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EDITORIAL

"*We are all of us more complicated than the roles we are assigned in the stories other people tell.*"

\- Tara Westover, Educated

The danger of restricting ourselves to one story lies in the lack of perspective. The danger of bearing witness to multiple stories is the complexity of them all. How do we know for certain that we have understood the little complexities in varying perspectives? Legal writing is one tool we use to help move us closer to a holistic understanding of the contemporary debate on legal issues. Professor Noam Chomsky once said that by entering the world of arguments, counter-arguments, footnotes and citations while accepting the presumption of the legitimacy of a debate, we lose our humanity. Perhaps that is a price that legal academia has to pay to scrutinize and offer responsible suggestions to improve our laws. The road to the first issue of the eighteenth volume of our Journal was a journey in itself. We transitioned to a merit-based promotion system to the Senior Editorial Board and contemplated different ways to make the Journal a space that is accessible and encourages legal debate. With that, I proudly present to you the first issue of the eighteenth volume of our Journal. I would like to thank our authors, the Board, its former members, our professors and our University for making this possible.

On behalf of the Board of Editors,

Parameswaran Chidamparam,

Editor-in-Chief

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Contingency Fee Arrangements in the United States and India: Legal Gamble or Golden Ticket?

Kirthana Singh Khurana*

Abstract

The practice of contingency fee arrangements in the United States has evolved into an established means of providing access to justice to those who may not be able to afford legal representation. While these arrangements increasingly occupy juridical space in the United States, there has been a raging debate on two highly contentious issues, the impact of the contingency fee arrangements on the quality of legal services provided and the professional responsibility of attorneys. In this paper, an attempt has been made to explore the contingency fee practice in the United States with reference to the contours within which it operates, the case law on contingency fees, and the dexterity with which contingency fee practice has met the professional responsibility standards. The growth of contingency fee agreements in class action suits in the United States has also been examined as a case study. The paper also discusses the status of contingency fees in India, the factors that have not permitted the practice to grow, and the likely reasons for its low acceptance. A thorough analysis of the advantages and disadvantages of contingency fees in the United States and India follows next. The paper concludes with recommendations for the robust functioning of the contingency fee regime.

I. Introduction

Let's imagine a young woman named Grace who works as a chef at a local restaurant in New Haven, United States. Although she always aspired to become a lawyer, her family could not afford to send her to law school. She

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still remains highly interested in the field of law. One day, her friend and colleague, Cindy, who works as a server in the same restaurant, has a car accident caused by a drunk driver. Cindy loses an arm and, therefore, is no longer able to work at the restaurant. In an attempt to file a lawsuit against the driver and his insurance company, she asks Grace to help her find appropriate legal representation.

Grace quickly discovers that many personal injury attorneys take cases on a contingency fee basis, which means they get paid only if their client prevails. This appears to be the best option for Cindy, but Grace knows that most attorneys who accept cases on a contingency basis only take those cases they believe they can win. She is concerned that Cindy's claim would need to be stronger in order to be represented by a competent attorney. Grace approaches a few personal injury attorneys in Connecticut despite her worries. She discovers to her pleasant surprise, that several of them are willing to take the case on the basis of a contingency fee. They explain to her that they will take a portion of the settlement as their fee if they win the lawsuit. They will not ask for compensation if they lose the case. As she goes about selecting a suitable attorney to represent Cindy's claims, she ponders on the concept of a contingency fee arrangement and its potential to grant access to justice to those with limited resources. Having been through the ignominy of being labeled as a form of champerty,[1] "contingency fee" is now an established practice in the

[1] Champerty is "[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds." BLACK'S LAW DICTIONARY 246 (8th ed., 2004). Matthew Scully, *Contingency Fees: Another Name for Champerty*, THE WALL STREET JOURNAL (1997), https://www.wsj.com/articles/SB879102812286062500 (last visited on Dec 18, 2023).

United States.[2] Many now see it as championing the cause of those who could not otherwise afford access to the court. The result is that the provision has been embraced, if not lovingly, at least knowingly, as a means of assuring citizens of a day in court.[3] However, this transition has come over time. With its origin being traced to the waning decades of the nineteenth century, contingency fees can safely be termed as the American response to the concern expressed by a vibrant young generation longing to ensure that both rich and poor will have access to the courts and shall be able to avail of the assistance of counsel.[4]

While the contingency fee arrangement started consolidating itself as an accepted practice in the United States' legal system, the mention of two developments occurring before or parallel to it shall be fitting. In the United Kingdom, a traditional hub of the evolution of most aspects of adjudication, a strong stand against offenses like champerty started growing as early as the thirteenth century.[5] As a result, in the UK, and also a larger part of the rest of the world, the practice of contingency fees was seen with suspicion, and it failed to garner the acceptance of the legal systems.[6] Another significant

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[2] William R. Towns, *U.S. Contingency Fees: A Level Playing Field?*, WIPO MAGAZINE (Feb. 2010), https://www.wipo.int/wipo_magazine/en/2010/01/article_0002.html (last visited on May 2, 2023).

[3] Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL LAW REVIEW 261 (1998). *See generally* Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL LAW REVIEW 231 (1998).

[4] Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL LAW REVIEW 347 (1998); Karsten, *supra* note 3.

[5] John Sorabji & Robert Musgrove, *229 Litigation, Cost, Funding, and the Future*, *in* THE CIVIL PROCEDURE RULES TEN YEARS ON (Déirdre Dwyer ed., 2009), https://doi.org/10.1093/acprof:oso/9780199576883.003.0011 (last visited on June 6, 2023).

[6] RICHARD MOORHEAD & PETER HURST, 'IMPROVING ACCESS TO JUSTICE' CONTIGENCY FEES: A STUDY OF THEIR OPERATION IN THE UNITED STATES OF AMERICA 2008, https://www.judiciary.uk/wp-content/uploads/2011/06/JCO_Documents_CJC_Publications_CJC+papers_Civil+Justice+C

development was the resistance offered by the purists within the United States, who saw in contingency fee, portends of the dilution of the professional responsibility every lawyer is required to follow as per the American Bar Association ("ABA") Model Code of Professional Responsibility ("Model Code").[7] Therefore, the growth of the practice of contingency fees in the United States has been a saga of efforts aimed at securing the balance between the demands of justice for the unrepresented and the professional responsibility obligations of the lawyers.[8]

Against this backdrop, India has been chosen as a suitable case study to undertake a comparative study of regulation of contingency fee arrangements. In India, while access to justice remains a key area of interest of law and policy makers, such fee agreements have not gained approval from either the courts or the Bar Council of India ("BCI"). This has been discussed in detail in Part III of the paper.

Both countries exhibit many similarities and are therefore chosen for the study. Both countries follow the common law system and have a huge diversity of cultural and socio-economic factors that have implications for legal policies.[9] Both India and the United States are significant global economies.[10]

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ouncil+Contingency+Fees+Report.pdf (last visited on May 12, 2023); Angela Wennihan, *Let's Put the Contingency Back in the Contingency Fee*, 49 SMU LAW REVIEW 1639 (1996).

[7] Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247 (1996).

[8] Vonde M, Smith Hitch, *Ethics and the Reasonableness of Contingency Fees: A Survey of State and Federal Law Addressing the Reasonableness of Costs as They Relate to Contingency Fee Arrangements*, 29 LAND AND WATER LAW REVIEW 215 (1994).

[9] *See generally* M.C. SETALVAD, THE COMMON LAW IN INDIA (1960).

[10] International Monetary Fund, *GDP, Current Prices*, INTERNATIONAL MONETARY FUND (2023), https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD (last visited on Dec. 18, 2023); Forbes India, *The Top 10 Largest Economies in the World in 2023*, FORBES INDIA (2023), https://www.forbesindia.com/article/explainers/top-10-

Examining their legal systems along with the prevailing methods of lawyer compensation may have valuable implications for understanding the future legal practices in economic development and business environment. The comparative study may draw attention to the distinctions between the countries and identify lessons, with best practices that may be shared across jurisdictions.

In this paper, an attempt has been made to look at the contingency fees practice as it exists in the United States, with particular reference to the contours within which it operates, case laws on contingency fees, and the dexterity with which contingency fees practice has met the professional responsibility standards. The paper also discusses the status of contingency fees in India, the factors that have not permitted the practice to grow, and the likely reasons for its low acceptance. A thorough analysis of the advantages and disadvantages of contingency fees in the United States and India follows next. The paper concludes with recommendations for a robust functioning of the contingency fee regime.

II. The status of Contingency Fees in the United States

The term 'contingency fee' refers to a "fee arrangement in a case in which an attorney or firm agrees that the payment of legal fees will be contingent upon the successful outcome of a case."[11] In its basic form, the contingent fee is a pre-filing contractual agreement fixing the attorney's fee as a percentage of the recovery rather than an hourly rate. If the outcome leads to no recovery,

largest-economies-in-the-world/86159/1#:~:text=The%20United%20States%20of,magnitude%20of%20a%20nation's%20economy. (last visited on Dec. 18, 2023).

[11] Legal Information Institute, *Contingency Fee*, CORNELL (2022), https://www.law.cornell.edu/wex/contingency_fee (last visited on Apr. 25, 2023).

the attorney gets no fee and must bear the litigation expenses also.[12] Today, the percentage-based contingent fees generally range from 33 percent to 50 percent of the client's award.[13]

In terms of its evolution, contingency fees made a beginning in civil cases such as workers' compensation claims or personal injury cases.[14] However, over time, it has been accepted for being used extensively in sexual harassment cases,[15] anti-trust actions,[16] shareholder derivative suits,[17] environmental actions,[18] tax revenue cases,[19] cases related to wage disputes and employment discrimination,[20] class action lawsuits,[21] and bankruptcy cases.[22] Yet, despite its general acceptance, American courts have traditionally proscribed the

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[12] *Id.*

[13] LESTER BRICKMAN, MICHAEL HOROWITZ, JEFFREY O'CONNELL, RETHINKING CONTINGENCY FEES: A PROPOSAL TO ALIGN THE CONTINGENCY FEE SYSTEM WITH ITS POLICY ROOTS AND ETHICAL MANDATES(1994).

[14] Herbert M Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASHINGTON UNIVERSITY LAW REVIEW 739 (2002).

[15] Holman Schiavone, LLC, *What Is the Average Settlement for Sexual Harassment in the Workplace?*, https://www.kdh-law.com/what-is-the-average-settlement-for-sexual-harassment-in-the-workplace/ (last visited on May 7, 2023).

[16] K. Craig Wildfang & Stacey P. Slaughter, *Funding Litigation*, *in* PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE UNITED STATES (2012), https://www.robinskaplan.com/-/media/pdfs/funding-litigation---chapter-10.pdf (last visited on Dec. 13, 2023).

[17] Wheeler v. Harrison, 50 A. 523, 523 (Md. 1901); Semmes v. Western Union Tel. Co., 20 A. 127, 127 (Md. 1890).

[18] Julie E. Steiner, *The Illegality of Contingency-Fee Arrangements When Prosecuting Public Natural Resource Damage Claims and the Need for Legislative Reform*, 32 WILLIAM & MARY ENVIRONMENTAL LAW AND POLICY REVIEW 169 (2007).

[19] Davis v. Commonwealth, 41 N.E. 292, 293 (Mass. 1895); Williams v. City of Philadelphia, 57 A. 578, 579 (Pa. 1904); County of Chester v. Barber, 97 Pa. 455, 456 (1881).

[20] Wylie v. Coxe, 56 U.S. (15 How.) 415 (1853).

[21] Nate Robson, *Equifax Data Breach Judge Approves $77.5M in Legal Fees*, (Dec. 24, 2019, 6:30 AM), https://www.propertycasualty360.com/2019/12/24/judge-oks-77-5-million-in-legals-fees-approves-equifax-data-breach-settlement-414-169215/?slreturn=20230412151738 (last visited on May 12, 2023).

[22] Stoy Law Group, *Everything You Need to Know About Contingency Fee and No Win, No Fee Lawyers*, (Jan. 23, 2018), https://www.warriorsforjustice.com/everything-need-know-contingency-fee-no-win-no-fee-lawyers/ (last visited on Apr. 28, 2023). Karsten, *supra* note 3.

practice of contingency fees in certain situations on the grounds of public policy.[23] Such matters include family disputes like divorce[24] or alimony,[25] criminal defense,[26] and legislative litigation.[27]

It would be pertinent to look at some of the path-breaking judgments which have shaped the legal landscape of contingency fee arrangements in the United States:

In *Bates v. State Bar of Arizona*,[28] the US Supreme Court held that lawyers have a First Amendment right to advertise their services, including the fact that they work on a contingency fee basis. This decision significantly increased the number of lawyers who advertise their services, particularly in personal injury cases.[29]

The landmark case of *Missouri v. Jenkins* involved a challenge to a court-approved settlement in a school desegregation case.[30] The settlement included an award of attorneys' fees, calculated as a percentage of the recovery obtained for the plaintiff class. The U.S. Supreme Court held that such contingency fee arrangements were permissible under federal law. Additionally, in the case of

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[23] Kritzer, *supra* note 14.
[24] Hillman v. Hillman, 42 Wash. 595, 85 Pac. 61 (1906).
[25] Lynde v. Lynde, 64 N.J. Eq. 736, 52 Atl. 694 (Ct. Err. & App. 1902).
[26] Weber v. Shay, 56 Ohio St. 116, 46 N.E. 377, 37 L.R.A. 230 (1897).
[27] *See for e.g.*, Crichfield v. Bormudez Asphalt Paving Co., 174 Ill. 466, 479, 51 N.E. 522, 42 L.R.A. 347.
[28] Bates v. State Bar of Arizona, 433 U.S. 350 (1977).
[29] *See* Lauren Bowen, *Attorney Advertising in the Wake of Bates v. State Bar of Arizona (1977): A Study of Judicial Impact*, 23 AMERICAN POLITICS QUARTERLY 461 (1995). Anayat Durrani, *Lawyer Advertising: ___ A. Reaches New Heights Or ___ B. Sinks To New Depths*, (Aug. 2011), https://plaintiffmagazine.com/recent-issues/item/lawyer-advertising-a-reaches-new-heights-or-b-sinks-to-new-depths (last visited on Nov. 17, 2023); David Rothman, *How Lawyers' TV Ads Became a Billion-Dollar Industry*, CBS NEWS (Feb. 13, 2022), https://www.cbsnews.com/news/lawyer-commercials-a-billion-dollar-industry
[30] Missouri v. Jenkins, 491 U.S. 274 (1989).

in re Baycol Products Litigation,[31] the U.S. District Court for the District of Minnesota approved a settlement in a products liability case involving the drug Baycol. The settlement included an award of attorney's fees based on a percentage of the recovery obtained for the plaintiffs. The court held that the fee arrangement was reasonable and approved the settlement.

In a rare verdict, the U.S. Supreme Court, in *Perdue v. Kenny A.*, held that attorneys might receive enhanced fees than the usual rates in rare and exceptional cases.[32] The Court reasoned that such fees are necessary to incentivize lawyers to take on complex issues and to provide adequate representation to their clients. However, the Court also cautioned that an enhanced fee should not be awarded without specific evidence that the otherwise reasonable fees (or "lodestar fee") would have been insufficient to attract competent legal consultancy, and the party requesting a fee enhancement has the burden of proving its necessity.

A. Class-Action Suits – Focal Point of Contingency Fee Practice in the United States

Since the beginning of the emergence of contingency fees as a practice, the key concern expressed by its critics was a flood of litigation that such an approach might entail.[33] However, its proponents would vehemently ask whether we want a system open to all comers or one whose doors remain closed to a vast majority.[34] The evolution of contingency fee agreements in

[31] In Re Baycol Products Litigation, 348 F. Supp. 2d 1058 (D. Minn. 2004).
[32] Perdue v. Kenny A., 559 U.S. 542 (2010).
[33] Aaron C. Charrier, *Taxing Contingency Fees: Examining the Alternative Minimum Tax and Common Law Tax Principles*, 50 DRAKE L. REV. (2002); David A. Root, *Attorney Fee-Shifting in America: Comparing, Constrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. (2005).
[34] Landsman, *supra* note 3.

class action suits was precisely aimed at catering to the vast majority of the public, specifically to those whose access to justice is restricted owing to their financial conditions or other similar barriers. Thus, this approach serves as a potential tool for bringing about greater inclusivity in the legal system.[35]

As regards class action suits, the contingency fee agreements made their appearance in the United States at the onset of the 1970s when the civil rights movement and consumer advocacy groups brought attention to issues like workplace discrimination, product safety, and environmental concern.[36] The 1974 amendments to the Federal Rules of Civil Procedure ("FRCP") allowed for class actions to be brought on behalf of numerous plaintiffs who suffered similar injuries caused by a defendant's actions.[37] This opened the door for attorneys to represent clients in class action suits, allowing multiple plaintiffs to join a single lawsuit. Since then, contingency fee agreements have been a common way for plaintiffs' attorneys to handle class action lawsuits.[38]

Despite all the traction that contingency fee agreements showed in class action suits in the United States, they did not have smooth sailing. They encountered many objections, such as excessive attorney fees, incentivization of frivolous lawsuits, lack of transparency, and possible conflicts of interest.[39] The objections to contingency fee agreements hinged principally on lawyers' obligations under professional responsibility. The ABA has taken cognizance

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[35] *Id.*

[36] LESTER BRICKMAN - LAWYER BARONS: WHAT THEIR CONTIGENCY FEES REALLY COST AMERICA (1 ed. 2011).

[37] *See* Federal Rules of Civil Procedure, 1938, Rule 23 (U.S.)

[38] Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 THE UNIVERSITY OF CHICAGO LEGAL REVIEW 1 (1991).

[39] Wennihan, *supra* note 6. *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 103 (2006).

of this and has devised the Model Code of Professional Responsibility[40] which was later on replaced by The Model Rules of Professional Conduct[41] ("Model Rules") which provides guidance on contingency fee agreements in class action suits. Although these regulations are not mandatory in any jurisdiction, they can serve as templates for states to follow, with or without justification, and as recommended standards for ethical conduct.

The following rules are relevant in this regard:

> *Rule 1.5: Fees – This rule sets forth the requirements for contingency fee agreements, including the need for the agreement to be in writing, be signed by the client, and clearly state the method for calculating the fee. The rule also requires that the fee be reasonable and moderate.*
>
> *Rule 1.7: Conflict of Interest – This rule requires that attorneys avoid conflicts of interest, including any financial or personal interests that may interfere with the attorney's duty to the client. This rule is particularly relevant in class action suits, where the interests of the plaintiffs may be different from one another.*
>
> *Rule 23: Class Actions – This rule provides guidance on class action suits, including the need for the class to be certified and for the attorney to represent the interests of the class members adequately.*

In addition to the Model Rules, the ABA has issued formal opinions on contingency fee agreements in class action suits, such as Formal Opinion 94-

[40] MODEL CODE OF PROF'L RESPONSIBILITY Preface (1969).
[41] MODEL RULES OF PROF'L CONDUCT, Preface (1983).

389,[42] which provides guidance on the reasonableness of contingency fees in class action settlements. The ABA also has a rule that addresses the duty of attorneys to protect the interests of non-clients who may be affected by a class action.[43]

Most states have adopted the Model Code and the Model Rules, usually with minor variations.[44] For example, Florida has comprehensive regulations on contingency fees, especially in cases involving personal injury, where specific percentages of attorney compensation are allowed based on the amount recovered and the stage of litigation in which the case ends.[45] These percentages serve as presumptive (yet rebuttable) maximum limits on reasonable contingency fees.[46]

As regards the actual proceedings of class action suits, courts, too, remain vigilant about the professional responsibilities of lawyers. In the case of contingency fee agreements, unlike settlements in individual litigation, the FRCP expressly authorizes the court to award attorneys' fees in a certified class action where those fees are permitted by law or the parties' agreement.[47] In all class action settlements, there are two driving factors – relief to the class and attorneys' fees. The rules also require the court to scrutinize every provision of a class action settlement agreement and hold a hearing to determine whether the agreement is "fair, reasonable, and adequate."[48] The

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[42]ABA Comm. on Ethics and Professional Responsibility, Formal Op. 389 (1994). *See generally* Brickman, *supra* note 7.
[43] Model Rules of Prof'l Conduct R. 23 (1983)
[44] Forty-nine states and the District of Columbia have adopted some form of the Model Rules. California has adopted its own rules. Center for Professional Responsibility, *ABA Model Rules of Professional Conduct, State Adoption of Model Rules.*
[45] Rules Regulating the Florida Bar: Rules of Prof'l Conduct, 2010, Rule 4-1.5(f) (U.S.)
[46] *Id.*
[47] Federal Rules of Civil Procedure, 1938, Rule 23(h) (U.S.)
[48] Federal Rules of Civil Procedure, 1938, Rule 23(e)(2) (U.S.)

court must consider specific factors set out in FRCP 23(e)(2) to make this determination, including whether the attorney's fee provisions are adequate in relation to the proposed relief to the class.[49]

Determining the method for calculating attorney's fees is an integral part of class action settlements. There are two generally accepted methods: the percentage of recovery method; and the lodestar method.

(i) **Percentage of recovery method**: Under the percentage of the recovery method, class counsel collects a portion of the overall class recovery (known as the common fund). The court can then adjust the percentage up or down depending on the circumstances. Many courts applying this method will start with an assumption that 25 percent of a common fund is reasonable and permit special circumstances to justify adjustments to that amount.[50]

(ii) **Lodestar method**: this method attempts to calculate a reasonable fee by multiplying the time class counsel worked on the case by an appropriate hourly fee for those hours based on the counsel's geographic region and level of experience (in some instances, the court may remove items, such as travel and meal costs, when calculating the lodestar amount).[51] The resulting amount is

[49] Federal Rules of Civil Procedure, 1938, Rule 23(e)(2)(C)(iii) (U.S.)
[50] *See* Boeing Co. v. Van Gemert, 44 U.S. 472, 478 (1980); Florida v. Dunne, 915 F.2d 542, 545 (9th Cir. 1990); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir, 1988). Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 248 (2010). Theodore Eisenberg, Geoffrey P. Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937 (2016).
[51] Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The court laid down multiple factors to adjust the lodestar amount at 717-19.

usually presumptively reasonable, but the court may consider several factors to adjust the lodestar amount up or down.[52]

District courts generally have the discretion to use either the percentage of the recovery or the lodestar method if the resulting award is reasonable.[53] However, some circuit courts have recognized that one method may be more appropriate than the other in certain cases.[54] It is essential for both class counsel and defendants to understand the implications of each method.

Given the widespread recognition of the problems of conflicts of interest in class action litigation, one might safely presume that decision-makers would have developed a workable and well-understood doctrine for assessing these problems. Surprisingly, there is a near absence of coherent principles developed by the courts to orient their analysis. Consequently, conflicts of interest are principally dealt with on a case-by-case basis, with the trial court's intuitions and discretion supplying the standard and guidance for decision. Unfortunately, the rules of professional responsibility have also not catered to this deficit. Hence, ethics rules relating to conflicts of interest are predicated on a notion of client consent, which is unworkable in the context of class litigation. Class action suits involve a large number of individuals with potentially divergent interests, who may also have conflicting goals and

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[52] *See* Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973); Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, 465 U.S. 886 (1984); Gisbrecht v. Barnhard, 535 U.S. 789 (2002). Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865 (1992).

[53] *See for e.g.*, Manor Country Club v. Flaa, 874 A.2d 1020, 1022, 1034–35 (Md. 2005); Russell v. Harman International Industry, 945 F. Supp. 2d 68 (D.D.C. 2013).

[54] Thomson Reuters Practical Law, *Attorneys' Fees in Class Action Settlements*, https://uk.practicallaw.thomsonreuters.com/w-001-4099?comp=pluk&transitionType=Default&contextData=(sc.Default)&firstpage=true&OWSessionId=9e6ca4be9e11496e93b8fc3c6385ebc3&skipAnonymous=true (last visited on Dec. 13, 2023).

perspectives on how the litigation should proceed. Seeking individual consent from each class member becomes impractical due to the sheer number of members. This impracticality highlights how the traditional reliance on client consent becomes unworkable in a context where multiple, diverse interests are involved and in the absence of coherent principles, trial courts proceed with an ad-hoc approach to resolve conflicts of interest in class actions.[55]

While the contingency fee agreements kept on increasingly occupying the juridical space in the United States, there has been a raging debate on at least two highly contentious issues:

B. The impact of contingency fees on the quality of legal representation

While one view is that contingency fees can incentivize and inspire high-quality legal representation, the contrary argument is that contingency fee attorneys, whom critics call "bounty hunters," may create conflicts of interest and prioritize their own financial interests over the best interests of their clients.[56] Critics to such fee arrangements argue that this financial motivation may lead to hasty settlements, ignoring certain crucial aspects of the case, or focus on cases with high monetary rewards rather than those that have more legal merit. While some claim that contingency fee "encourages attorneys to engage in speculative litigation in the hope of landing the occasional large

[55] Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 UNIVERSITY OF CHICAGO LEGAL FORUM 581(2003).
[56] John C. Coffee Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MARYLAND LAW REVIEW 215 (1983); *see also* Jonathan R. Macey and Geoffrey P. Miller, *supra* note 38. Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 THE JOURNAL OF LEGAL STUDIES 47 (1975). Eyal Zamir & Ilana Ritov, *Revisiting the Debate over Attorneys' Contingent Fees: A Behavioral Analysis*, 39 THE JOURNAL OF LEGAL STUDIES 245 (2010).

jackpot",[57] others believe that this arrangement encourages abuse of the public.[58] These abuses include practices such as bribery, fraud, and charging fees based on risk even when there is no actual risk of non recovery.[59]

C. Contingency fees and the professional responsibility of lawyers

Lawyers have a professional obligation to act in the best interests of their clients and to uphold the ethical standards of the legal profession. The potential for hefty contingency fees can create conflicts of interest that may make it more difficult for lawyers to fulfill these obligations.[60]

Despite all the success registered by it, there remain justifiably serious concerns about the operation of the practice of contingency fees in the United States today. Although there are massive numbers of people who require personal injury litigation and cannot afford hourly fee counsel, the situation for these plaintiffs differs from that of the plaintiffs a few decades back. Owing to the massive reforms in tort laws, the ease of establishing liability in such cases has increased drastically.[61] Besides, the average amount of damages awarded to a plaintiff has increased dramatically.[62]

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[57] David E. Bernstein, *Procedural tort reform in the United States: lessons from other nations, part II*, 20 THE JOURNAL OF MEDICAL PRACTICE MANAGEMENT 157 (2004).
[58] Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 WASH. & LEE L. REV. 1339 (1996).
[59] *Id.*
[60] H M Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (1997).
[61] *See e.g.,* Stephen D. Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO LAW REVIEW 795 (1987).
[62] Stephen D Sugarman, *Tort Reform through Damages Law Reform : An American Perspective.*, 27 THE SYDNEY LAW REVIEW 507 (2005).

Yet, it should not be overlooked that the contingency fee is still the only real way to access the legal system for many people. Class action suits also offer a massive opportunity for attorneys to speak for the indigent or the unrepresented masses. Over the last few decades, many steps have been taken to address the concerns about the practice of contingency fees. However, the immense benefits that this great juridical tool promises should not be lost. The most critical responses sought about the crisis around contingency fees comprise a transparent flow of information regarding the fee arrangement to the client and the court and increasing and effective judicial regulation and monitoring of attorney's fees. Given these interventions, the graph of the contingency fee practice will only register ascendence.[63]

III. The Status Of Contingency Fees In India

Everywhere in the world, the demand for access to justice has been one of the major factors responsible for the growth of contingency fee agreements.[64] It is also an accepted position that indigent or uneducated people need to be assisted in their pursuit of justice. In this regard, the Indian Constitution has a robust mechanism in place. Article 39A of the Indian Constitution, inserted in 1976 by the 42nd constitutional amendment,[65] states

> *The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or*

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[63] Andrew Maloney, *Law Firms Boost Fixed and Contingency Fees Amid Uncertain Economy*, (Feb. 23, 2023, 05:00 AM), https://www.law.com/americanlawyer/2023/02/23/law-firms-boost-fixed-and-contingency-fees-amid-uncertain-economy/ (last visited on May 16, 2023).
[64] Nitin Jain, *Complex Legal Cases and Rising Costs to Drive Litigation Funding in 2023*, THE TIMES OF INDIA (Jan. 18, 2023), https://timesofindia.indiatimes.com/blogs/voices/complex-legal-cases-and-rising-costs-to-drive-litigation-funding-in-2023 /.
[65] INDIA CONST., art. 39A.

> *schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.*

Article 39A is a reassertion of the intent of the Indian Constitution for securing justice for all and ensuring that the indigence or ignorance of citizens should not be a barrier to their access to justice. Thus, while Articles 14 and 22(1) of the Indian Constitution[66] make it mandatory for the state to secure equality before the law and a legal system that fosters justice for all people, Article 21 recognizes the privilege of a timely trial and also free legal representation as an element of the right to life and personal liberty.[67] Similarly, Section 304 of the Indian Code of Criminal Procedure, 1973, provides that if an accused person does not have adequate means to hire a lawyer, the court must provide one at the state's expense.[68]

Free legal aid and *pro bono* services have been given statutory backing in India, with the enactment of the Legal Services Authorities Act, 1987, which mandates the Supreme Court, the various High Courts, and the district courts to spearhead the legal aid mission in India.[69] Aside from the above, owing to the initiation by the Supreme Court of India, the Ministry of Justice, Government of India, introduced a pro bono legal service in 2017.[70] It is a

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[66] INDIA CONST., arts. 14, 22(1).
[67] INDIA CONST., art. 21; Anita Kushwaha v. Pushap Sudan, AIR 2016 SC 3506; Rattiaram v. State of Madhya Pradesh, AIR 2012 SC 1485.
[68] Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1973 at §304.
[69] Legal Services Authorities Act, 1987, No. 39, Acts of Parliament, 1987.
[70] Priyanka Mittal, *Law Ministry launches 3 legal aid services for poor*, LIVEMINT (Apr. 20, 2017, 10:34 AM), https://www.livemint.com/Politics/WRepRAhQvdKgngmFjlq8FP/Law-ministry-launches-3-legal-aid-services-for-poor.html (last visited on May 12, 2023).

web-based portal through which lawyers can enroll to volunteer for pro bono services for people who are incapable of affording legal representation.[71]

Interestingly, in India, while the concern for access to justice has been voiced, acknowledged, and given legal recognition through legal provisions for free legal aid, the practice of contingency fee agreements has not found favor with either the courts or the BCI.

The BCI, a statutory body established under section 4 of the Advocates Act, 1961[72] ("The Act"), regulates legal practice and education in India. BCI prescribes standards of professional conduct and etiquette and exercises disciplinary jurisdiction over the bar. Section 7 of the Act[73] lays down BCI's regulatory and representative functions, which principally relate to:

i. Laying down standards of professional conduct and etiquette for advocates;
ii. Laying down procedures to be followed by the disciplinary committees;
iii. Safeguarding the rights, privileges, and interests of advocates;
iv. Promoting and supporting law reform; and
v. Organizing and providing legal aid to people experiencing poverty.

The BCI has, exercising its rule-making power under Section 49(1)(c) of the Act, 1961, declared Standards of Professional Conduct and Etiquette for advocates practicing in India.[74]

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[71] Government of India Ministry of Law & Justice, *Legal Aid and Empowerment Initiatives Launched*, PRESS INFORMATION BUREAU (2017), https://pib.gov.in/newsite/printrelease.aspx?relid=161179 (last visited on May 12, 2023).
[72] The Advocates Act, 1961, §4, No. 25, Acts of Parliament, 1961.
[73] The Advocates Act, 1961, §7, No. 25, Acts of Parliament, 1961.
[74] The Advocates Act, 1961, §49(1)(c), No. 25, Acts of Parliament, 1961.

Rule 20 of the BCI Rules on Professional Conduct[75] states:

> *Rule 20: An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof.*

The clear implication is that Indian lawyers are bound by legal and ethical standards and are prohibited from charging contingency fees. They are also subject to disciplinary action by the BCI in cases of violation of rules on contingency fees.

In India, the judicial resistance against the practice of contingency fees has principally emanated from concerns about adherence to ethical and professional standards in the legal profession and the imperative of maintaining the system's integrity. The Indian judiciary's stance on contingency fees can be observed in the case of *In Re KL Gauba*.[76] In this case, the Bombay High Court ruled that fees that are contingent upon the outcome of a case and grant the lawyer a stake in the subject matter, have the potential to undermine the integrity of the legal profession. Such practices have long been condemned as unworthy of the legal profession because they may lead advocates to deviate from ethical standards in pursuit of personal gain.[77]

In *Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd.*[78], a case concerning an arrangement for sharing fees, the Supreme Court of India held that an advocate could not enter into a contract for sharing fees with a non-

[75] Bar Council of India Rules on Professional Conduct, Chapter II, Part VI, Rule 20.
[76] In Re K L Gauba, AIR 1954 Bom 478.
[77] The Supreme Court of India has also expressed concern on the failing professional norms in the legal profession in many cases, *see* R.K. Anand v. Delhi High Court (2009) 8 SCC 106, ¶333 ; Sanjiv Datta, Deputy Secretary, Ministry of Information and Broadcasting, In Re. (1995) 3 SCC 619, ¶20; Tahil Ram Issardas Sadarangani v. Ramchand Issardas Sadarangani, 1993 Supp. (3) SCC 256.
[78] Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd., (2000) AIR 2000 SC 954.

advocate. The Court observed that such an agreement would be against public policy and the principles of legal ethics. Similarly, in *V.M. Salgaocar & Bros. Pvt. Ltd. v. Commissioner of Income Tax*[79], the Bombay High Court held that contingency fees paid to a lawyer are not deductible as a business expense for income tax purposes. The Court observed that a contingency fee is not a legitimate business expense as it is contingent on the outcome of the case. Drawing a clear demarcation about the applicability of the contingency fee arrangement, the Madras High Court, in *V.C. Rangadurai v. D. Gopalan*[80], held that an advocate could not charge contingency fees for criminal cases. The Court observed that contingency fees would lead to a conflict of interest and compromise the lawyer's professional independence. It was also observed that the relationship between a lawyer and his client is highly fiduciary in nature, and the advocate remains in a position of trust.[81]

In another landmark verdict in *Bar Council of India v. AK Balaji*[82], the Supreme Court of India held that foreign lawyers could not have regular practice in India on a fly-in-fly-out basis; they can only advise in such cases. It also held that they could not be paid contingency fees. The Court observed that contingency fees are against Indian law and professional ethics. Similarly, in the recent case of *B. Sunitha v. The State of Telangana & Another,*[83] the Supreme Court of India has levied a scathing attack on the exceptionally high fees charged by legal professionals and has held explicitly that the advocates'

[79] V.M. Salgaocar & Bros. Pvt. Ltd. v. Commissioner of Income Tax, 2000 (2) SCR 1169.
[80] V.C. Rangadurai v. D. Gopalan, (1979) 1 SCC 308, ¶ 31.
[81] *Id.* ¶16.
[82] Bar Council of India v. A.K. Balaji and others, AIR 2018 SC 1382.
[83] B. Sunitha v. The State of Telangana, 2018(1) SCC 638.

fee that is set on the basis of a percentage of the result of litigation shall be illegal.

While the practice of charging contingency fees by lawyers is generally prohibited in India under the Advocates Act 1961, there are a few exceptional categories of cases where courts have allowed contingency fees to be charged by lawyers. For example, in personal injury cases, where it has been held that if the client is unable to pay the lawyer's fees, a court may permit the lawyer to charge a contingency fee[84], or in arbitration cases, where the parties are free to agree to a contingency fee arrangement.[85]

Aside from the above case law, the Indian legal system now has its own well-grown procedure for collective redress. The practice of public interest litigation ("PIL"), which is similar in some ways to class action suits in the United States, has become a strong device to raise matters of common interest. PIL petitions are proactively entertained under the extraordinary jurisdiction of the Supreme Court or the High Courts by way of writs under Articles 32 and 226 of the Indian Constitution. In these matters, courts have traditionally relaxed the standards related to locus standi and the procedural requirements, and one also finds instances of pro bono representation for a fixed fee.[86]

As for the desirability of contingency fee arrangements, at least for ensuring greater access to justice, the recent study by an Indian think-tank, DAKSH, is

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[84] Mukund Dewangan v. Oriental Insurance Co. Ltd., (2017) 14 SCC 663.
[85] Jayaswal Ashoka Infrastructure (P) Ltd. v. Pansare Lawad Sallagar, 2019 SCC Online Bom 578; Bom HC | Not unlawful for an Advocate to enter into a "contingent contract" while appearing in capacity of a "counsel" in arbitration proceedings, SCC ONLINE (2019), https://www.scconline.com/blog/post/2019/04/08/bom-hc-not-unlawful-for-an-advocate-to-enter-into-a-contingent-contract-while-appearing-in-capacity-of-a-counsel-in-arbitration-proceedings/ (last visited on Dec 18, 2023).
[86] Parmanad Singh, *Promises and Perils of Public Interest Litigation in India*, 52 JOURNAL OF THE INDIAN LAW INSTITUTE 172 (2010).

worth taking note of. As per its findings, the average cost per day for civil litigants in India is Rs. 465 (approximately $5.67 at the present exchange rate), and only a tiny percentage of litigants from lower-income groups use free legal services provided under the National Legal Services Authority Act 1987.[87] The study suggests that this may be due to inadequate legal awareness among the public and the government's ineffective utilization of funds allocated for legal aid.[88] The current legal aid system also does not benefit middle and upper-class individuals who struggle to pay high legal fees upfront. Additionally, the incentives for lawyers to provide free legal aid are insufficient. Instead, contingency fee arrangements can allow individuals from lower-income groups to finance their litigation.[89]

Over the years, voices have been raised regarding India adopting the United States' contingency fees system.[90] Still, it is a complex issue that requires careful consideration of various factors. While the system has its advantages, it is important to weigh them against the potential downsides and consider how it would fit within the Indian legal system and codified rules of professional responsibility for lawyers.

IV. Advantages And Disadvantages Of Contingency Fee Practice

The practice of charging contingency fees has been scrutinized throughout its growth, and there are divergent views about its efficacy as both a device

[87] Daksh, *The State of the Indian Judiciary: A Report by Daksh*, (2016) at 14, http://dakshindia.org/state-of-the-indian-judiciary/08_contents.html (last visited on Apr. 28, 2023).
[88] *Id.*
[89] Shubhangi Maheshwari, *Allowing Lawyers to Charge Contingency Fees: Impact on the Legal Services Market*, II GNLU JOURNAL OF LAW & ECONOMICS 79 (2019).
[90] Bar Council of India v. A.K.Balaji and others, AIR 2018 SC 1382.

championing the cause of indigent persons as well as a practice that raises ethical concerns.

A. Advantages of Contingency Fee Arrangements

As for the advantages of a system permitting contingency fees, the following are the most prominent ones:

i. Better quality and decrease in time of settlement

Contingency fees can enhance the quality of legal services while reducing the time taken for settlement. By incentivizing attorneys to pursue successful outcomes for their clients, contingency fees encourage greater attention to detail, thorough case preparation, and effective negotiation. This ultimately leads to better outcomes for clients and a higher standard of legal practice. Additionally, because attorneys are only compensated if the case is successful, they are motivated to resolve the matter efficiently, which can help speed up the settlement process.[91]

ii. Agency Problem

The agency problem arises whenever the welfare of one party, termed the 'principal,' depends upon the actions taken by another party, termed the 'agent.' The problem lies in motivating the agent to act in the principal's interest rather than simply in the agent's own interest. Lawyers represent their clients' interests and are responsible for developing arguments in their favor. The foundation of the agency problem is information asymmetry. Contingent fee agreements may help resolve the agency problem between lawyers and their clients, as the agent's motivations will be linked to the client's

[91] Eric Helland & Alexander Tabarrok, *Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 517 (2003).

motivations. This fee arrangement encourages lawyers to work hard, as their fees are directly tied to the outcome of the case.[92]

iii. Access to justice

Contingency fees can allow individuals or groups with limited financial resources to bring appropriate suits, including class action suits, and obtain representation in courts to seek justice. An attorney's concern for their reputation often incentivizes them to perform well and act responsibly toward their client. It can mitigate the potential harm caused by perverse incentives and attending fee arrangements.[93]

iv. Leveling the playing field

Contingency fees can help level the playing field between individuals and powerful corporations or institutions. Lawyers pursue cases on behalf of clients who may otherwise be unable to afford the litigation expenses. This arrangement also allows for shifting the risk of negative returns from litigants to their lawyers.[94]

v. Serving the purpose of the legal system

In the existing legal system, lawyers charge their clients in advance. This entails that those facing difficulty raising funds are discouraged from pursuing their cases. This not only defeats the purpose of the legal system to compensate the injured party but also deters future injurers from seeking remedies.[95]

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[92] Maheshwari, *supra* note 89.
[93] Adam Shajnfeld, *A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements*, 54 NYLS LAW REVIEW (2010).
[94] Maheshwari, *supra* note 89.
[95] Legal Information Institute, *supra* note 11.

vi. Promotes freedom to contact

The freedom to enter into contracts should be available to all persons of sound mind, and limitations on contingency fee arrangements curtail this freedom.[96]

B. Disadvantages of contingency fee arrangements

Despite all the advantages that the contingency fees regime offers, the detractors of the practice also have some strong reasons for its disapproval. The following are the significant disadvantages mentioned by them:

i. Excessive litigation

Critics argue that this system encourages parties to sue simply because they have too little to lose. For example, a party who has suffered only minor damages may file a lawsuit simply because there is no financial risk in doing so. This can lead to a backlog of cases in the court system and can also increase the costs of litigation for everyone involved.[97]

ii. Conflict of interest and ethical concerns

The potentially large contingency fees may incentivize lawyers to prioritize their own financial interests over the best interests of their clients, leading to a conflict of interests.[98] Contingency fees can raise important ethical issues for lawyers, particularly regarding their professional responsibility to act in the best interests of their clients. This has also been a major reason for the retarded growth of this practice in many countries.[99] Some critics of this fee arrangement have even claimed that it encourages an attorney to turn a "valuable claim into a merchantable commodity", which makes lawyers

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[96] *See generally* Lochner v. New York, 198 U.S. 45 (1905) (invalidating statutory restriction prohibiting parties from contracting for labor exceeding specified time limits).
[97] F.B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES: PROFESSIONAL ECONOMICS AND RESPONSIBILITIES (1st ed. 2008); Miller, *supra* note 55.
[98] Richard H Underwood, *Legal Ethics and Class Actions: Problems, Tactics and Judicial Responses*, 71 KY. L.J. 782 (1983).
[99] Kritzer, *supra* note 60.

buyers and sellers of lawsuits rather than professional representatives of clients.[100]

iii. Deficient legal representation

The scope for hefty contingency fees can motivate lawyers to settle cases too early or for too little, harming the quality of legal representation. In such a situation, the clients' interests get side-lined, and the lawyer is seemingly driven by her own interests. Also, in these situations, lawyers bear a more significant risk which may discourage them from taking cases with lesser merit. Lawyers may take up only those cases that are likely to succeed; thus, it would be difficult to find legal representation for relatively weaker cases.

iv. An undue benefit to the lawyers

A lawyer invariably has better legal knowledge about the complexity of a case and the level of services required. This information asymmetry between the client and the lawyer creates incentives for opportunistic behavior on the lawyer's part. The consequent greed that the lawyer may develop hits at the very foundation of the value system of his noble profession.

v. Risks for lawyers

Contingency fee arrangements for lawyers carry several potential risks, including the likelihood that (i) the client may terminate the attorney's services after substantial work has already been done but before any recovery is obtained, (ii) the client may insist on accepting a low settlement offer or refuse a reasonable offer in favor of taking the risk of litigation, (iii) the governing law may change while the case is still ongoing, (iv) the case may ultimately be lost, (v) the award granted may be minimal despite a win, or (vi) the award may be adequate, but the defendant is unable to pay it.[101]

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[100] MacKinnon, *supra* note 97.
[101] Shajnfeld, *supra* note 93.

V. Contingency Fee And Professional Responsibility

The contours of lawyers' professional responsibility have undergone significant changes over the years, driven by various factors such as changes in the legal landscape, societal expectations, and technological advances. There is an increased burden on the lawyers to be aware of these changes and adapt their practices to meet new challenges and expectations. It is also heartening to find that the practice of contingency fees has now moved out of the United States and is being increasingly recognized in the United Kingdom, Canada, Australia, France, and Japan.[102]. Most of the provinces in Canada now permit such contingent fee contracts.[103] In New Zealand, solicitors and barristers can resort to charging 'speculative fees', 'uplift fees' or 'percentage fees' which are different forms of the contingency fee arrangement.[104] In France, while "no-win no-fee" agreements are prohibited, it is possible for lawyers to obtain contingency or success fee combined with another method

[102] Kritzer, *supra* note 14.

[103] See Loraine Minish, *The Contingency Fee: A Re-Examination*, 10 MANITOBA L.J. 65 (1979). Several provinces have adopted rules permitting contingency fees in the last twenty-five years. *See* Jean V. Swartz, *Lawyer Contingent Fee Agreements in Canada*, at 4 (1976) (memorandum prepared by the American-British Law Division, Law Library, Library of Congress; on file with author) (reporting that as of 1976, Ontario, Nova Scotia, Prince Edward Island, Newfoundland, and the Yukon did not permit contingency fees).

[104] *See* E. SKORDAKI & D. WALKER, REGULATING AND CHARGING FOR LEGAL SERVICES: AN INTERNATIONAL COMPARISON (1994) at 33. In the event of success, the lawyer charges the usual fee which is called speculative fees. If in the event of success, the lawyer charges the usual fee plus an agreed flat amount of percentage uplift on the usual fee, it is termed as uplift fees. If in the event of success, the lawyer charges an amount calculated as a percentage (which might be fixed or sliding) of the amount won, it is termed as percentage fees. LAW COMMISSION, NEW ZEALAND, *Women's Access to Justice: He Putanga Mo Nga Wahine Ki Te Tika. Lawyers' Costs in Family Law Disputes*, (June 1997), http://www.nzlii.org/nz/other/nzlc/mp/MP10/MP10.pdf (last visited on Nov. 17, 2023).

of remuneration (like hourly rates or task-based fees).[105] Japanese law firms are also being seen showing greater acceptance of contingency fee agreements.[106] They act on a quasi-contingency fee basis, consisting of a retainer fee (which is a certain percentage of the claim amount) and a success fee (which is linked to award obtained).[107] Greece also allows contingency fees on lines similar to the American model but has put a limit of 20 percent of the total amount recovered from the court.[108] Thus, there is a perceptible and widespread acceptance of contingency fee agreements, which are no longer limited to the United States only.[109]

The growth of the practice of contingency fees has also generated tremendous debate about its utility, particularly in light of its likely impact on the professional responsibility of the practitioners of the legal profession. The dichotomy between contingency fees and professional responsibilities arises because of the fear that having a financial interest in the outcome of the case may create perverse incentives for lawyers to resort to unscrupulous practices to win the case. This conflict of interest can turn out to be detrimental to the interests of justice.[110] In class action suits with huge ramifications, lawyers

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[105] *Id.* at 61. *See* EUROPA, COMPARATIVE REPORT PREPARED BY ASHURST FOR THE COMPETITION DIRECTORATE GENERAl, 10304 (2004); LINDA A WILLET, *U.S.-style Class Actions in Europe: A Growing Threat?* in BRIEFLY 9 (2005).

[106] See Takao Tanase, *The Management of Automobile Accident Compensation in Japan*, 24 LAW & SOC'Y REV. 651 (1990).

[107]*See* Atsushi Miyake, HG.org, *Japan: Costs of Litigation*, https://www.hg.org/legal-articles/japan-costs-of-litigation-48073 (last visited on Nov. 17, 2023). Koki Yanagisawa & Hiroyuki Ebisawa, ICLG.COM, *Litigation & Dispute Resolution Laws and Regulations Japan*, (2023), https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/japan (last visited on Nov. 17, 2023).

[108] *See* SKORDAKI & WALKER, *supra* note 104 at 57. *See* Nitesh Mishra, Law Times Journal, *Contingency Lawyering: "It Depends on Results"*, https://lawtimesjournal.in/contingency-lawyering-it-depends-on-results/ (last visited May 2, 2023).

[109] Kritzer, *supra* note 14.

[110] Kritzer, *supra* note 60.

may get tempted to pursue weak or frivolous cases or to settle cases too early or for too little. This can harm the interests of the plaintiffs and irreparably damage public trust.[111]

Cognizant of the pressing need to reconcile contingency fees with professional responsibility, the governing bodies or bar associations across geographies have devised robust rules and regulations to secure the client's best interests, maintain client confidentiality, and avoid conflict of interests.

We have already seen how, in the United States, Rule 1.5 of the Model Rules has spelled out the regime that needs to be followed in case of the contingency fee agreements.[112] Additionally, the ABA has issued guidelines on the use of contingency fees in class action suits that emphasize the importance of ensuring that fee arrangements are always fair and reasonable and that lawyers act in the best interests of their clients.[113] Most states including California[114] and New York[115], have adopted similar prohibitions on contingent fees.

If we go by the traditional image of a professional lawyer, detachment from clients becomes imperative. Lawyers ideally should not seek out clients; on the contrary, clients should reach out to lawyers on the basis of their reputation for professional excellence.[116] If we take the example of personal injury suits in the United States, we observe excessive solicitation.[117] This has taken many

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[111] Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 UNIVERSITY OF ILLINOIS LAW REVIEW 102.
[112] Model Rules of Prof'l Conduct R. 1.5 (1983)
[113] *Id.*
[114] Cal. Code Regs. Tit. 16, §62.
[115] N.Y. Comp. Codes R. & Regs. Tit. 22 § 806.27.
[116] Brickman, *supra* note 36.
[117] MacKinnon, *supra* note 97.

forms, for e.g., advertising in the form of publicity of large settlements. Because there is a possibility of higher fees in a contingent fee setup, personal injury lawyers undergoing active solicitation of clients are sometimes also called "ambulance chasers".[118] A possible way to prohibit this behavior is to put a cap on the size of attorney fees.[119] Lawyers may also be required to obtain court approval of the fee agreement, particularly in cases where the fee exceeds a certain percentage of the recovery.[120]

The tweaking in the regulations about contingency fees that have taken place in various other countries apart from the United States exhibits uniformity in terms of typically requiring lawyers to explain the terms of the agreement to the client in writing, including the percentage of the recovery that will be paid as fees, any expenses that will be deducted, and the circumstances under which the lawyer may withdraw from representation, as discussed above.

In contrast to its status in some parts of the world, contingency fee practice is yet to make a mark in India. Legal practice in India has traditionally been considered a noble profession, and the opposition to contingency fees emanates majorly from a concern that lawyers may develop ulterior motives about the ultimate outcome of such an arrangement. This concern was aptly conveyed in a 1975 ruling of the Supreme Court of India, wherein Justice V R Krishna Iyer famously remarked, "*Law is no trade, briefs no merchandise, and*

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[118] Post Editorial Board, New York Post, *Build Back's Gift to Ambulance-Chasing Attorneys*, (2021), https://nypost.com/2021/11/23/build-backs-gift-to-ambulance-chasing-attorneys/ (last visited on May 16, 2023).

[119] MacKinnon, *supra* note 97. *See also* 1 ROBERT L. ROSSI, ATTORNEYS' FEES (2nd ed. 1995).

[120] E.g., in medical malpractice cases, sixteen states (California, Connecticut, Delaware, Florida, Illinois, Indiana, Maine, Massachusetts, Michigan, New Jersey, New York, Oklahoma, Tennessee, Utah, Wisconsin, and Wyoming) have a statute or court rule lays down limit or sliding scale on contingency fees attorneys may charge their clients. Many of these statutes and rules are applicable to other categories of lawsuits as well.

so the heaven of commercial competition or procurement should not vulgarize the legal profession."[121] Yet, much has happened in the last about 50 years, and, as some legal verdicts in the last few years suggest, one also finds evidence of limited acceptance of the practice in India.

Overall, contingency fee arrangements can be reconciled with professional responsibility as long as lawyers take appropriate steps to ensure that they act in their client's best interests and comply with all ethical obligations outlined in their respective jurisdictions. Professional responsibility is the cornerstone of the legal profession. Lawyers must uphold the highest ethical standards and act in the best interests of their clients, the legal system, and the public.[122]

VI. Recommendations And Conclusion

Although the practice of contingency fees is not an unmixed blessing, its biggest advantage lies in facilitating access to justice in all those cases where litigants either cannot afford to pay the lawyer's fees or do not qualify for public legal aid funding. Moreover, under a contingency scheme, the lawyers often assume the financial risk of the litigation, which might move the burden away from the plaintiff and partially reduce unmeritorious cases. Lawyers may also have an additional incentive to win the case, dedicating quality time and funding in order to succeed while becoming more specialized in consumer claims. Besides, contingency fee arrangements can pave the way for overcoming the financial and legal knowledge barriers to accessing justice. This can have a lasting effect on the administration of justice in a country.

[121] Bar Council of Maharashtra v. M.V. Dabholkar and Ors., 1976 SCR (2) 48 .
[122] Kritzer, *supra* note 60.

In the wake of the global movement towards embracing contingent fee contracts, it is high time for India to reconsider its approach as well.[123] There must be a clear understanding that contingent fees cannot be left unregulated as such, and provisions have to be made to safeguard clients' interests and curb their undue exploitation. Besides, contingent fees need not always be against public policy for the reason that despite the lawyer having an interest in the result of the case, they have their credibility and reputation to take care of as well. Hence, the presumption that attorneys shall tend to indulge in unethical practices for a favorable judgment needs a reassessment .

Strong jurisprudential evidence from the United States validates the case of contingent fee contracts in India. Such an arrangement is typically necessary for a country like India, where most litigants do not have the financial wherewithal to pay the lawyer's fees upfront.[124] Hence, they prefer to avoid going to court with their claims. Contingent fee contracts would open the doors of justice for them and pave the way for equal access to justice for all.[125]

As for the potential flaws in the existing contingency fee practice, a middle-path approach shall be the best way forward. Some corrective steps can undoubtedly go a long way in instilling confidence in the whole exercise –

A. Enhancing communication and transparency in legal fee structures

One of the most pressing challenges in the legal profession is ensuring that clients understand and appreciate the various fee payment options available to them. Lawyers must be transparent and upfront about their fees and billing

[123] Mittal, *supra* note 70.
[124] Daksh, *supra* note 87.
[125] Mittal, *supra* note 70.

practices so that the client can make informed decisions about the kind of legal representation they want to opt for. There should be a concerted effort by lawyers, clients, and the courts to improve communication and ensure that no gray areas remain.

For clients with limited financial means, contingency fee arrangements may sometimes be the only way to access justice. It is imperative that they fully understand the potential costs and benefits of such an arrangement. Their lawyers must provide detailed information about their fees, including the percentage of any settlement or judgment that will go towards their fees and any additional costs or expenses that the client must bear.

Lawyers can help clients make informed decisions about their legal representation by providing the necessary information clearly and transparently so that there are no surprises or misunderstandings in the future. This can also help build a foundation of trust and confidence for a healthy attorney-client relationship.

Lawyers should work closely with their clients and educate them about the various fee structures available to them, such as hourly billing, contingency fees, flat fees, or a combination of them. They should clearly convey the services included and the possible additional costs that may be incurred. The information should be presented in a way that is easy for the clients to understand. The legal systems should also provide guidance and support to clients about fee payment options. Courts can play a vital role by setting clear expectations for lawyers by requiring them to provide detailed fee agreements to their clients. Courts can also monitor fee agreements to ensure that they are fair and reasonable.

Lawyers' chambers should also proactively educate the members about the importance of transparent and ethical billing practices. Proper training and workshops should be organized to help lawyers improve their communication skills and ensure they provide accurate and timely information to their clients. By working together, lawyers, clients, and the courts can create a more transparent and ethical legal system that benefits everyone involved.

B. Maintaining accurate records of attorney's fees

It is essential to maintain accurate and detailed records of the resources the lawyer employs to ensure fair and reasonable attorney fees. This may include tracking the number of hours spent on the case, court fees, travel expenses, and the expenses incurred in obtaining expert witnesses' statements.

If attorneys maintain records meticulously, they can exhibit the amount of time and effort put into a case and justify their fee requests to the court. This also minimizes the risk of any potential dispute or misunderstanding between attorneys and their clients about the billing amount. Here, courts may plan an essential role in accurately assessing the reasonableness of the attorney's fees.

C. Establishing ethical guidelines for contingency fee practice

Creating standards for contingency fee practice can be a major task for professional organizations like bar associations. However, implementing these norms can assist in ensuring that attorneys put the interests of their clients before their own financial gain and that there are no conflicts of interest that might jeopardize the legal system's integrity.

A few ethical policies that may be established include requiring lawyers to disclose any possible conflicts of interest to their clients, ensuring that the fee charged is fair and reasonable, and requiring attorneys to give credence to their client's interests throughout the course of the legal proceedings. Through these

measures, bar associations can help maintain public trust in the legal system and ensure equal access to justice.

D. Use of AI and data analytics

Lawyers can leverage artificial intelligence and data analytics to assess the strength of legal claims. These upcoming powerful tools can analyze a range of documents, such as legal documents, court records, and expert witness testimony. This can help identify relevant patterns and trends that may indicate the likelihood of success. By using the right technological tools, attorneys can provide clients with more accurate and informed assessments of their alternatives and help them make more informed decisions. Additionally, lawyers can also benefit from AI-powered analytics by gaining essential insights into cases and improving their own legal strategies. By harnessing these advanced technologies, lawyers can provide their clients with assessments that are not only more precise but also better informed. The ability to sift through extensive data quickly and comprehensively will allow lawyers to offer a clear understanding of potential outcomes and risks associated with various legal strategies. By leveraging AI to analyze data sets, lawyers can uncover nuances, predictions, and potential challenges that might otherwise go unnoticed.[126]

E. Implementing caps to promote fairness

Using a cap on the recovery percentage prevents lawyers from charging excessive or unconscionable contingency fees so that clients can be confident

[126] AI tools like Lex Machina, Latch, AI Lawyer, Humata AI have gained popularity as legal research platforms, facilitating lawyers in conducting efficient legal research and expediting the process of drafting legal documents.

of getting a fair share of a settlement or judgment.[127] In addition to promoting access to justice, lower legal fees may encourage more plaintiffs to pursue legal action knowing they will not be unfairly burdened with high fees. A balance must be struck between protecting clients' interests and allowing lawyers to earn a reasonable living. An appropriate cap should be set according to the complexity and risks of a particular case. However, it should not be so low that it discourages lawyers from taking on contingency cases. A cap on the recovery percentage under a contingency fee agreement promotes fairness and transparency in the legal system and ensures that clients have affordable access to representation.

These measures shall need the active participation of the bar and the bench, with the bar associations particularly having to lead from the front to secure ownership from the legal fraternity. Such an ecosystem alone can lead to a contingency fee regime which may be a win-win for all the stakeholders.

As for Grace, she assists Cindy in finding an attorney based in New Haven who is a recent Yale Law School graduate who offers to take the case on a contingency-fee arrangement. The attorney puts in a lot of effort to compile a compelling case, and they ultimately obtain a hefty settlement that pays Cindy’s medical expenses and lost wages. Grace feels pleased that she was able to help Cindy in securing justice and living a dignified life.

[127] MacKinnon, *supra* note 97.

Unveiling E-Shadows: Understanding Women's Cyber Victimisation

Lalit Anjana*

Abstract

Cybercrime is emerging as a global epidemic, with women often being the primary target. The prevalence of cybercrimes against women has shown a notable increase in recent years. This article presents a comprehensive examination and statistical analysis of various forms of cybercrime, with a particular focus on those specifically against women. This article also explores the rising concerns around deepfakes and the harassment experienced by women in the virtual reality world. Perpetrators of cybercrimes often operate under false identities in cyberspace, making their identification and prosecution challenging. The current legal and judicial system in India needs a revamp to effectively address and tackle the situation of rising cybercrimes against women. This article provides a comprehensive examination of specific cybercrimes against women, a detailed analysis of relevant statistics, legal framework, interpretations of judicial precedents, and an exploration of new emerging cybercrimes in the age of artificial intelligence (AI). Furthermore, it offers suggestions for addressing cybercrimes against women.

I. Introduction

Cybercrimes against women, a contemporary manifestation of gender-based violence, are increasing at an alarming rate, posing a significant threat to their safety, security, and empowerment.[1] These crimes impact mental well-being,

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[1] Nir Kshetri, *Cybercrime and Cybersecurity in India: Causes, Consequences and Implications for the Future*, 66 CRIME LAW SOCIAL CH. 313, 323 (2016).

threatening women's dignity, security, and privacy.[2] The increasing use and reliance on technology have led to a significant surge in cybercrime targeting women.[3] New risks have arisen as people worldwide may connect through a simple click. There is a substantial prevalence of cybercrimes that affect individuals of all genders, with certain crimes specifically targeting women.[4]

Women are disproportionately susceptible to online threats and vulnerabilities within the digital realm, primarily because of real-world gender discrimination and the prevalence of societal norms, often making women soft targets in the digital realm.[5] Considering the fact that the place of women in patriarchal society makes them more responsible for the good or bad reputation of the family, women victims and their family members are often burdened by the oppressive weight of societal expectations and thus feel compelled to remain silent about the crimes committed against them.[6] This reluctance stems from the deeply ingrained fear of potential harm to their reputation, perpetuating a culture that prioritises the preservation of patriarchal norms over the pursuit of justice.[7] It has been asserted that the computer culture is predominantly male-dominated, resulting in women frequently experiencing feelings of threat, discomfort, subordination, and being silenced, especially within the

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[2] Vijayashri V., *Violence Against Women in Cyber Information Super Highway in India- A Legal Analysis*, 5 IJLESS 55 (2018).
[3] G. Selvi, *Crime Against Women in Cyber Space- An analysis*, 5 IJLESS 192 (2018).
[4] Vijayashri, *supra* note 2 at 55.
[5] DEBARATI HALDER & K. JAISHANKAR, CYBER CRIME AGAINST WOMEN IN INDIA 9 (Sage 2017); *see also,* NORC at the University of Chicago & the International Center for Research on Women, *Technology-facilitated Gender Based Violence in Asia: India,* 2 (2022), https://www.icrw.org/wp-content/uploads/2021/09/USAID-TFGBV-India.pdf.
[6] *Id.*; *see also,* Sanjeev Kumar & Priyanka, *Cyber Crime Against Women: Right to Privacy and Other Issues*, 5 JLSR 160 (2019); Abhinav Sharma & Ajay Singh, *Cyber Crimes against Women: A Gloomy Outlook of Technological Advancement*, 1 IJLMH 4 (2018); Tanaya Saha & Akancha Srivastava, *Indian Women at Risk in the Cyber Space: A Conceptual Model of Reasons of Victimization*, 8 IJCC 61 (2014).
[7] *Id.*

digital realm, where they are subjected to various forms of abuse, such as harassment, trolling, and cyber pornography, to name a few.[8]

According to a report by the 'Broadband Commission for Sustainable Development,' it has been found that a significant majority of women, approximately 83 percent, perceive the internet as a means of attaining greater freedom.[9] However, it is concerning to note that 73 percent of women have reported online abuse. According to the report, it was also emphasised that the majority of online harassers were male, and the likelihood of women encountering online abuse is around 27 times higher in comparison to men.[10] The internet and technology are essential tools for the empowerment of women. Thus, imposing limitations on internet or smart device usage by women is not an appropriate approach to address cybercrimes against women. Rather, it is imperative to establish regulations governing the conduct of abusers online, implementing additional safety measures and providing a secure navigation experience in the digital realm.

Regrettably, the existing legislation and legal safeguards are insufficient and do not align with the technological advancements needed to prevent women's victimisation in the digital realm.[11] In the current era of AI, new forms of cybercrimes are reshaping the victimisation circumstances and increasing the

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[8] MARIA BADA, ET AL., *Exploring Masculinities and Perceptions of Gender in Online Cybercrime Subcultures*, in CYBERCRIME IN CONTEXT THE HUMAN FACTOR IN VICTIMIZATION, OFFENDING, AND POLICING 240 (MARLEEN WEULEN KRANENBARG & RUTGER LEUKFELDT EDS., Springer 2021); *see also,* Subhra Rajat Balabantaray, Mausumi Mishra & Upananda Pani, *A Sociological Study of Cybercrimes Against Women in India: Deciphering the Causes and Evaluating the Impact on the Victims*, 19(1) IJAPS 39 (2023).

[9] The UN Broadband Commission for Digital Development Working Group on Broadband and Gender, *Cyber Violence Against Women and Girls A World-Wide Wake-Up Call* 15 (2015), https://en.unesco.org/sites/default/files/genderreport2015final.pdf.

[10] *Id.*

[11] Aamir Yousuf Wagay & Mohd Imran Khan, *Cyber Laws to Curb Cyber Victimization of Women in India: A Critical Legal Analysis*, 16 ARMY INSTITUTE OF LAW JOURNAL 53 (2023).

complexities. These new forms of cybercrimes pose heightened threats and uncertainties.[12]

India was one of the earliest nations to implement information technology legislation, initially enacted with the primary goal of fostering electronic commerce, as stated in its preamble, rather than preventing cybercrime victimisation.[13] Thus the Information Technology Act, 2000 (IT Act), in its initial form, had inadequate provisions to address various forms of cybercrimes. Consequently, the Indian Penal Code, 1860 (IPC) was expanded to its limits to encompass instances of cybercrimes.[14] The IT Act was subsequently amended in 2008, and as a result, the Act now encompasses and provides for the punishment for various forms of cybercrimes.[15] Nevertheless, the IT Act still fails to provide comprehensive safeguards to effectively prevent and adequately punish cybercrimes committed against women.[16] To address this situation, an Amendment Bill was introduced in the Rajya Sabha on August 5, 2022, in recognition of this concern.[17] This Bill seeks to improve

[12] *Id.*
[13] The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000.
[14] Debarati Halder & K. Jaishankar, *Cyber Gender Harassment and Secondary Victimization: A Comparative Analysis of the United States, the UK, and India, Victims & Offenders*, 6 VICT. OFFENDERS 386, 393 (2011).
[15] The Information Technology (Amendment) Act, 2008, No. 10, Acts of Parliament, 2009, Chapter XI.
[16] Halder & Jaishankar, *supra* note 14 at 393.
[17] The Information Technology (Amendment) Bill, 2022, Bill No. 124 of 2023. It is stated in the statement of objective and reasons of this bill that it seeks to protect women's freedom of expression from threats and abuse, especially online, aiming to prevent silencing attempts and punish offenders appropriately. It emphasises creating an efficient process for swiftly removing offensive internet content, acknowledging the need to safeguard women from feeling insecure or uncomfortable in the public sphere.

women's safety and welfare in the digital realm by introducing an additional non-bailable provision to safeguard them.[18]

II. Cybercrimes Against Women: Exploring Perils In Cyberspace

The term 'cybercrime against women' pertains to unlawful activities carried out against women in the digital realm, which are enabled by the use of computers, smart devices, and internet connectivity. The digital sphere can be seen as a reflection of the real world, wherein women are regrettably perceived as weak targets as a result of prevailing gender inequalities and patriarchal power dynamics.[19]

A. Analysis Of Major Cyber Crimes Against Women

There are certain specific subsets of cybercrimes that are predominantly targeted against women. According to data provided by the 'National Crime Records Bureau' (NCRB), only specific categories of cybercrime against women are being taken into consideration for gathering data in the report.[20] Therefore, the primary objective of this study is to conduct a theoretical and

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[18] *Id*., at §66G. "*(1) The following acts shall be considered punishable offences, when committed against a woman, with the intention to intimidate or discredit her or force her to express a certain view, opinion or observation, or to force her to state any view, opinion or observation or to force her to refrain from expressing a certain view, opinion or observation. (2) The offences referred to in §66G (1) shall be cognizable and non-bailable and shall be punishable in the following manner*." Refer to §§66a and 67BA of the Bill for the detailed information.

[19] International Center for Not-for-Profit Law (ICNL), *Online Gender-Based Violence and Its Impact on the Civic Freedoms of Women Human Rights Defenders in the Indo-Pacific* 7 (2023), https://www.icnl.org/wp-content/uploads/Online-Gender-Based-Violence-report-final.pdf.

[20] *See generally*, NCRB, *infra* note 84 at 793; NCRB, *infra* note 83 at 417-435, It is essential to acknowledge that the NCRB Crimes in India 2016 report did not include any information about cybercrimes against women. The inclusion of statistics concerning cybercrimes against women was only introduced in subsequent NCRB Crimes in India reports starting from 2017.

statistical analysis of various cybercrimes against women, with particular emphasis on cyber blackmailing, cyber threatening, cyber extortion, cyber bullying, cyber pornography, cyber stalking, cyber defamation, morphing, and fake profiles.

'Cyber harassment' against women is a serious concern that commonly encompasses the utilisation of predominantly sexually explicit forms of violence with the intention of instilling fear or intimidation.[21] Cyber harassment, primarily targeting women comprises a range of behaviours involving sexual threats and derogatory tactics.[22] Cyber harassment can also take many forms, such as unwanted sexually explicit messages, threats via email, and hate speech.[23] As per the definition provided by the 'European Institute for Gender Equality', cyber harassment against women refers to one or more acts of controlling, stifling, or intercepting communication via the use of 'information and communication technology' (ICT), and such harassment's objective is to create an intimidating, hostile, demeaning, humiliating, or insulting environment for the victim.[24] 'Cyber blackmailing' against women involves sending threatening communications to coerce compliance with unlawful demands by threatening to expose sensitive information and destroy

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[21] Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH LAW REV 374 (2009); *See generally*, Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1110 (2011).

[22] *Id*., at 378.

[23] European Institute for Gender Equality, *Cyber violence against women and girls, European Union* 44 (2017), https://eige.europa.eu/sites/default/files/documents/combating_cyber_violence_against_women_and_girls.pdf.

[24] European Institute for Gender Equality, *Cyber Violence Against Women and Girls Key Terms and Concepts* (2022), https://eige.europa.eu/sites/default/files/cyber_violence_against_women_and_girls_key_terms_and_concepts.pdf.

reputation.[25] It may comprise secretly gathering and sharing sensitive content, images, or videos motivated by vengeance or unlawful demands.[26] The phrase 'blackmailing' is not defined anywhere under Indian law, but blackmailing runs parallel to the legal definition of criminal intimidation.[27] Threats of publishing and disseminating images and video clips of a woman's personal/private moments through online mediums are frequently used to blackmail women.[28] Blackmail is often addressed through the charge of 'criminal intimidation,' which involves threatening another with injury to a person, reputation, or property.[29] 'Cyberbullying' against women encompasses various manifestations of coercion, aggression, harassment, extortion, derogation, defamation, identity theft, or unauthorised gathering, or publication of sensitive personal information, and such acts are recurrently perpetrated through the use of ICT with the intention of isolating, assaulting, or ridiculing the victims.[30]

'Cyber extortion' is a criminal act that resembles the real-world offence of extortion, wherein someone attacks or threatens to attack and subsequently demands money or other valuable things to cease the attack. In the realm of cyberspace, extortion occurs through the utilisation of digital mediums, primarily involving the threat to publish obscene media or other confidential

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[25] DEBARATI HALDER & K. JAISHANKAR, CYBER CRIME AND THE VICTIMIZATION OF WOMEN: LAWS, RIGHTS AND REGULATIONS 131-132 (IGI Global 2012).
[26] G. Tanuja Reddy, *Regulation of Cyber Crimes Against Women – A Critique*, 8 IJIRT 83 (2022).
[27] *See generally*, Press Information Bureau, Cybercrime Against Women (Dec. 7, 2022), available at https://pib.gov.in/PressReleseDetailm.aspx?PRID=1881404.
[28] Vijayashri V., *Violence Against Women in Cyber Information Super Highway in India- A Legal Analysis*, 5 IJLESS 57 (2018).
[29] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, §§503, 506 (hereinafter 'IPC').
[30] European Institute for Gender Equality, *supra* note 24.

information stored in digital formats with the intention of coercing the individual. It is essential to mention 'sextortion,' which is an act of attempting to coerce a person into giving up money or sexual favours by threatening to expose the person's intimate or obscene photos or videos.[31] Sections 383 and 384 of the IPC deal with extortion and provide for punishment when a person places another person in fear of any injury to dishonestly induce the other person to deliver any property or valuable security. Section 354A of the IPC applies if the extortion is done in exchange for sexual favours.

The phrase 'cyber pornography' is used to characterise content that is predominantly sexually explicit and lascivious and is primarily meant to arouse sex cravings or erotic activities through the internet. This includes pornographic websites and e-magazines that contain pornographic pictures, photos, writings, videos, and other such things that can be downloaded from the internet and are easily transferable.[32] In the digital realm, images or videos, particularly those featuring women, hold significant value and are like currency in the digital realm.[33] Pornography seems to be the most serious offence committed against women in the digital realm, and it also constitutes the most distressing experience for victimised women.[34] Section 67-A of the IT Act, 2000, provides for punishment for publishing or transmitting sexually explicit material, etc., in electronic form, whereas there is no punishment for

[31] Saloni Agrawal, *Online sextortion*, 6 INDIAN J. HEALTH, SEX. CULT. 14 (2020).
[32] S.K VERMA & RAMAN MITTAL (EDS.), LEGAL DIMENSION ON CYBER SPACE 237-240 (Indian Law Institute 2004).
[33] Anita Gurumurthy & Nivedita Menon, *Violence Against Women via Cyberspace*, 44(40) ECON POLIT WKLY. 19 (2009).
[34] Shalini Kashmiria, *Mapping Cyber Crimes Against Women in India*, 1(50) IRJCL 28 (2014).

storing or downloading sexually explicit material (except in the case of child pornography).

This heinous exploitation and dissemination of sexually explicit material was starkly highlighted in the case of *Dr. Prakash v. State of Tamil Nadu & Ors,*[35] where the accused used to force young girls, without their permission, to participate in sexual activities with other males and then used to photograph and videotape the acts. He would then send the images and videos to his brother, who was living and working in the United States at the time, intending to publish the same photographs and videos on a website for commercial gain. The offender was convicted and subsequently ordered to pay a fine of Rs. 1,19,000 in addition to being sentenced to life imprisonment. In this particular case, it was further determined that the commission of such offences warrants severe penalties due to their inherent societal implications.

'Stalking' is a situation when an individual frequently pursues a woman for personal engagement despite her disinterest or monitors her internet, email, or other electronic communications.[36] Stalking by electronic means, often known as 'cyberstalking,' is essentially an extension of traditional forms of stalking. It occurs when a person pursues, harasses, or makes unsolicited contact with another person by using electronic mediums such as emails or the internet to gain access to the victim's personal information.[37] This information may also include family-related history, contact details, and details of everyday activities.[38] The actions of the perpetrator become cyberstalking when they are

[35] Dr. Prakash v. State of Tamil Nadu, 2002 Cri LJ 2596.
[36] IPC, *supra note* 29, §345D.
[37] Sapna Sukrut Deo, *Cyber Stalking and Online Harassment: A New Challenge for Law Enforcement*, BHARATI LAW REVIEW 86, 86-88 (2013).
[38] *Id.*

committed repeatedly by the same person, undermine the victim's feeling of safety, and create distress, anxiety, or worry. The anonymity in cyberspace provides a suitable cover for the criminal to conduct the crime without being readily caught.[39] It is true that both genders can be equally susceptible to becoming victims of cyberstalking, but women are more likely to be targeted.[40] A criminal might stalk a woman via social media or even by placing a keylogger on her computer, allowing the offender to view everything the woman writes whenever she is online.[41] Cyberstalking is a form of harassment that violates the victim's basic human rights to privacy, dignity, and personal liberty and causes emotional distress and a feeling of imminent threat in the mind.[42] As the right to privacy is an integral part of the fundamental right to life and personal liberty, this cybercrime needs special attention for upholding the privacy and security of women in the digital realm.[43]

In India's first cyberstalking case of *Manish Kathuria v. Ritu Kohli*,[44] the accused, Manish Kathuria, used to chat under the identity of Ritu Kohli on the website www.mirc.com. He used filthy and vulgar language during online chats with random persons and disseminated her phone number to these random persons, encouraging them to call Ritu at odd hours. Ritu Kohli received obscene calls from India and overseas. On a complaint by her, Manish Kathuria was charged with the offence of outraging the modesty of a woman under Section 509 of the IPC. This case was adjudicated upon before

[39] VERMA & MITTAL (EDS.), *supra* note 32 at 240-241.
[40] P. Sree Sudha, *Techno-Voyeurism: A Threat to Dignity of Women*, 5 IJLESS 12 (2018).
[41] KANIKA SETH, CYBERCRIMES AGAINST WOMEN AN INDIAN PERSPECTIVE 14 (2018).
[42] Pritam Banerjee & Pradip Banerjee, *Analysing the Crime of Cyberstalking as a Threat for Privacy Right in India*, 7 J. CONTEMP. ISSUES LAW 35, 38-39 (2022).
[43] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.
[44] Manish Kathuria v. Ritu Kohli, C.C No.14616/2014.

the passing of any specific law dealing with cyberstalking, so it was only recorded as an offence under the IPC.

In the contemporary era, another serious cybercrime 'cyber defamation' has emerged as a more aggressive manifestation of defamation, posing a severe threat to an individual's reputation, social standing, and personal integrity, particularly women and girls.[45] In the Indian legal system, defamation is both a civil and a criminal wrong, and it refers to the act of maligning a person to harm his reputation in the eyes of others and make him a target of hate, scorn, or ridicule.[46] The defamation that occurs online is more harmful than the one that occurs offline since a defamatory word or message may spread to a large number of individuals with only the click of a button.[47] Section 4 of the IT Act establishes the legitimacy of digital records and facilitates the adjudication of cyber defamation, encompassing defamatory acts committed through electronic means falling under Section 499 of the IPC.

The ramifications of cyber defamation and its legal implications became strikingly evident in the case of *State of Odisha v. Jayanta Kumar Das*,[48] where a woman's modesty was outraged. The offender, Jayanta Kumar Das, was found guilty of establishing fake profiles in the name of the complainant's wife on a porn website, specifically 'Desi Hunt.com.' The complainant's phone numbers were included in the fake profiles on the porn website, resulting in the complainant receiving obscene messages for months. The accused published fake information about the complainant's wife on fake accounts in order to teach him a lesson since the complainant, as a journalist,

[45] Wagay & Khan, *supra* note 11 at 56.
[46] SETH, *supra* note 41 at 16.
[47] Kashmiria, *supra* note 34 at 32.
[48] State of Odisha v. Jayanta Kumar Das, G.R. case no. 1739/2012 T.R.No. 21/2013.

had previously written adversely against the accused. The accused person in the present case received a sentence of imprisonment of six years and a monetary penalty of 8,000 rupees for offences under Sections 292, 465, 469, and 500 of the IPC, in addition to 66C/67/67A of the IT Act.

The act of taking a person's images that are placed online and then altering or manipulating the original image using software or another technological instrument without the person's consent is known as 'morphing.'[49] Under the IPC, actions like these might be considered forgery committed with the intent to harm someone's reputation.[50] The concept of morphing has recently evolved as a form of cybercrime that predominantly targets women as victims, although it's crucial to acknowledge that men can also be victims of such manipulative tactics. The technique entails utilising software applications to modify the original image, and with the emergence of artificial intelligence (AI), this procedure has been much more simplified. In the contemporary era, it is observed that cyber criminals predominantly partake in the activity of collecting photos of visually appealing women and young girls, then altering them by superimposing the head onto a nude body. The altered images are subsequently disseminated across diverse digital platforms such as social media. The objectives of the perpetrator are to blackmail and extort funds from their victims. The aforementioned modified images are also disseminated on adult websites for commercial financial gains.[51]

Hacking into another person's online account and using that person's online identity to transmit or post anything that is malicious or embarrassing is a serious identity theft crime. It is also common to establish 'fake profiles' on

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[49] Sudha, *supra* note 40 at 14.
[50] IPC, *supra* note 29, §469.
[51] Wagay & Khan, *supra* note 11 at 58.

social networking websites, apps, and many other online platforms, and it can be quite difficult to have these profiles deleted after they have been created.[52] A number of women's social media accounts get compromised, and their images are unlawfully taken and used to construct fake profiles. In order to delete or remove false accounts, users may register a complaint with the service provider, such as Facebook or Instagram, these social media platforms also provide additional support in the form of an abuse report button and a technical or legal support team. As per Section 79 of the IT Act, a third-party service like Facebook is obligated to eliminate fraudulent accounts from its system if it receives notification of them.[53] The 'identity theft' crime is penalised under Section 66C and Section 66D of the IT Act.

In the case of *Suhas Katti v. State of Tamil Nadu,*[54] the offender desired to marry Ms. Roselind (victim), but she rejected him and married another man. The marriage ended in divorce. The offender viewed this as a chance and again proposed marriage in response. The victim declined once again. Upon being rejected for the second time, the offender proceeded to disseminate explicit and derogatory remarks concerning the victim within various Yahoo messaging groups, thereby causing harm to her character and dignity. The offender constructed a bogus account in Ms. Roselind's name to ruin her reputation. The victim received a series of unpleasant phone calls due to the offender's actions. The victim, exhausted by the harassment, took action and

[52] V. Sowbhagya Rani & V.R.C. Krishnaiah, *Impact of Cyberbullying in Children and Youth-A Critical Analysis*, 5 IJLESS 46 (2018).
[53] KARNIKA SETH, COMPUTERS, INTERNET & NEW TECHNOLOGY LAWS (Lexis Nexis, 2nd edition 2012).
[54] Suhas Katti v. State of Tamil Nadu, C.No. 4680 of 2004.

filed a complaint against the offender. The offender was convicted as per sections 469 and 509 of the IPC and section 67 of the IT Act.

Even now, India's cybercrime protections aren't comprehensive. Many definitions and explanations contain loopholes that let criminals get away.[55] It is apparent that there exists a notable overlap amongst different forms of cybercrime against women, as they exhibit shared elements. This overlap adds complexity to the issue, emphasising the need for a well-defined legal framework that encompasses comprehensive definitions and appropriate punishments. The current legislation in India pertaining to cybercrimes against women necessitates an update, and the introduction of the IT Act amendment of 2022 represents a noteworthy endeavour aimed at acknowledging and tackling the escalating issue of cybercrimes against women.

B. Emerging Threats: Deepfakes And Virtual Reality

In the contemporary era, it is imperative to consider the evolving landscape of modern, complex technology-driven cybercrimes, encompassing deepfakes and virtual reality-based victimisation of women.

Sexual harassment against women is indeed a growing concern in the real world. If this harassment transitions into the metaverse or virtual reality, it presents a formidable challenge for legal authorities. The intricate nature of the situation, coupled with the absence of well-defined laws and specialised knowledge in this domain, makes it challenging to address such situations.

Entering into a virtual realm, commonly referred to as the metaverse, is not just a distant dream but a reality that can now be experienced. In this realm,

[55] Nilesh Beliraya K & Abhilasha, *Cyber Crime Against Women in India: Legal Challenges and Solutions*, 3 INT. J. LAW MANAG. HUMANITIES 1012 (2022).

users can inhabit avatars and participate in various digital interactions. It is possible for scenarios to arise, including instances where an individual may experience unwelcome contact initiated by another user.[56] The virtual world, still in its developmental stage, has witnessed horrifying incidents involving upsetting accounts of women experiencing harassment and, in some cases, occurrences of sexual assault within this virtual domain.[57] In an unfortunate incident in the virtual world, a woman was subjected to verbal and sexual harassment within the Facebook metaverse, namely in Horizon venues. According to her, shortly after entering the virtual realm, male avatars subjected her avatar to a virtual gang rape; the male avatars also proceeded to capture photographic evidence of the incident.[58]

The effects of cyber abuse in the metaverse can have an adverse impact, resulting in trust issues that can affect both online and offline connections. This, in turn, can also lead to social isolation and evoke dreadful feelings of fear, worry, and stress, and can even lead to post-traumatic stress disorder.[59] Tech companies such as 'Meta' do provide safety features like the 'safe zone' to safeguard their users, but it is important to note that the legal framework pertaining to cyber abuse in the metaverse is still largely unexplored. In this

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[56] Brenda K. Wiederhold, *Sexual Harassment in the Metaverse*, 25 CYBERPSYCHOL BEHAV SOC NETW. 479 (2022).

[57] Bloomberg, *Metaverse Harassment of Women- Rape to Groping- Bad For Mark Zuckerburg's Dream Project*, HINDUSTAN TIMES (Aug. 22, 2022), https://tech.hindustantimes.com/tech/news/metaverse-harassment-of-women-rape-to-groping-bad-for-mark-zuckerberg-s-dream-project-71645435415877.html; Bharat Sharma, *A Woman Was Raped In Zuckerberg's Metaverse While Users Watched and Drank Vodka*, INDIATIMES (May. 31, 2022), https://www.indiatimes.com/technology/news/a-woman-was-raped-in-zuckerbergs-metaverse-while-users-watched-and-drank-vodka-570966.html.

[58] Tarini Mehta, *British Woman Alleges Virtual Gang-Rape in Facebook's Metaverse*, INDIA TODAY (Feb. 4, 2022), https://www.indiatoday.in/world/story/british-woman-virtual-gang-rape-facebook-metaverse-1908629-2022-02-04.

[59] Wiederhold, *supra* note 56 at 480.

ever-evolving digital realm, it is worth noting that there are presently no specific laws in place that govern digital avatars or specifically address the issue of harassment in virtual reality.[60]

Government regulations are crucial for fostering a safer cyberspace. The metaverse poses unique legal challenges that require dedicated, comprehensive legislation. It is important to note that women are at a higher risk of victimisation in virtual reality. Virtual reality is so immersive that it can blur the lines between virtual and real experiences. In the near future, as virtual reality becomes more widespread, it becomes crucial to ensure that these platforms prioritise user safety and adhere to legal frameworks that uphold the privacy and security of individuals, with a special focus on the safety of women.

In recent years, the menace of deepfakes has emerged as a cause for concern. The phrase 'Deepfake' is associated with the technological concept of 'deep learning,' which falls within the domain of AI. Deep learning techniques are commonly employed in addressing challenges that require processing extensive datasets. These algorithms can also assist in swapping faces in videos and digital content, enhancing the realism of fake digital content.[61] Deepfake, a form of digitally manipulated media, is now being increasingly used with the intention of deceiving online users for various illicit purposes such as monetary gain, extortion, and other criminal activities. Deepfakes, indeed, pose significant concerns in relation to impersonation, privacy infringement, and the dissemination of false information. These issues have

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[60] *Id.*

[61] Sandeep Singh Mankoo, *Deepfakes- The Digital Threat in the Real world*, 17 GYAN MANAGEMENT 73 (2023).

the potential to inflict considerable harm upon individuals, groups, and organisations alike.[62]

The increasing prevalence of AI-generated obscene content and deepfake pornography, which involves the unauthorised utilisation of women's visual representation, is indeed a matter of grave concern. The improper utilisation of AI for digitally removing clothing from women and subsequently disseminating these edited photos is a notable concern. This could potentially contribute to the humiliation, extortion, and violation of women's privacy. It is crucial that this issue be promptly addressed with the utmost urgency.[63]

The nation was shocked by the news of 'Bois Locker Room,' a chat group where conversations involving morphed images of underage girls took place. Morphed images involve the merging and overlaying of pre-existing images, videos, or audio onto a given source image, video, or audio.[64]

The growing influence of deepfake technology in Indian society is a pressing concern. Despite its increasing impact, India lacks dedicated legislations to address deepfake related crimes, highlighting a significant gap in the

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[62] Julia Stavola & Kyung-Shick Choi, *Victimization by Deepfake in the Metaverse: Building a Practical Management Framework*, 6 IJCIC 3 (2023).

[63] *In the Age of AI, Women Battle Rise of Deepfake Porn*, THE ECONOMICS TIMES (Jul. 24, 2023), https://economictimes.indiatimes.com/tech/technology/in-age-of-ai-women-battle-rise-of-deepfake-porn/articleshow/102069206.cms?from=mdr.

[64] Rashi Choudhary, *The Emergence of Deepfakes In India,* THE GCLS BLOG (Jun. 26, 2020), https://thegclsblog.wordpress.com/2020/06/26/the-emergence-of-deepfakes-in-india/; Pramod Sharma, *Bois Locker Room case: Delhi Police Claims Juvenile Girl Created Fake Account, Suggested Sexual Assault Plan*, ZEENEWS (May 11, 2020), https://zeenews.india.com/india/bois-locker-room-case-delhi-police-claims-juvenile-girl-created-fake-account-suggested-sexual-assault-plan-2282576.html; *see also,* Jeffin P. Mathew, *Malayali in India's First Deep fake Fraud is Just Teaser, Says S. P. Harishankar,* ONMANORAMA (July 31, 2023), https://www.onmanorama.com/news/kerala/2023/07/31/kozhikode-ai-deepfake-fraud-cyber-security-harishankar-ips-case.html.

government's efforts to combat this emerging threat. In 2023, amidst the controversy surrounding the circulation of deepfakes involving famous Indian actresses, the Indian Government issued an advisory to social media intermediaries.[65] They were instructed to identify and remove deepfakes within 36 hours of reporting, ensuring prompt action within the timeframes specified by the IT Rules 2021. Additionally, the advisory mandated the disabling of access to such content or information. The advisory specifically highlighted that deepfakes constitute a major violation and are primarily perpetrated against women.[66] The need for explicit guidelines and provisions is evident because current laws are insufficient to adequately address the distinct challenges presented by deepfakes. Although the IT Act and the Digital Personal Data Protection Act, 2023 (DPDPA) play a significant role in governing digital content, data protection, and punishing cybercrimes, they do not adequately address the intricacies related to deepfakes. The DPDPA delineates the comprehensive duties and obligations of data fiduciaries and guarantees the protection of personal data. The IT Act prescribes penalties for a range of cybercrimes. However, the rapid developments and intricacies of deepfake technology, combined with the lack of explicit regulations regarding deep fakes in existing laws, result in delays in dealing with these offences, impeding the prompt administrative resolution of such instances. Incorporating explicit provisions or guidelines that specifically address deepfakes, recognising their complex nature and recent appearance, would

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[65] Nabeel Ahmed, *Why has the government issued a directive on deepfake? Explained*, THE HINDU (Nov. 13, 2023), https://www.thehindu.com/sci-tech/technology/why-has-the-government-issued-a-directive-on-deepfake-explained/article67516589.ece.

[66] Press Information Bureau, *Union Government issues advisory to social media intermediaries to identify misinformation and deepfakes* (Nov. 7, 2023), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1975445.

enable more appropriate and efficient administrative measures to combat this growing threat in the digital realm.

It is also crucial to acknowledge that responsible utilisation of AI can indeed serve as a pivotal factor in differentiating genuine content from deceptive deep fakes within the expansive digital realm. AI technology has the potential to serve as a preventive measure against cybercrimes by facilitating the development of tools for detecting fake videos and images. Harnessing these new technologies for constructive purposes, rather than misuse, promises to substantially reduce cybercrime incidents.

The current situation is the mere tip of the iceberg as we delve into the escalating threat brought about by the growing utilisation of deep fake technology and the safety concerns within virtual reality. It is clear that there is an urgent need for robust legal frameworks to tackle the current and potential challenges that arise from the use of AI and virtual reality. Patiently waiting for the risks associated with this technology to escalate to a critical level is an impractical course of action. Moreover, it is also imperative to emphasise the need for increasing public awareness regarding the creation of technology-facilitated manipulated digital content and safety concerns within virtual realities. As primary stakeholders, tech companies should prioritise public safety with technological advancement.

It is crucial that legislative frameworks evolve in parallel with advancements in technology.[67] Legislators, industry leaders, and academics must come together in a collaborative effort to combat the issue of cybercrime against

[67] MOHD SHAHID HUSAIN ET AL. (EDS.), ADVANCES IN CYBEROLOGY AND THE ADVENT OF THE NEXT-GEN INFORMATION REVOLUTION 220 (IG Global 2023). Chapter X of this book, published by IG Global, provides a detailed discussion on the growing prevalence of deepfakes.

women. Until an effective framework is established to combat this menace, the situation is expected to grow at an alarming rate.

In this contemporary era of advanced technologies and readily accessible softwares, it is imperative to examine notable instances of 'mulli deals' and 'sulli deals.' These instances serve as a stark reminder of the grave dangers women face when it comes to their privacy, dignity, security, and the potential for defamation in the digital realm.

C. Bulli Bai & Sulli Deals: An In-Depth Analysis

Trolls in Pakistan, the United Arab Emirates, Bangladesh, Sri Lanka, Nepal, and India use the derogatory terms ‘sulli and ‘mulli’ to describe Muslim women. Misogynistic anti-muslim slurs like ‘bulli’ and ‘sulli’ are often used to degrade Muslim women.[68] In 2021, an open-source software called ‘sulli deals’ featured photos and personal information of more than 100 Muslim women. These photos were shared on the social media platform Twitter (now known or rebranded as X) as a ‘deal of the day.’[69] In 2022, a similar application known as Bulli Bai was created; it was related to internet-based mock bidding of Muslim women in India. Photographs of esteemed Muslim reporters and activists were uploaded on the Bulli Bai application without their consent, where they were made available for virtual bidding.[70] In both applications, actual auctions were never intended, and both aimed to demean and disrespect Muslim women.

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[68] Bharat Sharma, *Deafening silence: What’ Bulli Bai and Sulli Deals’ Tell Us About Big Tech Giants*, INDIAN TIMES (Jan. 5, 2022), https://www.indiatimes.com/technology/news/bulli-bai-app-558479.html.

[69] Wikipedia.org, *Sulli Deals*, 31st August, 2023, available at https://en.wikipedia.org/wiki/Sulli_Deals.

[70] Wikipedia.org, *Bulli Bai case*, 31st August, 2023, available at https://en.wikipedia.org/wiki/Bulli_Bai_case.

The main objective behind Sulli Deals and Bulli Bai applications was to auction Muslim women in the virtual space. Both applications used publicly accessible images of prominent Muslim women to generate profiles for online mock auctions.[71] A First Information Report (FIR) was filed under Section 509 of the IPC, which pertains to outraging the modesty of women, as well as under Sections 66 and 67 of the IT Act, which are applicable in instances involving the dissemination of obscene material in electronic form.[72] These applications also compromised the data security and privacy rights of a number of Muslim women. They were turned into commodities as a result of these applications.[73] When these women were subjected to improper remarks and behaviour, it constituted a violation of their right to life, including their right to live with dignity and their right to privacy.[74] The bulli bai and sulli deals applications were created via GitHub, a Microsoft Corporation-owned open-source US-based platform; however, both applications were subsequently deleted from GitHub's platform. Microsoft initially refused to reveal the identities of the individuals who created the applications. Even though the application creators were only arrested later, the procedure may have been expedited if GitHub had provided the police with the suspected I.P. data earlier. Furthermore, GitHub is headquartered in the United States, a country that has signed a Mutual Legal Assistance Treaty (MLAT) with India.

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[71] Suchitra Mohanty, *Delhi Court Grants Bail to Bulli Bai, Sulli Deals Creators*, BBC NEWS (Mar. 29, 2022), https://www.bbc.com/news/world-asia-india-60910718.

[72] Mythreyee Ramesh & Himmat Shaligram, *Delhi Police Makes Breakthrough in Bulli Bai: Why Didn't It Act 6 Month Ago?*, THE QUINT (Jan. 6, 2022), https://www.thequint.com/neon/gender/sulli-deals-investigation-by-delhi-police-what-went-wrong.

[73] Priyanshi Jain & Preeti Bohra, *Cyber-Crime and Bulli Bai App***:** *Where Do We Draw The Line*, THE CRIMINAL LAW BLOG (Feb. 17, 2022), https://criminallawstudiesnluj.wordpress.com/2022/02/17/cyber-crime-and-bulli-bai-app/.

[74] INDIAN CONST., art. 21.

It is imperative to adhere to the MLAT process and procedure to acquire or gather data. The current MLAT process is slow and time-consuming, and there is an urgent need to overhaul the whole procedure, considering that cybercriminals operate without territorial boundary restrictions and the potential erasure of digital evidence if appropriate and prompt actions are not taken.[75]

The MLAT procedure encompasses a series of multi-level evaluations and checks that involve central governments, state governments, courts, and enforcement agencies, leading to a complex and time-intensive process.[76] The MLAT procedure was not intended to account for challenges in the contemporary digital environment; rather, it was developed to handle infrequent cross-border scenarios.[77] The current MLAT procedure has been criticised for being sluggish, burdensome, bureaucratic, and lacking in efficacy.[78] The MLAT procedure typically requires a minimum time of around ten months, on average, to obtain electronic evidence.[79] The intricate nature

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[75] Gauri Anand & Hinduja Verma, *Bulli Bai and Cyber Violence: A Symptom of Power Imbalance*, THE LEAFLET (Jan. 05, 2022), https://theleaflet.in/bulli-bai-and-cyber-violence-a-symptom-of-power-imbalance/.

[76] Ministry of Home Affairs, *Guidelines on Mutual Legal Assistance in Criminal Matters* (F.No.25016/52/2019-LC) (2019), https://www.mha.gov.in/sites/default/files/2022-08/ISII_ComprehensiveGuidelines16032020.pdf, at 9; Observer Research Foundation (ORF), Hitting Refresh: Making India-US Data Sharing Work, 20-21 (2017), https://www.orfonline.org/wp-content/uploads/2017/08/MLAT-Book.pdf.

[77] Andrew Keane Woods, *Mutual Legal Assistance in the Digital Age*, in THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW 659 (David Gray & Stephen E. Henderson eds., 2017).

[78] Halefom H. Abraha, *Law enforcement access to electronic evidence across borders: mapping policy approaches and emerging reform initiatives*, 29(2) INT. J. LAW INF. TECHNOL. 122 (2021); Smriti Parsheera & Prateek Jha, *Cross-Border Data Access for Law Enforcement: What Are India's Strategic Options?*, 3 (Carnegie India Working Paper, 2020).

[79] Observer Research Foundation (ORF) & Cross-Border Requests for Data Project of the Georgia Tech Institute for Information Security & Privacy (IISP), *India-Us Data Sharing For Law Enforcement: Blueprint For Reforms* 12 (2019), https://www.orfonline.org/wp-content/uploads/2019/01/MLAT-Book-_v8_web-1.pdf.

of the procedure, in conjunction with the notable increase in MLAT requests and the ambiguity surrounding legislation pertaining to privacy and data protection, has resulted in substantial delays.[80] Certain reformations are proposed with emphasis on the necessity of introducing online submission forms, as the current system of paper or email submissions is sluggish and burdensome.[81] It has also been suggested that one of the factors contributing to the backlog of MLAT requests is the insufficient deployment of technical and financial resources. As a result, it is imperative to allocate additional resources in order to enable timely responses to MLAT requests.[82]

III. Statistical Insights: Uncovering Trends And Patterns

Conducting statistical data analysis is crucial to comprehensively understand a specific issue and identify areas that require prompt and concentrated attention. Conducting an analysis of reports and collating pertinent data to understand patterns in cybercrimes against women provides useful insights. These insights have the potential to impact the development of policies, regulations, and future research related to pressing issues that need immediate attention.

The NCRB offers comprehensive statistical data on cybercrimes against women. According to the NCRB reports, cybercrimes against women are reported under the IT Act and IPC, as well as under special and local laws. It is evident from the data that there is a significant rise in cybercrimes against women. Consequently, an urgent response is imperative to address this issue.

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[80] Jonah Force Hill, *Problematic Alternatives: MLAT Reform for the Digital Age*, HARVARD LAW SCHOOL NATIONAL SECURITY JOURNAL (2015), https://harvardnsj.org/2015/01/28/problematic-alternatives-mlat-reform-for-the-digital-age/
[81] *Id.*
[82] *Id.*

Table 1: Number of Persons (as per gender) Convicted for Cyber Crime Cases (Total all India).

Year	Male	Female
2015-2016[83]	251	3
2016-2017[84]	162	0
2017-2018[85]	600	1
2018-2019[86]	482	3
2019-2020[87]	1369	0

[83] National Crime Records Bureau, Crimes in India 2016, Statistics (table 9A.8) 433 (2017), https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1653886924_Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf.

[84] National Crime Records Bureau, Crimes in India 2017, Statistics Volume-II (table 9A.8) 793 (2019). For accuracy, it was double checked that this report of 2017 was published in 2019, instead of 2018 by NCRB, https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1653885719_Crime%20in%20India%202017%20-%20Volume%202_0_1.pdf; *see generally*, National Crime Records Bureau, Crimes in India 2017, Statistics Volume-I (2019), https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/post/16959893381653885627CrimeinIndia2017-Volume100.pdf.

[85] National Crime Records Bureau, Crimes in India 2018, Statistics Volume-II (table 9A.8) 793 (2019), https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1653734519_Crime%20in%20India%202018%20-%20Volume%202_1_0.pdf.

[86] National Crime Records Bureau, Crimes in India 2019, Statistics Volume-II (table 9A.8) 793 (2020), https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1653730632_CII%202019%20Volume%202.pdf.

[87] National Crime Records Bureau, Crimes in India 2020, Statistics Volume-II (table 9A.8) 801 (2021), https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1653720991_CII%202020%20Volume%202.pdf.

2020-2021[88]	728	8

Source: Annual reports of the NCRB from 2016 to 2020.

This data highlights a notable gender disparity in the realm of cybercrime, wherein the majority of convicted perpetrators are male, while the number of convictions of females for cybercrime is negligible. This highlights the necessity of directing particular attention towards comprehending and mitigating the activities of male individuals involved in cybercrime.

The NCRB reports highlight five major categories of cybercrimes against women. It's important to note that, in addition to these crimes, there are also other types of cybercrime against women, which are mentioned under the 'other cyber crimes' category.[89]

Table 2: Cybercrimes Against Women From 2017 to 2021 (Particularly Focusing Upon the Specific Major Category as Specified by the NCRB Report)

Year	Cyber Blackmail Threatening	Cyber Pornography	Cyber Stalking/ Cyber	Defamation/ Morphing	Fake Profile

[88] National Crime Records Bureau, Crimes in India 2021, Statistics Volume-II (table 9A.8) 827 (2022), https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/post/1679310741CII2021Volume2.pdf.

[89] This article primarily focuses on the analysis of cybercrimes specifically addressed in the NCRB reports, which fall under the category 'Cybercrimes against women'. The inclusion of Table 9A.10 in Chapter 9A, in 2017 NCRB report marks the first instance of NCRB reports incorporating statistics on cybercrimes against women.

			Bullying		
			of Women		
2016-2017[90]	132	271	555	50	147
2017-2018[91]	113	862	738	62	207
2018-2019[92]	113	1158	791	61	289
2019-2020[93]	74	1655	887	251	354
2020-2021[94]	200	1896	1172	276	225

Source: NCRB report from 2017 to 2021.

It is crucial to highlight that, as per the 2017 NCRB data, the total number of cybercrimes perpetrated against women amounted to 4,242, while in the year

[90] NCRB, *supra* note 84 at 796. It is essential to note that in the Crimes in India 2016 report, there was no mention of cybercrimes against women.
[91] NCRB, *supra* note 85 at 796.
[92] NCRB, *supra* note 86 at 796.
[93] NCRB, *supra* note 87 at 804.
[94] NCRB, *supra* note 88 at 831.

2021, there has been a notable escalation in this figure, reaching a total of 10,703 instances. The significant increase observed over time highlights the significance of tackling cybercrimes against women on a priority basis.[95]

The NCRB reports reveal a significant increase in cybercrimes against women, specifically cybercrimes such as pornography, cyberstalking, cyberbullying, defamation and morphing. The statistics highlight the need for comprehensive measures and policies to protect women from cybercrimes. The reduction in fraudulent profile cases suggests some control over issues related to identity theft and impersonation in the digital sphere; this reduction in such instances can also be attributed to a factor, as mentioned earlier, that social media platforms do provide prompt support in the form of reporting mechanisms and technical support. Furthermore, there has been an insignificant rise in instances of cyber-blackmailing or threatening cases, as these cybercrimes appear to be relatively stable. This underscores the need for continued vigilance and measures to address these evolving challenges in the realm of online safety.

Analysing the pending rate of cybercrime cases within courtrooms is also of utmost importance to comprehend the workings of the legal system. According to the NCRB crimes in India annual reports, it was noted that there were no gender-based differences in the pendency of cybercrime cases in courts. The NCRB data analysis provides insights into the effectiveness of the judicial system and its ability to handle cybercrime cases. In the year 2015-2016, the court's pendency rate for cybercrime cases was 92.3 percent.[96] This rate increased to 94.6 percent in 2016-2017, slightly decreased to 93.3 percent

[95] NCRB, *supra* note 84 at 796; NCRB, *supra* note 88 at 831.
[96] NCRB, *supra* note 83 at 429.

in 2017-2018, and then rose again to 94.6 percent in 2018-2019.[97] However, there was a decrease in the pendency rate in the years 2019-2020, down to 89.1 percent, and a further decline to 87 percent in 2020-2021.[98] The significant prevalence of pending cybercrime cases can be attributed to the persistent challenges related to collecting and presenting evidence in the courtroom. The other potential reasons that may contribute to the high pendency rate are the delays in the detection and reporting of cybercrimes, inadequate handling of evidence by both victims and law enforcement agencies, and a lack of sufficient understanding regarding the technical procedures in regard to digital evidence.

It is crucial to acknowledge that the incidence of cybercrime against women had a significant surge during the phase of the COVID-19 lockdown.[99] On March 24, 2020, the government of India issued an order to lock down the whole country.[100] During this period of lockdown, the National Women's Commission (NCW) received a large number of complaints from all over India.

Table 3: Complaints of Cybercrimes Against Women Received by NCW from 2013 to 2021.

Year	Number of Complaints

[97] NCRB, *supra* note 84 at 785; NCRB, *supra* note 85 at 785; NCRB, *supra* note 86 at 789.
[98] NCRB, *supra* note 87 at 797; NCRB, *supra* note 88 at 822.
[99] Subrata Sankar Bagchi & Satyaki Paul, *Violence During Lockdowns in India*, 7 NAT. HUM. BEHAV. 306 (2023).
[100] Wikipedia.org, *Covid-19 lockdown in India*, 31st August, 2023, available at https://en.wikipedia.org/wiki/COVID-19_lockdown_in_India.

2015-2016[101]	252
2016-2017[102]	325
2017-2018[103]	339
2018-2019[104]	402
2019-2020[105]	458
2020-2021[106]	797

Source: *National Commission for Women Annual reports*

In 2020-2021, the NCW received almost twice as many complaints about cybercrime against women as it did in the previous year. The data also reveals that a large number of complaints regarding cybercrime against women skyrocketed during the pandemic, whereas the rise in complaints regarding cybercrime against women had previously been gradual.

The advent of COVID-19 brought forth an era characterised by a significant dependence on digital technology, as individuals worldwide were compelled

[101] National Commission for Women, *Annual Report 2015-2016*, 20 (2016), http://ncw.nic.in/sites/default/files/Annual_Report_2015-16_English_Full.pdf.
[102] National Commission for Women, *Annual Report 2016-2017*, 9 (2017), http://ncw.nic.in/sites/default/files/ANNUALREPORT2017_18.pdf.
[103] National Commission for Women, *Annual Report 2017-2018*, 9 (2018), http://ncw.nic.in/sites/default/files/ANNUALREPORT2017_18.pdf.
[104] National Commission for Women, *Annual Report 2018-2019*, 7 (2019), http://ncw.nic.in/sites/default/files/FINAL%20NCW%20ENGLISH%20ANNUAL%20REPORT%202018-19_0.pdf.
[105] National Commission for Women, *Annual Report 2019-2020*, 14 (2020), http://ncw.nic.in/sites/default/files/Annual_Report_2019_20_English_Full.pdf.
[106] National Commission for Women, Annual Report 2020-21, 11 (2021), http://ncwapps.nic.in/pdfReports/Annual_Report_2020_21_English_Full.pdf.

to use the internet for purposes such as employment, learning, and social engagement due to widespread lockdown measures. The heightened reliance on digital technology has exposed individuals, particularly women, to risks.

It is essential to acknowledge that enforcing constraints or imposing restrictions on the utilisation of digital technology by women is not a viable solution. Instead, it is essential to prioritise the implementation of comprehensive safety measures, precise regulations, and explicit recommendations in order to safeguard women in the online realm. It is vital to ensure the broader availability of secure and cost-effective digital technology while concurrently enhancing safety.[107] It is critical to ensure that women have easy access to and can afford digital technology and internet services in order to prevent cybercrime targeted towards them. The accessibility and affordability of technology and internet services provide opportunities for women to gain essential skills and information, assisting them in identifying and addressing online dangers and ultimately improving their safety in digital spaces.

The statistical data analysis derived from NCRB and NCW reveals a significant surge in cybercrimes against women. This surge is particularly evident in categories such as cyber pornography, harassment, blackmail, and stalking, which necessitate focused attention and solutions. Furthermore, a high pendency rate of cybercrimes in courtrooms is a matter of concern, thereby underscoring the imperative for an advanced and adequate legal and

[107] UN Women, *Online and ICT Facilitated Violence Against Women and Girls During COVID-19* (2020), https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Brief-Online-and-ICT-facilitated-violence-against-women-and-girls-during-COVID-19-en.pdf.

technical infrastructure to effectively tackle and reduce the high pendency rate of cybercrimes.

Considering the concerning trends evident in the statistical data, which reveal a substantial increase in cybercrimes against women, predominantly perpetrated by males, it underscores the need to prioritise measures to combat this escalating threat. These statistical trends underscore the crucial requirement for implementing comprehensive policies and legal changes to effectively safeguard women in the digital realm.

IV. Recommendations & Conclusion: Safeguarding Women

In order to tackle the escalating issue of cybercrimes against women effectively, it is crucial to emphasise the significance of disseminating information and raising awareness about the perils of the digital realm. A crucial strategy also entails prohibiting and regulating the disclosure of personal information on social media platforms and establishing protective measures. Moreover, it is crucial that women who become victims of cybercrimes do not remain silent due to societal expectations and prejudices. It is crucial that the accused be brought to justice for their transgressions; otherwise, leniency towards cybercriminals would perpetuate the notion that women are vulnerable targets, which in turn would encourage further cybercrimes against women. To facilitate the prompt and appropriate administration of justice in cybercrime cases, it is essential to establish a specialised training programme and ensure timely updates on technical knowledge that are critical for relevant stakeholders, including judges, advocates, and others involved in such matters.

One of the most concerning cybercrimes against women is cyber pornography, which is on the rise. Despite being a non-bailable offence,[108] cases of cyber pornography continue to increase mainly due to the commercial gains associated with this crime. To tackle this issue extensively, banning pornographic websites based on public morality is insufficient without also prohibiting the use of 'Virtual Private Networks' (VPNs). While only a few provisions of the IT Act, such as 67A, 67B, and 66F, are non-bailable, other offences under the Act are bailable. Enhancing the severity of penalties is crucial to deter cybercriminals and curb the rising incidence of cybercrimes.

The introduction of the IT Act Amendment Bill of 2022 signifies a significant step forward in addressing the increasing instances of cybercrimes against women and the urgent necessity of curbing such offences against women in the digital realm. The addition of a non-bailable provision pertaining to cybercrime against women is a praiseworthy endeavour that warrants commendation. Given the complex and ever-evolving landscape of digital crimes against women, it is vital that our legislative framework is aligned with technological progress. The passage and enactment of the 2022 Bill is of utmost importance to enhance women's security and protection within the digital realm.

In light of the existing gaps in India's legal framework concerning cybercrimes against women, it is essential to enact provisions that precisely delineate these crimes, offering explicit guidance to law enforcement and judicial authorities

[108] *See generally*, The IT Act, §67A, 67B, 77B. It is provided under §77B that "Offences with three years' imprisonment to be bailable.–Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offence punishable with imprisonment of three years and above shall be cognizable and the offence punishable with imprisonment of three years shall be bailable."

to accurately interpret and apply the law. It is also essential to enact measures that guarantee the highest level of confidentiality for the identities of victims to provide confidence for the prompt reporting of cybercrimes. Additionally, the establishment of specialised cybercrime units equipped with the requisite training and skills to combat cybercrimes against women will ensure expeditious and effective dispensation of justice.

The rising incidence of cybercrimes against women is an alarming issue that requires immediate attention, as it poses a significant threat to women's safety, security, and well-being. The occurrence of gender-based violence in the digital domain is just as harmful as its real-world counterpart. In both the cyber and physical realms, violence against women primarily stems from social norms, gender discrimination, and the perception of women as weak and vulnerable targets. According to the statistical data, it is evident that male individuals commit a substantial majority of cybercrimes, whereas females committing cybercrimes were a rare phenomenon. Henceforth, it is of utmost importance to implement measures that focus on supervising the actions and behaviour of male individuals engaging in online activities. One such effective measure to effectively address this issue may involve implementing targeted educational programmes. Conducting workshops, seminars, and social media campaigns to educate and inform males about the ethical and legal consequences of their online activities, highlighting the impact of cybercrimes. This initiative aims to encourage responsible online behaviour.

The digital realm has afforded criminals the opportunity to engage in unlawful activities behind the shadows of technological intricacies, often at a considerable distance from their victims. This situation greatly complicates the task of monitoring their actions and gathering evidence. Moreover, the extensive use of digital platforms in recent years has resulted in a significant

surge in cybercrimes, particularly against women. To effectively address this issue, law enforcement officials must possess adequate knowledge and skills, such as proficiency in digital forensics, cyber laws, and investigative techniques. Sensitivity towards victims, continuous training to adapt to evolving threats, and fostering inter-agency collaboration are equally critical. Furthermore, maintaining ethical conduct, adhering to legal requirements, and possessing expertise in presenting digital evidence are essential for ensuring a prompt and appropriate administration of justice.

The mitigation of the increasing instances of cybercrime against women also necessitates implementing several strategies, such as awareness campaigns, efficient reporting mechanisms, preventive measures, and the imposition of severe sanctions to deter cybercriminals. Significant updates and modifications within the IT Act are necessary to ensure its alignment with technical advancements, the escalating prevalence of cybercrimes, and the increasing dependency on technology. Implementing preventive measures to prevent cybercrimes against women involves establishing robust cybersecurity protocols, educating individuals on online safety, and promoting digital literacy. Simultaneously, the enforcement of severe sanctions entails imposing stringent penalties and legal consequences on individuals involved in cybercrimes against women. Rigorous enforcement of existing cyber laws, swift legal actions, and severe punitive measures can convey an unequivocal message that such actions are unacceptable and effectively deter potential offenders from committing cybercrime against women.

Presumed Culprits or Protected Traders? Decoding SEBI's 2023 Draft Regulations on Unexplained Suspicious Trading Activities: A Dive into Efficacy and Challenges

Meghana Killampalli[*] & Soumya Tiwari[**]

Abstract

With the advent of modern technology and the proliferation of trading activities with unlawful intent, market manipulators have become the focal point of attention for the SEBI. In response, SEBI has introduced Prohibition of Unexplained Suspicious Trading Activities in the Securities Market ('PUSTA') Regulations, 2023 to regulate dubious and malevolent trading practices that lead to abnormal gains within a short period or enable the avoidance of substantial losses through deceitful means. Notwithstanding the vigilant surveillance detecting instances of insider trading and front-running, the use of ingenious, evanescent, and encrypted methods of vanishing communication, untraceable funding arrangements, presents formidable challenges in establishing conclusive evidence. As a result, actions against such activities have often been hindered due to the inability to establish connections. To eradicate such activities, SEBI has proposed regulations that shift the burden of proof onto the accused. Thus, if an accused is suspected of engaging in unusual trading activity based on non-public information and fails to provide an effective rebuttal, they will be deemed liable under the proposed regulations. Concerns arise regarding whether market participants who legitimately utilize innovative technologies will also fall under the purview of regulatory suspicion. The author will analyze the implications of Consultation paper while evaluating its effectiveness and addressing the challenges ahead. The draft regulations are a miniscule and maybe a very dim

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light to the end of the tunnel, and consequently, the author advocates for SEBI to reassess the regulations, aiming to avert unwarranted repercussions for bona fide traders and investors.

I. Introduction

In the realm of financial regulations, the dynamics between regulatory bodies, market participants, and evidentiary burden allocation play a pivotal role in ensuring the integrity and transparency of financial markets. A recent development that has sparked significant attention and discourse in this context is the introduction of the SEBI (Prohibition of Unfair Trade Practices and Fraudulent Activities) Regulations, 2023 commonly known as the SEBI PUSTA Regulations. These draft regulations, with their multifaceted implications, have raised intriguing discussions regarding the allocation of evidentiary burden, particularly in cases involving unfair trade practices and fraudulent activities within the securities market. As we delve into the intricacies of the SEBI PUSTA Regulations, it becomes evident that they introduce a paradigm shift in the landscape of financial regulation, prompting a closer examination of the indeterminate nature of placement of evidentiary burden and its potential consequences for all stakeholders involved.

In response to the rising instances of contravention of securities laws, including manipulative and fraudulent trade practices, SEBI took a proactive step by issuing a consultation paper on May 18, 2023, inviting public feedback on the draft PUSTA Regulations.[1] The main goal presumably sought to be

[1] *See* SEBI, *Consultation paper on draft SEBI (Prohibition of Unexplained Suspicious Trading Activities in the Securities Market) Regulations, 2023, Securities and Exchange Board of India* (May. 18, 2023), https://www.sebi.gov.in/reports-and-statistics/reports/may-2023/consultation-paper-on-draft-sebi-prohibition-of-unexplained-suspicious-trading-activities-in-the-securities-market-regulations-2023_71385.html [hereinafter 'SEBI PUSTA Regulations, 2023'].

achieved by propounding these regulations is the prevention of unexplained suspicious trading patterns that may emerge when material non-public information ('MNPI') is present in the securities market. These regulations seek to enhance market integrity and investor confidence by effectively dealing with potential cases of illicit trading practices that exploit undisclosed and sensitive information.

SEBI aims to strengthen the regulatory framework to prevent and detect suspicious trading activities that can lead to unfair advantages, market manipulation, and potential financial losses for innocent investors.

The essay provides comments on the draft guidelines, addressing the burden of proof that market participants bear to demonstrate their innocence regarding presumed malicious activities. The author(s) have navigated through the intricacies of the draft regulations, along with the overlapping procedures in the SEBI Act, 1992 ('SEBI Act'). The author(s) discuss the impact that the proposed regulations might have over the various aspects related to trading activities, and thereby conclude by recommending a revisitation to the draft regulations by SEBI. The essay outlines the difficulties that the draft regulations may pose in the future, and why there needs to be a reconsideration of the said guidelines.

II. Key Provisions and challenges

The main purpose of the regulations is to levy charges against market participants using a specific level of rebuttable presumption, which can be disproven by providing a good explanation. This represents a notable deviation from the existing legal principles concerning the criteria for presenting evidence in cases of insider trading and unfair trade practices.

The author herein discusses elaborately the provisions laid down in the regulations, and delves into the intricacies of the said regulations. The regulations are a mix and match of various key principles on which the author has focused, varying from the technical terminology of the provisions to the regulation of fin-influencers and the standard of proof set in the draft regulations. The regulations provide a roadmap of the action plan of SEBI to deal with the cases of fraudulent practices in the market area, and how it seeks to further establish the investigation and conviction. Therefore, the key provisions of the regulations become important in order to study and understand the SEBI's intent of bringing in these regulations.

A. Technical Terminology

As per the consultation paper, a novel regulatory framework is proposed to be established wherein individuals or connected groups engaging in an unexplained suspicious trading pattern, characterized by repeated abnormal profitable transactions involving a security or a group of securities, in proximity to the possession of MNPI, shall be presumed to be in violation of the securities laws. However, they may avoid liability if they effectively rebut this presumption.

In context to avoid such trading activities and bring a regulatory framework which guides the securities and their exchange within the financial system, the SEBI issued the aforementioned guidelines, wherein a lot of technical terms have been used to describe the Suspicious Trading Activity (STA), which is explained in the consultation paper as follows:

"any trading activity of a person or a group of connected persons found to be exhibiting Unusual Trading Pattern in a security or a group of securities

where such Unusual Trading Pattern coincides with Material Non-Public Information in relation to a security or a group of securities."[2]

The definition provided faces a challenge due to its broad scope, making it susceptible to a high level of subjectivity. The formula provided in the consultation paper includes new defined terms. The scope and ambit of those terms are also specified.

"STA = UTP + Existence of MNPI"[3]

UTP herein stands for the Unusual Trading Pattern (UTP), "*which involves repetitive trading activity leading to a substantial change in risk taken in one or more securities over a short period. It results in abnormal profits or the avoidance of abnormal losses.*"[4] Whereas, Material Non - Public Information (MNPI) is characterized as confidential data ,public disclosure of which could reasonably affect a firm's security prices, akin to UPSI[5] in insider trading regulations. It also includes information about the potential price impact upon execution of an imminent order and the forthcoming security recommendation from an influencer, who is an individual deemed to have the capacity to influence investment decisions in securities for a reasonably large number of persons through their statements or representations.[6]

However, the regulations lack specific criteria for objectively quantifying what qualifies as a "substantial change in risk," "short period of time," and "abnormal profits or averted abnormal losses." The absence of clear metrics

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[2] *Id.* at Reg. 2(1)(i).
[3] *Id.* at ¶4.2.4.
[4] *Id.* at Reg. 2(1)(j).
[5] SEBI (Prohibition of Insider Trading) Regulations, 2015, Reg. 3 [hereinafter 'PIT Regulations, 2015'].
[6] SEBI PUSTA Regulations, 2023, *supra* note 1, at Reg. 2(1)(f).

makes it challenging to precisely determine when trading patterns fall under the category of 'Unusual Trading Pattern.' More clarity is required on this end. In addition, the phrase "repetitive" applies to the practice of buying and selling stocks to create artificial market inflation. However, the word "short period of time" can put limits to its application as the events that happen over a long period of time cannot be determined.

A presumption of violation must be raised if an STA is established, and SEBI will then begin legal action against the individual or group of related individuals. The burden of proof will shift to these individuals, and they will be held accountable until they sufficiently refute the presumption.

Unexplained Suspicious Trading Activity (USTA) in the securities market has been suggested to be prohibited by the capital markets authority.

"*USTA = STA + (Absence of effective rebuttal / explanation)*."[7]

The comprehension and use of these terms are of utmost importance in interpreting and executing the regulatory structure that is put out in the draft consultation paper by SEBI. They serve the purpose of detecting and resolving trading activity that gives rise to apprehensions and possibly breaches securities legislation. However, it may be necessary to provide more clarification and establish precise criteria to ensure consistent and equitable use of these concepts in practical situations.

[7] *Id.* at ¶ 4.2.6.

B. Regulating Finfluencers

Finfluencers refer to individuals who possess public social media platforms and provide guidance while sharing their personal encounters regarding money matters and stock investments. Through their videos, they delve into various topics such as budgeting, investment strategies, real estate purchases, cryptocurrency recommendations, helping their audience stay updated with financial trends.

The SEBI consultation paper also includes influencers who are in a position to impact investment decisions through their statements to a reasonably large number.[8] For quite some time, there has been a stark increase in the number of influencers that have emerged on social media platforms, who claim to be financial advisors, and knowledgeable market influencers, and advise people on investment strategies according to the contemporary situations in the market. Recently, it has been noticed that there have been several people who have taken up this advice, and have benefited substantially from the market, unlike in the case of cryptocurrency, where huge losses have been suffered after dramatic and unprecedented market crashes.[9]

There has to be a definite set of guidelines for 'Finfluencers' that enables SEBI to encroach upon vicious market manipulators, which does not narrow down on the innocent traders or the short-term investors, who come under the wrath of these guidelines, putting them under the liability of proving their innocence.

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[8] *Id.* at Reg. 2(1)(e).

[9] Billy Bambrough, *Elon Musk Suddenly Hit With Huge $258 Billion Crypto Pyramid Scheme Lawsuit Over Dogecoin Amid A Devastating Bitcoin And Ethereum Price Crash*, FORBES (Jun. 16, 2022,07:45PM), https://www.forbes.com/sites/billybambrough/2022/06/16/elon-musk-suddenly-hit-with-huge-258-billion-dogecoin-pyramid-scheme-lawsuit-amid-a-devastating-bitcoin-and-ethereum-price-crash/?sh=1798f50e772d.

While the reports claim that there are probable chances of SEBI bringing in a definite set of guidelines for such influencers[10], the consultation paper and draft regulations concerned herein, have limited the scope of any practical application if enacted in the verbatim manner.

C. Standard of Proof

SEBI operates on the principle of 'preponderance of probabilities',[11] wherein they take action against individuals who are suspected of breaking the law based on the likelihood of the violation occurring. The degree of 'preponderance of probabilities' must be much higher.[12] The ruling in the Balram case seeks to elevate the standard of proof to prevent situations where regulators prevail in court relying on flimsy coincidental evidence rather than clear-cut corroboration. This is notwithstanding the acceptance of circumstantial evidence in the absence of direct proof.[13]

During discussions concerning 'insider trading' activity governed by SEBI (Prohibition of Insider Trading) Regulations, 2015 ('SEBI PIT Regulations'), the case of *SEBI v. Abhijit Rajan*[14] becomes relevant. The brief facts of the case are as follows- Abhijit Rajan, the chairman and managing director of Gammon Infrastructure Projects Limited (GIPL), and another business called Simplex Infrastructure Limited (SIL) were granted individual contracts by the National Highways Authority of India (NHAI). Nevertheless, in 2013, the

[10] *Sebi finalising draft discussion paper over guidelines for 'finfluencers'*, THE ECONOMIC TIMES (Jun. 29, 2023, 03:41 PM), https://economictimes.indiatimes.com/markets/stocks/news/sebi-finalising-draft-discussion-paper-over-guidelines-for-finfluencers/articleshow/101364631.cms?from=mdr
[11] SEBI v. Kishore R. Ajmera, (2016) 6 SCC 368.
[12] Balram Garg v. SEBI, (2022) 9 SCC 425.
[13] SEBI v. Rakhi Trading, (2018) 13 SCC 753.
[14] SEBI v. Abhijit Rajan, 2022 SCC OnLine SC 1241.

GIPL Board enacted a resolution granting the authority to terminate contracts. The information was transmitted to the stock exchange after a delay of 21 days. During that time, Mr. Rajan had already divested his shares, which became the focus of an investigation into insider trading by SEBI. The securities regulator ultimately issued an order finding Mr. Rajan guilty of violating insider trading restrictions. The Securities Appellate Tribunal (SAT) reversed SEBI's ruling on appeal, prompting SEBI to file the current case with the Supreme Court.

The Supreme Court had to evaluate two main problems. The initial question was whether the information about the GIPL board's decision to cancel the contracts constituted "price-sensitive information". The second concern was whether Mr. Rajan's selling of equity shares in GIPL, given his unique and compelling circumstances, would be considered "insider trading" and result in legal repercussions. The apex court emphasized the crucial role of motive as an essential element in identifying suspicious trading activities. The court stated that "*an insider's motive for financial gain is a prerequisite for successfully accusing someone of insider trading*."[15]

As a result of this landmark decision, SEBI may take action against insider trading cases currently falling under its regulatory framework, considering the implications of the Supreme Court's ruling. However, this ruling has raised several questions regarding the draft regulations. These inquiries range from how SEBI plans to determine the motive and establish the guilt of individuals involved in 'Suspicious Trading Activities' ('STA'), including insider trading, to the aspect of the accused having the burden to prove their innocence under

[15] *Id.*

the draft regulations, which diverges significantly from the principles of the SEBI Act, 1992 ('SEBI Act') and the Indian penal system's jurisprudence.

III. The Presumption of Guilt in Suspicious Trading Activity

Under the regulations, The presumption of guilt can be refuted. A cursory examination of the counter arguments presented in the consultation paper reveals the challenging task that the alleged offender faces. One argument is that the trades are purportedly executed based on intangible or widely available information, therefore excluding them from being considered material non- public information (MNPI). The proposed methodology aims to provide education to the alleged wrongdoer regarding SEBI's definition of Material Non-Public Information (MNPI), without assessing whether they possessed a justifiable cause to be aware of or associate with such information.

An accused individual may encounter challenges in legitimately asserting that such material is insignificant, particularly considering that SEBI would have assessed it before issuing the show cause notice. SEBI is implementing stringent regulations that have the potential to ensnare lawful traders due to the subjective nature of presumptive deeming clauses. Accused individuals are required to present comprehensive documentary evidence to substantiate their assertions. Modifications in trading patterns could involve uncomplicated choices to embrace greater risk in pursuit of increased earnings. Keeping data for every option can be challenging and frequently unattainable.

A. Reverse onus jurisprudence

It is the duty of the stock exchange recognized by the board, and every intermediary registered with the board to inform the board of any Suspicious Trading Activity ('STA'). Once SEBI establishes STA, the proceedings will be initiated against the person / group of connected persons involved in such

STA calling upon them to explain the STA. As a result, the accused is subjected to a rebuttable presumption that must be disproven. According to general legal principles, the prosecution has the duty of proving guilt beyond a reasonable doubt; if there is any question, that the accused person in the said case should be found not guilty.[16] The accused is always given the 'presumption of innocence'.[17] However in certain cases, like narcotics, corruption and food adulteration which threaten the welfare of the community special efforts for their enforcement is necessary.[18] Hence law imposes a reverse burden on the accused, requiring them to prove their innocence. This shifting of burden is called reverse burden. The phrase "*praesumptio luris tantunn*" which means "*assumption of a fact unless someone comes forward to contest it and prove otherwise*" underline the whole concept.

The concept of persuasive reverse burden places the responsibility on the accused to demonstrate their innocence based on the preponderance of probabilities.[19] In *M/s. Semma Silk and Sarees v. Directorate of Enforcement*, the court observed that "*When the burden of proof shifts, the standards must be clearer.*[20] *Presumption is raised only when certain foundational facts are established by the prosecution.*"[21] Hence, In situations involving a reversal of

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[16] Mancini v. DPP, [1941] 3 All E.R 272.

[17] Juhi Gupta, *Interpretation of Reverse Onus Clauses*, 5 NUJS L. REV. 49, 50 (2012); ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 72 (2009).

[18] Law Commission Of India, *The Trial and Punishment of Social and Economic Offences* (Law Commission Report No.47, 1972), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080816-1.pdf at 2,4.

[19] David Hamer, *The Presumption of Innocence and Reverse Burdens: A Balancing Act*, 66, CAMBRIDGE LJ, 142, 143 (2007).

[20] Pooja Garg, *Shifting Trends in Burden of Proof and Standard of Proof: An Analysis of the Malimath Committee Report*, 17 STUDENT BAR REV. 38, 38–58 (2005).

[21] M/s Seema Silk and Sarees v. Directorate of Enforcement, SLP (Criminal) No. 6812 of 2007 (India).

the evidentiary burden, the establishment of clearly delineated criteria becomes imperative to facilitate the identification of circumstances warranting the transfer of the burden of proof onto the accused party.

In order to bring legal action against the accused, the SEBI PUTSA Regulations attempt to create a presumption of guilt based only on suspicion, without the establishment of material facts or the presentation of convincing evidence on record to justify such a presumption. To simplify the argument, if the defendant cannot establish their innocence, they cannot be found guilty until the prosecution can prove they were the ones who did the crime beyond a reasonable doubt. But, if the defendant bears the burden of proof and is unable to establish their innocence, they will be found guilty. Therefore, it is obvious that a simple accusation under a statute would not be sufficient for the presumption to apply unless the fundamental facts are not proven by the prosecution.[22]

In the case of *Mr. Kunal Ashok Kashyap & Anr. v. SEBI,*[23] SEBI demonstrated a position in which any person even tangentially associated with the alleged wrongdoer could be presumed to have access to UPSI. In the above case, this assumption was made based solely on his high-ranking position within the organization in question and his function as a transaction advisor, despite his lack of actual access privileges to UPSI. The presumption of culpability for insider trading was based on the trading activity conducted during the UPSI period and the offender's relationship with the company's key managerial personnel. Interestingly, in reaching its conclusion, SEBI did not consider

[22] *Id.*
[23] Kunal Ashok Kashyap, In re, 2021 SCC OnLine SEBI 175 (India); Biocon Ltd., In re, 2021 SCC OnLine SEBI 1082 (India).

factors such as the direction of trade or association with the Key managerial personnel of Biocon. As a consequence, SEBI heavily relied on presumptions without taking the overall circumstances and evidence surrounding the case into account. This strategy seems to contradict SEBI's mandate as stated in the preamble of the SEBI Act.

The standard of evidence to rebut the presumption of STA is difficult for the accused. Under Regulation 5(2),[24] any person or group of connected persons may rebut the accusation by presenting detailed documentary evidence to substantiate any claim against them. Providing such documentary evidence to accurately demonstrate the circumstances of the occurrence of the STA can be difficult, as the burden of proof is on them.

In certain instances, market participants may encounter challenges in providing a valid rebuttal while adhering to stringent requirements and regulations, including the demand for "documentary evidence." A scenario could arise when a trader or investor engages in trading based on hearsay market rumours rather than participating in an elaborate manipulative scheme. In such cases, the ability to produce concrete documentation as proof may be impractical.

In the absence of documented evidence to substantiate their defense, individuals facing suspicion of misconduct may face severe enforcement actions. These measures can include freezing their bank and demat accounts, levying fines, and prohibiting or barring them from participating in certain securities market operations. In such cases, the burden of proof becomes particularly onerous for the accused, as they must demonstrate the absence of

[24] SEBI PUSTA Regulations 2023, *supra* note 1.

certain information or actions, which can be virtually impossible to achieve. The accused trader may face severe consequences, such as penalties, fines, or even criminal charges, despite their efforts to provide documents supporting their innocence.

B. Inaccurate Reliance on Legal Provisions

The consultation paper relied on a few legal provisions under both domestic and international law which allows certain level of rebuttable presumptions to bring changes in the society, at large. It quoted Section 68 of the Income Tax Act, 1961 ('IT Act'), which says that if any sum is found credited in the books, and the taxpayer fails to provide a satisfactory explanation regarding the nature and source of that credit, the amount may be treated as taxable income for that particular previous year. Additionally, the Assessing Officer must find the explanation offered by both the company and the individual to be satisfactory to avoid the credit being treated as taxable income.[25] Also quoted section 11 of the Securities Act, 1933 in the United States, which establishes liability for parties involved in securities offerings if the registration statement contains material false statement or omits a material fact. The section states that "*Investors with the ability to hold issuers, officers, underwriters, and others liable for damages caused by untrue statements of fact or material omissions of fact within registration statements at the time they become effective*"[26]. Due diligence defense is available to defendants under Section 11, but they must show that they took reasonable steps to investigate the claims made in the registration statement and that there were no important facts

[25] The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961, §68.
[26] The Securities Act, 1933, Pub. L. 73-22, §11 (United States).

omitted from their findings.[27]However, reliance on the provisions in the consultation paper is incorrect as to the nature of the activity being regulated in this section. Here, the section was bought in to comply with the disclosure regime of registration of securities for sale to the public.[28]

The IT Act includes a provision for a "rebuttable presumption," which means that there is a presumption or assumption made by the law, but it can be challenged or disproved if the concerned party presents evidence to the contrary. This provision is explicitly mentioned within the IT Act itself. In contrast to the IT Act, the SEBI Act does not have any provision for "rebuttable presumption." This means that there is no such assumption made in the SEBI Act, and any claims or accusations would require the burden of proof to be solely on the accusing party without any presumption of guilt. It also raises the possibility of the draft regulations being challenged on constitutional grounds due to their reliance on incorrect or irrelevant provisions.

One of the most controversial provisions of the Prevention of Money Laundering Act, 2002, Section 24 was challenged as unconstitutional before many High Courts[29] as it puts the burden on the accused to provide evidence to refute the presumption that the property discovered in their possession does

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[27] WK Sjostrom, *The Due Diligence Defense Under Section 11 of the Securities Act of 1933*, 44 BRANDEIS LAW JOURNAL 549 (2006).

[28] Allan Horwich, *Section 11 of the Securities Act: The Cornerstone Needs Some Tuckpointing*, 58 THE BUSINESS LAWYER 1, 1-43 (2002).

[29] Madhav Khurana & Vignaraj Pasayat, *Reverse Burden of Proof under Section 24 of the Prevention of Money Laundering Act, 2002– Obligation of the prosecution and the accused and at what stage can this provision be invoked*, SCCONLINE (June 4, 2020), https://www.scconline.com/blog/post/2020/06/04/reverse-burden-of-proof-under-section-24-of-the-prevention-of-money-laundering-act-2002-obligation-of-the-prosecution-and-the-accused-and-at-what-stage-can-this-provision-be-invoked/.

not qualify as "proceeds of crime" and is devoid of any unlawful provenance or associations.[30] Late Mr. Ram Jethmalani also argued that the assumption that the proceeds of crime are undiluted property of the accused is seen to be illogical, irrational, and legally illegitimate due to its lack of factual basis.[31]

The provision prior to the Amendment is as follows-

"*24. Burden of Proof: When a person is accused of having committed the offence under Section 3, the burden of proving that proceeds of crime are untainted property shall be on the accused.*"

The provision underwent subsequent modifications to mirror the underlying principle, which asserts that-

"*a person accused of committing a crime is deemed innocent unless proven guilty*." [32]

This amendment acknowledged that the burden of proof should not be unfairly placed on the accused. Therefore, relying on this provision to establish a reverse onus is not justified, as it contradicts the presumption of innocence at the core of the legal system.

In the context of regulatory enforcement, it is imperative that the onus of establishing compliance with regulations not be singularly placed on market participants. Instead, SEBI should direct its efforts towards augmenting its

[30] *Id.*
[31] Pragun Goyal, *Reverse Burden of Proof and its Implications on Presumption of Innocence*, THE CRIMINAL LAW BLOG (Oct. 9, 2022), https://criminallawstudiesnluj.wordpress.com/2022/10/09/reverse-burden-of-proof-and-its-implications-on-presumption-of-innocence/.
[32] *Id.*

investigative methodologies and embracing sophisticated technological innovations to bolster its enforcement capabilities.

The use of legislative provisions that establish rebuttable presumptions for regulatory objectives, such as those found in the Income Tax Act 1961 and the Securities Act, 1933, as relied upon in the consultation paper, may not be appropriate for effectively regulating suspicious trading activity under the SEBI Act. The lack of these assumptions in the SEBI Act gives rise to questions about the enforceability of these provisions and the possibility of constitutional objections. In order to achieve an equitable equilibrium between regulatory aims and the rights of market players, it is essential for SEBI to give precedence to enhancing its investigation methodology and integrating technology improvements into its enforcement endeavors.

IV. Lack of Clarity in Provisions

This section delves into punitive measures under the SEBI Act of 1992, covering insider trading, fraudulent practices, and the lack of penalties for unusual trading behavior. It highlights the uncertainty around consequences like imprisonment under Section 24, discussing SEBI's burden of proof and comparing it to PUSTA regulations. It also addresses SEBI's investigative authority and the absence of a clear process for probing suspicious trading in PUSTA, expressing concerns about potential regulatory misuse, emphasizing the need for fairness and transparency in investigations.

A. The applicable penal provisions

Generally Penal provisions are provided under the 1992 Act which includes,

insider trading[33] and Fraudulent and Unfair trade Activities.[34]As there are no explicit penal provisions prescribed for a person or such connected persons engaged in undertaking Unexplained Suspicious Trading Activity. The potential applicability of the 1992 Act is under consideration, or there can be a possibility of introducing an amendment in the Residuary Act to incorporate it. The outcome of a violation under Section 24 of the SEBI[35] Act, specifically in relation to potential consequences such as imprisonment, remains uncertain. It is noteworthy that SEBI would need to establish its case with a high degree of certainty to establish the accused's liability under Section 24, requiring proof beyond a reasonable doubt.

This is in contravention to the shift in the burden proof introduced in the PUSTA regulations 2023.

B. Lack of Adequate Investigative Authority

According to SEBI's investigative jurisdiction, serious civil and criminal penalties can be imposed even in the absence of a formal investigation. Over time, SEBI has broadened the scope of its investigations as an indication of a stronger commitment to uphold market accountability and integrity. Section 11 of the 1992 Act focuses on the powers of SEBI to conduct investigations.

The board has the authority to issue a written order directing an investigation into the activities of an intermediary or any individual connected to the securities market.[36] This directive can be issued at any time when the board has reasonable grounds to suspect that securities transactions are being

[33] The Securities and Exchange Board of India Act, 1992, , No.15, Acts of Parliament. 1992 at §15G [hereinafter, SEBI Act, 1992].
[34] *Id.* at §15HA.
[35] *Id.* at §24.
[36] *Id.* at §11C(1).

conducted in a manner detrimental to shareholders or the overall securities market. Additionally, if the board finds any violation of the provisions within this Act by an intermediary or any person associated with the securities market, it can initiate an investigation.

However, in the PUSTA regulations, the procedure for any investigation pertaining to the alleged suspicious trading activities (STAs), has not been laid down. Chapter III of the draft consultation paper addresses "SURVEILLANCE AND INVESTIGATION". In this section, SEBI delegates the power to the stock Exchange Boards to report to SEBI about any suspicious transactions, or malafide trading activities. Subsequently, lays down the power of the Board to order investigation as it deems fit in case of suspicious transactions, which appears to be very vague considering the criteria laid down by the SEBI about *"Information doesn't meet the test of MNPI".*

The draft regulations derive their powers from the SEBI Act, 1992, resulting in a conflict between the investigation process outlined in the Act and the regulations due to the different concepts of "standard of proof" and "onus of proof". To address this conflict, it is necessary to amend the regulations to align with the Act's provisions regarding the nature of the investigation process.

C. Potential misuse of power

Moreover, a potential issue arises concerning the criteria for choosing trading data for scrutiny by SEBI or the stock exchanges. This procedure runs the unintended risk of becoming both selective and subjective, thereby heightening the potential for arbitrary actions. In these instances, regulatory authorities might concentrate on particular cases they aim to censure, as long

as they are capable of substantiating a reasonable degree of suspicion. This arbitrary approach could lead to unfair treatment and undermine the credibility of regulatory actions. It is essential for the regulator to maintain transparency and objectivity in their investigations to ensure a fair and unbiased enforcement of the securities laws.

While self-acting investigating agencies may exercise some subjectivity in selecting cases, it should be based on solid preliminary evidence rather than mere suspicion. If regulators across the globe start deeming activities of market participants as violations solely based on suspicion, it may lead to an uncontrolled and chaotic regulatory environment. This situation would be akin to a "wild west" scenario in the securities markets. Such an approach could adversely affect genuine investors and traders, causing significant inconvenience.

SEBI should reconsider the necessity of introducing additional regulations specifically targeting suspicious trades. The current regulations already cover insider trading, price manipulation, and front running, offering sufficient tools to establish the likelihood of wrongdoing. These regulations are carefully designed to prevent undue regulatory overreach and maintain a balanced approach.

Therefore, SEBI should exercise caution in introducing new regulations and instead focus on enhancing the effectiveness of existing measures to maintain market integrity while ensuring fairness for all stakeholders involved.

V. Conclusion

SEBI must protect the market's integrity without hindering its growth. It is crucial to strike a balance between punishing insider traders and requiring sufficient proof. SEBI must safeguard market integrity and promote fair and

transparent trading while avoiding regulatory overreach that could stifle market growth. Reversing the burden of proof raises worries about unjust punishment of the innocent without sufficient evidence. Critics argue this method may encourage law enforcement and investigators to cut corners and use flimsy evidence, resulting in more erroneous convictions.[37] A limited use of reverse burden might be acceptable. For instance, the doctrine of "res ipsa loquitur" allows for a reverse burden in both civil and criminal cases.[38] which means "the thing speaks for itself." Res ipsa loquitur is a legal principle in personal injury law that enables plaintiffs to establish a presumption of negligence on the defendant's behalf by presenting circumstantial evidence. In legal cases, plaintiffs usually need to demonstrate that the defendant behaved with negligence. However, when the doctrine of res ipsa loquitur is invoked, the burden of proof shifts to the defendant if the plaintiff presents specific circumstantial evidence. The defendant then has to establish that they were not negligent.[39] It's a bit like flipping the usual way we think about who has to prove what in a legal situation.This means that in certain circumstances, the burden of proof is shifted to the defendant.

Practicality becomes more relevant when a reversal burden would not cause severe unfairness. This may occur if the offense is minimal or the reverse burden involves minor guilt considerations. In certain circumstances, it may be more feasible to let the defendant prove their innocence. This strategy can also improve the efficiency of activity regulation. Both SEBI and the accused

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[37] Juhi Gupta, *Interpretation of Reverse Onus Clauses*, 5 NUJS LAW L. REV. 49, 57 (2012).
[38] Alimuddin v. King Emperor, (1945) Nagpur Law Journal 300; Noor Aga v. State of Punjab, (2008) 16 SCC 417.
[39] Murray B. Guterson, Comment, *Res Ipsa Loquitur: Application and Effect*, 27 WASH. L. REV. & ST. B.J. 145
(1952).

are grappling with technological advancements. SEBI insists that the accused must prove their innocence, however expecting an ordinary trader with limited resources to defend themselves against SEBI's standards is unjust.

The consultation paper fails to understand that even market participants struggle to gather enough evidence. Current technology and inventive methods make evidence collection inefficient, thus authorities employ circumstantial evidence like market patterns to find misconduct. Therefore, the regulations should properly explain the conditions to avoid misinterpretation. Setting the threshold too high and accepting just direct proof would likewise harm market integrity. Therefore, the author concludes that SEBI needs to revisit the draft regulations and assess them critically in accordance with the penal jurisprudence and all probabilities to avoid arbitrariness and plethora of "unexplained" suspicious trading activities.

THE JURISPRUDENCE OF PUBLIC PURPOSE: MOVING BEYOND MALA FIDE INTENTION AND COLOURABLE EXERCISE

Ayush Mathur*

Abstract

This paper examines the concept of 'public purpose' in the context of land acquisition laws in India, focusing on The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 ('the LARR Act'). The analysis reveals a notable lack of judicial uniformity in interpreting the concept of 'public purpose.' The analysis underscores a lack of judicial uniformity in interpreting the concept of 'public purpose.' The paper emphasises this inconsistency and advocates for a unified approach, favouring the one which suggests that courts should scrutinise whether the stated public purpose genuinely serves the public interest, instead of unquestioningly accepting the government's characterization of it as such, like the courts have followed in a line of cases.

Tracing the legal evolution since The Land Acquisition Act, 1894 ('the LAA'), the paper contends that the LARR Act, despite introducing safeguards like the Social Impact Assessment ('SIA') and Expert Group reports, maintains ambiguity and grants substantial discretion to the Government. It explores cases where the courts have either actively assessed the public purpose or deferred to the Government's determination, highlighting a notable imbalance in their approach.

The analysis suggests that, despite safeguards, the courts remain in a similar position as they were in prior to the enactment of the LARR Act, and the safeguards have limitations, particularly concerning the non-binding nature of Expert Group recommendations. In advocating for a more proactive

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judicial role, the paper proposes leveraging existing tools within the LARR Act and The Code of Civil Procedure('CPC') to ensure fairness for landowners. It emphasises the need for robust judicial scrutiny that goes beyond the constraints of mala fide intention and colourable exercise.

In conclusion, the paper calls for a nuanced shift in the judiciary's approach, encouraging a more assertive stance without proposing radical legal changes. It underlines the importance of maintaining a delicate balance between upholding public purpose and safeguarding the rights and interests of landowners in the context of evolving land acquisition laws in India. Lastly, the paper suggests that Courts should adopt a more uniform and proactive stance in assessing public purpose within the jurisdiction conferred by the LARR Act.

I. Introduction

As defined in Black's Law Dictionary, public purpose is simply a term used to categorise things into those that the Government is supposed to provide and those that are left to private interest.[1] A public purpose aims to advance the general welfare, security, prosperity, and contentment of all the citizens or residents within a given political division, such as a state, and for which the sovereign powers of that political division are used.[2] Therefore, two primary prongs of public purpose have been developed: one, it should be for public welfare and two, the State must do it, or at least it should be something a private entity may not do individually. To understand this in a broader context, the interpretation and application of the public purpose principle has been shaped by State actions and court rulings, all with the ultimate goal of serving the public interest. Consequently, the judiciary has developed a complex and inconsistent understanding of how public purpose should be applied. This

[1] Henry Campbell Black, BLACK'S LAW DICTIONARY (revised 4th ed., St. Paul, Minn West Publishing Co., 1968) 1394.
[2] *Id.*

paper aims to provide a comparative analysis of judicial positions in cases where the concept of public purpose has been contested.

On the one hand, there are instances where the court refrains from delving into the substantive question of whether the stated purpose indeed serves the public interest. Instead, it confines its examination to the procedural aspects, the intentions of the authorities involved, and the exercise of their powers. On the other hand, there are cases where the courts scrutinise the substance of the stated purpose and assume an authoritative role in reviewing it. This practice has led to the judiciary possessing the discretion to select between these approaches. The paper contends that this constitutes a noteworthy concern deserving prompt attention and correction.

The paper aims to determine which approach taken by the courts aligns better with the legislative intent, the Act's purpose, and the citizens' fundamental rights. Furthermore, the paper explores the extent to which the courts possess the authority to ascertain what constitutes a public purpose, addressing whether it is due to judicial passivity or the constraints imposed by legislative principles. To seek this objective, the paper has been divided into three broad sections. Firstly, the paper lays down the evolution of the concept of 'public purpose' and the criteria used by the courts to apply this principle in the LARR Act.[3] Thereon, the paper demonstrates the two lines of cases mentioned above and highlights the self-imposed restrictions imposed by the judiciary in determining 'public purpose'. Lastly, the paper provides a way forward and establishes a mechanism that may help the courts to form a unifying approach.

[3] The Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement Act, 2013, No. 13, Acts of Parliament, 2013 [hereinafter 'LARR'].

II. Evolution of the Concept of 'Public Purpose' in Land Acquisition Laws: From Ambiguity to Government-Centric Interpretations

A workable definition of 'public purpose' was absent from the LAA.[4] Section 3(f) of the LAA defines public purpose with a broad and extensive list. Since 'public purpose' was not defined in the statute in a clear or consistent way, the Government had complete discretion over what qualified as a public purpose. The judiciary's authority to influence State Government decisions was severely restricted.[5] As a result, Governments often interpreted the term in their own fashion, and courts rarely intervened.[6] Several instances of Governments acting in the profit-driven interests of private businesses and forcibly displacing millions of people under the guise of development occurred during this regime.[7] There have also been cases where companies have received more property than needed. For instance, Tata received 997 acres in Singur even though it only needed half of that size.[8] It is considered a fact now that the Supreme Court has consistently held that the State alone should determine whether a given acquisition will serve a public purpose and that courts lack the authority to address the question of whether a given

[4] The Land Acquisition Act, No. 1, Acts of Parliament, 1894 [hereinafter 'LAA'].
[5] *Id.*, §3(f)
[6] Pooja Murthy, Ritwika Sharma & Leah Verghese, *Do The Meek Inherit The Earth? A Study of Land Acquisition Litigation in Karnataka and Maharashtra*, 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3642371 (last visited 17 September, 2023) 17.
[7] *Id.* at 18.
[8] Ashish K Mishra & Archisman Dinda, *Singur Is Still The Waste Land*, FORBES INDIA (July 19, 2011) https://www.forbesindia.com/article/big-bet/singur-is-still-the-waste-land/26902/1.

purpose is a public purpose, absent evidence of a colourable exercise of power, which is virtually impossible to establish.[9]

It is contended that the understanding of public purpose has always been Government-centric due to the relevant section in the LAA being loosely interpreted. For instance, in the *Yamuna Expressway* case,[10] the two primary defences were that, in addition to buying land for the expressway itself, additional properties were being bought to build amusement parks and for other private uses that could not be justified as being bought for public use.[11] The second contention was that land was bought and given to a private developer. Regarding the first factor, the Supreme Court stated that the term public necessity should not be used to define the term public purpose.[12] An argument to refute the second ground was that an acquisition does not stop being for a public purpose just because the advantages accruing from it benefit a specific group of people in society. A private developer was to be given control of the project, use it for thirty-six years, and then return it to the Government.[13] The Court determined that the lands could not be said to have been purchased for a private person since they were not vested in the developer, who was required to return them after thirty-six years.[14]

Following such instances, the courts have laid down the understanding that public purpose does not necessarily have to serve public use or necessity. The courts have held that land acquisition under public purpose can be given to

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[9] Mihir Desai, *Land Acquisition Law and the Proposed Changes*, 46 ECONOMIC AND POLITICAL WEEK, 85-100 (2011).
[10] *Id.* 97.
[11] *Id.* 97.
[12] *Id.* 97.
[13] *Id.* 97.
[14] *Id.* 97.

private entities as long as they do not own it. This purpose could be for something that even remotely serves the public, like setting up paper mills[15] or factory manufacturing compressors.[16] However, the courts cause confusion by saying two things in the same breath. On one side, they say that if even a fraction of the public is benefiting directly or indirectly, it will amount to public purpose,[17] and on the other side, they claim that the purpose must be for the welfare and prosperity of the community or public at large.[18] This inconsistency is furthered by cases where the courts have, aiming to protect the State, diverged from the essentials of public purpose. In *Sooraram Pratap Reddy v. District Collector, Ranga Reddy District*,[19] the Court persistently connected the result from the cause, as it accepted that the land had been acquired for a private purpose, and the sole aim was to make a profit. However, because the intended acquisition of land would help in saving foreign exchange, which would ultimately serve the public at large, the Court ruled that the purpose must have been a legitimate public one.[20]

III. Status Quo? Examining the Continuity in Land Acquisition Laws and Judicial Discretion

With these inconsistencies and the broad scope under the existing LAA, it was expected that the new Act would propose a clear definition or framework.[21]

[15] Sarmukh Singh v. State of Maharashtra, 1995 2 SCC 442.
[16] Smt. Somawati and Ors v. State of Gujarat, AIR 1963 SC 151.
[17] Babu Barkya Thakur v. State of Bombay, (1961) 1 SCR 128.
[18] Daulat Singh Surana v. First Land Acquisition Collector, Civil Appeal No. 6756 of 2003 (Supreme Court).
[19] Sooraram Pratap Reddy v. District Collector, Ranga Reddy District, (2008) 9 SCC 552.
[20] *Id.,* ¶124.
[21] LAA, *supra* note 4.

While it is often believed that this is the case,[22] this section argues that in terms of the court's discretion, the ambiguity in the provision is just the same as it was before. The LAA provided eight instances in Section 3(f), in which the land could be acquired for a public purpose, and these were wide enough to allow the court to navigate around the provision and define 'public purpose' as something that is useful to the public rather than public use, as demonstrated above. In the LARR Act, the same can be argued as Section 2, which lays down the application of the Act, only demonstrates that in some cases, the public purpose would be valid. The principle of public purpose rightfully applies to many aspects, and it's important to consider if there are any limitations or restrictions. These may well be regarded as the illustration of the section, as the cases provided are not exhaustive given the words included in the section. Therefore, it is true that there are differences between the new and old Acts as the LARR Act restricts the movement of the court's discretion by providing a more elaborative list and reasons. However, in terms of application, the courts still have enough space to navigate around Section 2 of the LARR Act in a similar fashion to how they navigated around Section 3(f) of the LAA, as demonstrated above.

In the recent case of *Indore Development Authority v. Manoharlal and Ors, 2020,* it could be inferred that the object of the Act is to give the upper hand to the State to decide on the question of the public purpose,[23] just as the old Act did. Therefore, there has been no substantial change made either in the

[22] Alfaro, Laura, Lakshmi Iyer, & Rachna Tahilyani, *Land Acquisition In India: Public Purpose and Private Property (C),* INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE IN EMERGING MARKETS 95-108 (2016).
[23] Indore Development Authority (LAPSE-5 J.) v. Manoharlal, (2020) 8 SCC 129 ¶91.

section or in its object to indicate that the new Act somehow narrows down the power of the executive.

Having laid down the wide scope and inaction of the new Act with respect to public purpose, the paper will move towards its primary objective, demonstrating how cases related to land acquisition are treated differently, pointing towards the wide discretion of the court. The paper will also agree with the narrative that the courts seldom side with the landowners but often with the State. The discretion and proactiveness of the courts in some of the cases will show that the principles of mala fide intention, that is, acting with dishonest or malicious intention and colourable exercise, that is a seemingly legitimate action concealing an ulterior motive, which have been created by the courts themselves, are not absolute, and there is scope for a judge to move away from or beyond these principles, thus bringing into doubt the essential principle of legitimate expectation for the public. Both the terms in the context of land acquisition, were solidified in the case of *Gajaraj and Ors. v. State of U.P.*[24] wherein the Court laid down that the threshold for determining if the public purpose has been served is only if the authorities have acted maliciously or in the name of land acquisition there is actually any other ulterior motive. The same was also discussed in *Patasi Devi v. State of Haryana,*[25] *Tata Motors Ltd. v. State of West Bengal,*[26] *and Radhey Shyam v. State of Uttar Pradesh*.[27]

The cases discussed above dealt primarily with the LAA. Although it has been agreed in the current section that the new Act does no better job of determining

[24] Gajaraj and Ors. v. State of U.P., Writ C No.- 37443 of 2011 (Allahabad High Court).
[25] Patasi Devi v. State of Haryana, AIR 2013 SC 856.
[26] Tata Motors Limited v. State of W.B., 2011 SCC OnLine Cal 3915.
[27] Radhey Shyam v. State of U.P., (2011) 5 SCC 553.

public purpose than the old one, it introduces two safeguards for determination. The SIA, which also calls for a public hearing,[28] is the first process check.[29] In order to determine whether a specific project achieves its stated goals, the SIA is evaluated by the Expert Group,[30] which consists of impartial actors. A Government committee then examines whether the gains from land purchase outweigh the costs.[31] Only the minimal necessities should be acquired if land acquisition is the final resort and there is a valid public purpose.

However, both of these two safeguards have severe limitations. On the part of the SIA, the Act does not specify how the SIA's composition should be determined. The Act should have specified the selection method and the nature of the composition of such an independent organisation that is responsible for ensuring the commission and conducting of the SIA as well as being responsible for the selection of a very decisive SIA team that plays a crucial role in the process of land acquisition, rather than delegating this critical power to the Government.[32] Now, because the party evaluating the SIA and the party taking over the land is the same, that is, the Government, it is reasonable to question the legitimacy and transparency of the report. In this regard, the following section discusses the reasons why the Expert Group reports under Section 7 of the LARR Act fail to become a practical solution to take some control from the government in determining public purpose.

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[28] LARR, *supra* note 3, section §5.
[29] LARR, *supra* note 3, section §4.
[30] LARR, *supra* note 3, section §7.
[31] LARR, *supra* note 3, section§ 7(5)(b).
[32] Dr. Sairam Bhat & Y R Rajeev Babu, *Contemporary Issues and Challenges of Land Acquisition Law in India*, CEERA NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE (2019), https://ceerapub.nls.ac.in/contemporary-issues-and-challenges-of-land-acquisition-law-in-india/.

Nevertheless, it is important to highlight that the Government is not required to follow the Expert Group's proposal making, the recommendations ineffective.[33] Despite the Expert Group's recommendation that a project be abandoned and no land acquisition be started, the appropriate Government may nevertheless move through with the land purchase.[34] The only requirement the Government must adhere to when purchasing land against the Expert Group's advice is stating the justifications for the purchase in writing. In light of this, the issue of whether or not the Expert Group's recommendation must be made public for publication arises,[35] as the Government is not required to research, take into account, or even wait for any opposition or public response to such a decision.[36] As a result, it is argued that the Expert Group's recommendations and existence are merely helpful for eliciting public opinion, which the Government is not required to take into account.[37]

Therefore, despite the introduced safeguards, the courts find themselves in a similar position as they were before the enactment of the new Act. This paper contends that the courts should not be restricted just to the SIA reports and strictly adhere to only them. As the next section will illustrate, judges have exhibited proactive approaches, showcasing the flexibility to go beyond precedent principles. They can independently assess whether the stated public purpose genuinely serves the public interest, free from mala fide or colourable intentions.[38]

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[33] *Id.* at 5.
[34] *Id*. at 6.
[35] LARR *supra* note 3, section §7(2).
[36] Dr Sairam Bhat, *supra* note 32, 5.
[37] *Id*. At 6.
[38] Nelles v. Ontario, [1989] 2 S.C.R. 170 at ¶184.

IV. Exploring Judicial Approaches: Cases Involving Public Purpose Scrutiny and Self-Imposed Limitations

This section of the paper is divided into two parts, the first dealing with cases wherein the courts have looked into the question of public purpose and have moved beyond the aspects of mala fide intention and colourable exercise, and the second dealing with cases wherein the courts have restricted themselves with self-imposed principles and have not determined whether the public purpose in question would actually serve the public.

A. Cases where the courts looked at whether the acquisition serves a public purpose

In *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu*,[39] the issue placed in front of two judges of the Supreme Court was whether the acquisition was valid. The facts of the case are as follows: in a crowded market area, there was a well-established historic public park. The local government proposed a redevelopment plan to replace this park with an underground shopping complex, aiming to alleviate traffic congestion in the neighbourhood; this was challenged, and the Court observed that implementing the proposed plan would not effectively address the traffic issues but instead exacerbate them. They noted that the plan would "*only complicate the situation*" and further congest the area rather than providing the anticipated relief.

Furthermore, the Court questioned the legitimacy of the Government's stated public purpose for acquiring the park.[40] They considered this purpose "*illusory*", suggesting that the Government's true motives might not align with

[39] M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu, AIR 1999 SC 2468 at ¶52.
[40] *Id.* at ¶*52.*

the reasons presented to the public. The Allahabad High Court characterised the Government's actions as "*illegal, arbitrary, and unconstitutional*", indicating that the acquisition of the park for the underground shopping complex was not conducted within the bounds of the law and may have lacked a reasonable and justifiable basis; this reasoning and consequent decision was upheld by the Supreme Court.

The questions of mala fide intention and colourable exercise did not find a place in the Court's ruling. Instead, the motives that the Government sought were not to be achieved by the acquisition in question. To reiterate, a colourable exercise is one where the executive aims to do one thing by doing it in the name of another objective.[41] Here, it cannot be said that colourable exercise occurred; the Court has simply pointed out a lack of judgement on the side of the State. If anything, a new ground of arbitrariness comes into the picture through this judgement. Could this be considered a third prong for land acquisition that the courts must consider after this judgement? Evidently, that has not been the case. If arbitrariness were a component of establishing a legitimate public purpose, the instances of states prevailing in cases against landowners would have significantly diminished; this is due to the fact that proving arbitrariness is easier than demonstrating mala fide intention or the Government's colourable exercise of authority.

In the case of *Nabipur Gram Panchayat v. State of Gujarat*,[42] more than 1100 cattle heads had been pastured on the ground around a village of about four thousand people who had been depending on agriculture since the beginning

[41] K.C. Gajapati Narayana Deo v. The State of Orissa, [1954] SCR 1 at ¶64.
[42] Nabipur Gram Panchayat v. State of Gujarat, AIR 1995 Guj 52 [hereinafter 'Nabipur'].

of time. The Village Panchayat was instructed to convert the aforementioned grazing field into a shelter to set aside a portion of it for landless people. Due to the already present issue of insufficient grazing area, which would be made worse by the construction of the shelter, this was met with strong criticism. Despite these objections, the order for construction was approved, and it was later overturned on appeal. The respondent's assertion that the land was acquired for the public purpose of rehabilitating homeless people was rejected by the Court. It was ruled that the acquisition did not further the public good. Because of this, it was found that this case did not have a public purpose, even though all healthcare matters are included in the statute's definition of public purpose as per the LAA.[43]

In analysing this case, the Court reasoned that although the Government has the power to acquire grazing land under the garb of public purpose, this power has to be exercised reasonably upon consideration of the relevant factors.[44]

Since this is a High Court judgement, it cannot be considered for expanding the judiciary's scope for considering public purpose. However, it may be noted that the Court, in this case, passed over the questions of mala fide, colourable exercise or arbitrariness to rule that the action performed by the Court was simply not reasonable or considerate of the situation. Unfortunately, the case did not go for an appeal to offer an expanded scope for determining public purpose.

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[43] Vasu Aggarwal & Aastha Asthana, *Scope of Public Purpose in Land Acquisition Law*, 1 HPNLUJ OF ENVIRONMENT AND DISASTER MANAGEMENT (2020).
[44] Nabipur, *supra* note 42 at ¶8.

State of Bombay v. R.S. Nanji stated that it is required to carefully review all the circumstances and elements of where the phrase 'public purpose' appears in order to determine whether a public purpose has genuinely been demonstrated.[45] The State Government was considered to be the best judge to assess if a purpose was a public one. Still, the Court opined that it had the jurisdiction to determine whether the Government's requisition was genuinely for a public purpose.

In *Ezra v. Secretary of State for India-in-Council*,[46] the Privy Council ruled that while it is true that the Government alone should have the authority to decide what constitutes a public purpose, the requirement in this regard is that a compelling reason must exist. That reason must be demonstrated before purchase. The community's overall interests are regarded as the cornerstone of public purpose, surely indicating that the court may investigate the causes.

Another case on this line is that of *Radhey Shyam v. State of U.P.*; the Court here ultimately reversed the Government's decision to expropriate after taking a more aggressive approach to reviewing the public purpose decision and concluding that it had failed to meet the requirements for a public purpose.[47] In this case, the Court declared that the Court must carefully evaluate the question of public purpose when determining whether someone loses their land as a result of the State's arbitrary purchase of it.[48] If the public interest can be served by not making the typical individual homeless and by considering other acquisition choices, the courts must use their judicial review authority to focus on the principle of social and economic justice before

[45] State of Bombay v. R.S. Nanji, AIR 1956 SC 294.
[46] Ezra v. Secretary of State for India-in-Council, (1903) ILR 30 Cal 36.
[47] Radhey Shyam v. State of U.P., 2011 (107) AIC 129.
[48] *Id.* at ¶53.

allowing an acquisition.[49] The courts cannot afford to act as mere umpires while deliberating on issues of national significance.[50] Three tools for challenging the acquisition arose from this judgement: the mala fide intention, application of mind and unreasonableness. The last two concepts give enough power to the court to consider the questions of whether the Government had selected the best option wherein the least number of people were affected, and whether the purpose would serve the public, by going into the length and breadth of the public purpose.

The last case that can further strengthen the aim of this section would be *State of Karnataka & Anr. v. Shri Ranganatha Reddy & Anr.*, in which seven judges refined the LAA's definition of public purpose and its application, holding that if the purpose is for serving the public, then everything furthering such a public purpose falls within the broad and expanding rubric of public purpose.[51] If the former can address the latter, there is a necessary connection between taking property and serving the public good. On the other hand, if the purpose is private or non-public, just because the acquiring or requiring hand is that of the Government or a public company, it does not automatically transform the purpose into a public one. Therefore, the courts have the authority to invalidate Government actions that go beyond the scope of the authority granted to them by the LAA. In order to prevent the Government from abusing its power of acquisition, the courts have been given the sacred task of doing so.

The discussed cases mark a shift in the judicial approach to land acquisition, expanding the scope of scrutiny beyond traditional considerations like mala

[49] *Id.* at ¶45.
[50] *Id.* At ¶45.
[51] State of Karnataka & Anr. v. Shri Ranganatha Reddy & Anr., AIR 1977 SC 215.

fide intention. In cases like *M.I. Builders v. Radhey Shyam Sahu*, the courts introduced dimensions like arbitrariness, reasonableness, and the overarching principle of social and economic justice when evaluating the concept of 'public purpose.' *The Bombay v. R.S.Nanji* case affirmed the judiciary's role in independently assessing the existence of public purpose. *Radhey Shyam v. State of U.P.* introduced the concepts of application of mind and unreasonableness as tools for judicial review, allowing the courts to scrutinise the decision-making process. *The State of Karnataka v. Shri Ranganatha Reddy* refined the definition of public purpose, emphasising the necessity of a connection between taking property and serving the public good. These developments signify more nuanced and robust judicial scrutiny of land acquisition decisions, ensuring that acquisitions genuinely serve the public purpose and preventing potential abuses of governmental power. The judiciary's role has evolved beyond that of a mere umpire to actively safeguard individual property rights and uphold broader community interests.

Though less in number, there are several cases wherein the courts have demonstrated that they possess enough scope and power to determine whether the public purpose serves the purpose. This section has carried out the precise job of laying down such cases.

In the subsequent section, an illustration of the contrary scenario will be provided - namely, instances in which courts have voluntarily abstained from delving into the matter of public purpose. Instead, they have deferred to the State's determination as long as the purpose is not characterised by mala fide intent or a colourable exercise of authority.

B. Cases where the courts refuse to look at whether public purpose was served

The constitution bench made a landmark decision regarding determining public purpose in land acquisition proceedings in the case of *Somawanti v. State of Punjab*.[52] The Court upheld the Government's prerogative to decide what counts as a public purpose. It highlighted that what was contended to be a public purpose held definitive weight once the Government expressed its satisfaction on this topic. This principle recognised the Government's discretionary power, which could only be contested if there were claims of improper use, either mala fide intention or colourable exercise.

In *Laxman Rao v. State of Maharashtra*,[53] the Government's crucial role in determining what constitutes a public purpose was reaffirmed. In affirming that the State Government possessed the final say in deciding the specifics of a public purpose, this decision reaffirmed the justification advanced in *Somawanti*.

Building on these ideas, it was highlighted in *Sooraram Pratap Reddy and Ors. v. District Collector* that the State Government had been given the right by the legislature to determine and declare the necessity of specific property purchases in order to further a public purpose.[54] The Court reaffirmed that the State's decision was subject to judicial review, with intervention only being justified in cases of clear evidence of abuse of power, fraud on the law, an apparent discrepancy between the stated purpose and the actual public interest, or when ancillary motives were at play; this was done in recognition of the dynamic nature of public purpose.

[52] Somawanti v. State of Punjab, (1963) 2 SCR 774.
[53] Laxman Rao v. State of Maharashtra, (1997) 3 SCC 493.
[54] Sooraram Pratap Reddy and Ors. v. District Collector, (2008) 9 SCC 552.

Daulat Singh Surana v. First Acquisition Collector highlighted that no statutory definition of a public purpose gives the Government broad discretion.[55] Due to its flexibility, the Government was able to purchase land for the benefit of the community and to protect its shared interests.

Lastly, the decision in *Bajirao T. Kote and Others v. State of Maharashtra and Others* firmly reinforced the idea that it was the State Government's responsibility to determine the public purpose.[56] The Court reiterated its deference to the Government in this matter by affirming that neither the Supreme Court nor the High Courts had the authority to independently evaluate the facts and determine whether a public purpose existed.

In the above section, with a few cases and brief details, it has been demonstrated how, in some landmark cases, the courts have restricted themselves from examining whether the public purpose laid down by the State serves the public. The number of cases where the courts have followed the methods demonstrated in this section whoppingly exceeds the number of cases where the courts have looked into the public purpose.[57] As per a report, only 6.3 per cent of the total dataset of 1269 cases question whether the land was acquired for a public purpose.[58] In only thirteen cases, that is, about one percent of the total dataset cases, did the Supreme Court invalidate the acquisition on the grounds of violating the 'public purpose' requirements.[59]

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[55] Daulat Singh Surana v. First Acquisition Collector, AIR 2007 SC 47.
[56] Bajirao T. Kote and Others v. State of Maharashtra and Other, AIR 2007 SC 47.
[57] Namita Wahi, *Land Acquisition in India: A review of Supreme Court Court cases 1950-2016*, CENTRE FOR POLICY RESEARCH (Feb 27, 2017) https://cprindia.org/briefsreports/land-acquisition-in-india-a-review-of-supreme-court-cases-1950-2016/ (last visited Aug 11, 2023).
[58] *Id.* at 29,30.
[59] *Id.* 29,30.

Notably, the judiciary generally defends the administration's decisions in the context of judicial scrutiny of Government actions relevant to the declaration of public purpose.[60] The courts normally avoid getting too determinant on what defines a public purpose when the Government proclaims a particular project to be in the public interest. Instead, they analyse the administrative action's reasonableness, particularly when legislation supports the purchase as serving a public purpose.[61]

The standard of reasonableness is the main focus of the judicial analysis, with exclusive considerations for factors such as colourable use of authority and mala fide purpose. Clarifying the constitutional framework guiding the establishment of mala fide behaviour is essential since proving mala fide intent can be a difficult process. A standard of proof must also be established in cases involving accusations of malicious behaviour or questionable use of authority. It should be made clear that such assertions cannot be supported by mere accusations. The legal precedent outlined in the case of *E.P. Royappa v. State of Tamil Nadu* offers an organised process for determining a justifiable use of authority and malicious intent.[62] However, it is generally understood that, in reality, proving malicious intent provides a much greater bar than justifications do to a colourable use of authority.

Simply put, it is worth noting that in legal discussions, courts have often focused more on proving that the Government's actions are reasonable, which is seen as a more robust legal argument, as showing that the Government acted

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[60] Amlanjyoti Goswami, *Land Acquisition Rehabilitation and Resettlement: Law Politics and the Elusive Search for Balance*, 4 JOURNAL OF LAND AND RURAL STUDIES (2015).
[61] M.S Anusha Reddy & H. Murali Krishnan, *Understanding The Judicial Interpretation Of Public Purpose Under The Land Acquisition Laws In India: A Case Of Robbing The Poor To Feed The Rich*, 1 NATIONAL LAW UNIVERSITY JODHPUR LAW REVIEW (2013).
[62] E.P. Royappa v. State of Tamil Nadu, AIR 1974 SCC 555.

with malicious intentions is difficult to prove in court because such a contention requires more evidence and proof. Therefore, the understanding of reasonableness has been restricted to the action not being mala fide or colourable. Reasonableness and arbitrariness are not looked at together in these judgements as they are looked upon in cases of violation of fundamental rights.[63] A move from the Supreme Court towards questioning the degree of such reasonableness by exploring 'arbitrariness' could potentially be a step in the right direction.[64]

V. Unlocking the Potential: Judicial Activism and Expanding Tools for Fair Land Acquisition

The courts have facilitated the ability of economic progress to take precedence over other considerations. They achieved this by broadly defining what constitutes a 'public purpose' and what constitutes reasonableness therein for property acquisition. The courts now view work on property as a legitimate public purpose as long as it provides economic advancement.[65] For instance, they have justified the taking of land to produce chinaware and porcelain using this logic.[66] Because the courts consider almost any action to be connected to public requirements and interests, it is practically hard to challenge these property acquisitions because they were carried out for the wrong reasons.[67] Therefore, any and most of the activity can be traced back to the public regardless of who they benefit from before reaching them; with this understanding, minimum interference from the court cannot be expected.

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[63] Goswami, *supra* note 60 at 8-9.
[64] *Id*.
[65] Reddy & Krishna, *supra* note 61 at 9.
[66] Jage Ram & Ors. v State of Haryana & Ors., AIR 1971 SC 1033.
[67] Reddy & Krishna, *supra* note 61 at 9.

In this section, it is argued that the courts must show proactiveness and should not restrict themselves with the self-imposed principles of mala fide intention and colourable exercise. Instead, the courts should possess a relatively free hand to determine the public purpose. The frameworks used by the courts to determine a public purpose need not be very novel or challenging, given the help provided by the new Act.

As discussed earlier Section 7 provides for the report of an independent muti-disciplinary Expert Group, which furnishes the report to determine whether the public purpose could be served and whether the benefits outweigh the harm.[68] This principle's drawback is that it is not binding on the Government, which is a fair criticism. However, nothing in the rules or the Act prevents the court from utilising this report to look into the substantive arguments for determining public purpose. *Arguendo*, the courts also possess the power to issue commissions under Sections 75 till 78 of the CPC.[69] The courts can deploy these commissions to perform local investigations as per Rules 9 and 10 of Order 26 of the CPC[70] or to hold investigations as per Rule 10A of Order 26 of the CPC.[71] These powers of the civil courts can determine whether the SIA and Expert Report would be valid or biased, if the courts deem fit, or by the application of either party.

Broadly, this section aims to point out that there are tools that go much beyond the principles of mala fide intention and colourable exercise that are effective and important to seek results that are just, fair, and reasonable to the

[68] LARR, *supra* note 3, §7(5)(b).
[69] The Code of Civil Procedure, No. 5, Acts of Parliament 1908.
[70] *Id.*, Rule 9 and 10 of Order XXVI.
[71] *Id.*, Rule 10A of Order XXVI.

landowners. The courts stand as the sole guardians of justice in the Indian legal system, and they must confine or restrict the frameworks that do not give equal opportunities to the public; they must explore as many tools as they may deem fit to reach the conclusion that shall leave the landowners with justifications and reasons. It has been stated in the international convention that in cases of land acquisition for a public purpose, the States must clearly define the concept of public purpose in law,[72] which allows space for judicial review; the legislature for the former part has attempted admirably, however, for the latter, it is noted that the judiciary has confined itself with self-imposed restrictions.[73] It is therefore argued that there is an importance attached to the active role of the judiciary within the rules/guidelines of the State legislature.

VI. Conclusion

In conclusion, this paper navigates the landscape of the LARR Act, aiming not for a radical transformation but a nuanced consideration of existing judicial trends. By delving into case laws analyses, the paper has observed parallel lines of reasoning on issues related to public purpose, with limited instances where courts move beyond conventional criteria like mala fide intention and colourable exercise. The paper highlights the expansive application of the colourable exercise criterion, providing the courts with broad discretion to validate public purpose without in-depth scrutiny.

Acknowledging the historical inclination toward Government-centric interpretations and the continued reliance on administrative principles, such as

[72] Bjorn Hoops & Nicholas K. Tagliarino, *The Legal Boundaries of 'Public Purpose' in India and South Africa: A Comparative Assessment in Light of the Voluntary Guidelines*, 8 LAND 154 (2019).
[73] *Id.*

mala fide intention and colourable exercise, the paper questions the effectiveness of safeguards in the LARR Act, such as the SIA and Expert Group reports. Notably, the absence of binding authority on the Government, despite these safeguards, is underscored as a limitation.

To address these challenges, the paper proposes a more proactive judicial role within the existing legal framework. It advocates for leveraging tools embedded in the LARR Act and the CPC, such as reports from independent multidisciplinary Expert Groups and the power to issue commissions for local investigations. This approach aims to enhance fairness for landowners by emphasising the significance of judicial scrutiny in cases of land acquisition for public purposes.

In essence, the paper encourages a measured and assertive judicial stance without necessitating drastic legal changes, which is unification of the two approaches demonstrated above to the one wherein court has a proactive role. By advocating for a nuanced application of existing tools and procedures, the proposal seeks to strike a balance between upholding public purpose and safeguarding the rights of landowners. This approach aligns with the demonstrated trends within the judiciary, providing a pragmatic solution to the challenges posed by the current state of the LARR Act.

Finally, as the proposed recommendations can be implemented without resorting to significant legal formalities, an opportunity exists for the courts to establish guidelines promoting proactive engagement. This could include, adhering to the recommendations outlined in the Expert Groups report, utilising legal instruments under LARR Act and CPC to meticulously assess public purpose, and surpassing mere governmental satisfaction for determining ‘public purpose’.