institutional investment is present in a geographical market or jurisdiction, as well as particular industries must be considered to understand what policy must be adopted to tackle the same. For instance, empirical studies in the United

[33]OECD Competition Committee, 'Antitrust Issues Involving Minority Shareholding and Interlocking Directorates' (23 June 2009) DAF/COMP (2008) 34-35.
[34]OECD Competition Committee, 'Antitrust Issues Involving Minority Shareholding and Interlocking Directorates' (23 June 2009) DAF/COMP (2008) 36-37.
[35]Daniel P O'Brien and Steven C. Salop, 'Competitive Effects of Partial Ownership: Financial Interest and Corporate Control' (2000) 67 Antitrust LJ 559, 577.
[36]OECD, 'Common Ownership by Institutional Investors and its Impact on Competition: Background Note by the Secretariat DAF/COMP' (2017) (*OECD*, 29 November 2017) 10, 27-28 <https://one.oecd.org/document/DAF/COMP(2017)10/en/pdf> accessed 18 December 2023.

States ("**US**") have shown that large institutional investors like State Street, BlackRock, and Vanguard constitute the single largest shareholder in about 40% of the listed entities in the country. Further, industry-wise studies have shown similarly staggering levels of common ownership in relation to airlines, mobile phones, soft drinks and cereals, banks, pharmacies, and even technology companies- covering a wide range of industries.[37] The EU began a similar analysis in 2019,[38] with the Telecom industry standing out in particular.[39] The UK has likewise found some level of common ownership in the banking industry.[40] This also indicates that common ownership is not an isolated phenomenon.

B. Strategies to counter common ownership concerns

Various policies have been proposed as to how antitrust or competition law can address these concerns. One solution seems to be to adopt a case-by-case approach to the issue. This would be prudent considering the market and jurisdiction specific consideration, apart from the specific rights and shares concerned in the impugned case.[41] However, this leaves the scenario somewhat uncertain, which makes enforcement

[37]Einer Elhauge, 'Horizontal Shareholding' (2016) 129 Harvard L Rev 1268; Eric A Posner, Fiona Scott Morton and E Glen Weyl, 'A Proposal to Limit the Anti-Competitive Power of Institutional Investors' (2017) 81 Antitrust LJ 669; José Azar et al, 'Anticompetitive Effects of Common Ownership' (2018) 73 J FIN <Papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345> accessed 18 December 2023; José Azar et al, 'Ultimate Ownership and Bank Competition' (*SSRN*, 23 July 2016) <papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252> accessed 18 December 2023.

[38]Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective' (2020) 8 Journal of Antitrust Enforcement 456, 462.

[39]Rosati N et al, 'JRC Technical Reports: Common Shareholding in Europe' (2020) 212 <https://op.europa.eu/en/publication-detail/-/publication/eafd4226-02c9-11eb-8919-01aa75ed71a1/language-en> accessed 18 December 2023.

[40]Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective' (2020) 8 Journal of Antitrust Enforcement 456, 463.

[41]Menesh S Patel, 'Common Ownership, Institutional Investors and Antitrust' (2018) 82 Antitrust Law Journal (Draft) 1, 51.

difficult and unpredictable, as is the present case in India.

Posner et al instead propose creating a narrow safe harbour provision. This would be much more specific than what is provided in most jurisdictions today such as Schedule I in India and the US' exemption for investments made solely for investment purposes. The proposal is in the form of either allowing large institutional investors to only invest in one entity in a concentrated market or alternatively, by placing a 1% market-wide cap up to which they can invest in any number of entities they choose.[42]

Another alternative is to require a mechanism of *mirror voting* where the common institutional owner's votes are simply voted in a proportionate manner in favour of the decision already taken.[43] However, this does not address the concern regarding the effect of passive investments in reducing the incentive to compete and invent in general, as identified earlier.[44]

The Dutch Competition Law Authorities have also devised an interesting mechanism from an *ex-post* enforcement perspective by holding investment companies liable for their portfolio companies' antitrust violations through the parental liability principle.[45] The parental liability principle means that the parent company is held liable

---

[42]Eric A Posner, Fiona Scott Morton and E Glen Weyl, 'A Proposal to Limit the Anti-Competitive Power of Institutional Investors' (2017) 81 Antitrust LJ 669.

[43]Edward B Rock and Daniel L Rubinfeld, 'Antitrust for Institutional Investors' (2017) New York University, School of Law Law & Economics Research Paper Series Working Paper No. 17-23, 37-3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2998296> accessed 19 December 2023.

[44]Dorothy Shapiro Lund, 'The Case Against Passive Shareholder Voting' (2018) 43 Journal of Corporate Law 493.

[45]Mariska van de Sanden, 'Private equity investors held liable for cartels in the Netherlands' (*Kluwer Competition law Blog*, 4 April 2019) <https://competitionlawblog.kluwercompetitionlaw.com/2019/04/04/private-equity-investors-held-liable-for-cartels-in-the-netherlands/> accessed 19 December 2023.

for the acts of the subsidiaries over which they have a level of control.[46] Therefore, typically its applicability is confined to traditional parent-subsidiary relationships. While this could be an interesting proposition, it falls short from a merger control angle, which aims for *ex-ante* regulations of any anticompetitive harm. Yet, borrowing from the idea of extending decisional influence as was done in this case, the next section argues that India can extend the material influence standard to combat *common ownership* concerns.

IV. AN INDIAN SOLUTION IN MATERIAL INFLUENCE

As noted in Part II, material influence, as currently defined in India, is broad enough to encompass a large number of factors, enabling a broader *ex-ante* review. This is an advantage since, unlike the *decisive influence* standard, it creates space for common ownership to be considered under the existing jurisprudence and now even under the Amended Act. However, this inclusive understanding must not be left undefined. Some inspiration can be taken from the US.

While the governing Hart-Scott-Rodino Act 1976 provides a fairly open-ended exemption for acquisitions made "*solely for the purpose of investment*,"[47] the accompanying rules specify that the investor should have no intention of participating in the formulation, determination, or direction of the basic business.[48] Similarly, the CCI can specify certain kinds of rights and scenarios where influence may occur, under the amended definition of "control." Read along with the exceptions already provided in Schedule I of the Combination Regulations, this

[46]Yves Botteman and Agapi Patsa, 'The construct of parental company liability' (*LexisNexis*) <https://www.steptoe.com/a/web/5919/0714-046_The_construct_of_parental_company_liability_practice_note.pdf> accessed 20 December 2023.
[47]15 United States Code s 18a(c)(9).
[48]Debbie Feinstein, Ken Libby and Jennifer Lee, '"Investment-only" means just that' (*Federal Trade Commission*, 24 August 2015) <https://www.ftc.gov/enforcement/competition-matters/2015/08/investment-only-means-just> accessed 22 December 2023.

would prevent an overbroad and legally uncertain environment which might jeopardise India's ability to attract institutional investors, especially foreign ones.

Although the usefulness of Schedule I is acknowledged, the current exception under Schedule I, especially Item I, can be narrowed further in light of competition concerns arising even from the holding of passive investment, as highlighted in Part III. The approach that *non-strategic* investments would necessarily not require notification has influenced the CCI before as well. In the *ANI Technologies* case, the parent company of the acquirer had a minority, non-controlling stake in Zomato which provided identical or substitutable services to a subsidiary of the Target.[49] However, because the acquirer had no strategic rights and therefore was only a passive investor, the CCI did not see any likelihood of AAEC in the case. Such a blanket approach must be avoided to be able to assess cases like *Meru* in the future.

However, when looking at jurisprudential practice, we see that sometimes, decisions have been surprisingly stringent. For instance, in the *Etihad/ Jet Airways* decision, the CCI found that although the investment by Etihad into Jet Airways was less than 25% and did not confer any affirmative, veto or blocking rights, Board majority, quorum rights in the Board or general meetings, casting vote rights, or any pre-emptive or tag along rights, this would still amount to *material influence* because Etihad could nominate two out of the six directors to Jet's Board, including its Vice President.[50] Thus, having an indicative list of factors contributing to material influence would be extremely valuable for entities to self-assess and notify, creating more certainty.

Additionally, these factors must also clarify the distinction between rights that would allow for minority investor protection, an important

[49] *Lazarus Holdings/ ANI Technology* Case No. C-2018/08/598 (11 October 2018) [10-11].
[50] *Etihad Airways PJSC/ Jet Airways (India) Limited* Combination Registration No. C-2013/05/122 (12 November 2013).

aspect for many institutional investors, versus those which would amount to conferring material influence. This type of conundrum was witnessed in the *ChrysCapital* case.[51] In this case, the acquirer was a subsidiary of ChrysCapital who held portfolio investments in companies which were rivals to the target. The CCI found that the combination of Board representation, the right to seek information as well as veto powers in relation to certain strategic decisions such as deciding lines of business amounted to material influence. However, the CCI approved the acquisition since ChrysCapital voluntarily undertook to restrict these rights to avoid its influence on day-to-day management.[52] Therefore, greater clarity on where the line between protection and influence rights can be drawn would be an important step.

V. CONCLUSION

This paper has argued that the material influence standard, which has been recently codified in the Competition Act through the 2023 Amendment might prove to be a viable option through which the growing issue of *common ownership* can be addressed in the Indian competition law regime. In Part II, the paper traced the development of the material influence standard, highlighting its current pitfalls and advantages. Meanwhile, in Part III, the economic concerns of common ownership as well as possible approaches to it were highlighted. While Part IV posits the material influence standard as a solution in India, it also suggests modifications that can be made in the delegated legislation that is yet to be notified under the amended provision, namely: specifying the various factors which can amount to material influence; drawing a distinction between such factors and minority protection rights, and discarding automatic exemption for passive investments. Together, such a standard can achieve the balance of

[51] *Canary Investment Limited/ Link Investment Trust II/ Intas Pharmaceuticals Limited* Case No. C-2020/04/741 (30 April 2020) [16].
[52] ibid.

predictability and strictness to foster holistic competition and investment in India.

DETERMINING URGENCY IN COMPULSORY PRE-LITIGATION COMMERCIAL MEDIATION

Aravind Sundar[*]

ABSTRACT

Section 12A of the Commercial Courts Act mandates litigants to compulsorily attempt to settle their disputes through mediation, prior to instituting a suit and litigating the dispute. However, it provides an exception to this rule and allows suits that "contemplate urgent interim relief" to bypass pre-litigation mediation. This article identifies and critically analyses three conflicting approaches given by various High Courts on how this exception is to be interpreted and applied, and how a Court must determine whether a suit qualifies for this exception. It reconciles the conflicts on how urgency is determined, keeping in mind the landmark judgement of Patil Automation v. Rakheja Engineers, in which the Supreme Court held that the requirement of pre-litigation mediation in Section 12A is mandatory and not optional. This article underscores the need for courts to meticulously adhere to Section 12A and uphold its intent of reducing judicial workload and docket explosion by directing suits to undergo

[*]Aravind is a second-year B.A. LLB. (Hons.) student at the National Law University, Delhi. The author may be reached at aravindsundar.as7@gmail.com.

mediation. It advocates for a rigorous assessment of urgency claims and argues that plaintiffs must be burdened to prove that their suit falls within the exception of Section 12A. This rigorous assessment is aimed at ensuring that litigants do not misuse its exception and render the pre-litigation mandate to be discretionary, which would defy the ruling of Patil Automation and the intent of Section 12A. Furthermore, it delves into some criticisms surrounding the compulsory pre-litigation mediation mechanism propounded by Section 12A and addresses concerns about the existing inadequacies in the Indian commercial mediation infrastructure, and the supposedly coercive nature of a mandatory mediation mechanism.

Keywords: *The Commercial Courts Act, 2015, Pre-Litigation Commercial Mediation, Patil Automation, Section 12A, Interim relief, Pleadings Approach, Justification Approach, Antecedent Conduct Approach*

I. INTRODUCTION

The Commercial Courts Act, 2015, ("**CCA**") creates specialised, fast-track forums that deal with high-value commercial suits. Section 12A of the CCA states that commercial suits, except for those that *contemplate urgent interim relief*, cannot be instituted under the provisions of the CCA unless the plaintiff exhausts the remedy of pre-

institution mediation.[1] The Supreme Court settled the law on whether Section 12A was directory or mandatory in nature when a Division Bench in *Patil Automation v. Rakheja Engineers*[2] ("***Patil Automation***") held that the requirement of pre-institution mediation is mandatory in nature. It was further held that non-compliance would lead to rejection of the complaint under Order VII, Rule 11 of the Code of Civil Procedure.

Recently, in *Yamini Manohar v. TKD Keerthi*[3] ("***Yamini Manohar***"), the Supreme Court in an order stated that no absolute power to invoke the exception in Section 12A existed by simply making a prayer for urgent interim relief and that the Court had to be satisfied that an urgency existed. In light of this judgement, this piece aims to critically analyse a key aspect of the compulsory pre-litigation mediation ("**PLM**") mechanism in the CCA and the conflicting approaches that had been taken up by the High Courts in determining whether a suit *contemplates urgent interim relief.* It seeks to add on to the rule of urgency determination made in *Yamini Manohar* by delineating the various approaches that have been taken up by the High Courts and attempts to reconcile these approaches with the observations in *Patil Automation* and the intent of the legislature in enacting Section 12A.

Section II summarises the Apex Court's observations in *Patil Automation*, and shines a light on other judicial interpretations or observations related to Section 12A. Section III draws attention to the conflicting High Court jurisprudence that has arisen in attempting to determine whether a suit falls under the exception of Section 12A. In doing so, it explains the three conflicting approaches to determining such an urgency: the Pleadings Approach (Section III A), the Justification Approach (Section III B), and the Antecedent Conduct Approach (Section III C). Section IV attempts to provide a solution to

[1]The Commercial Courts Act, 2015 (4 of 2016) s 12A.
[2]*Patil Automation (P) Ltd v Rakheja Engineers (P) Ltd* (2022) 10 SCC 1.
[3]*Yamini Manohar v TKD Keerthi* (2023) SCC OnLine SC 1382.

the conflict arisen in such a manner that would be in line with the intent of the CCA. Section V addresses some critiques related to Section 12A and its compulsory PLM mechanism. Section VI summarises the observations made in this article.

II. UNDERSTANDING SECTION 12A AND THE OBSERVATIONS IN *PATIL AUTOMATION*

The CCA is a by-product of two Law Commission Reports: the 188th Report[4] and the 253rd Report.[5] In the 188th Report, the Law Commission recommended the constitution of Commercial Division Benches in High Courts across the country, which would be equipped with high-tech facilities, fast-track procedures, and specialised judges, so as to quickly dispose high-value commercial disputes and assure foreign investors that India would be a viable country to conduct their business in.

In the 253rd Report, which was submitted in response to a 2009 Bill[6] passed by the Lok Sabha, the Law Commission recommended the constitution of specialised Commercial Courts at the trial level and Division Benches in the High Courts. The Report also made other recommendations on fast-track procedures and cost regimes. Most importantly, it noted that the 2009 Bill had failed to "*fundamentally alter the litigation culture in India*",[7] and that merely creating fast-track courts would not be enough to resolve the disposal rate issues. The Report noted that a change in the Indian litigation culture, from a

[4]Law Commission of India, 'One Hundred and Eighty Eighth Report on Proposals for Constitution of Hi-Tech Fast-Track Commercial Divisions in High Courts' (2003).
[5]Law Commission of India, 'Two Hundred and Fifty Third Report on Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015' (2015).
[6]The Commercial Divisions of High Courts Bill, 2009 (139 of 2009).
[7]Law Commission of India, 'Two Hundred and Fifty Third Report on Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015' (2015) para 2.11.

litigant-managed to a court-managed process, was required.[8] In light of these reports, the Legislature enacted the CCA in 2015, and further amended it in 2018, to introduce the mechanism of compulsory PLM through Section 12A.

Section 12A was added to the CCA via the 2018 Amendment Act.[9] It states that "*a [commercial] suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of [pre-institution] mediation*."[10] Various High Court judgements had given conflicting interpretations of the word "*shall*" in Section 12A, with some holding that the requirement was mandatory in nature,[11] whilst others holding that the requirement under Section 12A was merely directory in nature.[12] In 2022, the Supreme Court settled the law on this point in *Patil Automation.*

In *Patil Automation,* a Division Bench referred to the Statement of Objects and Reasons of the 2018 Amendment Bill, which states that the objective of introducing the PLM mechanism under Section 12A was to provide for "*compulsory mediation before the institution of a suit where no urgent interim relief is contemplated*" (emphasis provided).[13] This was noted by the Bench, which held that the word *shall* must be interpreted in such a sense, so as to give Section 12A a mandatory flavour, keeping in mind the legislative intent.

---

[8]Law Commission of India, 'Two Hundred and Fifty Third Report on Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015' (2015) para 2.14.

[9]The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (28 of 2018).

[10]The Commercial Courts Act, 2015 (4 of 2016).

[11]*Ganga Taro Vazirani v Deepak Raheja* (2021) SCC OnLine Bom 195 [17-19]; *Shahi Exports (P) Ltd v Gold Star Line Ltd* (2021) SCC OnLine Mad 16514 [20-24].

[12]*Deepak Raheja v Ganga Taro Vazirani* (2021) SCC OnLine Bom 3124; *Dredging and Desiltation Co (P) Ltd v Mackintosh Burn & Northern Consortium* (2021) SCC OnLine Cal 1458.

[13]Statement of Objects and Reasons, The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 (123 of 2018).

The Court therein also referenced a Bombay High Court judgement, which held that Section 12A was enacted in the larger public interest.[14] A similar view was taken in *Patil Automation,* wherein it was held that the mandatory nature of Section 12A would help in bettering the ease of doing business in India, thereby making the country a "*destination attracting capital.*"[15] Keeping in mind issues of docket explosion and the requirements of terminating commercial disputes expeditiously, the mechanism of mediation would offer a viable alternative to the drawn-out court proceedings and help in reaching a speedy end to commercial disputes, which in turn would better the ease of doing business in India. The Supreme Court constructed this to be the legislative intent behind Section 12A and deemed it necessary to fulfil this intention by interpreting the section in a mandatory manner.[16]

However, since *Patil Automation,* there have been various conflicting approaches by High Courts on how to determine whether a suit would fall under the exception of the concerned section, that is, whether it *contemplates urgent interim relief.* These approaches will be introduced in the next section.

III. WHAT IS AN URGENT INTERIM RELIEF?

While Section 12A states that a suit that contemplates urgent interim relief would be allowed to bypass the requirement of PLM, the CCA does not explain what a suit *contemplating urgent interim relief* actually means, or how a Court is to determine whether an application can or should contemplate urgent interim relief, or whether a Court should even delve into the merits of the urgency aspect of the suit. Prior to *Yamini Manohar,* the High Court jurisprudence on Section 12A reveals three different approaches to determining whether a suit contemplates urgent relief. The first approach (Section IIIA) relies

[14] *Deepak Raheja v Ganga Taro Vazirani* (2021) SCC OnLine Bom 3124 [35].
[15] *Patil Automation (P) Ltd v Rakheja Engineers (P) Ltd* (2022) 10 SCC 1 [70].
[16] *Patil Automation (P) Ltd v Rakheja Engineers (P) Ltd* (2022) 10 SCC 1 [77-79].

merely on a pleading of urgency filed by the plaintiff. The second approach (Section IIIB) burdens the plaintiff with justifying their pleadings of urgency. The third approach (Section IIIC) applies the second approach, but also takes into relevance the antecedent conduct of the plaintiff.

A. The 'pleadings' approach

A Division Bench of the Delhi High Court in *Chandra Kishore Chaurasia v. RA Perfumery Works*[17] ("***Chandra Kishore***") held that the question of determining whether a suit even requires urgent interim relief is one that is to be decided solely by the plaintiff.[18] Therefore, a court can only determine whether a suit contemplates urgent interim relief based on the pleadings in the plaintiff's suit and the relief(s) sought.[19] In other words, if a plaintiff in their pleadings aver that they require urgent interim relief, the court must take that averment as it is and allow them to invoke the exception of Section 12A. As explained by the Delhi High Court in *Ajay Gupta v M/S Greenways*[20]("***Ajay Gupta***"), once an application contemplating urgent interim relief has been filed, it cannot be said that the plaintiff is not entitled to bypass compulsory PLM.[21]

It was rightfully held in *Chandra Kishore,*[22] *Ajay Gupta*[23] and other cases[24] that the question of whether a suit involves any urgent interim

[17]*Chandra Kishore Chaurasia v RA Perfumery Works (P) Ltd* (2022) SCC OnLine Del 3529.
[18]*Chandra Kishore Chaurasia v RA Perfumery Works (P) Ltd* (2022) SCC OnLine Del 3529 [33-35].
[19]*Chandra Kishore Chaurasia v RA Perfumery Works (P) Ltd* (2022) SCC OnLine Del 3529 [35].
[20]*Ajay Gupta v M/s Greenways* (2023) MANU/DEOR/53131/2023.
[21]*Ajay Gupta v M/s Greenways* (2023) MANU/DEOR/53131/2023 [9].
[22]*Chandra Kishore Chaurasia v RA Perfumery Works (P) Ltd* (2022) SCC OnLine Del 3529 [33].
[23]*Ajay Gupta v M/s Greenways* (2023) MANU/DEOR/53131/2023 [8].
[24]*Royal Challengers Sports (P) Ltd v Sun Pictures A Division of Sun TV Network Ltd* (2023) SCC OnLine Del 5263 [4]; *Sharad Enterprises v Saboo Emery Stone*

relief is not contingent on whether the court would actually accede to that request, that is, the merits of the application for the relief are not relevant in deciding whether the case is urgent and should be allowed to bypass Section 12A. If a plaintiff requests relief for a reason, and requests it urgently for a different reason, these cases correctly held that the court must consider only the different reason while determining whether the case falls within the ambit of Section 12A.[25] At the stage of determining urgency, the court must not look into the merits of the request for relief (which would be delved into once the Court allows a bypassing of Section 12A and begins to hear arguments on whether the urgent interim relief should be granted or not).

However, there is a problem in claiming that the plaintiff is the sole determinant of urgency in reliefs and that the court should allow bypassing of Section 12A merely if the pleadings of the suit say so. In other words, it is problematic to blindly accede to an averment that claims urgency for the purposes of bypassing Section 12A simply because it was pleaded. As was held by the Bombay High Court in *Future Corporate Resources v. Edelweiss Special Opportunities Fund* ("***Future Corporate***"), the words "*which does not contemplate*" in Section 12A cannot be equated to "*in the opinion of the plaintiff.*"[26] Merely because a plaintiff pleads that their suit requires urgent interim relief, does not mean that the court should blindly accede to that request and allow them to bypass Section 12A. Such an approach would enable the plaintiff to misuse their right to plead '*urgency*', and hence, bypass the mediation mechanism propounded by the CCA without a justifiable cause and on their own whims and fancies. This would defeat the

Industries (2023) MANU/RH/0893/2023 [8.1]; *Yamini Manohar v TKD Keerthi* (2023) SCC OnLine Del 2653 [14].

[25] An example of this distinction between the reason for the relief and the reason for urgency is given in Section IV of this article.

[26] *Future Corporate Resources (P) Ltd v Edelweiss Special Opportunities Fund* (2022) SCC OnLine Bom 3744 [42].

purpose of Section 12A and only serve to exacerbate the pendency issues faced by the judiciary.

This leads us to the approach taken up by the Calcutta High Court, which also criticised the *Chandra Kishore* approach on similar grounds.[27]

B. The 'justification' approach

Rather than blindly acceding to a request for urgent reliefs, this approach stipulates that the court must delve into the merits of the urgency aspect of the reliefs pleaded, and question whether the reliefs sought are actually 'urgent' in nature. In *Laxmi Polyfab v. Eden Realty Ventures*[28] ("***Laxmi Polyfab***"), the Calcutta High Court observed that the regulation in approaching a commercial court, by way of Section 12A, was in place to expedite the resolution of the commercial dispute.[29] Hence, a plaintiff, pleading for the application of the exception of Section 12A, must demonstrate and satisfy the court that there is a need for bypassing mediation, due to the urgency of the reliefs sought.[30] The same Court in *Indian Explosives v. Ideal Detonators*[31] ("***Indian Explosives***") relied on *Laxmi Polyfab* and criticised the very premise of the test laid down in *Chandra Kishore* and held that the exercise of seeking urgent dispensation cannot be made plaintiff-centric, and instead requires some judicial discretion in determining whether the claim of urgency is actually reasonable in nature.[32]

[27] *Indian Explosives (P) Ltd v Ideal Detonators (P) Ltd* (2023) SCC OnLine Cal 1944.
[28] *Laxmi Polyfab (P) Ltd v Eden Realty Ventures (P) Ltd* (2021) SCC OnLine Cal 1457.
[29] *Laxmi Polyfab (P) Ltd v Eden Realty Ventures (P) Ltd* (2021) SCC OnLine Cal 1457 [56].
[30] *Laxmi Polyfab (P) Ltd v Eden Realty Ventures (P) Ltd* (2021) SCC OnLine Cal 1457 [54].
[31] *Indian Explosives (P) Ltd v Ideal Detonators (P) Ltd* (2023) SCC OnLine Cal 1944.
[32] *Indian Explosives (P) Ltd v Ideal Detonators (P) Ltd* (2023) SCC OnLine Cal 1944 [12].

The Court held in *Indian Explosives* that the plaintiff must be made to prove that if the merits of their case are accepted, then there is a sense of urgency in the reliefs that they seek, which would justify the bypassing of Section 12A.[33] The Court further observed that allowing the plaintiff to bypass Section 12A merely on the grounds that they have averred a contemplation of urgency would render the purpose of compulsory PLM futile, as anybody could bypass Section 12A by simply pleading urgency, regardless of whether the reliefs that they seek are actually urgent or not.[34] An inquiry into the justification of the pleading of urgency was required to ensure compliance with the legislative intent of the CCA, which perceived mediation as a way to unclog the judiciary and as a new mechanism of access to justice, except for those cases that satisfied the court that there was a sense of urgency in the reliefs pleaded.

Similarly, the Bombay High Court in *Kaulchand Jogani v. Shree Varshan Investment*[35] ("***Kaulchand Jogani***") observed that the mandate in Section 12A could be easily circumvented if the court allowed an application that merely pleaded urgency, howsoever unjustified or unwarranted.[36] Hence, it was held that a court dealing with the bypassing of Section 12A must delve into an extremely narrow inquiry of whether there is an element of justifiability in the urgency aspect of the suit, while not considering the actual merits of the prayer for relief. In other words, the assessment must be on whether there are elements that prima facie indicate urgency of the suit, or whether there

[33] *Indian Explosives (P) Ltd v Ideal Detonators (P) Ltd* (2023) SCC OnLine Cal 1944 [11].
[34] *Indian Explosives (P) Ltd v Ideal Detonators (P) Ltd* (2023) SCC OnLine Cal 1944 [12].
[35] *Kaulchand H Jogani v Shree Vardhan Investment* (2022) SCC OnLine Bom 4752.
[36] *Kaulchand H Jogani v Shree Vardhan Investment* (2022) SCC OnLine Bom 4752 [28].

is a justification for seeking urgency, irrespective of whether the suit would actually succeed on its merits.[37]

The exercise that was taken up by these courts was to determine whether the need for urgency in obtaining interim relief was reasonably made out from these pleadings. By doing so, the courts were able to ensure that only cases which are actually urgent in nature and require interim relief immediately, are allowed to bypass PLM. This enabled the courts to uphold the mandatory intent of Section 12A.

C. The 'antecedent conduct' approach

The exercise taken up by the courts in the previous section slightly differs from what was taken in the below-mentioned cases, which relied on both the pleadings and the antecedent conduct of the plaintiff. In *Indian Explosives*, the Court rejected the request based on the antecedent conduct of the plaintiff: since the right to sue had arisen more than 5 years prior to the filing of the commercial suit, it could not be contended that there was any urgency in filing the suit, or that the plaintiff could not await the process of mediation.[38]

Antecedent conduct of the plaintiff has been recognised as a relevant factor in similar cases involving parties that file for exceptions to Section 12A. In *Srmb Srijan v. BS Sponge*,[39] the Calcutta High Court distinguished *Chandra Kishore* and refused to exempt the plaintiff from Section 12A on the grounds that the plaintiff had filed the suit 2 years after the right to sue first arose.[40] In *Riveria Commercial*

[37] *Kaulchand H Jogani v Shree Vardhan Investment* (2022) SCC OnLine Bom 4752 [30-31].
[38] *Indian Explosives (P) Ltd v Ideal Detonators (P) Ltd* (2023) SCC OnLine Cal 1944 [13].
[39] *Srmb Srijan Private Limited v BS Sponge Pvt Limited* (2023) MANU/WB/1666/2023.
[40] *Srmb Srijan Private Limited v BS Sponge Pvt Limited* (2023) MANU/WB/1666/2023 [5-7].

Developers v. Brompton Lifestyle Brands[41] ("***Riveria***") and *Bolt Technologies OU v. Ujoy Technology*[42] ("***Bolt Technologies***") the Delhi High Court noted that the plaintiff had attempted to reach an amicable settlement with the defendant before the institution of the suit, and such a factor would favour granting the bypass of Section 12A.[43] On a similar note, the plaintiff in *Gavrill Metal v. Maira Fabricators*[44] ("***Gavrill***") had pleaded that the defendants were habitual defaulters in nature and that their conduct was such that they would be likely to dispose of their property to render any decree in favour of the plaintiff infructuous, therefore giving rise to a necessity for bypassing Section 12A.

In the aforementioned cases, the courts had delved into the antecedent conduct of the plaintiff in relation to the dispute at hand. Relevant conduct included any attempts that were being made to amicably reach an out-of-court settlement and the urgency with which the plaintiff instituted the suit. In other words, the courts considered a long waiting period between when the right to sue first arose and when the suit was actually instituted, to be a relevant factor in rejecting an application to bypass Section 12A.

In some cases, the courts have also taken the defendant's conduct in relation to the dispute into consideration while ruling in favour of the exception. In *Zee Entertainment Enterprises v. Triller Inc*,[45] the Bombay High Court ruled in favour of granting an exception on the grounds that there was reasonable anxiety on part of the plaintiff that the foreign defendant would alienate its Indian assets and properties in

[41] *Riveria Commercial Developers Ltd v Brompton Lifestyle Brands (P) Ltd* (2022) SCC OnLine Del 4624.
[42] *Bolt Technology OU v Ujoy Technology (P) Ltd* (2022) SCC OnLine Del 2639.
[43] *Riveria Commercial Developers Ltd v Brompton Lifestyle Brands (P) Ltd* (2022) SCC OnLine Del 4624 [51]; *Bolt Technology OU v Ujoy Technology (P) Ltd* (2022) SCC OnLine Del 2639 [25].
[44] *Gavrill Metal (P) Ltd v Maira Fabricators (P) Ltd* (2023) SCC OnLine Cal 2443.
[45] *Zee Entertainment Enterprises Ltd v Triller* (2023) SCC OnLine Bom 1916.

an effort to deprive the former of their rightful dues.[46] In *Bolt Technologies,* the Delhi High Court noted both the attempt of the plaintiff to reach an amicable settlement and the conduct of the defendant in refusing and condemning the same, while granting an exemption to Section 12A.[47] The Court also condoned an alleged delay in the filing of the suit, on the grounds that the conduct of the defendant had strengthened the need for the urgency of the reliefs pleaded.[48]

The focus on the defendants' conduct in these two cases was related to the possibility of the defendant depriving the plaintiff of their right to collect their dues, and the defendant's refusal to participate in attempts at reaching an amicable settlement.

IV. WHAT SHOULD BE THE CORRECT APPROACH?

While attempting to reconcile these conflicts, it is important to remember the legislative intent of the CCA that was affirmed by the Supreme Court in *Patil Automation*: there is a need for the speedy resolution of commercial disputes, which in turn would ensure an expeditious delivery of justice by reducing docket explosion.[49] This need can be met by mandating that all commercial cases must first go through compulsory PLM, which would lighten the load on judges and in turn, allow them to focus on cases that require urgent relief.[50] This is important, especially keeping in mind the fact that the 2018 Amendment Act reduced the pecuniary jurisdiction of Commercial Courts from Rs. 1 crore to Rs. 3 lakhs,[51] which has resulted in an

[46] *Zee Entertainment Enterprises Ltd v Triller* (2023) SCC OnLine Bom 1916 [22].
[47] *Bolt Technology OU v Ujoy Technology (P) Ltd* (2022) SCC OnLine Del 2639 [23-25].
[48] *Bolt Technology OU v Ujoy Technology (P) Ltd* (2022) SCC OnLine Del 2639 [21-24].
[49] *Patil Automation (P) Ltd v Rakheja Engineers (P) Ltd* (2022) 10 SCC 1 [70-72].
[50] *Patil Automation (P) Ltd v Rakheja Engineers (P) Ltd* (2022) 10 SCC 1 [74].
[51] The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (28 of 2018) s 4.

increase in the workload of these courts to over three-quarters of all civil disputes in the country.[52]

The Supreme Court has also firmly attested to the quality of mediation as a dispute resolution mechanism, calling it "*one of the best forms, if not the best, of conflict resolution.*"[53] Commercial mediation has also largely received backing from the business world as well, with commercial entities of various sizes willing to go through mediation in order to take advantage of the various benefits arising out of it, such as the maintenance of business relationships, or the expeditious settlement of disputes.[54]

In light of the above observations, it becomes imperative for courts to strictly enforce the mandate of Section 12A, and not blindly grant the exception. The *Pleadings Approach* suffers from a key problem: while it correctly refuses to consider the actual merits of the relief, it gives the plaintiff full power in determining whether their reliefs would qualify as urgent, and then puts an overworked judicial system at the mercy of such a determination. Such an approach brings about a real possibility of plaintiffs circumventing the mandate under Section 12A if a Court must accept a mere pleading of urgency. This also takes us back to the observation made by the Law Commission in its 253rd Report, wherein it was stated that the achievement of expeditious disposal rates through the Commercial Courts system is possible only

[52]Sudhir Krishnaswamy and Varsha Mahadeva Aithala, 'Commercial Courts in India: Three Puzzles for Legal System Reform', (2020) 11(1) *Journal of Indian Law and Society* 20, 29.
[53]*Vikram Bakshi v Sonia Khosla* (2014) 15 SCC 80 SC [19].
[54]Juvraj Singh and Pragya Jain, 'Compulsory Pre-Litigation Mediation for Commercial Suits – A Boon or a Bane?' (*Cyril Amarchand Mangaldas Blogs*, 11 October 2022) <https://corporate.cyrilamarchandblogs.com/2022/10/compulsory-pre-litigation-mediation-for-commercial-suits-a-boon-or-a-bane/> accessed 13 October 2023; Abhijnan Jha and Urvashi Misra, 'Mandatory Pre-Institution Mediation - Effective Remedy to Declog Courts in India' (*AZB Partners*) <https://www.azbpartners.com/bank/mandatory-pre-institution-mediation-effective-remedy-to-declog-courts-in-india/> accessed 13 October 2023.

if the Indian litigation culture changes from one that is litigant-managed to one that is court-managed.[55]

A similar ruling was made by the Supreme Court in *Yamini Manohar*. The Court therein held that "*the prayer for urgent interim relief should not be a disguise or mask to wriggle out of and get over Section 12A.*"[56] Giving the plaintiff the absolute choice and right to determine whether their suit qualifies for the exception goes against the legislative intent of Section 12A, which seeks to mandate litigants to compulsorily undergo PLM. Furthermore, the Pleadings Approach, which the Court in *Yamini Manohar* refers to as the "*absolute and unfettered right*"[57] approach, would not be justified in light of *Patil Automation* making Section 12A mandatory. As was correctly held by the Court, the word '*contemplate*' means that "*the plaint, documents and facts should show and indicate the need for an urgent interim relief*"[58] and that the phrasing of Section 12A "*should be read as conferring power on the court to be satisfied.*"[59]

Therefore, it becomes imperative for courts to test the justifiability and the reasonability of the urgency pleaded, and determine whether a plaintiff should be allowed to bypass mediation. In other words, the plaintiff must satisfy the court that a delay of 3-5 months by way of directing the parties to mediation[60] would actually be fatal to the achievement of justice and therefore justifies the need for bypassing

[55]Law Commission of India, 'Two Hundred and Fifty Third Report on Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015' (2015) 25-27.
[56]*Yamini Manohar v TKD Keerthi* (2023) SCC OnLine SC 1382 [9].
[57]*Yamini Manohar v TKD Keerthi* (2023) SCC OnLine SC 1382 [10].
[58]ibid.
[59]ibid.
[60]The Commercial Courts Act, 2015 (4 of 2016) s 12A(3) states that the pre-institution mediation proceedings must be completed within 3 months, which may be extended to 5 months at the behest of the parties. If a settlement is not reached within this time period, the mediator is bound by Rule 7(1)(ix), Commercial Courts Rules 2018, to file a Failure Report. This Report may be produced before the Commercial Court to entitle the plaintiff to begin litigation.

mediation. There is an onus on the party seeking to avoid mediation to explain why the process should be bypassed.[61] To take up this test of justifiability and reasonability, courts may refer to the plaintiff's pleadings and documents, the facts and circumstances of the case, the antecedent conduct of the plaintiff in filing the suit and if required, the conduct of the defendants, but not the merits of the reliefs pleaded. To quote *Yamini Manohar*, "*this is the precise and limited exercise that the commercial courts will undertake*."[62]

To summarise, courts must limitedly delve into the following factors while dealing with a request for exemption of Section 12A:

Firstly, it must determine whether the pleadings aver 'urgency.'

Secondly, it must satisfy itself that the claim of urgency is justified and warranted, without actually delving into the merits of the pleadings. This means that if a plaintiff pleads that interim relief is required for certain reasons, and is required urgently for some other reasons, the court must not delve into the merits of the reasons for the interim relief and must only determine the justifiability and warranted basis of reasons for the urgency of the relief. For example, if we were to refer to *Gavrill*, the interim relief sought by the plaintiff was a claim for recovery of price of goods.[63] However, the plaintiff pleaded urgency to bypass Section 12A on the grounds that the defendant was a habitual defaulter who was likely to sell off his properties to render any decree infructuous.[64] The Court therein did not delve into the merits of the claim for recovery of price but merely determined that the defaulting nature of the defendant was sufficient to meet the requirement of the

[61] Campbell Hutchinson, 'The Case for Mandatory Mediation' (1996) 42 Loyola Law Review 85, 91.
[62] Campbell Hutchinson, 'The Case for Mandatory Mediation' (1996) 42 Loyola Law Review 85, 100.
[63] *Gavrill Metal (P) Ltd v Maira Fabricators (P) Ltd* (2023) SCC OnLine Cal 2443 [5].
[64] *Gavrill Metal (P) Ltd v Maira Fabricators (P) Ltd* (2023) SCC OnLine Cal 2443 [18].

exception of Section 12A, and allowed the suit to bypass PLM. Only after this bypassing was allowed, did the Court permit the parties to submit arguments on the merits of the claim for recovery of price.

Thirdly, in order to determine the justifiability of the urgency pleaded, the courts may refer to the pleadings and documents, the facts and circumstances of the case, and the conduct of the parties. An important factor is to see if there is a considerable delay between the time when the right to sue first arose, and when the suit was actually filed. If there is a delay, the courts must satisfy themselves that the facts and circumstances of such a delay would not take away from the urgency of the specific interim reliefs pleaded before them.

V. SHOULD THE CCA PROPOUND COMPULSORY PLM?

The effect of this solution is to completely remove any discretion afforded to the plaintiff on deciding whether to pursue PLM or not. Not only are they required to plead urgency for bypassing mediation, but they are also required to substantiate their pleading of urgency and prove its merit. While it is in line with the intent of Section 12A, there have been criticisms against the same primarily on the grounds that there are not sufficient or skilled mediators in India that enable plaintiffs to seek effective mediation,[65] nor is there an effective mediation machinery in India.[66] Moreover, there have been recommendations from the Prime Minister's Economic Advisory Council to make PLM voluntary in nature, keeping in mind the high

[65]Deepika Kinhal and Apoorva, 'Mandatory Mediation in India – Resolving to Resolve' (2020) 2(2) Indian Public Policy Review 49, 53.

[66]Umakanth Varottil, 'Supreme Court on Mandatory Pre-Litigation Mediation in Commercial Court Cases' (*IndiaCorpLaw*, 5 September 2022) <https://indiacorplaw.in/2022/09/supreme-court-on-mandatory-pre-litigation-mediation-in-commercial-court-cases.html> accessed 18 October 2023.

failure rates of commercial mediation and the voluntary nature of mediation.[67]

This problem primarily existed due to the fact that the CCA had only authorised the Legal Services Authorities ("**LSA**") to carry out PLM. The main function of the LSAs is to provide free legal services to weaker sections of society[68] and consequently, their mediators were provided with training in family laws, consumer rights, criminal laws, and sexual harassment laws, but not in high value commercial disputes.[69] This meant that the mediators in these LSAs were not sufficiently trained to effectively mediate in high-value commercial disputes. Statistics provided by the National Legal Services Authorities prove their inability to effectively carry out commercial mediation. In 2022, while 23.3% of the overall cases received for mediation were successfully settled by the LSAs, only 1.9% of the commercial cases received were successfully settled.[70]

However, the Mediation Act, 2023 rectifies this issue to a certain extent. It amends Section 12A to also allow a plaintiff to approach a private mediator for pursuing PLM and subjects this private mediator to the same rules as the LSA mediators.[71] PLM can also be pursued using online mediation, which further reduces the costs and resources taken up.[72] Such a move is in line with the party-centric and voluntary

[67]Sanjeev Sanyal and Apurv K Mishra, 'Why Commercial Mediation Should be Voluntary' (2023) EAC-PM Working Paper Series EAC-PM/WP/25/2023 <https://eacpm.gov.in/wp-content/uploads/2023/10/EACPM-WP25-Why-Commercial-Mediation-Should-be-Voluntary.pdf> (accessed 1 December 2023).
[68]The Legal Services Authorities Act, 1987 (39 of 1987).
[69]NALSA, 'Training Modules' (5 March 2019) <https://nalsa.gov.in/training-modules> accessed 28 November 2023; NALSA, 'Manual For District Legal Services Authorities 2023' (30 June 2023) <https://nalsa.gov.in/library/manual-for-district-legal-services-authorities-2023> accessed 28 November 2023.
[70]National Legal Services Authorities, 'Statistical Snapshot 2022' (9 August 2023) 26-27 <https://nalsa.gov.in/library/statistical-snapshot/statistical-snapshot-2022> accessed 28 November 2023.
[71]The Mediation Act, 2023 (32 of 2023) s 64.
[72]The Mediation Act, 2023 (32 of 2023) s 30.

nature of mediation,[73] as the parties are now free to appoint any mediator who they think would be the most effective in resolving their dispute. While it is too soon to see if the Mediation Act is starting to solve the institutional problems in the domestic mediation framework, commentators have reacted positively to the Mediation Act and its attempt to institutionalise the mediation process in India.[74]

Another argument raised against compulsory PLM in the CCA is the fact that it mandates litigants to go through mediation, and such a mandate supposedly contradicts the voluntary nature of a dispute resolution method like mediation,[75] which emphasises on self-determination, collaboration and creative dispute resolution that addresses each party's concerns.[76] Critics characterise such a mechanism as coercing unwilling parties to sit through a long-drawn mediation process.[77]

---

[73]Sriram Panchu, *Mediation - Practice and Law* (3rd edn, LexisNexis) ch 3.2.

[74]'Mandatory Pre-Litigation Mediation Needs Lot of Ground Work before Rollout' *The Hindu BusinessLine* (9 January 2022) <https://www.thehindubusinessline.com/business-laws/mandatory-pre-litigation-mediation-needs-lot-of-ground-work-before-rollout/article38204536.ece> accessed 28 November 2023; Justice RS Chauhan, 'Why the Mediation Act 2023 Is a Great Leap Forward' (*Moneycontrol*, 14 November 2023) <https://www.moneycontrol.com/news/opinion/why-the-mediation-act-2023-is-a-great-leap-forward-11738231.html> accessed 28 November 2023; PTI, 'Mediation Act a Watershed Moment in Indian Legal Landscape: Justice Hima Kohli' *Deccan Herald* (23 September 2023) <https://www.deccanherald.com/india/mediation-act-a-watershed-moment-in-indian-legal-landscape-justice-hima-kohli-2698533> accessed 28 November 2023.

[75]Sanjeev Sanyal and Apurv K Mishra, 'Why Commercial Mediation Should be Voluntary' (2023) EAC-PM Working Paper Series EAC-PM/WP/25/2023, 7 <https://eacpm.gov.in/wp-content/uploads/2023/10/EACPM-WP25-Why-Commercial-Mediation-Should-be-Voluntary.pdf> (accessed 1 December 2023).

[76]Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 Cardozo Journal of Conflict Resolution 479, 481; Lon Fuller, 'Mediation: Its Forms and Functions' (1971) 22 Southern California Law Review 305, 308.

[77]Sanjeev Sanyal and Apurv K Mishra, 'Why Commercial Mediation Should be Voluntary' (2023) EAC-PM Working Paper Series EAC-PM/WP/25/2023, 7

This is an incorrect characterisation: there is a distinction between coercion *within* mediation, which forces a party to settle in the mediation process,[78] and coercion *into* mediation, which merely forces a party to *try* to settle the dispute via mediation, as opposed to compulsorily reaching a settlement.[79] The requirement is not for the parties to reach a settlement, but only for them to make a good faith effort in mediating their dispute.[80] The party's right to litigate the dispute still exists, but is merely delayed until mediation fails.[81] This delay is justified on two counts: *firstly*, it helps in reducing the number of cases that the judicial system is forced to deal with, and *secondly,* the mechanism of mediation itself provides benefits such as: a chance for parties to contribute to the resolution process,[82] improved communication between parties and their lawyers,[83] greater compliance with the settlements (as opposed to a judgement emanating

<https://eacpm.gov.in/wp-content/uploads/2023/10/EACPM-WP25-Why-Commercial-Mediation-Should-be-Voluntary.pdf> (accessed 1 December 2023).

[78]This defeats the very purpose of mediation in not allowing the parties to collaboratively achieve a mutually beneficial agreement.

[79]Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 Cardozo Journal of Conflict Resolution 479, 486; Frank Sander, H William Allen and Debra Hensler, 'Judicial (Mis)use of ADR? A Debate' (1996) 27 University of Toledo Law Review 885, 886.

[80]Campbell Hutchinson, 'The Case for Mandatory Mediation' (1996) 42 Loyola Law Review 85, 91.

[81]Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 Cardozo Journal of Conflict Resolution 479, 486.

[82]Roselle Wissler, 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) Ohio State Journal on Dispute Resolution 641, 690.

[83]Roselle Wissler, 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) Ohio State Journal on Dispute Resolution 641, 691.

from a litigation process),[84] maintenance of business relationships,[85] and many more. There may be a few instances where certain types of disputes should not be mediated and must be litigated, and a conjoint reading of the Mediation Act, 2023 and the CCA's interim relief exception covers such instances.[86]

VI. CONCLUSION

While the Supreme Court of India has provided clarity on the mandatory nature of the PLM mechanism under the CCA, the mechanism still suffers from fundamental flaws regarding the types of suits that are allowed to bypass it. *Yamini Manohar*, by interpreting Section 12A in a manner that takes power of determining urgency away from the litigant and returns it to the courts, has succeeded in ensuring that the purpose of Section 12A is not defeated.

The current jurisprudence reveals divergent approaches that are a representation of the two opposing litigation cultures that the 253rd Report identified: *firstly*, the pleadings approach, which represents a litigant-centric judicial process that causes structural issues of long delays, frivolous litigations and an overall abuse of the judicial process, and *secondly*, the justifiability and the antecedent conduct approaches, which represent a court-centric judicial process that empowers the Courts to force the plaintiff into acceding to fast-track measures and policies. The report argued that a change in litigation culture from being litigant-centric to court-centric was important to give effect to the creation of the fast-track forums and procedures under the CCA.

[84] Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 Cardozo Journal of Conflict Resolution 479, 482.
[85] Campbell Hutchinson, 'The Case for Mandatory Mediation' (1996) 42 Loyola Law Review 85, 88.
[86] The Mediation Act, 2023 (32 of 2023) s 6; The Commercial Courts Act, 2015 (4 of 2016) s 12A(1).

The mechanism of compulsory PLM was enacted to further increase the speed with which commercial disputes are resolved. While it has attracted some criticisms regarding its effectiveness in resolving disputes, the recently enacted Mediation Act, 2023 seems to provide solutions for these criticisms. Hence, there is a need for courts to deal with suits seeking bypass of mediation under Section 12A in a stricter sense. Courts cannot merely rely on a pleading of urgency and allow a litigant-centric approach to hijack the fast-track procedures and hold the system hostage to their determinations. Instead, courts must delve into the justifications and warranted basis of such pleadings, and take control from the litigants by creating a standard that they are expected to meet in order to bypass the pre-litigation mediation mechanism. Such an exercise must be taken in order to promote the intent of Section 12A and help decongest the judiciary's workload.

HORIZONTAL AND VERTICAL PROTECTION OF COPYRIGHT IN STAND-UP COMEDY

Chetan R.[*]

ABSTRACT

In today's day and age, with numerous streaming platforms present online, stand-up comedy remains one of the most watched categories of entertainment. Additionally, stand-up comedy in live performances and theatres has also gained extensive support and grown to an enormous extent in the country. With such great popularity of this field, there arises a great need for recognising and regulating the rights and duties vested in the parties involved in the making of such stand-up comedy videos and performances. However, with the lack of any special law for stand-up comedy, recourse has to be sought to the existing legal framework within the copyright laws of India, i.e., the Copyright Act, 1957, and the subsequent jurisprudence. This article aims to venture into this exercise of placing stand-up comedy within the Copyright Act, 1957 and its subsequent precedents, along with precedents from different jurisdictions, particularly the United States. This article adopts two methods of viewing this issue,

[*]Chetan is a fifth-year B.A. LLB. (Hons.) student at the National Law School of India University, Bengaluru. The author may be reached at chetanr@nls.ac.in.

firstly, in a horizontal manner, i.e., copyright issues between stand-up comedians copying each other's work, and secondly, in a vertical manner, i.e., copyright issues between producers of stand-up comedy shows and the stand-up comedians themselves, who not only write material for their show but also perform the same. The latter perspective is taken particularly in the light of the recent controversy surrounding the complaint lodged against Vir Das by his former producer for alleged copyright infringement from a previous show. This article adopts a comparative analysis with the United States and suggests a way forward for the stand-up comedy industry.

Keywords: *Stand-up comedy, Copyright Act, 1957, horizontal and vertical protection, performer's rights, extra-legal norms*

I. INTRODUCTION

Stand-up comedy is one of the emerging fields of art and performance in India, as can be witnessed in the number of stand-up shows and Netflix specials coming up.[1] Even the number of stand-up comedians has increased with some being, Kenny Sebastian, Saurabh Pant, Kapil Sharma, etc.[2] Netflix has also stated that Indian viewers are more likely

[1]Jyotirmoy Biswas Priyadharshini, 'Indian standup comedy has a bright future, even in these times of intolerance' (*The Print*, 07 July 2021) <https://theprint.in/campus-voice/indian-standup-comedy-has-a-bright-future-even-in-these-times-of-intolerance/691545/> accessed 05 December 2022.

[2]Deutsche Welle, 'Why stand-up comedy is gaining popularity in India' *Hindustan Times* (29 December 2021) <https://www.hindustantimes.com/lifestyle/art-

to watch stand-up comedy than others around the world.[3] Due to this growing popularity, there is bound to arise the need for protecting the rights that are associated with the field of art.

This is because, in creating any form of a stand-up comedy act, substantial amounts of work go into the process, the most important of which is the intellect and effort of the comedian.[4] In addition, there is a large amount of business attached to this art,[5] in the form of ticket sales for stand-up shows, subscriptions and pre-order on Netflix and Amazon Prime, etc.[6] Therefore, this calls for protection and recognition of this work and effort of the comedians and their subsequent economic benefits, in the form of intellectual property rights, with copyright being the most applicable form.

The creativity, innovations and investments are all safeguarded through this. This becomes particularly important in the backdrop of numerous allegations of joke theft and violations of copyrights among stand-up comedians throughout the world. The recent allegations against Vir Das for infringing the copyright of the producer of his previous show is an example of such news in the Indian scenario,[7] and the incidents

culture/why-stand-up-comedy-is-gaining-popularity-in-india-101640743474599.html> accessed 05 December 2022.

[3]John Sarkar, 'Comedy is serious biz for many Indians' *The Times of India* (07 July 2017) <https://timesofindia.indiatimes.com/business/india-business/comedy-is-serious-biz-for-many-indians/articleshow/59482534.cms> accessed 05 December 2022.

[4]Sampada Kapoor, 'Copyright Protection In Stand-Up Comedy' (*The IP Press*, 05 May 2022) <https://www.theippress.com/2022/05/05/copyright-protection-in-stand-up-comedy/#_ftn1> accessed 05 December 2022.

[5]Preetam Kaushik, 'Made In Mumbai: Indian Comedy Industry Is Thriving' *Business Insider* (16 December 2014) <https://www.businessinsider.in/made-in-mumbai-indian-comedy-industry-is-thriving/articleshow/45532619.cms> accessed 18 March 2024.

[6]'Comedy has become serious business for many post-pandemic' *The Tribune* (17 October 2021) <https://www.tribuneindia.com/news/features/comedy-has-become-serious-business-for-many-post-pandemic-325612> accessed 05 December 2022.

[7]'Mumbai: Comedian Vir Das and Netflix booked for copyrights violation, Producer Ashvin Gidwani says they stole jokes from an old show' *OP India* (09 November 2022) <https://www.opindia.com/2022/11/mumbai-comedian-vir-das-netflix-

of Josh Ostrovsky[8] and Elliot Tebele[9] stealing jokes of other comedians remain as one of the biggest incidences of joke theft on the global front. In light of all these, this article aims to analyse the legal and extra-legal frameworks available for comedians to protect their works.

To that effect, this article is divided into three sections. *Firstly*, this article aims to highlight the ineffectiveness of the traditional modes of copyright protection in the field of copyright due to a peculiar internal working of the industry. *Secondly*, this article aims to delve into two forms of horizontal protection of the copyrights of stand-up comedians, which is, through the legal concept of performer's rights and extra-legal norms which exist in the industry. *Thirdly*, this article aims to take up a case study on the recent allegations against Vir Das and analyse the mechanism in a vertical application of copyrights between stand-up comedians and the producers of their shows.

II. INEFFECTIVE COPYRIGHT PROTECTION IN STAND-UP

A. Placing stand-up in Section 13

Avenues for protecting copyrights in stand-up comedy are very valuable because of the increase in the amount of appropriation.[10] Moreover, with the prevalence of social media and the internet, the harm caused due to such appropriation gets exacerbated. Under Section

booked-for-copyrights-violation-producer-ashvin-gidwani/> accessed 05 December 2022.

[8]Alex Abad-Santos, 'The Fat Jew's Instagram plagiarism scandal, explained' *Vox* (19 August 2015) <https://www.vox.com/2015/8/19/9178145/fat-jew-plagiarism-instagram> accessed 05 December 2022.

[9]Nick Statt, 'Fuckjerry founder apologizes for stealing jokes and pledges to get creator permission' (*The Verge*, 03 February 2019) <https://www.theverge.com/2019/2/2/18208446/fuckjerry-elliot-tebele-meme-joke-aggregator-repost-new-policy-change> accessed 05 December 2022.

[10]Hannah Pham, 'Intellectual Property In Stand-Up Comedy: When #fuckfuckjerry Is Not Enough' (2020) 33 Harvard Journal of Law & Technology 1.

13 of the Copyright Act, 1957 ("**the Act**"), for any work to be copyrighted, it has to meet the Indian standard of originality, which is that there needs to be a minimum amount of creativity in the work, and it is not enough that the work is merely innovative/novel and/or a product of capital/labour.[11] Such creative works can then be placed under any of the six categories mentioned in Section 13 of the Act read with Section 2(y) which defines "work". These include: (1) literary work, (2) dramatic work, (3) musical work, (4) artistic work, (5) cinematographic work, and (6) sound recording.

Stand-up comedy can qualify under this threshold as there is some form of creativity involved in the process of preparing a show or performance.[12] Within the categories under this provision, stand-up comedy jokes can only be placed under dramatic works or cinematographic work and not literary work. This is because, it has been held that literary work under the statute may include anything expressed in writing, or in print, or in any form of symbols or notation.[13] In the field of stand-up comedy, majority of the act is instantaneous and improvisational.[14] Most stand-up comedians very rarely rely on scripts for the entirety of their performance.[15]

Therefore, using certain scripts or written paper to claim copyright over an actual performance which may not even be entirely according to the script (in which case it will be considered as distinct from the script) is

[11]*Eastern Book Company & Ors. v D.B. Modak & Anr*. (2008) 1 SCC 1.

[12]Vaibhav Gupta, 'The Copyright Conundrum In Stand-Up Comedy Scenario In India' (*mondaq*, 18 April 2022) <https://www.mondaq.com/india/copyright/1184344/the-copyright-conundrum-in-stand-up-comedy-scenario-in-india> accessed 05 December 2022.

[13]*University of London Press Ltd. v University Tutorials Press Ltd*. (1916) 2 ChD 601.

[14]Tobyn Demarco, 'Improvisation and Stand-Up Comedy: Demarco' (2020) 78(4) Journal of Aesthetics and Art Criticism 419.

[15]James D Creviston, 'Is Stand Up Comedy Scripted' (*Comedypreneur*) <https://www.comedypreneur.com/is-stand-up-comedy-scripted/> accessed 05 December 2022.

a very weak claim.[16] As regard to dramatic work, stand-up comedy qualifies the Section 2(h) requirements entirely even when we talk about the requirement of fixation.[17] This can be met through the performance of the act before a live audience in the form of the comedian's demeanour, facial expressions, etc.[18] Moreover, if this entire performance is video recorded, then the same can even be protected as a cinematographic work under Section 2(f).[19]

B. *Uncertain idea expression dichotomy*

The idea of copyright has been understood to only protect the expression of an idea and not the idea itself.[20] On the international front, this has been iterated in Article 9(2) of the Agreement on Trade Related Aspects of Intellectual Property Rights ("**TRIPS**")[21] and Article 2 of the World Intellectual Property Organisation ("**WIPO**") Copyright Treaty.[22] This has been reiterated by the courts that even if two works are similar in their subject matter, idea or theme, the one made later in time would not be infringing the copyright of the original.[23] Apart from this, attempts made at suing artistic works based on similar premises have failed.[24] This greatly impedes the protection of copyright in the stand-up arena because conceptually, it is only the individualised expression of the joke which will be protected and not

---

[16]Poulomi Chatterjee, 'The Price of Laughter: Stand-Up Comedy and Intellectual Property Law' (*International Journal of Advanced Legal Research*) <https://ijalr.in/the-price-of-laughter-stand-up-comedy-and-intellectual-property-law/> accessed 05 December 2022.
[17]The Copyright Act, 1957 (14 of 1957) s 2(h).
[18]'Stand-Up Comedy and Intellectual Property Rights: No Jokes There!' (*Jus Corpus Law Journal*, 26 August 2021) <https://www.juscorpus.com/stand-up-comedy-and-intellectual-property-rights/> accessed 05 December 2022.
[19]The Copyright Act, 1957 (14 of 1957) s 2(f).
[20]*R.G. Anand v Delux Films* (1978) 4 SCC 118.
[21]The Agreement on Trade Related Aspects of Intellectual Property Right, art 9(2).
[22]The World Intellectual Property Organization Copyright Treaty, art 2.
[23]*R.G. Anand v Delux Films* (1978) 4 SCC 118.
[24]Prashant Reddy, 'Hollywood v. Bollywood – 'Partner' In Crime' (*spicy IP*, 05 October 2007) <https://spicyip.com/2007/10/hollywood-v-bollywood-partner-in-crime.html> accessed 05 December 2022.

the idea or subject matter of the joke. This is the complex arrangement and choice of the comedian's words.[25]

This becomes particularly important in the field of narrative/observational stand-up comedy. In this form of stand-up, the comedian usually gives their perspective, observations and opinions about a particular situation, incident, or fact.[26] Comedians have even accused other comedians of plagiarising their joke only on the fact that both talked about the same topic.[27] In such cases, there can be no true claims of infringement. The two jokes, even though being based on the same premise, would have separate copyrights over the individualised expression of both the jokes, as long as they are expressed in different words.[28] Therefore, the idea-expression dichotomy greatly limits the copyright protection accorded to stand-up comedians and their jokes.

C. Inadequate jurisprudence by courts

Due to the insufficient legal and conceptual frameworks for protecting copyrights in stand-up, courts have also not been able to establish adequate jurisprudence in this regard. The case laws on jokes and comedy have been very limited, with most arising only in the Unites States, and almost none in India.[29] The cases have also been only about one or two liner jokes, and not about the more popular and prevalent narrative/observational stand-up. In the case of *Foxworthy v. Custom*

[25] Elizabeth Moranian Bolles, 'Stand-Up Comedy, Joke Theft, and Copyright Law' (2011) 14 Tulane Journal of Technology and Intellectual Property 237.
[26] Scott Woodard, 'Who Owns a Joke? Copyright Law and Stand-Up Comedy' (2019) 21(4) Vanderbilt Journal of Entertainment and Technology Law 1041.
[27] 'Stand-up comedian Abijit Ganguly accuses Kapil Sharma of plagiarising his joke' *Hindustan Times* (05 June 2017) <https://www.hindustantimes.com/tv/stand-up-comedian-abijit-ganguly-accuses-kapil-sharma-of-plagiarising-his-joke/story-egsAT53iXsW8mL5BHyAacO.html> accessed 05 December 2022.
[28] Dotan Oliar & Christopher Jon Sprigman, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy' (2008) 94(8) Virginia Law Review 1787.
[29] Varsha Jhavar, 'Stand-Up Comedy: Negative Space Or Traditional IP Worthy?' (2021) 5(2) Journal of Intellectual Property Studies 21.

Tees,[30] the judge had held that the use of a single line by the comedian as a prefix to his sentence could be copyrighted and the use of the same by the defendant's company in producing T-shirts would be an infringement of his copyright.[31]

In another US case of *Kaseberg v. Conaco LLC*.,[32] the court had held that in the case of copyright afforded to jokes (specifically punchlines), there is only a thin and broad protection which are constrained by (i) humour, (ii) application to the particular facts articulated in every joke's preceding sentence, and (iii) provision of mass appeal.[33] Therefore, there is much uncertainty regarding the scope of copyright protection which such narrative/observational jokes get. However, considering India's affinity to the welfare model of copyright[34] (because of its aim of promoting the interests of the whole society and ensuring the system does the greatest good to the greatest number),[35] there is a chance of promising jurisprudence arising in this arena. Moreover, the striking similarity test which was laid down in *Raja Pocket Books v. Radha Pocket Books*,[36] if extended to stand-up comedy, could be used to safeguard narrative/observational stand-up (even though the idea-expression dichotomy would still not be satisfied).[37] However, the application of this test may also be further

---

[30]*Foxworthy v Custom Tees* 879 F. Supp. 1200 (N.D. Ga. 1995).
[31]Andrew Greengrass, 'Take My Joke… Please - Foxworthy v. Custom Tees and the Prospects for Ownership of Comedy' (1997) 21 Columbia-VLA Journal of Law & the Arts 273.
[32]*Kaseberg v Conaco LLC* 260 F. Supp. 3d 1229.
[33]Wook Hwang & Kyle Petersen, 'Kaseberg v. Conaco, LLC' (*Loeb & Loeb*, 12 May 2017) <https://www.loeb.com/en/insights/publications/2017/05/kaseberg-v-conaco-llc> accessed 05 December 2022.
[34]Ankita Singhania, 'Copyright Laws in India and Maintenance of a Welfare State' (2006) 11 Journal of Intellectual Property Rights 43.
[35]Jessica Meindertsma, 'Theories of copyright' (*The Ohio State University Copyright Corner*, 09 May 2014) <https://library.osu.edu/site/copyright/2014/05/09/theories-of-copyright/> accessed 05 December 2022.
[36]*Raja Pocket Books v Radha Pocket Books* 1997 (40) DRJ 791.
[37]Hannah Pham, 'Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age' (2019) 30 Fordham Intellectual Property, Media and Entertainment Law Journal 55.

complicated or even made inapplicable due to both performance and literary aspects being present for the activity.

D. Practical barriers to enforcement

Considering the workings of the field of narrative/observational stand-up, limiting the premise of jokes through copyright could put the entire field in mayhem.[38] It would become highly impractical for comedians to change the entire premise of all their jokes to something which no previous comedian has talked about in fear of infringing someone's copyright.[39] The enormous amounts of creativity prevalent in the field would be curtailed, hence, ruining the entire field. Considering the popularity and pervasiveness of stand-up in the social media age, any joke made by a comedian can more often than not be only used once or twice, after which most tend to consider the joke as being retired from the stand-up show.[40]

If used more often, then tags of the comedian being *repetitive* may be brought up diminishing the comedian's reputation.[41] Therefore, litigating over one or a few jokes would be of no value to the comedian. Moreover, considering the cumbersome Indian judicial procedural system, no comedian could even be willing to sue someone for

[38]Poulomi Chatterjee, 'The Price of Laughter: Stand-Up Comedy and Intellectual Property Law' (*International Journal of Advanced Legal Research*) <https://ijalr.in/the-price-of-laughter-stand-up-comedy-and-intellectual-property-law/> accessed 05 December 2022.

[39]Vaibhav Gupta, 'The Copyright Conundrum In Stand-Up Comedy Scenario In India' (*mondaq*, 18 April 2022) <https://www.mondaq.com/india/copyright/1184344/the-copyright-conundrum-in-stand-up-comedy-scenario-in-india> accessed 05 December 2022.

[40]Varsha Jhavar, 'Stand-Up Comedy: Negative Space Or Traditional IP Worthy?' (2021) 5(2) Journal of Intellectual Property Studies 21.

[41]Gursimran Kaur Banga, 'Is The Kapil Sharma Show getting repetitive and losing its charm?' *The Times of India* (08 February 2017) <https://timesofindia.indiatimes.com/tv/news/hindi/is-the-kapil-sharma-show-getting-repetitive-and-losing-its-charm/articleshow/57040851.cms> accessed 05 December 2022.

infringing their copyright over a particular joke.[42] In addition to this, enormous amounts of time, effort and money would also be wasted for a few jokes. Additionally, many comedians even lack knowledge regarding the copyrightability of their jokes, due to which they do not pursue any legal action, even of their copyrights are infringed.[43]

III. HORIZONTAL PROTECTION OF COPYRIGHT IN STAND-UP

A. *Performer's right*

It has been argued by many authors that one aspect of the Indian copyright law through which stand-up comedy can be protected is as a dramatic work and subsequently, the performer's rights accrued to the comedian.[44] As previously mentioned, in narrative/observational stand-up, it is the performance of the comedian, their improvisation, personas, crowd work methods, etc., which make them distinctive from the rest,[45] and hence, capable of being registered as copyright. In this way, there can be a much broader protection being given, instead of it being just reserved for the one or two-line joke, as was done in the *Foxworthy* case.[46]

[42]Vidhi Doshi, 'India's long wait for justice: 27m court cases trapped in legal logjam' *The Guardian* (05 May 2016) <https://www.theguardian.com/world/2016/may/05/indias-long-wait-for-justice-27-million-court-cases-trapped-in-a-legal-logjam> accessed 05 December 2022.

[43]Varsha Jhavar, 'Stand-Up Comedy: Negative Space Or Traditional IP Worthy?' (2021) 5(2) Journal of Intellectual Property Studies 21.

[44]Dotan Oliar and Christopher Jon Sprigman, 'From Corn to Norms: How IP Entitlements Affect What Stand-Up Comedians Create' (2009) 95 Virginia Law Review In Brief 57.

[45]Bradford Evans, 'Stand Up Comedians and Their Alternate On-Stage Personas' (*Vulture*, 07 August 2012) <https://www.vulture.com/2012/08/stand-up-comedians-and-their-alternate-on-stage-personas.html> accessed 05 December 2022.

[46]Sampada Kapoor, 'Copyright Protection In Stand-Up Comedy' (*The IP Press*, 05 May 2022) <https://www.theippress.com/2022/05/05/copyright-protection-in-stand-up-comedy/#_ftn1> accessed 05 December 2022.

A stand-up comedian can qualify as being a performer under Section 2(qq) of the Act, as his stand-up is a performance under Section 2(q) of the Act for being a 'visual or acoustic presentation made live' before an audience.[47] The author's original expression and conceptualisation of the stand-up act through his peculiar combination and arrangement of words as well as his demeanour, timing, tone, etc. would be receiving protection under the performer's rights under Section 38 and Section 38A of the Act.[48] However, this is a limited protection being offered to the comedian, as it only prevents others from making a recording of the comedian's performance or broadcasting it any way in social media platforms like Instagram, YouTube, etc.[49] It allows other comedians to use the same material but present it in another tone or arrangement of words or timing. Due to this, these provisions of the Act would only be effective in the realm of social media or video platforms, and not particularly for joke theft between comedians.

B. Norms against appropriation

The most effective method of protecting the rights of comedians with regard to their jokes, is already existent within the field of stand-up itself, i.e., through the social-norms based system. Comedy, as a field of art, exists in intellectual property's negative space.[50] This means that creativity or innovation prevails in the industry, with the works of the comedians receiving protection, despite there being no formal intellectual property rights application. Therefore, these are termed as

[47]The Copyright Act, 1957 (14 of 1957) s 2(q) & s 2(qq).
[48]The Copyright Act, 1957 (14 of 1957) s 38 & s 38A.
[49]Megha Rathore, 'Significance of Performers' Rights in India: Identifying the Vacuum in times of Digitisation' (*Excelon IP*) <https://excelonip.com/significance-of-performers-rights-in-india-identifying-the-vacuum-in-times-of-digitisation/#:~:text=It%20was%20in%20the%20Amendment,be%20taken%20from%20the%20performer.> accessed 05 December 2022.
[50]Dotan Oliar and Christopher Jon Sprigman, 'Intellectual Property Norms in Stand-Up Comedy' (2010) The Making and Unmaking of Intellectual Property.

low *IP equilibrium* industries.[51] Primary examples of industries coming under this category are fashion, culinary and luxury goods.[52]

Stand-up falls under this category because of the forbearance of comedians to protect their jokes through the formal copyright registration system.[53] Instead, the industry relies on social norms for the said protection. This is because reputation exists as a major element in this industry.[54] It has been stated by numerous comedians that stealing jokes and material is one of the worst accusations against a comedian.[55] Therefore, stand-up comedy exists as a closely-knit industry wherein the comedians are regulated through an informal mechanism of detecting joke theft, deliberation and taking action through extra-legal or social norms and sanctions.[56]

These norms can include refusing to work with the comedian, refusing to host the comedian, bad mouthing of the comedian, etc., and this has even extended to physical altercations with the offender as well.[57] This is because reputation exists as a very important element in the stand-up industry and any bad reputation can result in the derailment of the entire career of the offending comedian.[58] Not only the comedians, but also

[51]Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92(8) Virginia Law Review 1687.
[52]ibid.
[53]Elizabeth Rosenblatt, 'A Theory of IP's Negative Space' (2010) 34(3) Columbia Journal of Law & the Arts 317.
[54]Dotan Oliar & Christopher Jon Sprigman, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy' (2008) 94(8) Virginia Law Review 1787.
[55]Sonia Rao, 'Conan O'Brien settles lawsuit over alleged joke theft, calls it 'the worst thing any comic can be accused of' (*The Washington Post*, 09 May 2019) <https://www.washingtonpost.com/arts-entertainment/2019/05/09/conan-obrien-settles-lawsuit-over-alleged-joke-theft-calls-it-worst-thing-any-comic-can-be-accused/> accessed 05 December 2022.
[56]Allen D Madison, 'The Uncopyrightability of Jokes' (1998) 35(11) San Diego Law Review 111.
[57]Jennifer E Rothman, 'Custom, Comedy, and The Value of Dissent' (2009) 95 Virginia Law Review In Brief 19.
[58]James Robinson, 'The comedy (stealing) club: How James Corden joins a list of stand-ups accused of pinching skits - from Robin Williams to Amy Schumer and

other intra-industrial players, such comedy room managers, club owners, agents, etc., also engage in this practice which greatly helps in regulating any bad conduct.[59]

Moreover, with social media and the internet, detecting and verifying any such joke theft is much easier and the audience also plays a role in protecting the original works of comedians because of the social backlash which those engaged in copying can face on social media and public.[60] Hence, such social norms based system works as an effective method of regulating the making, use and copying of jokes within the industry, thereby, protecting the efforts or creativity of the comedians and incentivises comedians to come up with new material for their acts.[61]

Ricky Gervais' *Daily Mail* (03 November 2022) <https://www.dailymail.co.uk/news/article-11385711/The-comedy-stealing-club-James-Corden-joins-list-stand-ups-accused-pinching-skits.html> accessed 05 December 2022.

[59]Hannah Pham, 'Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age' (2019) 30 Fordham Intellectual Property, Media and Entertainment Law Journal 55.

[60]Aya Yehia, 'Celebrities Who Went from Being Adored to Being Hated' (*The Things*, 09 December 2022) <https://www.thethings.com/celebrities-who-went-from-being-loved-to-hated/> accessed 05 December 2022.

[61]Siena Stanislaus, 'How Much Does a Laugh Cost? Comedians' Rising Demand for Royalty Payments for the Composition of Jokes' (*The Colombian Journal of Law & Arts*, 08 April 2022) <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/516> accessed 05 December 2022.

IV. VERTICAL PROTECTION OF COPYRIGHT IN STAND-UP

A. *Case study of Vir Das*

Recently, renowned stand-up comedian Vir Das has had an FIR registered against him under Section 51 and Section 63 of the Act.[62] Section 51 of the Act lays down the instances where the copyright of an author is infringed, and Section 63 is the criminalisation principle laying down punishments to be awarded in instances of copyright infringement. It has been alleged by Ashwin Gidwani, the producer of Vir Das's 2010 show, *History of India VIRitten*, that in his latest Netflix special *Virdas for India*, the comedian has copied 12 jokes from the 2010 show.[63] This incident raises numerous questions regarding the application of copyright law in a vertical manner between a comedian and a producer of the show.

This particular aspect has not been discussed much as almost all of the previous literature has only focused on the horizontal protection of jokes amongst comedians and not vertical protection. This section of the article aims to delve into this discussion regarding the existence of copyrights over jokes or stand-up acts, and whether they lie with the comedian or the producer. To this effect, the article will mainly be

[62] 'Vir Das, Netflix among four booked for copyright infringement' *The Indian Express* (Mumbai, 17 November 2022) <https://indianexpress.com/article/cities/mumbai/vir-das-netflix-fir-mumbai-copyright-infringement-8255052/#:~:text=Actor%20and%20stand%2Dup%20comedian,2010)%E2%80%9D%20by%20using%20concept%20and> accessed 05 December 2022.

[63] 'Mumbai: Comedian booked for violation of copyright by theatre producer' *The Times of India* (08 November 2022) <https://timesofindia.indiatimes.com/city/mumbai/mumbai-comedian-booked-for-violation-of-copyright-by-theatre-producer/articleshow/95367030.cms> accessed 05 December 2022.

relying upon arguments and conceptions of the operation of copyrights in the fields of theatre, cinema and music.

B. Resolving copyright ownership between comedians and producers

a) For cinematographic film

As previously mentioned, if any stand-up show of a comedian is recorded, as it happens with Netflix and Prime special, then such a recording would qualify as being a *cinematographic work* under Section 2(f) of the Act. So, for these forms of shows, when any form of dispute arises with regard to the copyrights of the show, the first argument which any producer would rely on would be the *ratio decidendi* of the case, *Indian Performing Rights Society v. Eastern India Motion Pictures Association* ("**IPRS case**").[64] According to this, the producer of a cinematographic film would be the first owner of the copyright in all works involved in the film. This argument mainly relies on the fact that, *firstly*, the definition under Section 2(d) specifies the producer to be the author of a cinematographic film,[65] and *secondly*, according to Section 17(b)[66] and Section 17(c),[67] the rights of a producer would trump the individual rights of the comedian (who might have both written the script and acted it out in the recording). Such a construction of the producer's rights in a cinematographic film, as per the *IPRS* case, has been upheld in various subsequent cases as well.[68]

[64]*Indian Performing Rights Society v Eastern India Motion Pictures Association* (1977) 2 SCC 820.
[65]The Copyright Act, 1957 (14 of 1957) s 2(d).
[66]The Copyright Act, 1957 (14 of 1957) s 17(b).
[67]The Copyright Act, 1957 (14 of 1957) s 17(c).
[68]*International Confederation of Societies of Authors and Composers v Aditya Pandey and Ors*. (2017) 11 SCC 437; *Saregama Ltd. v The New Digital Media & Ors*. (2018) 73 PTC 329; *International Confederation of Societies of Authors and*

However, this construction of the rights of the authors of different works in a cinematographic film is flawed in the sense that it does not take into account the different dimensions of Section 17 while invoking the same.[69] This flawed understanding has been slightly alluded to in the footnotes of Justice Krishna Iyer's opinion in the *IPRS* case.[70] Firstly, on a closer analysis of Section 17(b), it is observed that this provision is closely worded. There is a clear subject-matter limitation being imposed here, which is that, it only applies for photographs, paintings or portraits, engravings and cinematographic films. There is no mention of literary work or dramatic work in this provision, which is where the script and performance of the stand-up comedian fall under.[71] With respect to a cinematographic film, as per Section 14(d), copyright only exists for protecting the actual recording of the film, i.e., it prevents others from making copies of the cinematographic film recording. As regards communication to the public, this means, playing or displaying the film recording to the public. It does not cover the other works involved in the cinematographic film, like the script (literary work) or the composition (musical work) or the performance (dramatic work). Therefore, the producer of a recorded stand-up comedy show cannot claim to be the first owner of the script used in the show (cinematographic film).[72]

Composers v Aditya Pandey (2017) 11 SCC 437; *Indian Performing Right Society v Aditya Pandey*, 2011 SCC OnLine Del 3113.

[69]Vasundhara Majithia, 'Extinguishing the Rights of Lyricists and Composers: IPRS v Aditya Pandey' (*Spicy IP*, 04 November 2016) <https://spicyip.com/2016/11/extinguishing-the-rights-of-lyricists-and-composers-iprs-v-aditya-pandey.html> accessed 26 June 2023.

[70]Aqa Raza, 'Theoretical Underpinnings of Copyright and Design Laws: Decisions of the Supreme Court of India' (2021) 26 JIPR 220.

[71]Adyasha Samal, 'Delhi HC Order Cripples Authors' Royalty Rights in Underlying Works' (*Spicy IP*, 29 January 2021) <https://spicyip.com/2021/01/delhi-hc-delivers-order-crippling-authors-royalty-rights-in-underlying-works.html> accessed 27 June 2023.

[72]Prashant Reddy T, 'The Background Score to the Copyright (Amendment) Act, 2012' (2012) 5 NUJS Law Review 469.

Secondly, while it can be said that Section 17(c) has no subject-matter limitation like Section 17(b), for invoking the same, there has to be a relationship of *employment* through a *contract of service* between the producer and the comedian (script-writer). For establishing this, a perusal of Chitty on Contracts can be done. The eight factors mentioned in this book for establishing a contract of employment are: (1) Degree of control, (2) Prospect of loss or profit for the worker, (3) Worker being a part of the employer's organisation, (4) Business of worker or business of employer, (5) Ownership of equipment, (5) Incidence of tax and insurance, (6) Parties' view of relationship and (7) Traditional structure of the concerned trade or profession.[73]

In the context of stand-up comedy, between the producer and the comedian (script-writer), there is little to no degree of control exercised by the producer over the comedian on how to write their script. However, with regard to the profit or loss, it may be stated that the comedian has no prospect of this because of the fixed sum which they are paid. Nevertheless, the comedian cannot be said to be a part of the producer's organisation. Moreover, the script-writing is not a business of the producer. It is the business of the comedian. The question of equipment and tax incidence does not arise in this case. And with respect to the penultimate factor, the comedians would always tend to view themselves as independent workers and not employees of the producer. Lastly, in such forms of cinematographic works, the scriptwriters and the actors are never traditionally considered as a part of the producer's establishment. Moreover, this is heightened in the case of a stand-up comedian who has written their own script. Therefore, this relationship between the producer and the comedian is at most a relationship of principle-independent contractor, and not that of an employer-employee. [74]

---

[73] Hugh Beale, *Chitty on Contracts* (Vol 2, 33rd edn, Sweet & Maxwell 2020).

[74] RK Dewan & Co, 'Copyright in Music: Producer v. Composer' (*Lexology*, 23 September 2022) <https://www.lexology.com/library/detail.aspx?g=6f6ac53e-add0-4686-9946-452120704054> accessed 27 June 2023.

Finally, by a direct application of Section 13(4), it can be clearly gleaned that in any form of cinematographic work (like a stand-up show in the present case), separate copyrights exist for the individual works within a cinematographic film. It cannot be said that the copyright of the producer has subsumed the copyrights of all the constituent works.[75] Therefore, the presumption made in the *IPRS* judgement by Justice Jaswant Singh, that the right of the producer over all the works involved in a cinematographic film will be covered under either Section 17(b) or Section 17(c), is incorrect. The same has even been iterated in the Parliament during discussion on the Copyright (Amendment) Act, 2012, as stated in the 227th Report on the Copyright (Amendment) Bill, 2010 presented to the Rajya Sabha, and laid on the table of the Lok Sabha on 23rd November 2010.[76] Additionally, even various High Court have recognised this and have gone along with the line of reasoning laid down by Justice Krishna Iyer in his footnotes.[77]

Hence, it can be said that even by the application of Section 17(b) and Section 17(c), the producer of a stand-up comedy show (cinematographic film) will not be able to claim a copyright over the script which was written and used by the comedian. In the case of Vir Das, the same analogy can be extended, wherein, the producer of his previous show (if that was recorded and qualified as a cinematographic film) cannot claim any form of copyright over the script used in that show under these sections of the Act, unless a valid and legal agreement to the contrary has been entered into by the parties.

---

[75]Mohan Dewan, 'Music Composers v. Music Producers' (*Mondaq*, 23 July 2019) <https://www.mondaq.com/india/copyright/828194/music-composers-v-music-producers> accessed 27 June 2023.

[76]Sundara Bharathi, 'When you Compose it But Not Own it – Copyright Infringement in Indian Music Industry' (2021) 1(3) De Jure Nexus L. J. 1.

[77]*MRF Ltd. v Metro Tyres Ltd.* (2019) SCC OnLine Del 8973; *Novex Communications (P) Ltd. v DXC Technology (P) Ltd*. (2021) SCC OnLine Mad 6266; *Vendhar Movies v Joint Director* (2019) SCC OnLine; *Saregama Ltd. v New Digital Media* (2017) SCC OnLine Cal 16610.

b) For dramatic works

Additionally, if the previous stand-up show of Vir Das was not recorded and did not qualify as a cinematographic film, then it would qualify as a dramatic work under Section 2(g) of the Act.[78] In such a case, such shows are closer in their operation to theatre drama than cinematographic work.[79] Therefore, the application of copyright in theatre drama could be imported into live stand-up comedy shows. In theatre, the producer of any shows would not statutorily have any copyright vested in him over the copyrights of the involved artists because as per Section 2(d) and Section 2(uu) of the Act, producers are only recognised for cinematographic films (requiring visual recordings) and sound recordings, neither of which are present in live theatre dramas.[80]

Moreover, theatre operates in a manner different from films.[81] Playwrights are usually engaged by the producer as independent contractors, upon which the playwright gives the producer certain limited rights for producing the play.[82] Therefore, in the case of live stand-up shows, which was the case of Vis Das's 2010 show, there is also no visual or sound recording. So, the copyrights over the substance of the show, including the script, jokes, performance, etc., lie with the creators of those works. In Vir Das's case, he would hold a copyright

[78]Sebanti Sarkar, 'No Copyright for Playwright' (*Telegraph India*, 09 November 2008) <https://www.telegraphindia.com/west-bengal/no-copyright-for-playwright/cid/1255378> accessed 05 December 2022.

[79]Holly Cameron, 'Copyright Laws for Playwrights' (*Legal Beagle*) <https://legalbeagle.com/12719373-copyright-laws-for-playwrights.html> accessed 05 December 2022.

[80]Sudhanva Deshpande, 'Note on Copyright and Creative Commons in Theatre' (*Mumbai Theatre Guide*, 15 November 2008) <https://www.mumbaitheatreguide.com/dramas/features/08/dec/19_feature_note_on_copyright.asp#> accessed 05 December 2022.

[81]Wei-Ling Chan, 'The Writer is King: Copyright in Devised Theatre' (*Arts Law*, 30 June 2004) <https://www.artslaw.com.au/article/the-writer-is-king-copyright-in-devised-theatre/> accessed 05 December 2022.

[82]Beth Freemal, 'Theatre, Stage Directions & (and) Copyright Law' (1996) 71(3) Chicago Kent Law Review 1017.

over the script (i.e., in the form of original literary work) and a performer's right over his performance at the show.[83]

The producer would not have any copyright, unless there was an explicit assignment of the copyright to the producer in their agreement. If such a valid and legal assignment was not there, then if Vir Das has used some material from his 2010 show for his new Netflix special, there has been no infringement, and the FIR lodged against him is baseless. This same understanding can also be extended to stand-up shows performed in comedy clubs which are not recorded. The copyrights would lie with the comedian provided no contract to the contrary has been signed by the parties.

C. Policy considerations for future cases

The main policy consideration that courts and the legislature have to keep in mind for either adjudicating or legislating on such matters of copyright ownership between producers and stand-up comedians should be the great imbalance in power and position between the two parties. Cases involving stand-up shows as cinematographic work can directly be decided according to previously established precedents. In such cases, there is most likely to exist agreements wherein the stand-up comedians are paid decent consideration for their performance and art. Moreover, it is mostly more established stand-up comedians who land such shows with digital media production companies. So, the imbalance of power and position between the stand-up comedian and the producer in such instances is much less, where the former will not be able to exploit the talent and skill of the latter without paying due consideration.

However, the situation changes when we talk about independent stand-up comedians giving live performances in comedy clubs and other theatrical centres. They earn barely a fraction of what big production

[83]John Weidman, 'Protecting the American Playwright' (2007) 72(2) Brooklyn Law Review 639.

companies, like Amazon and Netflix, offer to stand-up comedians of their shows. Unlike established stand-up comedians, it is more of the upcoming, unestablished stand-up comedians, without financial and reputational backing who start off in such comedy clubs and live theatres.[84] Moreover, there is almost always no formal contract or agreement giving due consideration to the stand-up comedians for their skill and effort. So, there are much greater chances of producers of such live shows exploiting the stand-up comedians by giving them barely any remuneration.[85]

This wide gap in position and power between the stand-up comedian and the producer should be taken into account by the courts and the legislature while framing new jurisprudence and laws regarding copyright protection of the material, skill and performance of the stand-up comedians. This is also bolstered by the fact that India follows the *Welfare Theory of Intellectual Property Rights protection*, wherein IP laws should aim for the greatest benefit and welfare of the public or the people under consideration. So, by tightening the copyright protection of such stand-up comedians in comedy clubs and theatres, court and legislatures should end up doing the greatest benefit and welfare to the group of individuals under consideration.

V. CONCLUSION

This article has analysed the copyright protection available to stand-up comedians in India, both horizontally and vertically. Horizontally, it is seen that traditional copyright law is largely ineffective in protecting jokes and performances of stand-up comedians. The idea-expression

[84]Justin Caffier, 'Comedians Reveal What the L.A. Stand-up Scene Actually Pays' (*vulture*, 20 June 2018) <https://www.vulture.com/2018/06/comedians-reveal-what-the-l-a-stand-up-scene-actually-pays.html> accessed 10 January 2022.

[85]Lipi Roy, 'If Laughter Is The Best Medicine, Why Are So Many Comedians In Poor Health?' *Forbes* (14 November 2019) <https://www.forbes.com/sites/lipiroy/2019/11/14/if-laughter-is-the-best-medicine-why-are-so-many-comedians-in-poor-health-and-dying/?sh=59805c615925> accessed 10 January 2022.

dichotomy, lack of jurisprudence, and practical difficulties make formal copyright enforcement unsuitable. Instead, informal industry norms play a pivotal role. Social sanctions like refusal to work with or host offending comedians, act as deterrents.

Vertically, ambiguities exist regarding copyright ownership between comedians and producers, especially for live or theatrical shows. Judicial precedents establish producers as first copyright owners for cinematographic works. But, statutory construction and policy considerations demonstrate that these cannot be blindly applied where power imbalances exist. Separate copyrights vest in constituent works like scripts and performances. Unless validly assigned, comedians retain ownership. Hence, accusations against Vir Das seem legally untenable.

Overall, while horizontal joke theft can be regulated informally, ambiguities in vertical protection necessitate legislative or judicial clarification. Courts must note stand-up's welfare dimension and prevent exploitation of upcoming comedians by producers through stringent copyright enforcement. The legislature must correspondingly amend definitions of *authorship* under the Act to unambiguously vest ownership in comedians for their creative inputs.

Progressive jurisprudence and legislation balancing varied interests will stimulate creativity among stand-up comedians. It will ensure fair compensation and prevent illegitimate free-riding by powerful intermediaries. This will spur growth of stand-up comedy as an industry, enhancing incomes, reputation and job opportunities for artistes. Simultaneously, consumer interest will also be secured by ensuring continued creation and dissemination of qualitative stand-up content. Such legislative-judicial synergy, respecting industry dynamics while preventing exploitation, can enable healthy growth of stand-up comedy in India.

THE DISJUNCTION BETWEEN CUSTOM AND FORMAL LAW: EROSION OF MATRILINEAL SUCCESSION IN INDIA

*Devangi Dube** and Avi Kapoor***

ABSTRACT

Being distanced from the urban world through a practice of self-sustenance, tribal communities often developed certain traditional and customary practices that remain unique to their cultural identities. Although not recognized or codified by formal law, these customs continue to possess the sanction of their respective tribal communities and are practiced by their members as well. One such customary practice is that of matrilineal succession. Unlike the dominant patriarchal form of succession, the ancestral resources pass along to the female descendants under the custom of matrilineal succession. Additionally, the passage of identity works in a manner by which the mother's identity is assumed by the clan/tribe itself. This paper focuses on the matrilineal societies of Meghalaya, namely the Khasis and the neighbouring Garos. Often mischaracterized

*Devangi is a third-year B.A. LLB. (Hons.) student at the Jindal Global Law School, Sonepat. The author may be reached at 21jgls-ddube@jgu.edu.in.
**Avi is a third-year B.A. LLB. (Hons.) student at the Jindal Global Law School, Sonepat. The author may be reached at 21jgls-akapoor1@jgu.edu.in.

as "matriarchal," tribal women in these societies gain access to only a certain degree of power through matriliny. This paper seeks to argue that this special albeit restricted position of women in these tribal societies is further weakened by the non-recognition of matrilineal customs due to the adoption of colonial interpretation of customary laws by the Indian courts, mandating them to be 'ancient, certain, and reasonable.' Such an interpretation makes recognition of customs rigid, cumbersome, and improbable. This weakening is also exacerbated by the interaction between formal law structures, like land reform measures, codified personal laws, and informal customary practices. This interaction leaves the tribal customs vulnerable to the imposition of normative gender constructs practiced outside these communities.

Keywords: *Customs, Tribal Communities, Khasis, Garos, Matrilineal Customs, Matriarchal, Hindu Succession Act, 1956, Scheduled Tribes*

I. INTRODUCTION

The Khasis and the Garos are tribes inhabiting the north-eastern state of Meghalaya. The Khasis have traditionally been agriculturalists and their societies are organised around familial ties. They trace the origin of the family from ancestresses known as 'Kiaw' or grandmothers, that

are believed to be the root of the tree of the clan.[1] The Garos are agriculturalists as well, noted for the high status that the women hold in their society.[2]

The Khasis and the Garos of Meghalaya are some of the last existing matrilineal societies in the world.[3] In these societies, children assume the mother's last name/clan identity, and the youngest daughters inherit the ancestral property. Hence, women occupy a special position in matrilinies.[4] The justification for this matrilineal descent system is rooted in the idea that it is the mother who nurtures the child during incubation and should be given rights over the child. Since blood is transmitted from mother to child, it is on this sacred bond that the descent principle is based and clans are formed.[5] Consequently, Khasi women have a significant role in the domestic sphere. As an inheritor of family property, the youngest daughter is also deemed its custodian and trustee.[6] Although these societies are often mischaracterized as 'matriarchal,' what actually shifts the power to the mother is the matrilineal system of inheritance.

The practice of matrilineal succession amongst the Khasis and the Garos does not adhere to the normative and prevalent practice of patriliny in the rest of the country. These matrilineal customs are often not recognized as legally valid, which results in the imposition of

[1]Roopleena Banerjee, 'Matriarchy And Contemporary Khasi Society' (2015) 76 Proceedings of the Indian History Congress 918, 922.
[2]Jayashree Kalita, 'Socio-cultural changes of the Garo's in Meghalaya' (2020) 11 (7) JETIR 672.
[3]Zinara Rathnayake, 'Khasis: India's indigenous matrilineal society' *BBC Travel* (30 March 2021) <https://www.bbc.com/travel/article/20210328-why-some-indians-want-more-mens-rights> accessed 02 May 2023.
[4]ibid.
[5]Tiplut Nongbri, 'Gender and the Khasi Family Structure: Some Implications of the Meghalaya Succession to Self-Acquired Property Act, 1984' (1988) 37 (1,2) Sociological Bulletin 71, 74.
[6]Tiplut Nongbri, 'Gender and the Khasi Family Structure: Some Implications of the Meghalaya Succession to Self-Acquired Property Act, 1984' (1988) 37 (1,2) Sociological Bulletin 76.

patrilineal practices through the application of land reform laws and codified personal laws. This leaves tribal customs vulnerable to the normative gender constructs which dispossess the daughters who inherit ancestral property from the authority commensurate with their duties and responsibilities, invariably shifting the power of the men in the family. The absence of any legislative sanction for these customs opens a lacuna in the legal framework governing succession amongst matrilineal tribes, which is often hastily remedied by the application of the Hindu Succession Act, 1956, and the principle of patriliny by the courts of law. Inevitably, the women have little say not only in the passage of their identity onto their offspring, but also on the control and management of the property they may or may not inherit. It is argued that the non-recognition of matrilineal customs and the subsequent imposition of patrilineal statutes of the Khasis and the Garos is violative of their tribal identities and results in their 'Hinduisation.' This paper analyses judgements passed by the Courts in India, which have often been faced with the issue of determination of tribal identities and the application of Hindu personal laws in cases involving tribal customs.

II. CUSTOMS IN INDIA: CONSTITUTIONAL PROTECTIONS AND JUDICIAL INTERPRETATION

John Salmond defined the unique relationship shared by customs and society. According to him, the relationship between custom and society is synonymous with that between law and State.[7] Preceding the emergence of a politically organized State with modern legal systems, customary laws of societies were the primary vehicle of social control of human conduct.[8] This reflected the sovereign power of communities.

[7]Manju Koolwal, 'Custom: A Transcendent Law with Special Reference To Hindu Law and Muslim Law' (2006-07) 3 (1) NALSAR Law Review 157, 159.
[8]Manju Koolwal, 'Custom: A Transcendent Law with Special Reference To Hindu Law and Muslim Law' (2006-07) 3 (1) NALSAR Law Review 159.

All legal relationships regarding marriage, succession, adoption, etc. were governed by customs of each religion, caste, or tribe. As elaborated upon in the following paragraphs, the modern legal system, recognising the value of customs, also ventured into integrating them within its framework. To promote the interests of tribal communities, the Scheduled Tribes in India are regulated by their respective uncodified customary laws. These untouched customary laws enjoy constitutional guarantees for the preservation of tribal identity. Article 244 of the Constitution of India[9] insists that the administration of Tribal Areas in the states of Assam, Meghalaya, Tripura, and Mizoram is to be overseen by the Sixth Schedule. Tribal areas in these states are deemed to be autonomous districts or regions, the boundaries of which are subject to creation, definition, and alteration through a public notification by the Governor.[10] Since this paper specifically focuses on the Khasi and Garo tribes of Meghalaya, clause 12A of the Sixth Schedule becomes relevant. As per clause 12A(b), the President may, by notification, direct the inapplicability of Acts of Parliament to such autonomous districts or regions, or only allow their application as an exception.[11] Therefore, under the Sixth Schedule, the autonomy of tribal areas is sought to be protected.

This paper argues that the judicial interpretation of customs within the modern legal framework has largely discarded this constitutional responsibility of protecting tribal customs, diluting their importance in India. The way custom must be proved has been extensively evolved by Indian courts through various judgements. Customs become laws only when they are either judicially recognised by the Court or when they receive legislative sanction. This judicial recognition is centred around the idea of 'proof,' there being no presumption that a person is governed by customs.[12] Since several prerequisites have been

---

[9]The Constitution of India, 1950 art 244.
[10]The Constitution of India, 1950 schedule VI, clause (1).
[11]The Constitution of India, 1950 schedule VI, clause (12A).
[12]*Gokal Chand v Pravin Kumari* (1952) 1 SCC 713 [14].

conceived to prove a custom, it is a burdensome exercise. In the *MT Subhani case*, it was held that proving custom necessitates that it has been in practice for such a *long period* and with such *invariability* that it has been established as a governing rule of a particular locality by common consent.[13] Hence, a custom must be ancient, certain, and reasonable. This high standard of proof was intensified in *Ramalaxmi*,[14] which observed that for the Court to be assured of a custom's antiquity and certainty, the evidence must be clear and unambiguous. The proof is only unnecessary when the custom is so notorious that courts take judicial notice of it.[15] Evidently, then, a legal custom is easily distinguishable from social customs, the former being obligatory, binding, and accompanied by sanction. Whereas the latter are merely norms of social conduct that do not enjoy legal enforceability.[16] The conception of *legal custom* is critically assessed in the following section, which exposes it as a problematic postulation.

III. PROBLEMATIC CONSTRUCTION OF CUSTOMS: A COLONIAL LEGACY AND ITS IMPACT ON MATRILINY

This characterization of customs has, however, not always been part of Indian society. In the practice of ancient Hindu law, custom was afforded a high place, being binding on the monarch in administration of justice. *Narada*, a Vedic sage, observed that custom decided everything and overruled sacred law.[17] On the contrary, the colonial tendency initially was to disregard unwritten customs and apply Hindu and Muslim religious texts strictly.[18] Even when the British sensed the

[13]*MT Subhani v Nawab* AIR 1941 PC 21 [32].
[14]*Ramalaxmi Ammal v Sivantha Perumal Sethuraya* (1872) SCC OnLine PC 20 [9].
[15]*Laxmibai (Dead) through LRS v Bhagwantbuva (Dead) through* LRS (2013) 4 SCC 97 [14].
[16]Manju Koolwal, 'Custom: A Transcendent Law with Special Reference To Hindu Law and Muslim Law' (2006-07) 3 (1) NALSAR Law Review 158.
[17]ibid.
[18]Manju Koolwal, 'Custom: A Transcendent Law with Special Reference To Hindu Law and Muslim Law' (2006-07) 3 (1) NALSAR Law Review 161.

significance of effecting long-standing customs, they undertook a reductionist stance, with the Privy Council adopting the "ancient and invariable" criterion of proving customs.[19] Halsbury's *Laws of England* describes custom as a rule that existed from "*time immemorial and has obtained the force of law in a particular locality*." Undoubtedly thus, the rule on customs, as it stands today, is a colonial construct.[20] The relation of necessity of proof as between customary and established law is however against the spirit of customary law. Since there was no presumption in favour of custom, it demonstrated how the legislature was neither enamoured by custom rather than law, nor did it reflect any tendency to extend the principles of custom to any matter where custom was not clearly proved to apply.[21]

This onerous burden of proving custom stemmed from a deeply mistaken idea of the Indian legal system. Immediately preceding the consolidation of the colonial rule, India's legal landscape was pluralistic and diverse, with prevalence of customary informal bodies at the village level, co-existing harmoniously with state-instituted, formal courts at the district, province and central levels of the state.[22] Hence, the so-called *chaos* and *vacuum* purported by the British, was in fact a highly evolved and complex legal structure deeply connected with the socio-cultural aspirations of the Indian populace.[23] Reflecting it as a mere set of social norms implemented by informal traditional courts rather than the normative Western construct of formal adjudication is arguably a colonial attempt to retain the power of making laws (vested in the British legislature), by not allowing any

[19]Lindesay J Robertson, 'The Judicial Recognition of Custom in India' (1992) 4 (Parts 1 and 4) J Comp Legis & Int'l L 218, 218.

[20]Lindesay J Robertson, 'The Judicial Recognition of Custom in India' (1992) 4 (Parts 1 and 4) J Comp Legis & Int'l L 218, 219.

[21]Lindesay J Robertson, 'The Judicial Recognition of Custom in India' (1992) 4 (Parts 1 and 4) J Comp Legis & Int'l L 218, 221.

[22]Mahendra Pal Singh and Niraj Kumar, 'Tracing the History of the Legal System in India' in Mahendra Pal Singh and Niraj Kumar (eds), *The Indian Legal System: An Inquiry* (Oxford Academic 2019).

[23]ibid.

change to be affected in Hindu or Muslim law by any other agency.[24] If a new Hindu sect came into existence, and adopted a deviating form of marriage, the burden imposed on customs would not only render the marriage void but also bastardise a whole community. Ultimately, courts were exercising a kind of censorial power on custom, making it more rigid and formal. Conversely, in ancient Hindu law, it was not necessary to trace back the existence of any custom to an indefinite period.[25] Customs being enshrined in the unexpressed consciousness of the people, customary law was flexible.[26] Therefore, the sense in which custom is employed in English law, cannot be appropriately supplanted in the Indian society. The ultimate test should instead be what rules are now recognized as *binding on any community*, and not for how long they have been observed.[27]

Matrilineal succession in Garo and Khasi tribes of Meghalaya is rooted in customary law, its enforcement and implementation are disadvantaged through the onerous exercise of proving customs. By incorporating patriliny within a statutory framework, the law favours it over matriliny. A deconstruction of colonial policies then reveals the patriarchal biases of British officers who modernised the Indian legal system. It may be argued that colonial rulers, by giving India an artificial sense of cultural and political unity, reviving constructs such as *ancient Hindu/Indian tradition*, *cultural continuity*, and *institution of family*, further entrenched patriarchy and oppressed women.[28] The erosion of matriliny due to the inability to prove customs is evident in

[24]Lindesay J Robertson, 'The Judicial Recognition of Custom in India' (1992) 4 (Parts 1 and 4) J Comp Legis & Int'l L 218, 224-225.
[25]ibid.
[26]Manju Koolwal, 'Custom: A Transcendent Law with Special Reference To Hindu Law and Muslim Law' (2006-07) 3 (1) NALSAR Law Review 162.
[27]Lindesay J Robertson, 'The Judicial Recognition of Custom in India' (1992) 4 (Parts 1 and 4) J Comp Legis & Int'l L 218, 227.
[28]Nidhi Gupta, 'Rethinking The Relationship Between Law, Gender Justice and Traditions in India: From Hostility To Harmony' (Doctor of Law thesis, Ghent University 2017-18) 178.

recent judicial decisions. In *M. Marak v. State of Meghalaya*,[29] the petitioner rejected the Schedule Tribe identity of the respondent, who was the progeny of marriage between a Khasi father and non-Khasi mother. The custom pleaded by the petitioner was that the Khasi society being matrilineal, every Khasi must take the 'Jaid' (clan) of his mother, and the son of a non-Khasi mother cannot have a clan. Consequently, children of a Khasi father and non-Khasi mother cannot be Khasis, allowing matrilineal lineage alone. However, the court rejected proof of this custom on two grounds. Firstly, the custom pleaded was not accepted by the Guwahati High Court in *A.S. Khogphai case*.[30] It also relied on *Wilson Reade*,[31] which held that in absence of a definition of the "Khasi tribe," its membership cannot be determined solely on purity of blood. Instead, conduct of the individual in following the customs of the tribe, how they were treated by the community, etc., shall also be tested. By requiring stringent proof of custom, the Court diluted the importance given to matriliny in the Khasi tribe. Traditionally, children take the clan-name of their mother and the recognition of their Khasi identity stems through their Khasi mother. Thus, the perpetuation of the clan is ensured only through the role of the female as the mother. The Court in this instance conceivably follows the attitude adopted by the modern legislature through its codification of tribal inheritance by the Khasi Hills Autonomous District (Khasi Social Custom of Lineage) Act, 1997. Section 3(1)(c) of the Act,[32] much like the Supreme Court in this decision, enumerates the limited scenarios in which a Khasi father's (married to a non-Khasi mother) identity may be inherited. This non-recognition of custom that strictly allow matrilineal lineage alone, warrants a speculation of consequent erosion of matrilineal succession.

---

[29]*Sr. M Marak v State of Meghalaya* (2013) SCC OnLine Megh 122.
[30]*AS Khongphai v Stanley DD Nichols Roy* (2008) (1) GLT 180.
[31]*Wilson Reade v C.S. Booth* AIR 1958 Assam 128 [5].
[32]The Khasi Hills Autonomous District (Khasi Social Custom of Lineage) Act, 1997 s 3(1)(c).

In the *Anjan Kumar* case, the sole question involved was whether the offshoot of a tribal woman and non-tribal man could claim status of a Scheduled Tribe and be granted a certificate to that effect. The condition precedent for granting the certificate was that "*one must suffer disabilities wherefrom one belongs*." If an offshoot was brought up in the atmosphere of a Forward class, they are not subject to any disability. However, the case is different where a tribal man marries a non-tribal woman, in which case the offspring may attain tribal status.[33] In another case, *Lakhan KMA*,[34] the tribal identities of petitioners who were off-springs of a Khasi mother and non-tribal father were called into question. The petitioners used Section 3 of Khasi Custom Act to contend they are Khasis, following the Khasi matrilineal system of lineage and adopting the Khasi language. However, the Court, relying on *Anjan Kumar*, held that their mother being Khasi was not in itself sufficient to assume Khasi identity. Instead, one must prove that they have adopted all customs and culture of the tribal community, including their language, and are residing in a tribal area in as much as they are not availing the facilities of a forward class. Along with proving the custom, the Court placed an additional burden of practicing said customs. This additional burden imposed by the Court is still somewhat acceptable when the father is Khasi (as in the previous case) for the Khasis usually follow matriliny, an obstacle to assuming the father's identity. However, it makes little sense when the mother is a Khasi and matrilineal lineage should be a given by default. This indicates the less privileged position of matriliny and matrilineal succession in India. Hence, this ambiguity surrounding the determination of Khasi identity only exacerbates the issue of proving customs, and erodes the matrilineal succession grounded in it.

[33]*Anjan Kumar v Union of India* (2006) 3 SCC 257.
[34]*Dr. Lakhan KMA and Anr. v Union of India* (2011) SCC OnLine Gau 415.

IV. FORMAL LAW: IMPACT OF LAND REFORMS ON MATRILINEAL CUSTOMS

Although constitutionally protected under the Sixth Schedule,[35] tribal customs have not existed in a vacuum. Since colonialism, they have faced a threat of forceful integration with the mainstream culture. With advent of globalization in the modern day, tribal economies have had to integrate with national and global markets.[36] This has led to interactions between informal customary practices and formal legal systems, and subsequently, the imposition of the latter over the former.

Legislations like land reforms have enabled such imposition and the resultant erosion of matrilineal customs. Opposed to individualism, the Khasis and the Garos hold land as a Common Property Resource ("**CPR**"). Although ownership of CPR passes along the female descendants, the entire community enjoys the right of using it for their livelihood.[37] Matrilineal succession allows women to have a source of livelihood independent of their husbands or male relatives. Thus, given the self-sufficient and distant nature of tribes, larger landholdings become necessary to satisfy the needs of the entire community. However, with the promulgation of land acquisition and reform acts post-independence, customs of matrilineal succession amongst the Khasis and the Garos have been detrimentally affected. Such legislations have an underlying individualistic character and are aimed at reducing the size of landholdings and re-distributing them.[38] Although they may arguably be egalitarian causes when implemented in the context of increasing zamindaris and bonded labour, they take

[35]The Constitution of India, 1950 schedule VI.

[36]TN Subba, J Puthenpurackal and SJ Puykunnel, *Christianity and Change in Northeast India* (New Delhi: Concept Publishing Company, 2008) 97.

[37]Rekha M Shangpliang, 'Forest Legislations and Livelihood Strategies: Khasi Women in Rural Meghalaya' (2012) 61(3) Sociological Bulletin 479, 480.

[38]TN Subba, J Puthenpurackal and SJ Puykunnel, *Christianity and Change in Northeast India* (New Delhi: Concept Publishing Company, 2008) 97.

away the autonomy that the women of the tribe possess by virtue of matrilineal succession. In Khasi culture, matrilineal succession is justified by the primacy given to the role of a woman in reproduction.[39] This grants women a relatively higher social position, when compared to those in patrilineal societies.

Land acquisitions by the government for public purposes, under the principle of eminent domain, alienate the CPR from the tribes and result in the erosion of the female member's economic utility and social status.[40] A similar effect is seen with land redistribution, where property rights are distributed to *household heads* who are normatively interpreted as the eldest male members of the family.[41] In the absence of a CPR, matrilineal succession is rendered null as there is no common property to inherit anymore, or the landholding is no longer large enough to maintain the livelihoods of the members. Smaller individual landholdings become self-acquired properties and are not governed by matriliny.

The imposition of such individualistic attitude through land reforms can be better understood through the example of the conditional subsidization of rubber cultivation in the Garo Hills. This subsidy can only be availed by those that individually own land.[42] Since such subsidies would make agriculture more profitable and lucrative, Garo men were more inclined towards shifting away from the customs of matriliny and CPR and dividing up landholdings. Further, loans for rubber cultivation were only being given to *family heads* and most

[39]Tiplut Nongbri, 'Gender and the Khasi Family Structure: Some Implications of the Meghalaya Succession to Self-Acquired Property Act, 1984' (1988) 37 (1,2) Sociological Bulletin 74.
[40]TN Subba, J Puthenpurackal and SJ Puykunnel, *Christianity and Change in Northeast India* (New Delhi: Concept Publishing Company, 2008) 99.
[41]Susie Jacobs, 'Structures and Processes: Land, Families, and Gender Relations' (1996) 4(2) Gender and Development 35, 37.
[42]TN Subba, J Puthenpurackal and SJ Puykunnel, *Christianity and Change in Northeast India* (New Delhi: Concept Publishing Company, 2008) 100.

financial institutions interpreted them to be male.[43] This enforces the stereotypical notion of women not being fit enough to manage land.[44] Through such legislative measures, normative ideals and values are imported into tribal attitudes. They strengthen the patriarchal structures within the tribes, while systematically weakening the matrilineal customs that grant women a certain degree of autonomy which cannot be found in patrilineal societies.

Matrilineal succession is intricately related to the livelihood of tribal women as well. Although effective administrative control of the CPR has usually remained with the male members, matrilineal succession allowed women to deriving sustenance out of the CPR independently of their husbands. The dependency of tribal women on CPR is highlighted by the Supreme Court, where it granted inheritance to a tribal woman while dealing with a land reform legislation.[45] Although it did not explicitly deal with CPR, it observed that in the absence of the male heads, the female members are dependent on the agricultural land for their livelihood, and such livelihood must be preserved until they are dependent on such land.[46] Interestingly, the Court chose to employ Article 21[47] as the justification for its decision, instead of the Article 14.[48] It did not establish equal inheritance rights for both men and women, rather just ensured minimum means of survival for women. However, even this right seems to be subject to two conditions – absence of the male head of the family, and complete dependency on the subject land for livelihood.

Together, land acquisition and redistribution laws systemically take away the limited property rights that tribal women possess and leave

[43]ibid.
[44]Susie Jacobs, 'Structures and Processes: Land, Families, and Gender Relations' (1996) 4(2) Gender and Development 35, 37.
[45]*Madhu Kishwar & Ors v State Of Bihar* AIR 1996 SC 1864 [56].
[46]ibid.
[47]The Constitution of India, 1950 art 21.
[48]The Constitution of India, 1950 art 14.

them economically and politically vulnerable. They have led to the erosion of the CPR by reducing landholding sizes and alienating it from tribal practices and thus, adding to the erosion of matrilineal succession itself.

V. 'HINDUISATION': ASSESSING THE APPLICABILITY OF HSA ON MATRILINEAL TRIBES

Since matrilineal customs are often not legally recognised due to reasons mentioned before, the succession of property amongst these tribes becomes ambiguous. The Hindu Succession Act ("**HSA**") of 1956 governs matters of intestate succession among all Hindus, Buddhists, Jainas and Sikhs.[49] It exempts Schedule Tribes within the meaning of Article 366(25)[50] of the Constitution from its provisions, unless the Central Government directs otherwise.[51] Given that it does not explicitly apply to Scheduled Tribes, and that matrilineal customs fail to receive legal recognition through judicial interpretation, a lacuna in law is created in cases where customs are challenged. It is often argued that the courts should not hesitate in the application of HSA in the matters of '*Hinduised*' tribes.[52] A tribe is said to be *Hinduised* if its members practice the customs and traditions of Hinduism.[53]

The Supreme Court applied the HSA to the Santhal tribes, after holding them to be sufficiently *Hinduised*.[54] This reasoning was echoed by the Guwahati High Court[55] and the Delhi High Court[56] as well. The authors argue that one cannot apply the same reasoning in the case of

[49]The Hindu Succession Act, 1956 (30 of 1956) s 2.
[50]The Constitution of India, 1950 art 366(25).
[51]The Hindu Succession Act, 1956 (30 of 1956) s 2(2).
[52]Abhiruchi Singh, 'Hinduisation of Schedule Tribes vis-à-vis Codified Hindu Law' (2021) 4(4) IJLMH 2572, 2574.
[53]Abhiruchi Singh, 'Hinduisation of Schedule Tribes vis-à-vis Codified Hindu Law' (2021) 4(4) IJLMH 2575.
[54]*Labishwar Manjhi v Pran Manjhi And Ors* (2001) (1) BLJR 30 [5].
[55]*Anom Apang v Smt. Geeta Singh* (2012) (I) DMC 433.
[56]*Satprakash Meena v Alka Meena* C.R.P.1/2021.

matrilineal succession. Succession amongst Santhals is largely governed by patriliny, where the property passes along the male descendants.[57] This is in line with the general rule of male primogeniture, which forms the basis for HSA. Matrilineal succession is in direct contradiction with the rule of patriliny, as followed by HSA and thus, application of the same to tribes like Khasis and Garos would violate their customary practices. The Supreme Court, a year after the *Labishwar Manjhi* case, refused to apply the provisions of the Hindu Marriage Act of 1955, on account of Section 2(2) which exempts tribes from its application in the same manner as under the HSA.[58] The Court expressed concern on the required degree of *Hinduisation* and its conflict with Section 2(2) of HMA.[59] This has been affirmed by multiple High Courts as well.[60] Given both are codified personal laws of Hindus and have the same exemption, this reasoning would be applicable here as well.

Textual and purposive interpretations of Section 2(2) indicate that the legislative intent was the complete exemption of tribes from its application. Its language clearly indicates that nothing in this section is meant to be applied to the issues of inheritance amongst tribes, given the primacy their customs hold within the community.[61] The exception to this rule, given in the clause itself, which allows the Central Government to notify any tribe, reflects that such inclusion must be made by the legislature. Further, the purpose of the exemption under Section 2(2) is to preserve the customary and indigenous practices of

[57]Gitanjali Ghosh, 'De-Constructing Inheritance Rights Of Women Under Santhal Customary Laws Vis-A-Vis Hindu Succession Act, 1956' (2014) 3(1) IJLSR 58, 60.
[58]*Dr. Surajmani Stella Kujur v Durga Charan Hansdah* (2001) 3 SCC 13 [14].
[59]ibid.
[60]*Rajendra Kumar Singh Munda v Mamta Devi* (2015) SCC OnLine Jhar 3735; *Butaki Bai and Others v Sukhbati and Others* AIR 2014 Chh 110.
[61]Debayan Bhattacharya, 'The 'Hinduization' of Tribes: Examining the Application of the Hindu Code Bill to Scheduled Tribes' (*Law School Policy Review & Kautilya Society*, 13 November 2022) <https://lawschoolpolicyreview.com/2022/11/13/the-hinduization-of-tribes-examining-the-application-of-the-hindu-code-bill-to-scheduled-tribes/> accessed 02 May 2023.

tribals.[62] An arbitrary application of HSA not only overlooks this purpose, but also threatens the existence of those practices and by extension, the identity of the tribes themselves.

The Supreme Court held that one cannot give a rigid meaning to Hinduism and nor to its practices.[63] The Patna High Court held that whether a tribe is sufficiently *Hinduised* is a mixed question of fact and law.[64] The idea that a tribe is *Hinduised* on account of the practice of certain traditions, similar to those practiced in Hinduism, is quite problematic and leaves much to the value judgment of the court. The absence of a uniform requirement leaves many tribal customs vulnerable to the imposition of dominant religions and the threat of an autocratic integration. As seen above, the courts do not apply a consistent test, which only exacerbates these possibilities.[65] Enabling the '*Hinduisation*' of tribes undermines their independent cultural identity and violates the Constitutional ideal of their preservation under Article 46.[66]

It is argued that matrilineal precedent has sometimes been invoked successfully in civil litigation, especially by the Kerala High Court, thus proposing the idea that today matrilineal law and practice have been dismantled less comprehensively than thought.[67] Although matriliny ended completely in Kerala,[68] it is contended that it received a remarkable concession in the HSA. Under Section 15,[69] if a Hindu

---

[62]ibid.

[63]*Dr. Surajmani Stella Kujur v Durga Charan Hansdah* (2001) 3 SCC 13 [4].

[64]*Chunku Manjhi and Ors. v Bhabani Majhan and Ors.* AIR 33 1946 Pat 218.

[65]Debayan Bhattacharya, 'The 'Hinduization' of Tribes: Examining the Application of the Hindu Code Bill to Scheduled Tribes' (*Law School Policy Review & Kautilya Society*, 13 November 2022) <https://lawschoolpolicyreview.com/2022/11/13/the-hinduization-of-tribes-examining-the-application-of-the-hindu-code-bill-to-scheduled-tribes/> accessed 02 May 2023.

[66]The Constitution of India, 1950 art 46.

[67]Robin Jeffrey, 'Legacies of Matriliny: The Place of Women and the 'Kerala Model'' (2004/2005) 77 (4) Public Affairs 647, 661.

[68]Kerala Joint Hindu Family System (Abolition) Act, 1976 (30 of 1976).

[69]The Hindu Succession Act, 1956 (30 of 1956) s 15.

woman dies without a will, her heirs would be sons, daughters and husband. However, an *exception*[70] states the heirs to be sons, daughters, and mother. The mother supplanting the husband, Section 17 entails matrilineal recognition. The Kerala High Court[71] upheld the matrilineal provisions contained in Section 17 of HSA by deciding that the 1976 Act does not supersede or override it, and Section 17 prevails as long as there were people alive who would have been governed by matrilineal laws, i.e., those born before the notification of the 1976 Act.

However, there exists a failure to realise that relief for matrilineal succession is ultimately vested in the HSA, leading to a *Hinduisation* of matrilineal communities, which automatically entails an erosion of their identity. Therefore, this kind of so-called progressive interpretation or the *Kerala Model* cannot be co-opted by other tribes in India such as the Garos and Khasis, who are not governed by the HSA. It erodes their prevalent customary practices and imposes those values that are seen as normative by the rest of the society. The non-recognition of matriliny and the subsequent imposition of the formal legal structure erodes their prevalent customary practices.

VI. CONCLUSION

The non-recognition of matrilineal customs practiced by the Khasis and the Garos in Meghalaya, based on a colonial interpretation of Indian customary laws is detrimental to the interests of women in these tribal communities. In absence of any legislative sanction to these customs, such judicial interpretation of matrilineal customs *discards* the constitutional responsibilities of protecting the cultural identities of tribal communities. Therefore, the gap created by the lack of a statutory framework can only be filled in interim through an evolved judicial understanding of *customs* that abandons the necessity to prove longevity and invariability, rendering the burden to prove their

[70]The Hindu Succession Act, 1956 (30 of 1956) s 17.
[71]*Chellamma Kamalamma v Narayana Pillai* (1992) SCC OnLine Ker 336.

existence less onerous and more flexible. That being said, it is emphasised that the same can function as only a temporary suggestion, with explicit statutory recognition to matrilineal customs being the ideal solution.

Land reform laws and inheritance laws have eroded customary matrilineal practices of the Khasis and Garos by breaking down landholdings and by attempting to '*Hinduise*' tribes. Legislations aimed at re-distribution of land have led to the disintegration of the CPR. In absence of the CPR, the female members of the Garos and the Khasis end up losing the relatively little autonomy they possessed on account of matrilineal succession. Further, this has facilitated the intrusion of normative gender relations into tribal attitudes as well. The lacuna in law regarding the application of formal law in the absence of any recognition of tribal customs further exacerbates the difficulties faced by Garo and Khasi women. Although Hindu personal laws expressly exempt tribes from being subject to their provisions, there have been multiple instances where tribes have been declared '*Hinduised*' enough to be covered within the ambit of these laws. Imposition of personal laws based on the principle of male primogeniture not only vitiates the custom of matrilineal succession, but also strengthens the patriarchal structures already present within the tribes.

This dilution and transgression from strict observance of customs is noticed as the Apex Court infuses patriliny into the Khasi lifestyle by allowing the offspring to inherit the Khasi father's tribe under certain circumstances. Moreover, the Court in another decision, instead of deeming the child of a Khasi mother, also a Khasi by default, i.e., by virtue of being child to such a mother, places an additional burden of proving practice of Khasi customs besides proving the existence of such custom itself. In the absence of any legislative recognition of matrilineal customs and an emphasis on a colonial perspective towards

interpretation of customary laws, the fate of matrilineal succession in India ultimately hangs in the balance.

EXPLORING THE ROLE OF MOTIVE IN INSIDER TRADING: A CASE STUDY OF *SEBI V. ABHIJIT RAJAN* AND ITS IMPLICATIONS FOR INDIA'S LEGAL FRAMEWORK

Arnav Gulati[*]

ABSTRACT

This research paper aims to delve into the intricate role of profit motive in insider trading charges, specifically focusing on its implications within the Indian judicial landscape. Central to the analysis lies the recent landmark case, Securities and Exchange Board of India (SEBI) v. Abhijit Rajan. This pivotal case has not only reshaped the legal discourse on insider trading in India, but has also spotlighted the inherent challenges and ambiguities of the existing framework. The Prohibition of Insider Trading Regulations, 2015, while presenting a seemingly clear-cut approach, often encounters significant hurdles when practically administered, especially when tasked with establishing direct evidence of information flow. The inherent presumption of culpability, at times, leads to jurisprudential outcomes that challenge traditional legal interpretations. Through an examination of

[*]Arnav is a fourth-year B.A. LLB. (Hons.) student at the Jindal Global Law School, Sonepat. The author may be reached at 20jgls-agulati@jgu.edu.in.

various legal precedents, the paper aims to dissect the multifaceted nature of the intent to profit, alongside the stringent criteria that define what constitutes unpublished price-sensitive information. The Supreme Court's nuanced interpretation in the SEBI v. Abhijit Rajan case, coupled with the broader implications of its introduction of the motive of financial gain as an element to an insider trading charge, signals an urgent call to re-evaluate and potentially overhaul the legal framework in India. This urgency is accentuated in scenarios where the accused's profit-driven intent remains shrouded in ambiguity or is not overtly discernible. The evolution of financial gain as a pivotal determinant introduces a heightened need for rigorous, fact-based assessments, further complicating the already intricate regulatory landscape. In conclusion, the paper calls for refined insider trading regulations in India, emphasizing a balanced framework to uphold market integrity and prevent the over-penalization of legitimate business practices. It stresses the need for clear criteria to assess profit-driven intent, highlighting the far-reaching implications and fallacies of the Court's recent findings in reshaping insider trading laws.

Keywords: *Motive, Insider Trading, Securities and Exchange Board of India, Mens Rea, Price Sensitive Information*

I. INTRODUCTION

Insider trading is a complex legal issue that has significant implications for the integrity and fairness of capital markets. In simple terms, it is a practice that involves the buying or selling of securities based on *material non-public information* by an insider or a person who is connected to the company.[1] Insider trading is considered to be unlawful because it gives an unfair advantage to 'insiders' – a person who holds informational advantages[2] and undermines the integrity of the capital markets.

In order to prove an insider trading charge, the watchdog of the Indian securities market, the Securities and Exchange Board of India ("**SEBI**"), in the SEBI (Prohibition of Insider Trading) Regulations, 2015 (as well as the erstwhile regulations bearing the same name being the "**1992 Regulations**"[3]) ("**2015 Regulations**") (collectively referred to as "**PIT Regulations**"), has laid down the definition of an *insider*[4] and what constitutes *unpublished price sensitive information* ("**UPSI**")[5] – which is necessary to determine whether the information made accessible to the insider had the capability to influence price conditions of securities in the market. This two-pronged parameter has often been deemed to be insufficient as it does not account for profit motive/*mens rea* as essential elements in proving insider trading – restricting the framework's ability to address the ethical and intentional dimensions of market abuse, thereby limiting its effectiveness in both deterring and prosecuting insider trading activities comprehensively.

[1]'Insider Trading' (*Investopedia*, 2023) <https://www.investopedia.com/terms/i/insidertrading.asp> accessed 12 April 2023.
[2]Saul Levmore, 'Securities and Secrets: Insider Trading and the Law of Contracts' (1982) 68 Virginia Law Review 117.
[3]Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 regulation 3(ii).
[4]Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 regulation 2(e).
[5]Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 regulation 2 (ha).

Some argue that requiring the regulator to establish the insider's motive in insider trading cases would make it difficult to prosecute such cases, as it would be challenging to prove the insider's state of mind at the time of the trade.[6] Others argue that the inclusion of *mens rea* or motive as a pre-condition is necessary to ensure that only those who intend to profit from insider information are held liable for insider trading.[7] The recent judgement of the Supreme Court in *SEBI v. Abhijit Rajan*[8] clarifies the position on motive as a critical factor in the determination of insider trading under the erstwhile 1992 Regulations. This research paper seeks to explore the judgement and its implications of including *mens rea* or motive as a pre-condition in an insider trading charge in India.

II. ABSENCE OF THE ELEMENT OF MOTIVE – TRACING JUDICIAL VIEWPOINTS

Under the principles of criminal law, the element of *mens rea* is deemed to be an essential element in establishing guilt. The *mens rea* requirement encapsulates the underlying premise that punishment necessitates individual culpability in criminal law.[9] The punishment for insider trading in violation of the SEBI Act[10] and its accompanying SEBI Regulations[11] is spelt forth in Section 15G of the SEBI Act[12]

[6] Sezal Mishra 'Rationalizing the Need for Inclusion of Mens Rea in Insider Trading Regulations' (*The HNLU CCLS Blog*, 27 July 2020) <https://hnluccls.in/2020/07/27/rationalizing-the-need-for-inclusion-of-mens-rea-in-insider-trading-regulations/> accessed 12 April 2023.
[7] ibid.
[8] *Securities and Exchange Board of India v Abhijit Rajan* (2022) SCC OnLine SC 1241.
[9] John Hasnas, 'Mens Rea Requirement: A Critical Casualty of Overcriminalization' (2008) 18 Washington Legal Foundation <http://www.wlf.org/upload/12-12-08_Hasnas_LegalOpinionLetter.pdf> accessed 12 April 2023.
[10] The Securities and Exchange Board of India Act, 1992 (15 of 1992).
[11] Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.
[12] The Securities and Exchange Board of India Act, 1992 (15 of 1992) s 15G.

which is in the form of a monetary penalty. The Securities Appellate Tribunal ("**SAT**") noted in *Rakesh Agrawal v. SEBI*[13] that, other than Section 15G, no other provision of the SEBI Act gives SEBI the authority to impose a financial burden in the form of a monetary penalty in a case of insider trading.

Under the SEBI Act, it is not essential to demonstrate that the insider is engaged in insider trading on purpose.[14] This suggests, at least on the surface, that *mens rea* is not a pre-condition to insider trading. Therefore, it does not matter how wilfully or consciously the crime was done for a person to be held liable. The need for any specific motivation, knowledge, or intent to be convicted for insider trading is likewise absent from the SEBI Regulations.[15]

In this context, the 1998 decision in *Hindustan Lever Limited v. SEBI*[16] forms a notable precedent. Hindustan Lever Limited ("**HLL**") acquired 800,000 shares of Brooke Bond Lipton Limited from Unit Trust of India ("**UTI**") shortly prior to announcing its merger with Brooke Bond Lipton Limited. There was a contention that in order to establish insider trading, it must be shown that a fiduciary position was abused and that the transaction was carried out in order to gain profit or prevent loss. The SAT rejected these arguments and ruled that insider trading was at play therein even when the motive was not established.

Despite the fact that the SEBI Regulations do not explicitly bring in motive as a component of insider trading, the SAT, in 2003, decided in *Rakesh Agarwal v. SEBI* that the insider's purpose or motive must be taken into consideration.[17] Basing its ruling on a literal interpretation of Regulation 3 of the erstwhile 1992 Regulations, which forbids dealing in securities while having access to price-sensitive information

[13] *Rakesh Agrawal v SEBI* (2004) 49 SCL 351 (SAT).
[14] The Securities and Exchange Board of India Act, 1992 (15 of 1992) s 12A.
[15] Manthan Saksena, 'Insider Trading' <http://www.legalindia.in/insider-trading-2> accessed 12 April 2023.
[16] *Hindustan Lever Limited v SEBI* (1998) 18 SCL 311 (AA).
[17] *Rakesh Agarwal v SEBI* (2004) 49 SCL 351 (SAT).

and does not take into account the existence of any intention to make gains, SEBI had ruled against the appellant on the basis that motive was not necessary for a successful charge of insider trading. On appeal, the SAT determined that SEBI's interpretation was against the 1992 Regulations' intent and spirit. The SAT emphasized that the underlying intention or motive of an individual engaged in insider trading is crucial for the imposition of a penalty. This stems from the understanding that the primary aim of the PIT regulations is to prevent the unfair advantage that insider trading can provide. The SAT opined that if an individual partakes in insider trading without the intent to gain an unfair advantage, then penalizing such an individual might not be justified.[18]

However, the Bombay High Court in 2004 ruled in *SEBI v. Cabot International Capital Corporation*[19] that the scheme of punishment set down in the SEBI Act and the 1992 Regulations is a sanction for failing to comply with a statutory responsibility or breaching a civil commitment. Since there are no elements of any criminal offence as defined by criminal processes, *mens rea* is not a requirement for inflicting sanctions under the SEBI Act and 1992 Regulations. In 2006, the Supreme Court agreed with this interpretation in *SEBI v. Shriram Mutual Fund*,[20] explaining that Section 24 of the SEBI Act deals with criminal offences under the said Act and its penalties, whereas Section 15G of the SEBI Act deals with defaults or breach of statutory civil responsibilities under the SEBI Act and the 1992 Regulations. In the given case, *mens rea* is inapplicable as the actions brought under Section 15G are civil violations and are neither criminal nor quasi-criminal. In addition, the penalty is imposed based on whether the SEBI Act and its regulations have been violated, not based on the intent of the parties involved.[21] Further, the SAT believes requiring *mens rea* as

[18]ibid [90].
[19]*SEBI v Cabot International Capital Corporation* (2004) 51 SCL 307 (Bom).
[20]*SEBI v Shriram Mutual Fund* AIR 2006 SC 2287.
[21]ibid.

a necessary element for the charge of insider trading under the SEBI Act would create an environment where market participants could potentially break the law without consequence by claiming ignorance of the law or absence of motive. This defeats the purpose of Section 15G.[22] The Supreme Court, in 2008, affirmed these rulings with a unanimous vote from its three-judge bench.[23]

Subsequent rulings by both the Supreme Court and the SAT have effectively negated the precedent set in *Rakesh Agarwal v. SEBI*,[24] which argued for the necessity of proving *mens rea* or intent in the enforcement of penalties for insider trading.

In addition to incorporating the key elements of the PIT Regulations, the Companies Act, 2013[25] also expands their initial applicability to public unlisted companies and private companies. It includes in its ambit the personnel to whom it stands applicable, prohibiting insider trading of securities such as "director or key managerial personnel or any other officer of the company" who has access to sensitive or inside 'information.' It also includes counselling or communication of price-sensitive information directly or indirectly. Insider trading has been defined therein, as "*(i) an act of subscribing, buying, selling, dealing or agreeing to subscribe, buy, sell or deal in any securities by any director or key managerial personnel or any other officer of a company either as principal or agent if such director or key managerial personnel or any other officer of the company is reasonably expected to have access to any non-public price sensitive information in respect of securities of company; or (ii) an act of counselling about procuring*

[22]*Rajiv B Gandhi and Others v SEBI* Appeal No. 50/2007, SAT Order dated May 9, 2008.
[23]*Union of India v Dharmendra Textiles Processors and others* (2008) 2008 SCC (13) 369.
[24]*Rakesh Agarwal v SEBI* (2004) 49 SCL 351 (SAT).
[25]The Companies Act, 2013 (18 of 2013).

or communicating directly or indirectly any non-public price-sensitive information to any person."[26]

Even, Section 195 of the Companies Act, 2013 does not make *mens rea* a pre-condition for a successful charge, and it seeks to punish any director or senior management employee who engages in insider trading, with jail or a fine or both. Thus, until recently, it can be observed via judicial viewpoints and statutory stances that insider trading is unlawful regardless of whether or not a person has a profit motive.

III. CHANGE IN POSITION – *SEBI V. ABHIJIT RAJAN*[27]

In this case, Gammon Infrastructure Projects Limited ("**GIPL**") was led by Mr. Rajan, who served as both Chairman and Managing Director. The National Highways Authority of India ("**NHAI**") granted GIPL a contract in 2012. The NHAI also awarded a contract to a different business, Simplex Infrastructure Limited ("**SIL**"). Shareholder agreements were used by both GIPL and SIL to put their separate contracts into action. However, the stock exchanges were informed on August 30 that the GIPL board had approved terminating the contracts in a resolution voted on August 9. While SEBI was looking into this, Mr. Rajan sold roughly 144 lakhs (14,400,000) shares he had in GIPL on 22 August 2013. SEBI ultimately issued an order finding Mr. Rajan in breach of insider trading regulations and declaring him liable to disgorge Rs. 1.09 crores in unlawful earnings. SEBI had its first ruling rejected by the SAT, prompting SEBI to file an appeal with the Supreme Court.

The Supreme Court, in September 2022, decided on two major questions. The first was whether or not the board's decision to cancel the contracts had any effect on the value of the information in question

[26]The Companies Act, 2013 (18 of 2013) s 195.

[27]*Securities and Exchange Board of India v Abhijit Rajan* (2022) SCC OnLine SC 1241.

(a decision made by the GIPL board). The second concern was whether or not Mr. Rajan had engaged in insider trading, which would have had legal implications, by selling equity shares in GIPL under exceptional and pressing circumstances.

It is important to note right off the bat that this case originated under the 1992 Regulations, which have now been superseded by the 2015 Regulations. For the first contention, the main point of divergence emerged from the definition of *price sensitive information* under the 1992 Regulations. It read,

"*price sensitive information means any information which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of the company.*

Explanation: The following shall be ***deemed*** *to be price sensitive information: -*

(i) periodical financial results of the company;
(ii) intended declaration of dividends (both interim and final);
(iii) issue or securities or buy-back of securities;
(iv) any major expansion plans or execution of new projects;
(v) amalgamation, mergers or takeovers;
(vi) disposal of the whole or substantial part of the undertaking; and
(vii) ***significant changes in policies, plans or operations of the company***"[28]

The risk potential was described in (vii) above. The Supreme Court did not hesitate to rule that GIPL's termination of the agreements qualified under subitem (vii) because it represented a substantial change to the company's business strategy. Despite this, the Court went on to create an impasse between item (vii) which referred to 'policy, plan or operational changes' of the explanation, and the rest of the items.

[28]Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 regulation 2(ha).

Although factors (i) through (vi) are likely to have an influence directly on the financial condition of the corporation, the Court noted that factor (vii) stands out as unusual due to its extremely wide and general character. The events stated in (i) through (vi) above were recognized to have a significant influence on the price of the company's shares, whereas the events listed in (vii) were not.

Additionally, the Court ruled that in the instance of item (vii), one may have to determine if there was any chance of this information substantially impacting the value of the company's securities. This would need an examination of whether the insider bought or sold shares when the price of those shares rose or fell. "*... one cannot ignore human conduct*," the Court said. It would be difficult to charge someone for insider trading if they made a trade that was a certain loss. From the Court's viewpoint, what matters is the 'intent' to profit, not the magnitude of the gain or loss.

The Court agreed with GIPL's argument that Mr. Rajan should have known that the company's share price would rise once the contracts were terminated since he sold shares at the time. This transaction ran counter to what a profit-seeking insider may have done, which would have been to buy shares before the news of the contract terminations hit the market. The fact that Mr. Rajan had to sell shares so that he could use the money to save GIPL's parent firm from going bankrupt was also a strong argument in his favour. Therefore, the Supreme Court has shown some support for the divestment of shares to fulfil a need as a means of mitigating the effects of an insider trading accusation.

IV. FLAWED UNDERSTANDING AND IMPLICATIONS

First, the author contends that the Court in its decision has made an arbitrary split between parts (i) through (vi) of the explanation and part (vii). Item (vii) may seem broader than the rest, but the Courts' reasoning and the item itself lack the substance to support that difference. This distinction can be challenged on the basis of the

doctrine of *ejusdem generis*, which holds that when a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed.[29] Here, items (i) through (vi) list specific instances or categories. In contrast, item (vii) presents a more general category. On the application of the doctrine, the general nature of item (vii) should be interpreted in the context of the specific items that precede it – that is, it should be construed as encompassing items of a similar nature to those specifically listed in items (i) through (vi). Further, the Court's characterization of item (vii) as an independent clause has made the same inconsistent. The phrase 'deemed to be' is included in the explanation of Regulation 2(ha), suggesting that the listed elements are intrinsically considered to have a significant influence on the share price. The Court's reading of item (vii) as requiring both a profit motive and the potential for price volatility renders item (vii) redundant. In this situation, one should instead refer to the main provisions of regulation 2(ha) rather than the accompanying explanation. It is unclear whether this comports with what regulators had in mind.

Second, the Court has attempted to construct a difference even though the terminology of the 1992 Regulations is unambiguous. The Court did not attempt to employ any rules of statutory interpretation but instead diverged from the obvious sense of the rule and imposed a profit motive as a requirement for (vii).

Fourth, it is also noteworthy that the *NK Sodhi Committee*, in its proposed 2013 Draft Regulations[30] recommended specific defences for insider trading under certain conditions, emphasizing a nuanced approach to enforcement. The essence of their recommendation

[29] Legal Information Institute, 'Ejusdem Generis' (Cornell Law School) <https://www.law.cornell.edu/wex/ejusdem_generis> accessed 15 April 2023.

[30] 'Report of the High Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992' (2013) <https://www.sebi.gov.in/sebi_data/attachdocs/1386758945803.pdf> accessed 15 April 2023.

focused on allowing insiders to demonstrate that their trading actions were not influenced by the UPSI they possessed, thereby not violating the core principle of insider trading regulations. Specifically, if an insider's transactions were contrary to what would be expected based on the UPSI, it could indicate the absence of wrongful use of such information. Additionally, the Committee outlined circumstances under which insiders could argue that they were not aware of the UPSI's nature or its source's violation of law, thereby acting in good faith.[31] The suggested defence of allowing insiders to demonstrate that their trades were contrary to the UPSI they possessed as described above was not included in the notified version of the 2015 Rules since the Committee's suggestion was not adopted. Later, in August 2018, SEBI's Committee on Fair Market Conduct reviewed the defences but did not take into account this specific defence as suggested by the NK Sodhi Committee.[32]

Fifth, the regulator will have to prove a profit motive to sustain an insider trading charge under the current structure of the PIT Regulations, which is one of strict liability with predetermined defences and places the burden of proof on the person accused of insider trading. The regulator's well-documented difficulties in sustaining an insider trading case are anticipated to become far more challenging in light of the Supreme Court's decision.

Sixth, the ruling only directly applies to the 1992 Regulations on insider trading since that version was at the forefront of the case. As of now (April 2023), it is unclear whether or not the verdict would affect the way the 2015 Regulations are interpreted.

Seventh, the *parity of information* approach to insider trading has been adopted by several common-law jurisdictions, including India. Under

[31]ibid page 30.
[32]'Report of Committee on Fair Market Conduct' (2018) <https://www.sebi.gov.in/reports/reports/aug-2018/report-of-fair-market-conduct-committee_39918.html> accessed 15 April 2023.

this approach, rather than focusing on whether or not the insider intended to break the law, the emphasis is on the knowledge that the insider had in possession while setting a trade.[33] The current Supreme Court judgement has the impact of further eroding the *parity of information* approach by mandating a mental element as a prerequisite to insider trading. Thus, the Court has created a wedge from the approach that the regulator was aiming for.

Eighth, the Court has made it clear that the establishment of a profit motive cannot be equated with *mens rea*. The Court in its language appears to lean toward a preponderance of probability standard that prevents irrational convictions. This standard, which entails deciding whether it is more probable than not that an accused person participated in insider trading, contrasts with the stricter *beyond a reasonable doubt* threshold employed in criminal law.[34] The preponderance of probability approach, tailored for circumstances where direct evidence of intent is not mandatory, complements the author's viewpoint by prioritizing the act over the accused's mental state. However, it is essential to exercise caution to ensure this standard does not inadvertently compromise the robustness of SEBI regulations. By maintaining a stringent review process, this standard can aid in addressing the complexities of insider trading without necessitating proof of intent, thus preserving the integrity and deterrent effect of SEBI's provisions without leading to unjust convictions.

Thus, the Supreme Court's decision on SEBI's PIT Regulations consists of inconsistencies in its interpretation, the imposition of an unwarranted profit motive, and the arbitrary partitioning of the regulations.

---

[33]Umakanth Varottil, 'Due Diligence in Share Acquisitions: Navigating The Insider Trading Regime' (2016) NUS Law School Working Paper No. 2016/004 [7].

[34]Legal Information Institute, 'Preponderance of the Evidence' (*Cornell Law School*) <https://www.law.cornell.edu/wex/preponderance_of_the_evidence> accessed 15 April 2023.

V. CONCLUSION

The findings of the Court may have far-reaching implications, the nature and content of which are not predictable. With the introduction of financial gain, a fact-based assessment of an insider trading charge will become more important. The subjectivity that the Court had been trying to avoid in its reasoning will have far-reaching implications because the criteria of *profit motivation* and *necessity* have sneaked in. This might make it more difficult for courts to rule on instances involving insider trading. It is imperative for SEBI to refine its insider trading framework to explicitly articulate that the profit motive is not a determinant factor for establishing insider trading violations. This clarification is necessary to ensure that the regulations are consistently applied, safeguarding the integrity of the securities market while fairly adjudicating cases where the accused's intent to profit is ambiguous. A more nuanced approach is needed to balance the interests of investors, the accused, and the securities market as a whole such as to have profit motivation (or lack thereof) as a significant element in determining the degree of punishment in a specific instance rather than an extra leg or condition for sustaining a charge of insider trading in the absence of a stated defence recognized by the PIT Regulations.

THE STRUCTURAL ROLE OF PRIVATE ENFORCEMENT IN DIGITAL MARKETS: AN INDIAN COMPETITION LAW PERSPECTIVE

Neelanjana Ghosh[*] and Ranjul Malik[**]

ABSTRACT

Focus on consumer data and privacy in competition law has parallelly coincided with the rise in economies based on data-driven services in the digital market sphere. The alarming rise of Big Tech has led Competition Authorities across the EU, UK and US to introduce new legislations in the area. These implemented legislations have stretched their applicability across multiple areas of regulation. Taking a cue from the same, India is introducing the Digital Competition Act. However, an area that is turned a blind eye to, especially in India, is the role of private enforcement, especially for compensation claims by consumers. Hence through this piece, the authors make a case for an increased need for introducing a mechanism for availing antitrust damages within the Digital Competition Act. The piece describes the current private enforcement or antitrust

[*]Neelanjana is a fourth-year B.A. LLB. (Hons.) student at the Christ University, Bengaluru. The author may be reached at neelanjana.ghosh@law.christuniversity.in.
[**]Ranjul is a fourth-year B.A. LLB. (Hons.) student.

damage provisions with their lacunae and highlights structural methods to overcome those lacunae to evolve a better system going ahead. The piece includes a multi-jurisdictional comparison with the ongoing mechanism for antitrust claims from our peers abroad. The authors further analyse the inability of the Indian regulator to enforce private actions by consumers. In doing so, the authors advance a two-step suggestion, the first being to increase guidance in law and the second being expanding avenues to address compensation concerns. Private compensation will give more teeth to fight against big tech and damages. Though punitive, it will act as a deterrent towards the abusive practices of Big Tech. The authors additionally propose a conducive private system for compensation claims from Competition concerns without altering the role of public systems in place.

Keywords: *Private Enforcement, Abuse of Dominance, Digital Markets, DMA, Antitrust Compensation, Big Tech, Digital India*

I. INTRODUCTION

Considerations regarding the effects of digital platforms on our economy and society are expanding along with their size and significance. Numerous Big Tech giants, including Google, Facebook, Apple, and Amazon ("**GAFA**"), have largely divided and controlled digital markets, which present enormous business opportunities. In fact, just 10 years ago, none of these companies were among the top

ten by market capitalization; today, all four are among the top six.[1] One of the reasons for this growth essentially arose from 'killer acquisitions,' wherein Big Techs acquire their rivals or upcoming tech players to establish super domination across multiple markets. This domination makes it difficult for new players to enter the market and for existing players to sustain in the market. Such a foreclosure has been identified as a core concern of abuse of dominant position by Big Tech in various jurisdictions, including India.[2]

The incessant rise in the digital market has created numerous roadblocks for enforcement in most competition jurisdictions including the United States of America ("**USA**"), the European Union ("**EU**"), and India. Despite having been enforced since 2009, competition regulation of digital markets has not picked up half the pace in comparison to the rise of digital markets. However, it is worth noting that the Competition Commission of India's ("**CCI**") understanding of issues related to digital markets through its recent *Google Orders*[3] has developed from adopting the jurisprudence developed in the EU and USA.

These global competition regulators including India have mainly dealt with questions of abuse of dominance when it comes to Big Tech. However, the primary difference between foreign regulators and CCI lies in the latter having negligible private enforcement mechanisms. Jurisdictions of EU and USA have robust mechanism in place for both

[1]Payal Malik, Sayanti Chakrabarti and Maria Khan, 'Competition Law Enforcement in Digital Markets – Emerging Issues and Evolving Responses in India in The Evolution of Antitrust in the Digital Era: Essays on Competition Policy' in the Evolution of Antitrust in the Digital Era: Essays on Competition Policy (David Evans, Allan Fels AO & Catherine Tucker eds.) (2020) 1 Competition Policy International 253.

[2]Christophe Samuel Hutchinson, 'Potential Abuses of Dominance by Big Tech through Their Use of Big Data and AI' (2022) 10 (3) Journal of Antitrust Enforcement 443-468.

[3]*Umar Javeed v Google LLC* Case No. 39 of 2018**;** *XYZ (Confidential) v Alphabet Inc. & Ors* Case No. 07/2020 (25 October 2022).

public and private enforcement systems to deter the persistent anti-competitive practices employed by Big Tech.[4]

Private enforcement is a legal action brought by a victim of anti-competitive behaviour before a court.[5] Amongst a gamete of actions, one of the ways of implementing private enforcement is by making a Compensation Application. Such applications are in the nature of a civil suit, wherein the identified antitrust breach entitles the stakeholder to avail damages.[6] European Commission, in a White Paper, conveyed that full compensation should be the primary and the most important guiding principle of private enforcement. Additionally, an effective structure for compensation would ensure that the final cost of infringement is borne by the infringers in their entirety and not by those who were the victims.[7] The duty to revitalize private enforcement lies with the Competition Regulators, especially in providing relief to direct victims.

Compensation applications in global jurisprudence include *follow-on actions* and *stand-alone actions*. These damage actions are brought forth when a victim, including a consumer and/or a competitor, has faced a monetary loss by virtue of an anti-competitive act committed by an enterprise.[8] The authors in this paper delve into the need for an established mechanism for private enforcement of Competition Laws,

[4]Christophe Samuel Hutchinson, 'Potential Abuses of Dominance by Big Tech through Their Use of Big Data and AI' (2022) 10 (3) Journal of Antitrust Enforcement 443-468.
[5]Alexandre Lacresse, 'Private Enforcement: The Court of Justice of the European Union Clarifies the scope of the national court's powers in a stand-alone action for damages regarding the production of evidence contained in the national competition authority's file (Regiojet)' (2023) (2) Concurrences N° 2-2023, Art. N° 112563 135-137 <https://www.concurrences.com/en/review/issues/no-2-2023/chroniques/private-enforcement-the-court-of-justice-of-the-european-union-clarifies-the> accessed 12 January 2024.
[6]ibid.
[7]Rupprecht Podszun, 'Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act' (2022) 13(4) Journal of European Competition Law and Practice 254-267.
[8]ibid.

limited within the context of compensation matters, especially in antitrust claims against Big Tech.

Follow-on actions are raised followed by a finding of an antitrust infringement by the relevant competition authority whereas, in a *stand-alone* claim, a finding of antitrust infringement is not necessary and litigants can raise a stand-alone competition violation to accrue damages from the alleged enterprises.[9] Even though it is included in the text of the legislation, i.e., Competition Act, 2002, these claims have never been implemented in contrast to the strict public enforcement of competition laws. This is evidenced by the pending compensation claim in the *MCX Stock Exchange v. National Stock Exchange of India*[10] case which is currently pending before the Supreme Court of India.

The authors, keeping in mind the rise of antitrust violations in the digital market, propose a systemic model of private enforcement and attempt to make a case for it on the basis of functional suggestions and benefits. They also analyse the interplay between public and private enforcement while asserting the proposition that effective private enforcement by way of compensation applications or damage suits would act as adequate deterrence against the Big Tech, much like public enforcement of competition concerns poses through penalties.[11]

This paper is focused towards taming Big Tech in the digital market space by way of enforcing private compensation applications. There are two factors that drive this specific focus on Big Tech, *first,* being

[9]European Commission, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM(2008) 165 Final <https://ec.europa.eu/competition/publications/cpn/2008_2_4.pdf> accessed 13 January 2024.
[10]*National Stock Exchange of India v Competition Commission of India* (2014) Civil Appeal 8974.
[11]Saïd Souam and Jeanne Mouton, 'Privacy and Competition Law: Is There a Room for Private Enforcement?' (2020) Concurrences N° 4-2020, Art. N° 97146 74-80 <https://www.researchgate.net/publication/344630001_Privacy_and_competition_law_Is_there_a_room_for_private_enforcement> accessed 12 January 2024.

the extant jurisprudence from the EU and USA on matters of private enforcement involving Big Tech, and *second,* being the slew of Competition concerns with the Big Techs' behaviours, a trend which is only likely to solidify in times to come.

In the initial chapter of the paper, the authors attempt to explain the fundamentals of public enforcement. Authors discuss how private enforcement deserves equivalent attention as public enforcement. Herein, the authors look at the developments of abuse of dominance cases, particularly in the EU, USA, and India, which display the continual litigations involving digital gatekeepers. In particular, the chapter contains an analysis of cases where competition authorities have inculcated a nuanced approach in adjudging matters involving Big Tech [**II**]. Further, the authors in the next chapter analyse the developing international approach of regulators of the EU and USA in matters of private antitrust compensation. The authors have specifically noted the application of the same by market participants and consumers of the digital market across these jurisdictions [**III**]. In the following chapter, the authors analyse the legal framework of private enforcement in the Indian Competition Law sphere. Here, the authors have discussed the reasons for ineffective enforcement of Section 53N of the Competition Act, 2002 ("**Act**") [**IV**]. The next chapter contains suggestions made by the authors to enforce compensation applications by amending the present act and introducing provisions in the upcoming Digital Competition Act. The authors here attempt to draw references from specific Big-Tech regulations such as the Digital Markets Act ("**DMA**"), which is enforced in the EU with an aim to bring a more feasible and practical option for accommodating changes [**V**]. Lastly, the authors conclude this paper by laying down the objectives and reasons for one to focus on the growing concerns posed by the digital markets and highlight the importance of private enforcement in competition law to help curb the same.

II. ANTITRUST ENFORCEMENT IN DIGITAL MARKETS

Digital Gatekeepers, mainly the names of GAFA, have become omnipresent on files of competition authorities all around the world. The proliferation of matters involving GAFA has given rise to enhanced jurisprudence in the competition sphere. In this section, the authors enumerate prominent cases involving these digital gatekeepers that have led competition authorities to amplify their powers to enforce the objectives of competition law in the nuanced field of the digital market. This chapter will discuss cases from the EU, USA, and India, respectively. These developments, especially in the USA, have driven antitrust authorities from enforcing compensation applications for the stakeholders, including consumers that have been at a disadvantage by virtue of an abuse by the GAFA, more on which has been detailed below:

A. EU

Prior to the advent of the DMA and the Digital Services Act ("**DSA**"), the EU emerged as one of the stronger jurisdictions, winning the battle against Digital Gatekeepers.[12] Some of the landmark cases are:

a) Google Android

The EU in 2018 held Google liable for having abused its dominant position under Article 102 of the Treaty of Functioning of the European Union ("**TFEU**").[13] One of the restrictions imposed by Google through its Mobile Application Distribution Agreement ("**MADA**") required

[12]Kyriakos Fountoukakos et al 'Digital Market Act soon to enter into force – overview of Key Provisions' (*HSF Notes,* 27 October 2022) <https://hsfnotes.com/crt/2022/10/27/digital-markets-act-soon-to-enter-into-force-overview-of-key-provisions/?utm_source=mondaq&utm_medium=syndication&utm_term=Anti-trustCompetition-Law&utm_content=articleoriginal&utm_campaign=article> accessed 12 January 2024.

[13]Consolidated Version of the Treaty on European Union (2008) OJ C115/13.

manufacturers of mobile devices, to pre-install Google Search and Chrome browser apps in order to be able to obtain a licence from Google to use the Google Play Store.[14] EC held that such an imposition was in furtherance of maintaining a dominant position in the online search market as such preinstallation could give rise to a *status quo bias* as a result of which consumers would tend to use the search and browser apps made accessible to them.[15] Such a pre-installation gave Google a competitive edge over its other competitors in the online search market.[16] This decision of EC was upheld by the General Court in its judgement dated 14 September 2022.[17] This decision also gave rise to prominent *follow-on* actions that are ongoing, for example, the compensation claim filed by Seznam in Czech. [18]

b) Google Shopping

The 2021 judgement by the General Court in *Google Search (Shopping) case* was a milestone for the EC.[19] This landmark case gave effect to enforcement of Article 102 of the TFEU in the digital space.[20] In this case, Google had designed the result page of *Google Search* in a way that favoured its own comparison-shopping service (Google Shopping), while placing rival comparison-shopping service websites

[14]*Google and Alphabet v Commission (Google Android)* Case No. T-604/18 (14 September 2022).

[15]ibid.

[16]Johannes Persch, 'Google Android: The General Court takes its position' (*Kluwers Competition Law Blog,* 20 September 2022) <https://competitionlawblog.kluwercompetitionlaw.com/2022/09/20/google-android-the-general-court-takes-its-position/> accessed 13 January 2024.

[17]Aneta Kapuciánová, 'Czech Seznam.cz Sends Over CZK 9 Billion Bill to Google as a Damage Compensation Claim' (*Sblog*, 10 December 2020) <https://blog.seznam.cz/en/2020/12/czech-seznam-cz-sends-over-czk-9-billion-bill-to-google-as-a-damage-compensation-claim/> accessed 12 January 2024.

[18]ibid.

[19]*Google and Alphabet v Commission (Google Shopping)* Case No. T-612/17 (10 November 2021).

[20]Cristina, 'Google Shopping: A Shot in the Arm For the EC's Enforcement Effort, But How much will it Matter' (*Concurrences,* 13 December 2021) <https://www.concurrences.com/en/bulletin/special-issues/big-tech-dominance/104053> accessed 13 January 2024.

at a competitive disadvantage. EC held that Google indulged in self-preferencing of its own services by giving them greater visibility on the result pages of Google and simultaneously demoting its competing comparative shopping services on its result pages to lower-ranked links and pages.[21] It was held anti-competitive by way of leveraging the dominant position of Google in online search market to enter and protect another adjacent market for comparative shopping services, manifesting an abuse under Article 102 of the TFEU.[22] *Google Shopping* case stood out to be one of the watershed moments in EC jurisprudence as, for the first time in years, the General Court expanded the interpretation of Article 102 of the TFEU to give life to a theory of harm of self-preferencing in furtherance of enforcing of competition laws in the digital space. This decision gave rise to prominent *stand-alone* actions that are ongoing, for example, the compensation claim filed by PriceRunner in Sweden. [23]

B. USA

The USA, with label of being the first country to identify and enact Competition Laws, has adopted multiple nuances in the present years at their stint of fighting the battle against Big Tech, some of the judgements being:

a) Cameron et. al. v. Apple Inc.[24]

This case was filed in California, wherein Apple was held liable for violating antitrust laws by creating a monopoly with its App Store[25] under Sections 1 and 2 of the Sherman Act.[26] The case alleged that

[21]Pablo Ibáñez Colomo, 'Google Shopping: A Major Landmark in EU Competition Law and Policy' (2022) 13(2) Journal of European Competition Law & Practice 61.
[22]Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
[23]'PriceRunner Sues Google for 21 Billion Euros' (*PriceRunner*, 2 July 2022) <https://newsroom.pricerunner.com/posts/pressreleases/pricerunner-sues-google-for-21-billion-euros> accessed 12 January 2024.
[24]*Cameron et al v Apple Inc.* 4:19-cv-03074 (N.D. Cal.).
[25]*United States v Apple Inc* [2015] USCA2 14319, 791 F.3d 290 (2d Cir. 2015).
[26]Sherman Antitrust Act, 15 U.S.C. (1890) sec 1-7.

Apple monopolised (or attempted to monopolise) an alleged iOS app and in-app goods distribution services market in violation of antitrust and unfair competition laws in the United States and California.[27] The plaintiffs claimed that Apple's App Store was a monopoly, that Apple's 30% sales fee was only conceivable due to the monopoly, and that Apple's insistence on a $0.99-floor price harmed developers who sought to compete at a level playing field. Apple rejected all charges, however, agreed on a settlement with USA developers of any Apple iOS application or in-app product sold for a non-zero price and sold *via* Apple's iOS App Store between 2015 and 2021.[28]

b) State of Utah et al v. Google LLC [29]

The State of Utah, in the year 2021 alleged Google to have illegally maintained its Play Store to coerce app developers and consumers into using Google's payment processing system for in-app purchases without any alternatives. The complaint accuses Google of unfairly restricting competition, limiting consumer choice, and driving up app pricing through its dominance. The lawsuit seeks to hold Google liable for causing harm to app developers and customers attracting violations under 15 US Code Sections 1 and 2.[30] However, as a part of the lawsuit, a settlement of $700 Million were announced[31] wherein $629 Million has been allocated to a settlement fund for consumers, who were restricted from choices in processing any in-app purchase and as a consequence *overpaid* for such purchases, $70 Million will go to the other allied state parties and the remaining $1 Million would be allocated for settlement administration.[32]

[27] *Cameron et al v Apple Inc.* 4:19-cv-03074 (N.D. Cal.).
[28] ibid.
[29] *State of Utah v Google LLC* 3:21-cv-05227 (N.D. Cal.).
[30] Sherman Antitrust Act, 15 U.S.C. (1890) sec 1,2.
[31] *In re Google Play Store Antitrust Litigation* Case No. 3:21-md-02981-JD <https://www.texasattorneygeneral.gov/sites/default/files/images/press/Google%20Play%20Settlement%20Filestamped.pdf> accessed 12 January 2024.
[32] ibid.

C. India

Following suit of other competition authorities, CCI, in the year 2022, made its landmark decisions on Google's anti-competitive practices. CCI delved into nuanced concepts in the digital space and utilised them efficiently to render a decision. The regulator identified concepts such as the gatekeeper status of Google, and the interplay between multi-homing and network effects in defining relevant markets in digital space, among many others.[33] These cases being:

a) XYZ v. Alphabet & Ors.[34]

Much like *State of Utah v. Google*, an information was filed before CCI alleging that Google abused its dominant position by prohibiting app developers charging for apps and downloads from Google Play, from dealing with any payment processor other than the ones provided by Google, under its Google Play Billing System ("**GBPS**").[35] By virtue of such prohibition, it was opined by CCI that Google was removing choices from the market and later was charging excessive commissions to app developers that used the GBPS.[36] CCI held that Google, by virtue of such behaviour, has manifested violations under Sections 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b)(ii), 4(2)(c) and Section 4(2)(e) of the Competition Act, 2002, for imposing unfair conditions, indulging in predatory pricing, limiting, and restricting scientific development and for leveraging of dominant position in one market to enter another. CCI, in this case, focused on opening the market at every value chain and eliminating bottlenecks to promote innovative practices. This

[33]Avaantika Kakkar, Kirthi Srinivas and Ruchi Verma 'What's Happening: 2022 Wrap of Competition Law in India' (*Cyril Amarchand Mangaldas Competition Law Blog*, 25 February 2023) <https://competition.cyrilamarchandblogs.com/2023/02/whats-happening-2022-wrap-of-competition-law-in-india/> accessed 10 March 2023.
[34]*XYZ (Confidential) v Alphabet Inc. & Ors* Case No. 07/2020 (25 October 2022).
[35]ibid.
[36]ibid.

proactive initiative of unlocking markets was also noted in the *SAIL* judgement.[37]

b) Umaar Javeed v. Google LLC & Anr.[38]

This CCI case is largely similar to the Google Android case proceedings before the EC, where Google was found guilty of abusing the power of the Google Play Store to unfairly benefit its own proprietary mobile applications and to stifle the development of competing mobile operating systems.[39] Similar to the EU case, Google, through this MADA, its Anti Fragmentation Agreements ("**AFA**") and Revenue Sharing Agreements ("**RSA**"), imposed unreasonable terms on OEMs.[40] Pre-installation of the entire GMS suite, conditional upon signing of AFA for all Android devices, prohibited OEMs from developing and selling applications that compete with Google.[41] CCI held that Google, by virtue of such behaviour, has manifested violations under Sections 4(2)(a)(i), 4(2)(c), 4(2)(d), and Section 4(2)(e) of the Competition Act, 2002, for imposing unfair conditions, denying market access and for leveraging of dominant position in one market to enter another.

Now that relevant development of matters in the digital space has been identified, in the succeeding section, the authors shall recognise governing private enforcement laws and analyse the litigation that has emanated from the matters under the jurisdictions of the EU and the US.

---

[37]*Competition Commission of India v Steel Authority of India Ltd.* (2010) 10 SCC 744.
[38]*In Re: Umar Javeed and Ors v Google LCC and Ors.* Case No. 39 of 2018 (20 October 2022).
[39]ibid.
[40]ibid.
[41]Valentin Mircea, 'Private enforcement: An overview of EU and national case law' e-Competitions Private enforcement, Art. N° 105150 (*Concurrences*, 17 February 2022) <https://www.concurrences.com/en/bulletin/special-issues/private-enforcement-1850/private-enforcement-an-overview-of-eu-and-national-case-law-105150> accessed 12 January 2024.

III. THE DEVELOPING INTERNATIONAL APPROACH OF PRIVATE ENFORCEMENT IN DIGITAL MARKETS

In this chapter, the authors shall analyse the laws on filing compensation in competition matters of international jurisdictions such as the EU and USA, while analysing different circumstances wherein such compensations have been granted in antitrust matters relating to Big Tech.

A. EU

Private enforcement of EU competition law has a well-established and recognised role.[42] Onset of 2014 *Private Damages Directive* has given significant procedural autonomy to the Member States to adjudicate on matters of compensation arising out of Competition cases.[43] *Damages Directive* serves the key purpose of rendering effective remedies to persons while honouring their right to compensation.[44]

The intent of this enactment stemmed from a plethora of cases, such as *Courage Ltd v. Bernard Crehan*[45] and *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni*,[46] wherein the courts opined that practical effect of Article 101 of the TFEU would be at risk if the EU was not

[42]ibid.

[43]Assimakis P Komninos, 'The Digital Markets Act and Private Enforcement: Proposals for an Optimal System' Concurrences 425-444 <https://awards.concurrences.com/en/awards/2022/academic-articles/the-digital-markets-act-and-private-enforcement-proposals-for-an-optimal-system-3007> accessed 13 January 2024.

[44]Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Recital 3.

[45]*Courage Ltd v Bernard Crehan* and *Bernard Crehan v Courage Ltd and Others* (2001) Case C-453/99.

[46]*Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, *Antonio Cannito v Fondiaria Sai SpA* and *Nicolò Tricarico* and *Pasqualina Murgolo v Assitalia SpA* (2006) Case Joined C-295/04 to C-298/04.

open to any individual claims for damages for loss caused due to anti-competitive conduct.[47] Cases of *Crehan, and Manfredi* coupled with studies and reports conducted by the EC, had oscillated between deterrence and compensation as the key rationale for facilitating private enforcement of competition law.[48] This allowed the stakeholders to understand the importance of invoking private enforcement as a deterrent mechanism for actions arising from Articles 101 and 102 of the TFEU.[49]

The Directive, under its recitals, has allowed any person to claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law before *any national courts of the EU Member States*.[50] A *"person"* under the Directive has been broadly considered to be any natural or legal persons, including consumers, undertakings, and public authorities alike.[51] Therefore, the broad ambit of the Directive allows for anybody with a causal relationship to file a suit for damages, whether it is a *follow-on* action or a *stand-alone* action.[52] In the EU multiple claims

[47]Whish, Richard, and David Bailey, *Competition Law* (10th edn, Oxford University Press 2018).
[48]Alexandre Lacresse 'Private Enforcement: The Court of Justice of the European Union Clarifies the Law' (2023) Issue 2 Concurrences N° 2-2023, Art. N° 112563 135-137 <https://www.concurrences.com/en/review/issues/no-2-2023/chroniques/private-enforcement-the-court-of-justice-of-the-european-union-clarifies-the> accessed 12 January 2024.
[49]Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
[50]Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Recital 11.
[51]ibid.
[52]Alexandre Lacresse 'Private Enforcement: The Court of Justice of the European Union Clarifies the Law' (2023) Issue 2 Concurrences N° 2-2023, Art. N° 112563 135-137 <https://www.concurrences.com/en/review/issues/no-2-2023/chroniques/private-enforcement-the-court-of-justice-of-the-european-union-clarifies-the> accessed 12 January 2024.

of damages have been filed against the Big Techs in the form of *follow-on*, them being:

a) Follow-on suits against Google

In *Sweden*, PriceRunner, a Swedish Price Comparison firm, filed a follow-on lawsuit in Sweden, by virtue of the *Google Shopping* case with an aim to make Google pay compensation for the profit PriceRunner had lost in Britain since 2008, in Sweden and Denmark since 2013 because of Google's anti-competitive practices.[53]

In *Czech*, Seznam.cz, a Czech Republic web search platform, had filed a follow-on suit before the Czech courts demanding 9.072 billion crowns in damages from Google, in regard to the *Google Android* case. The damages were suffered while trying to distribute Seznam's applications and services via mobile devices with the Android operation system, which was limited because of Google's MADA. The claim was based on the period between 2011 and 2018.[54]

The DMA, which was instilled, has mentioned the application of the Regulation to be in consonance with the workings of the national courts under Recital 92 and Article 39. As a result, one may use the DMA to file a compensation claim in an EU national court. This comprehensive strategy aids in safeguarding a victim's entitlement to compensation.[55]

[53]'Sweden's PriceRunner sues Google for 2.1 bln euros' (*Reuters*, 7 February 2022) <https://jp.reuters.com/article/idUSL4N2UI1MY/> accessed 12 January 2024; 'Google sued for €2.1 billion in Sweden' (*DW*, 8 February 2022) <https://www.dw.com/en/swedens-pricerunner-sues-google-for-21-billion/a-60691620> accessed 12 January 2024.
[54]Prague Morning, 'Czech Platform Demands €345 Million from Google in Antitrust Damages' (*Prague Morning*, 11 December 2020) <https://www.praguemorning.cz/czech-platform-demands-e345-million-from-google-in-antitrust-damages/> accessed 13 January 2024; 'Google faces $417 million claim from Czech search engine Seznam' (*Reuters*, 10 December 2020) <https://www.reuters.com/article/us-alphabet-seznam-idUSKBN28K0UW> accessed 13 January 2024.
[55]Giulia Rurali and Martin Seegers, 'Private Enforcement of the EU Digital Markets Act: The way ahead after going live' (*Lexology*, 19 June 2023)

B. USA

While the EU has a settled law in place, the jurisdiction of the USA has been privately enforcing competition matters for longer than that of the EU. Private enforcement of competition law is an established, well-developed mode of enforcement in the US, constituting preponderance of the Department of Justice ("**DOJ**") and Federal Trade Commission ("**FTC**").[56] The success of the private enforcement system of antitrust infringement in the US stimulated the EU to adopt similar measures.[57] Deterrence plays a significant part in private enforcement under US antitrust law.[58] While the EU mandates fulfilment of a "*causal relationship*" between the loss and the anti-competitive behaviour by any direct or indirect person to claim compensation.[59] US, to the contrary, excludes indirect persons from claiming compensation. This is done to facilitate effective antitrust law enforcement and reduce the hassle of complicated damage calculation.[60] Nevertheless, claims are enormous in number, but the US is still considered one of the stricter jurisdictions when it comes down to brass-tacks of private enforcement of antitrust laws.[61]

Legal basis for private antitrust litigation in the US stems from Section 4 of the Clayton Act, 1914.[62] The section allows private parties to sue

---

<https://www.lexology.com/library/detail.aspx?g=615614f5-692d-419b-a5dc-b4e95f28493c> accessed 12 January 2024.

[56]Department of Justice, 'Private Antitrust Litigation: Procompetitive or Anticompetitive?' (4 October 2011) <https://www.justice.gov/atr/private-antitrust-litigation-procompetitive-or-anticompetitive> accessed 13 January 2024.

[57]Ulf Bernitz, 'Introduction to the Directive on Competition Damages Actions' in Maria Bergstrom, Marios Iacovides and Magnus Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart Publishing 2015).

[58]*Cameron et al v Apple Inc.* 4:19-cv-03074 (N.D. Cal.).

[59]*Otis GmbH & Ors v Land Oberosterreich & Ors* [2012] ECJ C-199/11.

[60]Rupprecht Podszun, 'Private Enforcement and Gatekeeper Regulation: Strengthening the Rights of Private Parties in the Digital Markets Act' (2022) 13(4) Journal of European Competition Law & Practice 254–267.

[61]*Cameron et al v Apple Inc.* 4:19-cv-03074 (N.D. Cal.).

[62]Clayton Act 15 U.S.C. (1914) sec 15.

under the federal antitrust laws for monetary losses caused due to an antitrust violation in the form of *follow-on* and *stand-alone* claims.[63] The same has been enforced in digital markets in the US in the form of *stand-alone* actions, vastly by application developers in the US against Google and Apple, them being:

a) <u>Stand-alone actions</u>

In regard to *Apple,* by virtue of the case of *Cameron et al. v. Apple Inc.,*[64] a group of App developers filed an antitrust class action lawsuit against Apple in 2019, claiming the tech giant maintained an unlawful monopoly on distribution services. According to the plaintiff, Apple used pricing restrictions, a "*supra-competitive*" 30 per cent commission fee, and other tactics to limit what developers can upload to the App Store. Apple, in a press release, announced a compensation of a sum of USD 100 million Dollars to help small app developers while also clarifying its app policies allowing app developers to contact their customers for payment options even outside the App Store.[65] The Small Developer Assistance Fund created out of the corpus of money as part of the settlement will benefit over 99 per cent of US iOS developers whose proceeds from the app and in-app digital product sales through all associated accounts were less than $1 million per calendar year during the period from 4 June 2015 to 26 April 2021.[66] These developers could claim sums from the fund ranging between minimum of $250 to $30,000, based on their historic participation in the App Store ecosystem.[67] Presently, by virtue of the aforementioned

[63]*Cameron et al v Apple Inc.* 4:19-cv-03074 (N.D. Cal.).
[64]ibid.
[65]Charley Connor, 'App developers score $100 million from Apple' (*Global Competition Review*, 17 June 2022) <https://globalcompetitionreview.com/gcr-usa/article/app-developers-score-100-million-apple> accessed 12 January 2024.
[66]William F Shughart II, 'Here's Why the Utah-Led Antitrust Lawsuit Against Google Play Games the System' (*Independent Institute*, 27 July 2021) <https://www.independent.org/news/article.asp?id=13686> accessed 12 January 2024.
[67]ibid.

case holding Apple liable for the aforementioned practices under the Sherman Act, there exists a proper mechanism in place to facilitate awarding of compensation to app developers.[68]

In regard to Google, by virtue of *State of Utah v. Google*,[69] US App developers and consumers had filed a class action lawsuit against the search engine giant Google, claiming that the platform created a closed app ecosystem *via* its Play Store that left them at a disadvantage. Google allegedly had made agreements with phone manufacturers and employed other tactics to exclusively channel all consumer payments through Google Play, while levying a 30% fee on all Google Play transactions.[70] Developers had also contended that the company was responsible for intentionally hindering ways developers could provide their consumers with any special offers and payment options outside the Play Store.[71] Google announced the settlement and other measures to improve the Play Store environment in a blog post, where the company pledged its support to create open platforms and intends the settlement for eligible US app developers, those who "*earned two million dollars or less in annual revenue through the Google Play Store during each year from 2016-2021*."[72] The settlement of $700 Million as announced in December,[73] merely awaits its final approval by the Court before Google moves forward with the fund. In addition to the multi-million-dollar settlement that is yet to go into effect, Google has

[68]*Cameron et al v Apple Inc.* 4:19-cv-03074 (N.D. Cal.) <https://smallappdeveloperassistance.com/frequently-asked-questions.php> accessed 12 January 2024.
[69]*State of Utah v Google LLC* 3:21-cv-05227 (N.D. Cal.).
[70]Anna Langlois and Ben Remaly, 'Google settles developers' claims for $90 million' (*Global Competition Review*, 5 July 2022) <https://globalcompetitionreview.com/gcr-usa/article/google-settles-developers-claims-90-million> accessed 12 January 2024.
[71]American Economic Liberties Project, 'Utah v. Google' <https://www.economicliberties.us/utah-v-google/> accessed 12 January 2024.
[72]*In re Google Play Store Antitrust Litigation* Case No. 3:21-md-02981-JD <https://www.texasattorneygeneral.gov/sites/default/files/images/press/Google%20Play%20Settlement%20Filestamped.pdf> accessed 12 January 2024.
[73]ibid.

also pledged to make the Play Store environment more open and flexible for consumers and app developers alike.[74]

This chapter has highlighted all the instances where victims of anti-competitive practices have exercised their right to compensation against GAFA. However, India has not seen any such suit despite having the same victims as the EU and the US. For example, in the *XYZ v. Google* case,[75] consumers had to incur increased costs to access App services from the Google Play Store because app developers increased costs of services by virtue of high commission charges under GBPS and app developers who did not charge their consumers, incurred losses due to the high commission charges Google under GBPS. Both of these are victims of the anti-competitive practices of Google, but unlike the EU and the US, India has not witnessed any private actions raised by the Consumers of App Developers.

IV. INDIA'S JOURNEY WITH PRIVATE ENFORCEMENT

The Competition Act, 2002 was passed, among other things, to prevent anti-competitive behaviour from having an AAEC in the Indian market and to promote a system of fair competition.[76] Although the Statement of Objects and Reasons of the Act makes no mention of consumer welfare, the preface of the Act unmistakably captures its spirit by stating that its goals are to protect consumers' interests; foster and sustain market competition, and ensure the freedom of trade practised by other market participants.

In its quest to further the same motive, CCI has ensured to broaden its horizons in niche and complex markets, including the ones of Big Tech. The Act accommodates provisions for both public and private

[74]William F Shughart II, 'Here's Why the Utah-Led Antitrust Lawsuit Against Google Play Games the System' (*Independent Institute*, 27 July 2021) <https://www.independent.org/news/article.asp?id=13686> accessed 12 January 2024.
[75]*XYZ (Confidential) v Alphabet Inc. & Ors* Case No. 07/2020 (25 October 2022).
[76]The Competition Act, 2002 (12 of 2003).

enforcement. However, the present jurisprudence as identified in *XYZ v. Google* and *Umaar Javeed v. Google* has observed a better implementation of public enforcement, by penalising Google a sum of Rs. 937 Crore[77] and Rs. 1338 Crore[78] respectively, in comparison to private enforcement, despite having a mechanism to enforce compensation applications, i.e., private enforcement against the Big Tech. In this chapter, the authors analyse the existing provisions with the judgement trajectory under the Act and identify the reasons for ineffective private enforcement.

A. Laws under the Competition Act

Private enforcement is not a novel topic to the Act and is covered under Section 53N of the Act. Section 53N allows any person to file a compensation application before the National Company Law Appellate Tribunal ("**NCLAT**") by virtue of an enterprise contravening any provision under Chapter II and/or if an enterprise contravenes any order by CCI or NCLAT.

The Act merely identifies *follow-on* actions in two ways: *First,* that allows *any person* to file an application for compensation to the NCLAT upon CCI's and/or NCLAT's finding on an enterprise contravening provisions under Chapter II.[79] This section allows for *follow-on* actions notwithstanding any contravention of an order. Therefore, it is a legislative footing for consumers and competitors to file suit for compensation for losses suffered as a consequence of anti-competitive behaviour. *Second,* that allows *any person* to file an application for compensation to the NCLAT who suffered a loss by virtue of an enterprise contravening any order passed by the

[77] 'CCI Set to Recover Rs. 13 Million Penalty from Google' (*BRICS Competition Centre*, 28 December 2022) <https://bricscompetition.org/news/cci-set-to-recover-rs13-million-penalty-from-google> accessed 12 January 2024.
[78] ibid.
[79] The Competition Act, 2002 (12 of 2003) s 53N

Commission or the Appellate Tribunal.[80] These follow-on compensations require the plaintiff to prove monetary loss; as a result, an enterprise unreasonably contravening any order by CCI or the NCLAT. These provisions can be invoked only when there is a contravention of an order, including unreasonable delay in the performance of remedies. Thus, under the framework, persons suffering losses do have methods to file for compensation applications. However, the record of judgments in India reflects otherwise.

B. Judgement trajectory

Despite having wide-ranging powers to clamp down on digital players through private enforcement, there has not yet been a judgement in this regard. The authors discuss two main cases in this regard, the *MCX* and the *Food Corporation of India* case. In the *MCX Stock Exchange* case,[81] the National Stock Exchange ("**NSE**") was convicted for abusing its dominant position in the currency derivatives market and continues to be the only case to make use of the Act's private enforcement provisions. A compensation of Rs. 856 crores was claimed by MCX for having faced losses by the predatory pricing of NSE in the currency derivatives market. In an application against the NSE, MCX-SX claimed that the latter had abused its market dominance by using predatory pricing to drive MCX-SX out of the currency derivative ("**CD**") market. The CCI noted that NSE dominated the CD market and, as a result, ordered NSE to amend its zero-price policy in the relevant market and to immediately desist from unfair pricing, exclusionary conduct, and leveraging its dominant position in other markets unjustly to safeguard its CD market.[82] However, the case is still sub-judice before the Supreme Court.

[80]The Competition Act, 2002 (12 of 2003) ss 42-A and 53Q
[81]*National Stock Exchange of India v Competition Commission of India* (2014) Civil Appeal 8974.
[82]ibid.

Subsequently, in *Food Corporation of India v. Excel Crop Care & Ors*. case,[83] the application of Section 53N was dealt with. In this case, the Food Corporation of India ("**FCI**") demanded a compensation of Rs. 26 crores under Section 53N. Excel Crop Care, along with UPL Limited & Sandhya Organic Ltd., was held guilty of causing an AAEC in the market. The Respondents, Excel Crop Care Limited, UPL Limited & Ors. argued that drafting of Section 53N is flawed, which, upon textual interpretation, entails that compensation claims may not be filed after the determination of an appeal by the Supreme Court. The Respondents further argued that since the Excel Crop Care case, CCI and NCLAT (erstwhile, COMPAT) decisions had merged with the judgment of the Supreme Court in 2017, the limitation period to file the application had elapsed.[84] This was dismissed by NCLAT since the cause of action was held to have arisen from CCI and/or COMPAT decision, as opposed to that of the Supreme Court, both of which found violations under provisions of the Act.[85] This decision of maintainability under Section 53N was challenged by UPL Limited before the Supreme Court. Through an order in September 2022, the Supreme Court disposed of the appeal by leaving questions of maintainability open to NCLAT's discretion. However, the case has witnessed no revelations thereafter and remains pending.

Owing to the matters being sub-judice, there is no precedence on the application of Section 53N; therefore, the proportion of compensation applications in comparison to the enforcement judgements is significantly less.

[83] *Food Corporation of India v Excel Crop Care Ltd. & Ors* Compensation Application (AT) No.01 of 2019 in Competition Appeal (AT) No.79-81 of 2012 (3 June 2020).
[84] Alexandre Lacresse 'Private Enforcement: The Court of Justice of the European Union Clarifies the Law' (2023) Issue 2 Concurrences N° 2-2023, Art. N° 112563 135-137 <https://www.concurrences.com/en/review/issues/no-2-2023/chroniques/private-enforcement-the-court-of-justice-of-the-european-union-clarifies-the> accessed 12 January 2024.
[85] ibid.

C. Inability to enforce

The inability to efficiently enforce provisions of private enforcement in comparison to public enforcement is because of a plethora of reasons that can be subjected under the broader headings of legal uncertainty and restrictions on forums.

a) Lack of guidance on the law causing legal uncertainty

Section 53N, on its bare textual reading, reeks of multiple unanswered queries, such as contemplation of the limitation period for filing, the stage at which it can be filed, quantification of damages, etc. The sole reason why Indian Jurisprudence has not witnessed any judgement in the area of awarding compensation is because of the legal uncertainty from the texts of the provision. Additionally, with no precedents to rely on, we are almost stuck in a hamster's wheel.

b) Shortage of avenues

The Appellate Tribunal, i.e., NCLAT, is the only authority that has been vested with powers of adjudicating on a matter of compensation. All applications made under 53N can be made only before NCLAT. Considerations of overburdening NCLAT have not been contemplated at the time of transferring the appellate functions of COMPAT to NCLAT scrapping.

Judgements passed by CCI are *in-rem*, and affect the public at large. However, in order to ensure that the deterrent character of competition law is firmly maintained, *in-personam* disputes or private enforcement by way of compensation applications must be revisited on priority. This would complement the advancing public enforcement, especially in the emerging fields of Big Tech, wherein public enforcement coupled with private enforcement is required to prevent Tech giants from contravening Competition Laws.

V. THE WAY FORWARD

Considering the legal background and fallacies of private enforcement, the authors suggest ways to curb loopholes of private enforcement in the Big Tech market, with particular emphasis on the upcoming Digital Competition Act in India, with specific focus the latest law report.[86]

GAFA in the Big Tech market has a strong economic character that allows for persisting market dominance. This market dominance creates a slew of harms, which makes it difficult for regulators to curb their activities through the general law. Hence, specific laws such as the DMA of the EU are imperative to regulate Big Tech.[87] The laws of DMA are formulated to eliminate the natural economic characteristic of Big Tech as a whole have envisaged a compliance structure that covers the bounds of consumer protection, privacy laws, data protection, telecommunication law, and competition laws.[88]

In data-driven markets, private enforcement and public enforcement of competition law are deeply intertwined. In a seminal article,[89] academicians have noted that repetitive competition law litigations in *digital markets* led them to consider that the deterrent effect of public enforcement is insufficient. Therefore, it seemed paramount for them to promote private enforcement in the digital markets space. the economic character of the digital market that Big Tech operates in

[86]Ministry of Corporate Affiars, 'Report of the Committee on Digital Competition Law' (2024) <https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=ope> accessed 21 March 2024.

[87]Rahul Mishra, 'India's Digital Competition Act' (*Mondaq*, 20 January 2023) <https://www.mondaq.com/india/antitrust-eu-competition-/1271904/indias-digital-competition-act> accessed 21 January 2024.

[88]ibid.

[89]Alexandre Lacresse 'Private Enforcement: The Court of Justice of the European Union Clarifies the Law' (2023) Issue 2 Concurrences N° 2-2023, Art. N° 112563 135-137 <https://www.concurrences.com/en/review/issues/no-2-2023/chroniques/private-enforcement-the-court-of-justice-of-the-european-union-clarifies-the> accessed 12 January 2024.

demands a novel approach to tackle problems the market throws at regulators, furthering which promoting private actions in data-driven markets or digital markets was opined to have a positive effect both on consumer welfare and on deterrence which was in consonance with the goals of public enforcement through penalties.[90]

Placing reliance on the rationale, multiple jurisdictions are mulling over a law special law to regulate Big Tech. In India, the *Digital Competition Act* aims to address all the complex issues surrounding digital markets, including self-preferencing, network effects, and anti-steering clauses, among many other things.[91] The Report under Clause 35 of Chapter VII, read in consonance with its general features, promises for compensation in case the *Systemically Significant Digital Enterprise*, i.e., Big Tech breach their obligations laid down under the Bill.[92] However, the Report has not delved into compensation in deep. The authors specifically argue for introducing guidelines for private enforcement mechanisms under the umbrella of the upcoming Digital Competition Act. The authors' suggestions are two-fold:

A. Enhanced guidance on the law

The authors hereunder suggest two things; *firstly,* Section 53N requires more guidance on its application, much like the EU Damages Directive. The directive entails substantive and procedural aspects of applying for compensation claims before national courts and contains guides on methods to quantify such damages. The existence of such a directive

[90]ibid.

[91]Avimukt Dar et al, 'Digital Competition Bill Consultations: India Prepares to Regulate "Gatekeeper" Platforms' (*Mondaq*, 10 March 2023) <https://www.mondaq.com/india/antitrust-eu-competition-/1292056/digital-competition-bill-consultations-india-prepares-to-regulate-gatekeeper-platforms-> accessed 12 January 2024.

[92]Ministry of Corporate Affiars, 'Report of the Committee on Digital Competition Law' (2024) Ch IV Clause 3.52 and Ch VII Clause 35 <https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=ope> accessed 21 March 2024.

provides any person suffering losses as a consequence of an act violating Articles 101 and 102 of the TFEU a detailed mechanism to further their applications before national courts. This includes disclosure of evidence, limitation period, joint and several liabilities, and quantification of harm, amongst many others. Such detailed guidance would reduce legal uncertainty, which the regulators are presently grappling with.

Secondly, as an addition, the authors suggest that with a specific focus on digital markets, the Digital Competition Act should include *provisions* to allow consumers and competitors to file compensation applications by virtue of violating provisions of the Act, details on limitations, quantification of damages, etc. Alternatively, the provision of the new Act can adopt a DMA-like approach, wherein provisions of DMA can be invoked at the national courts.

Illustration: App Developer X, from India, has suffered from the 30% commission fee charged for utilizing GBPS, and has incurred losses in the form of losing customers, removing important costs, etc. By virtue of the decision in the *XYZ v. Google* case, this app developer will now have multiple options to recoup the damages by filing an application by:

I. Under Section 53N, by virtue of accommodative guidance; or

II. Under provisions of the Digital Competition Act

thereby allowing X to make an efficient case against Google for contravening provisions of the Competition Act; this is much like the EU and US suits filed by app developers.

Should the law be amended to enforce and regulate compensation concerns, in ways of allowing *follow-on* claims and *stand-alone* actions, then much like the US in the *stand-alone* action against Google under the *State of Utah v. Google* case, consumers and app developers from India under *XYZ v. Google* case would be able to recoup their losses for the anti-competitive acts committed by Google under the

garb of its Billing System. This not only increases the monetary burden over and above the severe penalty that has been levied, but it also acts as an efficient deterrent for similar acts to be committed in the near future.

B. *Expansion of avenues*

The authors, in this regard, suggest that the provision of Section 53N should include an increased number of forums wherein a compensation application could be filed, making NCLAT the sole judicial authority to entertain compensation applications. Restricting the forum to NCLAT may give rise to judicial overburdening, considering competition cases are not the only kind of matters being heard at NCLAT. Additionally, owing to the nature of compensation applications, a deep economic assessment of quantifying damages is needed. Therefore, it is suggested by the authors that, *firstly*, forums must not be restricted to NCLAT, or there must be induction of more technical members at NCLAT, which warrants an amendment to Section 411(3) of the Companies Act, 2013.[93] *Secondly*, alternatively, CCI can institute a division or a panel that deals with compensation suits filed under Section 53N. *Thirdly,* CCI, by way of amending the Act or by way of orders by CCI or NCLAT, allows for alternate dispute resolution mechanisms like arbitration to specifically deal with questions of granting compensation to the victims. *Insofar* as arbitration is concerned, it is one of the efficient means to settle private enforcement matters in the EU.[94] Therefore, a similar approach can be implemented by the CCI wherein Arbitral Tribunals are restricted from overstepping their jurisdiction into that of the regulators; therefore, in the questions of competition, will only hear matters of compensation for follow-on actions by virtue of CCI or NCLAT decisions.

[93]The Companies Act, 2013 (18 of 2013) s 411(3).

[94]Lucian Ilie and Amy Seow, 'International Arbitration and EU Competition Law Complement Rather than Contradict One Another' (2017) 34 (6) Journal of International Arbitration 1007-1038.

Scrutinizing the want of increased private compensation matters in digital markets, the authors suggest that the proposed *Digital Markets Unit*[95] in the new Digital Competition Act must have a division or a panel of a few members, dealing specifically with matters of compensation raised against the Big Tech, would help in an expedited and efficient hearing on the matters of private enforcement.

VI. CONCLUSION

Antitrust legislation must continuously evolve and keep up with digital platforms that are constantly reinventing. Notwithstanding the variety of strategies suggested by competition regulators for dealing with digital gatekeepers and markets, regulators all concur that such platforms and marketplaces require a futuristic regulatory framework. Therefore, the conventional competition policy has often failed to capture the unique characteristics of digital markets. Competition authorities from across multiple jurisdictions, while making a law to further the collective motive of consumer welfare and encouraging competitive markets, must categorically note the nuances in aiding the motive. One such futuristic inclusion and nuanced regulation in digital markets would include diversifying private enforcement by way of compensation applications. Goals of consumer welfare as well as goals of competitive markets, will both be advanced by broadening the meaning of the legislation and establishing particular forums to decide on compensation claims. This is due to the fact that they dissuade Big Tech and other market participants who might otherwise have a tendency to break the rules of competition law. Although punitive damages are frequently connected with deterrence, even compensatory justice is likely to prevent future violations and encourage greater adherence to competition law requirements.

[95]Ministry of Corporate Affiars, 'Report of the Committee on Digital Competition Law' (2024) Ch IV Clause 3.52 and Ch VII Clause 35 <https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=ope> accessed 21 March 2024.

While we are cognizant of the fact that private enforcement gives more teeth to competition law, the problem of inefficient implementation is not only because of the underutilisation of laws, but also because of the deficit of detailed guidance, with courts yet to pronounce a decision in this area. In conclusion, it is long overdue for regulators from established jurisdictions such as India to recognise that private enforcement of competition law is just as formidable as public enforcement at deterring anti-competitive behaviour, and that implementation is even more necessary in light of expanding markets like digital market and the Big Tech.

ASSAILING THE TENABILITY OF SECTION 122 OF THE INDIAN EVIDENCE ACT: TRAVERSING THROUGH THE TROUBLED WATERS

Saumya Ranjan Dixit[*] *and Bhabesh Satapathy*[**]

ABSTRACT

Section 122 of the Indian Evidence Act of 1872 provides for marital communication privilege intending to protect marital privacy and marriage as an institution. However, this provision has been facing significant criticisms for obstructing the truth-seeking nature of the judicial process. This article attempts to highlight that the objective that the provision seeks to achieve is flawed and haphazard in nature. It further discusses various prevailing infirmities that have crept into the provision and proposes to abrogate those lacunae. It also highlights concerns relating to the exceptions grafted into the provision and contends to add some more exceptions to it by borrowing them from foreign jurisdictions. It further criticizes the reasonings adopted in various cases by courts of the United Kingdom ("UK"), the United States of America ("USA"), and India to showcase a comparative analysis of the

[*]Saumya is a B.A. LLB. (Hons.) student at the National Law University, Odisha. The author may be reached at 21bba040@nluo.ac.in.

[**]Bhabesh is a B.A. LLB. (Hons.) student at the National Law University, Odisha. The author may be reached at 21bba010@nluo.ac.in.

exercise of this provision in these states. At certain points, the authors also draw inspiration from foreign constituencies, which have evolved some welcoming developments and suggest its adoption in India. However, it should not be misconstrued that the authors demand a complete erasure of the privilege, but rather suggest limiting its impact on the information-seeking process of the judiciary. Therefore, to alleviate the present infirmities in the provision it is proposed that voluntary testimony of the witness spouse must be permitted. In other words, if a spouse is willing to become a witness and provide testimony voluntarily to the detriment of another spouse, then that should be permitted and accepted instead of restricting it. Further, some more exceptions are carved into the provision. These suggestions are the prime solutions which the authors propose to cure the existing defects in the provision. The authors also believe that adopting this mechanism could balance the competing interests of protecting marital privacy and the truth-seeking mechanism of the judiciary in an effective manner.

Keywords: *Marital Privilege, Truth-Seeking Nature, Flawed Objective, Prevailing Infirmities, Individual Privacy, Voluntary Testimony*

I. INTRODUCTION

Section 122 of the Indian Evidence Act, 1872[1] holds significant importance in the realm of marital communications privilege. It protects the communications made during marriage from one spouse to the other, which is treated as privileged communications between them. There are three parts of the section, the first part states that no married person shall be forced to disclose the communication made by the other person to whom the former is married.[2] The second part states that no married person shall be permitted to disclose such communications without the consent of his/her spouse or any representative in interest. The last part carves out an exception that such a privilege of non-disclosure without consent shall not be applicable in cases where one married person is prosecuted for a crime against the other.[3] In this context, it is important to note that under Indian law, this privilege is of the spouse who made the communication to the other spouse. That is, the privilege is of the communicating spouse and, not the witness spouse.[4] This provision originated from British colonial laws and was subsequently adopted in Britain as well. But the above three components mark a stark departure from the English common law privilege where only the witness spouse holds the privilege, it does not extend beyond the marriage and is applicable in civil cases only.[5]

The foundation of spousal privilege can be traced back to two medieval concepts, as highlighted in the case of *Trammel v. United States*.[6] First, it stemmed from the idea that a married couple was seen as a single entity, particularly without an independent legal existence for women.

[1]The Indian Evidence Act, 1872 (1 of 1872) s 122.
[2]Sudipto Sarkar & VR Manohar, *Law of Evidence*, vol 2 (Lexis Nexis 2010) 2527.
[3]M Monir, *Law of Evidence*, vol 2 (Universal Law Publisher 2018) 333.
[4]*TJ Ponnen v MC Varghese* AIR 1967 Ker 228.
[5]Tanmay Amar, 'Matrimonial Communications: Wedded to the Irrational' (2005) 17(1) National Law School of India Review 59, 65.
[6]*Trammel v United States* (1980) 445 US 40.

Second, it was based on the notion that an individual cannot self-incriminate due to their interest in the legal proceedings.

Consequently, if one spouse's communication was deemed inadmissible, the other spouse's communication would also be barred. Furthermore, considering the limited rights of women during that era, they were regarded as the *property* of men. This perspective led to the logical argument that one's property, in this case, a spouse, should not be compelled to testify against the owner of that property.[7]

There are two distinct types of privileges that fall under the umbrella of marital communications privilege: *Testimonial Privilege* and *Spousal Confidence Privilege*.[8] Testimonial Privilege relieves a witness, particularly a spouse, from the obligation to provide evidence against their spouse in legal proceedings. This privilege, rooted in older English laws, serves the purpose of fostering marital harmony and preventing discord within the relationship.[9] On the other hand, Section 122 of the Evidence Act 1872 is associated with Spousal Confidence Privilege. This privilege primarily focuses on safeguarding the privacy of communication between spouses and prohibits a spouse from divulging such confidential communications during testimony.[10] Its primary objective is to preserve marital harmony.

However, in recent times, the provision has come under scrutiny, with questions arising regarding its viability and potential shortcomings. Recently, in the case of *the State of Kerala v. Rasheed & Ors*,[11] the Kerala High Court questioned the legality of Section 122 of the Indian Evidence Act, 1872, which prohibits the admission of voluntary

[7] *RIT Foundation v The Union of India* (2022) MANU DE 1638.

[8] Tanmay Amar, 'Matrimonial Communications: Wedded to the Irrational' (2005) 17(1) National Law School of India Review 59, 65.

[9] US Legal Inc, 'Find a Legal Form in Minutes' (*Testimonial Privilege Law and Legal Definition | USLegal, Inc.*) <https://definitions.uslegal.com/t/testimonial-privilege>.

[10] James H Feldman and Carolyn Sievers Reed, 'Silences in the Storm: Testimonial Privileges in Matrimonial Disputes' (1987) 21(2) Family Law Quarterly 189.

[11] *State of Kerala v Rasheed & Ors* (2022) SCC OnLine Ker 963.

testimony given by a spouse against the accused spouse, even when granted with complete volition of the spouse. In this case, the accused, suspecting some illicit relationship between his wife and the deceased, killed the deceased by first hitting his car with the deceased's bike and then stabbed him to death. The wife deposed that on the day before the murder of the deceased, there was a quarrel between her and the accused over some telephonic chats between the deceased and herself, following which the accused left the house in his car with which the accused hit the deceased's bike. This statement of the accused's wife was essential to establish the motive to kill, but due to the protection of Section 122 the above statement was held to be inadmissible. Further, no other evidence proving motive was satisfactorily presented for which the prosecution failed to establish the alleged motive. In this context, the Court opined that although there was clear evidence establishing the motive, due to the flawed arrangement of placing marital privacy over public interest by virtue of Section 122, the truth-seeking process got obstructed. Therefore, the Court expressed the need for an amendment to address this matter and called into question, the validity of the provision. The aforementioned case shed light on a significant issue that calls for rectifying a fundamental flaw inherent in the objective of Section 122.

This article delves into exploring the troubled waters surrounding Section 122, aiming to critically analyse its tenability and address the emerging concerns. By examining the inherent complexities and implications of this provision, the authors seek to shed light on the need for a comprehensive revaluation of its application in the context of contemporary legal principles and societal norms. The second part of the article peruses the underlying legislative objective behind Section 122. The third part points out the flaw in such objective by highlighting how it obstructs the judicial truth-seeking process. The fourth part depicts the prevailing infirmities that crept into the marital privilege which includes sham marriages, considering legally married couples only, continuation of the privilege after the marriage ends and the

extension of the privilege when strangers are involved. The fifth part navigates through the insufficiency in the existing exceptions to the marital privilege and suggests some new exceptions to be added to it for assisting the truth-seeking process. The last part makes a case for permitting voluntary testimony of the witness spouse on the ground that the witness spouse has an individual privacy apart from marital privacy. The authors assert that exercising of such individual privacy rights should be allowed and hence, concomitantly, the witness spouse's voluntary testimony should be permitted.

II. PERUSING THE OBJECTIVE BEHIND SECTION 122

The objective behind framing this provision and preventing disclosure of communications without reservations between married persons is to protect the family peace, prevent domestic broils and maintain the mutual trust between married couples, which is considered most important to lead a harmonious married life.[12] In the United States, spousal privilege is supported by a two-fold objective: firstly, *utilitarian or instrumental rationale* under which privilege is essential to maintain the confidential relationship, and requires the communicating party to be aware of the privilege before revealing the confidences.[13] Secondly, *humanistic rationale* argues for the privilege to promote autonomy and enable spouses to make independent life choices.[14] In India, the framing of Section 122 hints that it adopts both the rationales of protecting the relationship and preserving marital autonomy.

[12]M Monir, *Law of Evidence*, vol 2 (Universal Law Publisher 2018) 333.
[13]Edward J Imwinkelried, 'State v. Gutierrez Abolishing the Spousal Communications Privilege: An Opinion Raising Profound Questions About the Future of Evidentiary Privileges in the United States' (2003) 53 New Mexico Law Review 71, 72.
[14]ibid.

III. FLAWED OBJECTIVE

The rationale behind Section 122 appears untenable to uphold it in its current form owing to two major reasons, as highlighted below.

A. Fails to satisfy the second part of Section 122

This objective succeeds in justifying that a spouse cannot be compelled to disclose such communications as it can be inferred from the necessity to preserve the marital ties and compelling a spouse could shake that domestic confidence.[15] However, it can in no way be contemplated to justify the second part where the spouse wants to disclose the communications willingly, but the law prevents it.[16] The spouse who is willing to disclose has moved further and seems ready to risk the family peace.[17] So, after that, it matters in the least, whether it actually gets disclosed or not, as the mutual distrust has already frayed between the spouses. Moreover, the reasoning for retaining family peace with non-compulsive disclosure is not logically applied since a disturbance in marriage due to such disclosure is not the most serious one amongst other reasons responsible for marital disturbances.[18]

B. Obstacles in the delivery of justice

Under this privilege, justice seems subservient to the consent of the accused as to whether the wrongdoer wants to get into trouble, which is generally negative.[19] This spousal privilege frustrates the nature of

[15]Ho Hock Lai, 'Spousal Testimony on Marital Communication as Incriminating Evidence: Lim Lye Hock v PP' (1995) Singapore Journal of Legal Studies 236, 242.
[16]Ho Hock Lai, 'Spousal Testimony on Marital Communication as Incriminating Evidence: Lim Lye Hock v PP' (1995) Singapore Journal of Legal Studies 242-244.
[17]Gazal Preet Kaur, 'Does Section 122 of the Evidence Act need reform?' (*The Leaflet*, 3 February 2022) <https://theleaflet.in/does-section-122-of-the-evidence-act-need-reform> accessed 11 March 2023.
[18]John Henry Wigmore, *Evidence in Trails at Common Law*, vol 8 (Wolter Kluwers 2010) 213.
[19]ibid.

evidence law as a truth-seeking process and hinders administration of justice more than safeguarding marital unity.[20] The crucial aim of this privilege, as considered to strengthen a marriage by increasing their confidential communication, is intrinsically flawed as there lies no causal link between them.[21] It is because even if marital privileges get abolished, it will not prohibit the revelation of confidential information between spouses.[22] It needs to be realised that people do not enter into a marriage because of the inducement of a guarantee of confidentiality, rather marriages and communications are motivated by trust and affection.[23] The Supreme Court of New Mexico resonating with the same view took a stern decision of abolishing the spousal communications privilege in the state.[24] The majority held that most married persons are generally unaware of the privilege.[25] Further, it is different from the attorney-client or doctor-patient privilege,[26] where the confidences are revealed with utmost awareness of the privilege that their information will not get revealed which is unfounded in marital privilege. Hence, if such privilege fails to have any impact on the regular married lives of spouses, then the balance should tilt towards *information seeking* in the judicial system instead of protecting some abstract harm to marital harmony.[27] It should be realised that when the social benefits of the truth-seeking process outweigh that of

[20]Anne N Deprez, 'Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communication Privilege' (1980) 56 Indiana Law Journal 121, 127.
[21]Tanmay Amar, 'Matrimonial Communications: Wedded to the Irrational' (2005) 17(1) National Law School of India Review 59, 65.
[22]Tanmay Amar, 'Matrimonial Communications: Wedded to the Irrational' (2005) 17(1) National Law School of India Review 59, 136.
[23]Tanmay Amar, 'Matrimonial Communications: Wedded to the Irrational' (2005) 17(1) National Law School of India Review 59, 137.
[24]*State v Gutierrez* (2021) NMSC 008 [82].
[25]ibid.
[26]ibid.
[27]David Medine, 'The Adverse Testimony Privilege: Time to Dispose of a 'Sentimental Relic' (1988) 67 Oregon Law Review 519, 548.

marital privilege, then the former should be considered as a dominant factor.[28]

However, it should not be misconstrued that the authors are claiming a complete abrogation of Section 122. The abrogation of the marital privilege in toto could cause more injustice to a spouse and may not further the interests of justice in seeking information.[29] Here, it needs to be clarified that the marital privilege includes both testimonial privilege and spousal confidence privilege and the authors do not propose to completely abrogate both of them. Instead, it is proposed that the testimonial privilege must be retained but the spousal confidence privilege, where the spouse is prohibited from disclosing information irrespective of the spouse's voluntariness, is proposed to be abrogated.

It is because the pivotal pedestal on which the testimonial privilege stands is that of marital privacy and autonomy. Neither society should tinker with it, nor the State or judicial system should interfere more in that restricted zone. The unit of family also enjoys autonomy in a free society as it is seen as an extension of the personal autonomy of individual spouses in the unit, which preserves the unit's decisional autonomy and choice-making.[30] It is this crucible of privacy which sustains marital privilege and precludes its elimination. Hence, the authors contend that the marital communications privilege should be available in every sphere of marriage, but its intensity and extent must be lowered in certain circumstances.[31] There needs to be wide

[28]ibid.
[29]Richard O Lempert, 'A Right to Every Woman's Evidence' (1981) 66 Iowa Law Review 725, 731.
[30]Edward J Imwinkelried, 'State v. Gutierrez Abolishing the Spousal Communications Privilege: An Opinion Raising Profound Questions About the Future of Evidentiary Privileges in the United States' (2003) 53 New Mexico Law Review 71, 93.
[31]Bentham, *Rationale of Judicial Evidence* (5th edn, Wolter Kluwer 1827) 332, 339-345.

availability without making any unintelligible differentia but with certain reforms in it which are highlighted in the following sections.

IV. PREVAILING INFIRMITIES IN THE PRIVILEGE

The foremost reform proposed is to remedy the prevailing infirmities that plague this privilege and hampers both the autonomy of the spouses and the information-seeking mechanism.

A. Sham marriages

Earlier, there have been instances where the accused married the witness before the witness could give her testimony to avail the protection of this privilege, and unfortunately, this has been warranted by the courts. In different cases like *State v. Chrismore*[32] and *Pedley v. Wellesley*,[33] the courts held that the time when the relationship of marriage begins is immaterial and the exclusion of testimony prevails even though the accused married the witness after she was made a part of the trial. But to tackle such instances, courts in the US developed a *sham marriage* exception under which the spousal immunity privilege is not extended to *premarital acts*.[34] However, the authors opine that this exception does not act as a bulwark in modern times where people marry to get immigrant visas or citizenship in developed foreign countries. In *United States v. Fomichev*,[35] a person got married to a US lady to obtain US citizenship in return for his paying the rent where both stay. But upon such revelation of the ill motive by his wife, they faced charges of sham marriage. The Ninth Circuit held that this exception does not apply to marital communications privilege, but instead applies only to *spousal immunity privilege*.[36] It held that "*marriages that are for entered into for practical reasons may ripen*

[32]*State v Chrismore* 223 Iowa 957.
[33]*Pedley v Wellesley* 3 Car. & P. 558.
[34]*United States v Clark* 712 F.2d 299 (7th Cir. 1983).
[35]*United States v Fomichev* 899 F.3d 766 (9th Cir. 2018).
[36]ibid.

into loving relationships" and that "*the applicability of the sham marriage exception requires a limited inquiry into whether parties married for the purpose of invoking the testimonial privilege*."[37] So, if couples are legally married without any intrinsic purpose of misusing the privilege, then they are protected by the spousal communications privilege.[38] This line of reasoning, when seen with the growing number of cases in India involving people entering into marriages for getting immigration visas (especially in the US),[39] it appears that the privilege provides for an an easy escape route.[40] Thus, this decision emphasizes that marriages entered into for practical reasons, such as obtaining immigration benefits, may still be protected by the spousal communications privilege if it is genuine. However, this legal nuance raises concerns, echoing Jeremy Bentham's observation that spousal privilege can create inconsistencies in justice, granting individuals a license to commit wrongdoing with spousal protection.[41] The prevalence of sham marriages for immigration purposes, particularly in the US, underscores the potential exploitation of this privilege as an escape route in various cross-border legal proceedings.

B. Concerned only with legally married couples

Furthermore, this objective appears flawed due to another reason that it is only applicable to legally wedded couples and not otherwise.[42] Its

---

[37]ibid.

[38]Stephen A Saltzburg, 'Sham Marriage and Privilege' (2019) 33 Criminal Justice 51, 52-53.

[39]PTI, 'Indian pleads guilty to marriage and visa fraud' *The Times of India* (Delhi, 15 March 2019) <https://timesofindia.indiatimes.com/nri/indian-pleads-guilty-to-marriage-and-visa-fraud/articleshow/68429342.cms> accessed 31 August 2023.

[40]H Glenister, 'Partner Visa for Indian Man Suspected of Being in a Sham Marriage' (*William Gerard Legal*, 17 August 2021) <https://www.wglegal.com.au/notable-cases/partner-visa-application-for-indian-man-suspected-of-being-in-a-sham-marriage>.

[41]Bentham, *Rationale of Judicial Evidence* (5th edn, Wolter Kluwer 1827) 332, 339-345.

[42]Sudipto Sarkar & VR Manohar, *Law of Evidence*, vol 2 (Lexis Nexis 2010) 2527.

application is restricted to paramours as well.[43] It is a prudent contemplation that if the aim is to protect family peace, then there is no ground to disregard the family peace of a couple who have been staying together irrespective of the fact that whether their marriage is valid or not. It simply disregards the harmony that gets dispensed between couples who are innocent about the validity of their marriage and have not stayed together for a long time leading to a legal presumption[44] that their marriage is valid. This shows the partiality that the objective accelerates in the time where there is a growing jurisprudence on accepting *live-in relationships* as equivalent to marriage by persons legally qualified to marry, upon fulfilling conditions of cohabiting for a significant time and holding themselves as spouses before society.[45] Further, considering the efforts in extending certain marital rights to them,[46] this privilege should be extended to them as well. In foreign jurisdictions, more radical views are expressed by scholars who argue for extending the marital communications privilege to unmarried cohabitants as well, owing to the policy objective which underpins the privilege, as that objective is not vitiated upon accommodating the unmarried cohabitants.[47] Views are also presented to recognise the privilege for same-sex partners as well, based on the *humanistic rationale* which upholds their privacy, autonomy, and their choice is equivalently precious as a couple in a heterosexual marriage.[48]

---

[43]*Shankar v State of Tamil Nadu* (1994) SCC (4) 478.

[44]Amit Anand Choudhury, 'Couple living together will be presumed married, Supreme Court rules' *The Times of India* (Delhi, 13 April 2015) <https://timesofindia.indiatimes.com/india/couple-living-together-will-be-presumed-married-supreme-court-rules/articleshow/46901198.cms> accessed 11 March 2023.

[45]*D Veluswamy v D Patchaiammal* (2010) 10 SCC 469.

[46]*Indra Sarma v VKV Sarma* (2013) 15 SCC 755.

[47]Julia Cardozo, 'Let My Love Open the Door: The Case for Extending Marital Privileges to Unmarried Cohabitants' (2010) 10 University of Maryland Law Journal of Race, Religion, Gender and Class 375.

[48]Elizabeth Kimberly (Kyhm) Penfil, 'In the Light of Reason and Experience: Should Federal Evidence Law Protect Confidential Communications Between Same-Sex Partners?' (2005) 88(4) Marquette Law Review 815, 841.

C. Continuity of the protection after the nullity of the marriage

It was held in the case of *T.J. Ponnen v. M.C. Varghese*[49] that there is a difference between English law and Indian law regarding Section 122 as this protection of communication continues even after the death of the maker of the communication. In English law, the privilege lies with the recipient of the communications and not the maker thereof so the recipient can waive the privilege and disclose the communication.[50] Further, it does not extend after death under the English law, but under Section 122, the privilege lies with the maker of the communication and "*a prohibition against the recipient which cannot be contravened by the recipient even after the maker's death*."[51] There is no thinkable reason for extending the privilege even after the death of the maker.

This was further reiterated by the Supreme Court in *M.C. Verghese v. T.J. Ponnan & Anr*[52] that the spouse will be barred from furnishing evidence even after the nullity of the marriage. Such a continuity of privilege, even after the nullity of marriage, can cause greater injustice to the victim. It can be inferred from the case of *SJ Chaudhury v. State*[53] where a widow married the accused but, due to some disturbance, left the accused and married another man. Thereafter, she also got divorced from the accused. However, the accused killed the other man in a blast, and the woman was examined, where she revealed some of the communications made to her by the accused. But those disclosures were not admitted by the court as they were made before the divorce was granted to them.[54] This clearly shows the precarious condition of the woman who can neither return to her former husband as she deemed him to be the killer, nor disclose the communications to punish him.

[49] *TJ Ponnen v MC Varghese* AIR 1967 Ker 228.
[50] ibid para 17.
[51] ibid.
[52] *MC Verghese v TJ Ponnan & Anr* (1970) AIR 1876.
[53] *SJ Chaudhury v State* (1984) SCC OnLine Del 185.
[54] ibid.

This shows a complete failure of the objective to protect peace and harmony in marriage after it has ended.

It is also unfortunate that a widow cannot be a representative in interest for her, and if there is no one to give consent to her, then she can neither be compelled nor permitted to disclose the communications made to her during his lifetime.[55] Unfortunately, this privilege has been granted high accord and made difficult to tamper with as has been held in various cases that "*the prohibition enacted by the section rests on no technicality that can be waived at will, but is founded on a principle of high import which no Court is entitled to relax.*"[56]

This set of precedence is not acceptable because of two sets of reasons: firstly, if the objective is to maintain family harmony, then it is in no way fulfilled as one of the spouses is already dead. It cannot be contemplated how family peace could get disturbed if the spouse is dead, which clearly shows an unacceptable extension of the flawed objective.[57] Secondly, it appears that the privilege of a dead spouse is being upheld to prohibit the other spouse from disclosing the communications between them which is unacceptable. It is because the privilege lies in the fact that the person can or cannot give consent to such disclosure. However, irrespective of the consent of the representative in interest, the dead spouse can never grant or deny consent, therefore his/her privilege ends at death. However, it is still absurdly made to continue, and its cost is to be borne not only by the other spouse but also by the society and the victim as well.

[55]*Nawab Howladar v Emperor* (1913) ILR 40 Cal 891.
[56]ibid.
[57]John Henry Wigmore, *Evidence in Trails at Common Law*, vol 8 (Wolter Kluwers 2010) 213.

D. *Includes cases involving strangers solely*

It is also repugnant to note that the privilege under Section 122 extends to all cases where the witness is a party to the action of a stranger[58] and includes cases where strangers' interests are solely involved.[59] This means that one spouse is not even free to disclose communications and needs the consent of the other spouse where the interests of a stranger are solely concerned. It seems to be nowhere related to achieving the objective of having privileged communications. This drawback is also found in foreign jurisdictions where under two circumstances involving strangers only, the privilege was upheld. Firstly, when a spouse's testimony implicating a third party creates a possibility of indirect implications for another spouse.[60] Secondly, when a spouse's testimony favouring a third party (a co-defendant of another spouse) could create an adverse inference against another spouse.[61] These justifications appear fallacious because giving testimony against any stranger which may indirectly put the other spouse in trouble is unlikely to disturb marital harmony. The authors believe that marital harmony gets severely perturbed when a spouse directly provides testimony against the other, but any indirect harm to the spouse through testimony against a stranger is less likely to disturb family peace.[62] Still this rule is elongated which could potentially be misused towards a miscarriage of justice and frustrate the truth-seeking process.

[58] *O' Connor v Majoribanks* 4 M & G 435.
[59] Sudipto Sarkar & VR Manohar, *Law of Evidence*, vol 2 (Lexis Nexis 2010) 2527.
[60] David Medine, 'The Adverse Testimony Privilege: Time to Dispose of a 'Sentimental Relic' (1988) 67 Oregon Law Review 519, 540.
[61] ibid.
[62] ibid.

V. PERUSING SOME PERTINENT CONCERNS: NEED TO ADD MORE EXCEPTIONS TO THE PRIVILEGE

Section 122 contains three exceptions:[63] Firstly, when there is the consent of the other spouse (the communicating spouse) or his representative in interest. Secondly, where there is a suit between married persons. Thirdly, when one married person is prosecuted for committing any crime against another. Apart from these exceptions, there is another non-textual exception to the privilege, which is the 'third-party exception.'[64] Under this exception, this privilege does not extend to prevent a third party from disclosing and proving the communications made between the spouses. The reasoning behind such an exception is that the privilege applies only to such information that is confidential (generally, in marriage, all communications are considered confidential) but when that is revealed to any third party, the confidentiality gets destroyed and warrants no such protection under the privilege.[65] This can be inferred from the case where a prisoner wrote a letter to his wife that was later found during the search of her house by police and was held admissible in court.[66] This was further extended to include cases where a third person overheard the communications made between the spouses and that was held

[63]The Indian Evidence Act 1872 (1 of 1872) s 122.
[64]KK Pappa, 'Evidence-Privileged Communications-The Marital Communications Privilege Does Not Preclude a Third Party from Testifying as to the Contents of a Written Interspousal Communication and the Priest is the Sole Holder of the Priest-Penitent Privilege and Can Waive That Privilege without the Consent of the Penitent. -State v. Szemple, 135 NJ. 406, 640 A.2d 817 (1994)' (1995) 25 Seton Hall Law Review 1591.
[65]KK Pappa, 'Evidence-Privileged Communications-The Marital Communications Privilege Does Not Preclude a Third Party from Testifying as to the Contents of a Written Interspousal Communication and the Priest is the Sole Holder of the Priest-Penitent Privilege and Can Waive That Privilege without the Consent of the Penitent. -State v. Szemple, 135 NJ. 406, 640 A.2d 817 (1994)' (1995) 25 Seton Hall Law Review 1626-27.
[66]*QE v Donaghue* 22 M 1.

admissible.[67] In the case of *Appu v. State*,[68] a third person was allowed to give evidence of the confession which he overheard between the spouses. This shows any disclosure of communication made by the spouses out of the court can be proved without applying any such privilege.[69] However, the current scenario is witnessing a growing number of grave and heinous crimes involving different tactics and misusing loopholes in the legal system. So, we contend to expand the exceptions in the following situations.

A. To protect the near and dear ones

The issue with these exceptions is that it has been interpreted in a very narrow and strict manner to include only the other married person and no one else. In one such case, a woman killed her daughter and made some incriminating statements about it to her husband, but the husband was not permitted to disclose it as the crime was not towards him rather toward their daughter.[70] In another case, it was reiterated that an offence *against* a person excludes even the son of the offender and the other spouse cannot disclose it irrespective of the grief caused to that spouse.[71] Also, in an Indian case of *Nagaraj v. State of Karnataka*,[72] the accused was levelled with charges of raping and killing his wife's sister and after committing the offence, he revealed it to his wife. But his wife was not permitted to give testimony of the fact and the information communicated.[73] This reasoning is flawed in the view of the authors because once a spouse commits any such crime against a near and dear one of the other spouse, there are less to no chances of having a peaceful marital life.

---

[67] M Monir, *Law of Evidence*, vol 2 (Universal Law Publisher 2018) 333.
[68] *Appu v State* AIR 1971 Mad 194.
[69] *Daniel Youth v King* (1945) ALJ 269.
[70] *Jhasanan v R* 81 IC 271.
[71] *Fatima v Emperor* (1914) PLR 216.
[72] *Nagaraj v State of Karnataka* (1995) SCC OnLine Kar 360.
[73] ibid.

Ironically, while defending marital privilege under Section 122, the sentiments of the spouses are taken into consideration as that is essential to maintain family peace.[74] However, when offence is committed against their own dearest children by one of the spouses, then the sentiment of the other spouse is not even considered. This is quite contradictory to the objective and only makes a travesty of justice. In such a scenario, the privilege, on one hand, fails to save the family peace and, on the other, allows a person to roam free without any punishment.

However, in the United States, an exception to the privilege is carved out when any crime is committed by one spouse on the children of either or both spouses. It can be seen in *United States v. Allery*,[75] where the wife was permitted to testify against her husband, who was accused of rape of her daughter. The same exception was upheld in *Reaves v. State,*[76] where a lady was charged with the murder of her minor step-daughter, and in *Commonwealth v. Hunter*,[77] where the defendant's wife was charged for causing brain injury to her minor stepson. In the common law regime as well, the exception to the privilege is more strict as the spouses can be compelled to give evidence for some specified crimes committed against the other spouse or their children.[78] Section 80(3) of the Police and Criminal Evidence Act 1984 of the United Kingdom specifies the offences of assault, injury, or sexual offence committed against the spouse or civil partner or a person below the age of 16 at that material time of commission under which the offender's spouse can be compelled to give testimony against the offender.[79]

[74]Sudipto Sarkar & VR Manohar, *Law of Evidence*, vol 2 (Lexis Nexis 2010) 2527.
[75]*United States v Allery* 526 F2d 1362, 1367 (8th Cir 1975).
[76]*Reaves v State* 292 Ga. 582, 740 S.E.2d 141 (Ga. 2013).
[77]*Commonwealth v Hunter* 60 A.3d 156, 159 (Pa. Super. Ct. 2013).
[78]David Lusty, 'Is there a Common Law Privilege Against Spouse Incrimination?' (2004) 27 UNSW Law Journal 1, 23-24.
[79]The Police and Criminal Evidence Act 1984, s 80.

Therefore, taking inspiration from the US and UK, India should carve out such an exception in a broad manner.

It is proposed that the exception should include the offences against human body committed against the immediate blood relations of the spouse, that is, immediate lineal ascendant and descendant including the adopted children of the spouse and siblings. This would be wide enough to cover the relations of father, mother, brother, sister and children. If the spouse has no such family or stays away from it for a long period of time voluntarily, then the lawful guardian of the spouse can be considered under this exception. It is to be noted that under this exception, the witness spouse can be compelled to provide testimony so a distinction is created between familial relations and other acquaintances, distant relatives, etc. of the spouse. Further, the condition of immediate blood relations is framed based on the closeness of the relationship of a person.

B. When both spouses are involved in crimes

George Rankin, the then Chief Justice of Bengal, from 1926 to 1934, had aptly pointed out that the requirement of consent of another spouse under Section 122 could be dilemmatic in the case of a joint trial of both spouses.[80] A curious situation may arise where it might be pertinent for one spouse's defence to disclose some evidence against another that may not be in the other spouse's interest to consent.[81] This situation raises the question of whether the marital communication privilege acts as a barrier in preventing the spouses from disclosure or not. In the US, such situations fall under a "*joint participants exception*," where the courts took a radical view and completely disallowed the application of the privilege to the spouses involved in

[80] Sir George Claus Rankin, *Background To Indian Law* (Cambridge University Press 1946) 132.

[81] ibid.

the crime.[82] The justifications used by the courts are: firstly, once married people are engaged in crime, their marriage is no longer harmonious. So, it does not satisfy the underlying purpose of the privilege.[83] Secondly, after they commit a crime, their marriage loses rehabilitative potential and cannot be accepted as a harmonious marriage by the society hence, the marriage is not worth protecting.[84] However, these reasonings have been challenged on the grounds that there is no link between the commission of crime and enjoyment of marital harmony by the spouses and also there is a possibility that the offending spouses re-integrate into society without completely losing their rehabilitative potential.[85] So, instead of completely abrogating the privilege, a modified version of it needs to be accommodated. Such a version was given in the case of *United States v. Trammel*,[86] where the Court, instead of complete abrogation, vested the privilege exclusively in the witness-spouse and held that "*the witness may be neither compelled to testify nor foreclosed from testifying*."[87] Thus, the Court balanced the competing interests of information-seeking and marital privilege. The effect of this judgment is not only restricted to *joint participant exception* but applies to all forms of marital privilege disputes where the privilege now lies in the witness spouse only and not the other defendant spouse.[88] However, some scholars also opined supporting the sustenance of 'joint participant exception' in certain situations[89] such as: firstly, where spouses participate in crime and witness-spouse refuse to testify. Secondly, where courts find there is

[82]Amy G Bermingham, 'Partners in Crime: The Joint Partners in Crime: The Joint Participants Exception to the Privilege Against Adverse Spousal Testimony' (1985) 53 Fordham Law Review 1019, 1026-1030.
[83]ibid.
[84]ibid.
[85]ibid.
[86]*United States v Trammel* 583 F.2d 1166, 1170-71 (10th Cir. 1978).
[87]ibid.
[88]ibid.
[89]JE Jones, 'Federal Marital Privileges in Criminal Context: The Need For Further Modification Since Trammel' (1986) 43 Washington & Lee Law Review 197, 218.

no such marital harmony to protect, then the compulsion of this exception can better serve the purpose in ascertaining the truth. The reasoning is that ascertainment of truth is more crucial than preserving a marriage already torn by the offending spouses.[90]

In this scenario, it is proposed that when both the spouses are actively engaged in committing crimes together, then the marital privilege should be abrogated completely. It is because, in this case, marriage serves an evil purpose of protecting both of them from facing punishment. So, compelling the spouses to testify against one another should be permitted so their offences cannot be hidden under the garb of marriage.

C. Excluding privilege in grave offences

Applying spousal privilege in cases involving heinous crimes may impede the administration of justice and hinder the truth-seeking process. The purpose of criminal proceedings is to determine the guilt or innocence of the accused and to protect the rights and safety of the victims. Therefore, allowing spousal privilege in cases of grave offences could create a potential loophole where one spouse (who could be a potential witness) is shielded from testifying against the other, thereby obstructing the pursuit of justice. In many grave offences involving crimes against children or acts of terrorism, the interests of society and the victims often outweigh the privileges afforded to marital relationships. Such cases require a comprehensive investigation and gathering of evidence to ensure justice is served and the community's safety is upheld. However, allowing spousal privilege in such cases where one of the spouses is accused of serious offenses like POCSO, UAPA, terrorism, or other grave crimes can open avenues for potential abuse or collusion between spouses.

[90]ibid.

Accused individuals may even use their marital relationship to manipulate or coerce their partners into remaining silent or providing false alibis, further obstructing the truth-seeking process and potentially allowing guilty parties to evade punishment. It may be viewed as affording undue protection to accused individuals in cases involving heinous offenses, which can undermine public confidence in the justice system and erode the principle of equal treatment before the law. Furthermore, in the case of *Mr. Vilas Raghunath Kurhade v. The State of Maharashtra*,[91] judges of the Bombay High Court rightly appreciated the views that the detrimental effects of Section 122 would be more specific towards special penal statutes like the POTA Act, 2002, POCSO Act, NDPS Act, and MCOC Act, etc. While maintaining the confidentiality of spousal relations is important, a single blanket ban on any communication related to such heinous crimes may not be suitable for the demands of modern times in ensuring justice is served.[92] Therefore, the authors contend that there should be an exception developed in cases involving such grave offences to place societal interests on a higher pedestal.

Here, it is proposed that grave offences should include those offences that hamper national and state security like terrorism, rioting, offences against the State, etc, and additionally, those offences which provide very high punishment without any *mens rea* requirement such as rape of both major and minor. The reason behind framing such a category is that the law provides stringent punishment even in absence of *mens rea*, which shows that these offences are graver than others. Hence, in such offences where strict liability is attached with punishment of life imprisonment, marital privilege should be completely abrogated and a spouse should be able to be compelled to testify against the other.

[91]*Mr Vilas Raghunath Kurhade v The State of Maharashtra* MANU/MH/0198/2011.
[92]ibid.

VI. PRIVACY OF MARITAL UNITY VIS-À-VIS INDIVIDUAL PRIVACY

The restriction on a spouse to not disclose marital communications "*unless the person who made it, or his representative-in-interest, consents*"[93] casts a strange conflict between marital autonomy and individual privacy. This is specifically a concern where the individual is willing to give a testimony but is not permitted to do so, and such testimony is made inadmissible. While it is argued that once a spouse is willing to testify, then marital harmony no longer exists, so the privilege need not be extended to the spouses,[94] the contention appears more convincing from the individual privacy perspective as the former reasoning fails to empirically substantiate that the marriage failed owing to the spouse's willingness to testify. It appears that by getting married, one renounces one's ability of individual decision-making regarding liberty of expression and is even compelled to put down one's dignity by being subservient to another. It sounds similar to upholding the antiquated notion of treating husband and wife as a single entity instead of separate individuals.[95]

In the landmark *Puttaswamy* case[96] D.Y. Chandrachud, J. (later CJI) observed that "*Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised.*" He also stated, "*Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised.*"[97] In these statements, there are two crucial aspects requiring sincere attention: firstly, privacy is of an individual and not

---

[93]The Indian Evidence Act, 1872 (1 of 1972) s 122.
[94]John Henry Wigmore, *Evidence in Trails at Common Law*, vol 8 (Wolter Kluwers 2010) 213.
[95]Wendy Harris, 'Spousal Competence and Compellability in Criminal Trials in the 21st Century' (2003) 3 QUTLJ 1, 2.
[96]*Justice KS Puttaswamy (Retd.) & Anr v Union of India & Ors* (2017) 10 SCC 1.
[97]ibid.

of any group so the spouses enjoy individual privacy independent of each other and the common marital privacy. Secondly, privacy forms the foundation for exercising their liberties, which shows that the liberty to express and the manner of expression of one's opinion and views emanates from the zone of privacy.

This can also be inferred from the case of *People's Union for Civil Liberties (PUCL) v. Union of India* (SC, 1997),[98] where it was held that the personal liberty of a person under Article 21 of the Indian Constitution[99] entails freedom from any reservation or encroachment on his person whether they are brought directly or indirectly on his liberty. This shows that every spouse enjoys a certain degree of decisional autonomy which is not lost or compromised to a great extent upon entering into marriage.[100] It is this decisional autonomy that formed the foundation of decriminalizing adultery in the *Joseph Shine* case.[101] Thus, it should not be sacrificed before any other group privacy, but rather balanced with the common marital privacy.[102]

Similar views were expressed by scholars while opposing the Federal Wiretap Act in the US, which was interpreted by courts to create a *wiretap exception* allowing a spouse to trap private communications of

---

[98]*People's Union for Civil Liberties (PUCL) v Union of India* (2007) 12 SCC 135.
[99]The Constitution of India, 1950 art 21.
[100]Gautam Bhatia, 'A Question of Consent: The Delhi High Court's Split Verdict on the Marital Rape Exception' (*Indian Constitutional Law and Philosophy*, 11 May 2022) <https://indconlawphil.wordpress.com/2022/05/11/a-question-of-consent-the-delhi-high-courts-split-verdict-on-the-marital-rape-exception> accessed 28 August 2023.
[101]*Joseph Shine v Union of India* (2019) 3 SCC 39.
[102]Gautam Bhatia, 'Guest Post: Decisional Autonomy and Group Privacy – on the Karnataka High Court's Hijab Judgment' (*Indian Constitutional Law and Philosophy*, 22 March 2022) <https://indconlawphil.wordpress.com/2022/03/22/guest-post-decisional-autonomy-and-group-privacy-on-the-karnataka-high-courts-hijab-judgment> accessed 28 August 2023.

another and use it in contentious court proceedings.[103] These views advocate for a transition from *marital unity* to *marital individualism* which not only eliminates the condemned *single entity* concept but also aims at creating equality between husband and wife.[104] It cannot be denied that with marriage, the spouses forego some level of seclusion and not doing so can create significant trouble in marriage. However, still, individual zones of privacy and decision-making must be secured.[105]

Similarly, in India, there is a serious conflict regarding the acceptability of videos or calls of a spouse secretly recorded by another as evidence in contentious court proceedings. The Rajasthan High Court held that the marital privilege will not get attracted in such cases before the Family Court as Section 14 of the Family Court Act eclipses the marital privilege under Section 122 in proceedings before it.[106] On the other hand, the Punjab & Haryana High Court held that although Family Court is not bound by rules of evidence to dismiss the admissibility of such evidence, but this infringes the right to privacy of a spouse, so acceptance of such evidence by the Family Court was unjustified.[107] This conflict needs a permanent settlement by the Apex Court in favour of preserving individual privacy at the cost of marital unity.

[103]Karli Ramirez, 'To Catch a Snooping Spouse: Re-evaluating the Roots of the Spousal Wiretap Exception in the Digital Age' (2022) 170 University of Pennsylvania Law Review 1093, 1095.
[104]Karli Ramirez, 'To Catch a Snooping Spouse: Re-evaluating the Roots of the Spousal Wiretap Exception in the Digital Age' (2022) 170 University of Pennsylvania Law Review 1093, 1119-20.
[105]Karli Ramirez, 'To Catch a Snooping Spouse: Re-evaluating the Roots of the Spousal Wiretap Exception in the Digital Age' (2022) 170 University of Pennsylvania Law Review 1093, 1118-19.
[106]*Preeti Jain v Kunal Jain* (2016) SCC OnLine Raj 2838.
[107]*Neha v Vibhor Garg* (2021) SCC OnLine P&H 4571.

VII. RECOMMENDATIONS AND CONCLUSION

From the above analysis, it appears that Section 122 fails to properly balance the twin objectives of preserving marital privacy and assisting in the truth-seeking process. The authors also recommended some suggestions for extending the exceptions which can be summarised as: firstly, to protect the near and dear ones, marital privilege should be completely abrogated for bodily offences against immediate blood relations like father, mother, siblings and children including adopted ones. Secondly, when both spouses are involved in the crime, then compelling the spouse to testify against the other should be permitted. Thirdly, the privilege should be completely extinguished for offences hampering national security and such offences on which law imposes strict liability with punishment extending till life imprisonment or more. But what about other offences which do not fall under these exceptions? Should Section 122 be available against those offences in full-fledged manner or apply partially?

Answering these queries, we propose a reform as discussed in the previous part that the requirement of *consent* of the communicating spouse or the defendant spouse needs to be eliminated. The marital communications privilege instead of availing to the defendant-spouse must be exclusively granted to the witness-spouse. This serves the purpose of protecting marital harmony very well by making it contingent on the witness spouse. It is because if the witness-spouse is willing to protect her marriage, then there is complete liberty to not disclose anything, otherwise the spouse can act according to her moral consciousness and reveal the information. This kind of reform can also be found in jurisdictions of Missouri, the District of Columbia, Georgia, Louisiana, Massachusetts, and Alabama, where the witness spouses are given the privilege of such voluntary testimony.[108]

[108]Malinda L Seymore, 'Isn't it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence' (1996) 90 Northwestern University Law Review 1032, 1059.

However, this reform is not free from obstacles and can turn extremely pernicious in the hands of government officials. As happened in the above-discussed case of *Trammel*,[109] where the wife was promised leniency for giving testimony against her husband. It hints that the state can intervene and provide either incentive or punishment to the witness spouse to let go of her privilege.[110] Similarly, in *Hawkins v. United States*,[111] such a reform was asked for, but the court declined considering that the state could apparently secure voluntary testimony even from an unwilling witness spouse through various ways.[112] There are ample chances that if the privilege is shifted from defendant spouse to the witness-spouse then the government can certainly exercise coercion on the unwilling witnesses and could compel them to disclose confidential information.[113] Similarly, even prosecutors can induce witness spouses to testify against the defendant spouses which could further damage their marital lives.[114] Therefore, although this reform appears appealing, but choosing this will put an extra burden on courts to ensure that the testimony by the witness spouse was truly voluntary without any intervention or coercion. But by exercising such scrutiny, this reform can perfectly balance the competing interests of seeking crucial information to prevent society from getting battered with crimes and preserve marital privacy through the marital communications privilege. Hence, lastly, the authors assert that this reform must be adopted by the Indian legislature to quell the prevailing infirmities in marital privilege.

[109] *United States v Trammel* 583 F.2d 1166, 1170-71 (10th Cir. 1978).
[110] Richard O Lempert, 'A Right to Every Woman's Evidence' (1981) 66 Iowa Law Review 725, 733.
[111] *Hawkins v United States* (1958) 358 US 74.
[112] Richard O Lempert, 'A Right to Every Woman's Evidence' (1981) 66 Iowa Law Review 725.
[113] Richard O Lempert, 'A Right to Every Woman's Evidence' (1981) 66 Iowa Law Review 725, 734-37.
[114] Richard O Lempert, 'A Right to Every Woman's Evidence' (1981) 66 Iowa Law Review 725, 737-38.