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EDITORIAL

"*Very unwelcome truths have emerged from the universities, and very unwelcome judgements have been handed down from the bench time and time again; and these institutions, like other refuges of truth, have remained exposed to all the dangers arising from social and political power. Yet the chances of truth to prevail in public are, of course, greatly improved by the mere existence of such places and by the organization of independent, supposedly disinterested scholars associated with them*."

- Hannah Arendt, Truth and Politics

Arendt described courts and universities as society's "*refuges of truth*"—spaces where facts and justice are meant to withstand power. As Artificial Intelligence ("AI") challenges the need for these institutions through predictive policing, automated research, and algorithm-driven sentencing – the question of whether it can ever replace the moral agency of these institutions as "*refuges of truth*" remains unclear. The promise and peril of efficiency offered by algorithms have already given rise to what Arendt might call "*unwelcome truths*", evident in global instances of racial bias in predictive sentencing and class disparities in automated welfare decisions. This leaves the question of replaceability an open one that even Arendt has no answer for.

While algorithms have not yet eclipsed these institutions, they compel us to evolve. On the Journal front, AI can now draft reviews or detect plagiarised text, but what remains uniquely human? Editors bring judgment to nuanced arguments after collaborative discussions, spot subtle plagiarism (even when paraphrasing tools mask it), and weigh the intent behind ideas. For instance, for Round 2 reviewing we shifted from rigid review requirements to targeted

comments that integrate multiple perspectives. AI tools may advance, but what endures are the values that bind us: sincerity in collaboration, diligence in scrutiny, and empathy in disagreement.

I extend my sincere gratitude to our authors and to those who have shaped our journey. To Poorvi and Param, for instilling the values and standards that continue to define our work; to Divya and Niyati, for making this possible with their tireless effort and perseverance even when it seemed rewardless; to Shivani and Ustat, for always pitching in their balanced perspective; and to Anil sir and Hari sir, for nudging us back on course when needed with their unwavering support. To all contributors, editors, and readers, thank you for sharing your work and trust. This Journal is a collective effort—one that thrives because of your belief in thoughtful dialogue.

On behalf of the Board of Editors,
Fathima Rena Abdulla,
Editor-in-Chief
March, 2025

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Trade Secrets, Test Data, and Transparency in Indian Public Health

Swaraj Paul Barooah[*] & Md Sabeeh Ahmad[**]

Abstract

The law and policy around intellectual property norms has often found itself steeped deep in public health discussions over the last few decades. Usually centred around patent law, the COVID-19 pandemic revealed how other subject matters that could fall under the intellectual property umbrella, such as confidential information and test data, can also have strong repercussions, such as slowing down vital development and obstructing access to essential manufacturing know-how. The analysis in this paper traces India's approach to these non-patent exclusion rights, focusing on confidential information and test data in the pharmaceutical industry and the intensified scrutiny they face in the public health context in a post-pandemic era. This paper highlights the implications of non-disclosure, specifically for biologics, which obstruct the entry of biosimilars into the market. The paper examines the potential and scope of relevant provisions in the draft Trade Secrets Bill (2024), noting areas that could use more clarity. Additionally, discussing the role of transparency in crucial test data disclosures and the regulatory failures therein, we argue that public health hazards are inevitable in the absence of transparent regulatory practices. This paper discusses several measures to

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increase transparency and access, like whistleblower protection and compulsory licensing, advocating for a safer public health regime in India.

I. Introduction

The global health crisis during the COVID-19 pandemic brought increased attention to the role of intellectual property in health care. Issues involving patent law, trade secrets, know-how, and test data garnered specific focus in light of the global health situation, which required creating and planning mass production of vaccines and treatments. To many observers of the intersection of intellectual property and public health, this was not surprising, as even prior to the pandemic, these issues have had a history of tension *vis-a-vis* public health outcomes. While most of the literature on this tension has focused on patent issues, this paper discusses the specific role that non-patentable subject matter, such as confidential information and test data, as well as differing measures at protecting them, plays in the Indian public health scenario. Tracing the history of how "*trade secrets*" have been considered in India, this paper looks at the increased scrutiny these subject matters received as the COVID-19 pandemic unfolded: how the unique and complex manufacturing processes involved in the development of vaccines brought confidential information to the spotlight of access discussions, a discussion that had primarily been dominated by patents thus far. The urgent need for effective vaccines and treatments highlighted how non-patented information could impede access to manufacturing know-how, essential for scaling up production and, therefore, achieving some sort of distributional equity. Aside from know-how, this paper also questions the extent to which clinical trial data can affect public health, thus requiring a look at not just legal provisions but also the working relationship with the regulatory authorities. As we discuss further in this paper, the lack of transparency has revealed consequential gaps within the existing regulatory mechanism, most notably affecting safety and

efficacy. This paper also touches upon issues around the overlap of patents with trade secrets, the viability of compulsory licensing for trade secrets and the role of prospective or existing mechanisms in promoting transparency in Indian public health discourse. By examining historical precedents, instances from other jurisdictions and contemporary challenges, COVID-19 and otherwise, we seek to highlight the role that test data and trade secrets can play in developing a pro-public-health framework, in particular by emphasizing biologics, transparency and accountability in test data, and regulatory gaps.

II. Background

Over the course of the last five decades, India's pharmaceutical industry has made a mark for itself in the international sphere as a strong generic manufacturing base, often being referred to as the "*pharmacy of the world*"[1] for its production and exports of generic pharmaceuticals across the world. As of 2023-24, the Indian pharmaceutical industry ranked third worldwide for production by volume and fourteenth by value, with current market size of $50 billion expected to rise to $130 billion by 2030.[2] As is well recognised, the growth and dominance of the Indian generic industry has its roots in the 1959 Report on the Revision of the Patents Law by Justice Rajagopala Ayyangar ("Ayyangar Committee Report"), which among other things, recommended only process patents, and the abolishment of product patents in the fields of chemicals, food and medicine. This recommendation was put forward after in-depth consideration of India's socio-economic realities at the time, and on the

[1] Ministry of Chemicals & Fertilizers Department of Pharmaceuticals, *Annual Report 2020-21* (2021), https://pharmaceuticals.gov.in/sites/default/files/english%20Annual%20Report%202020-21.pdf.

[2] *See*, Chapter 10 *in* Ministry of Finance, *Economic Survey 2023-24* (2024), https://www.indiabudget.gov.in/economicsurvey/doc/eschapter/echap10.pdf.

basis that "*…chemical and pharmaceutical industry of this country would be advanced and the tempo of research in that field would be promoted*."[3] After much deliberation, this recommendation was taken on board as a cornerstone of the Patents Act 1970.[4] Hand in hand with the new law, the Indian government also invested in local manufacturing firms and educational institutes to encourage local capacity building in chemical-based reverse engineering. In this way, the government encouraged scientific infrastructure and skilled local capacity for absorption into the new burgeoning local pharmaceutical industry.[5] Together, these actions led to the creation of a robust domestic generic pharmaceutical industry, adept at developing reverse-engineered pharmaceutical products and developing production processes. This process-patent-only policy remained in place until India amended its patent laws to allow for product patents as well, with India signing on to the World Trade Organization's ("WTO") Trade-Related Aspects of Intellectual Property Rights Agreement ("TRIPS Agreement") in 1995.[6] By this time,

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[3] N. Rajagopala Ayyangar, *Report on the Revision of the Patent Law*, 35 (1959), https://ipindia.gov.in/writereaddata/Portal/Images/pdf/1959-_Justice_N_R_Ayyangar_committee_report.pdf. It should also be noted that the 1950 'Report of the Patent Enquiry' ('Tek Chand Committee Report') had earlier instigated discussion and criticism around the working of the patent system as well.

[4] The Patents Act, 1970, §5, No. 39, Acts of Parliament, 1970. ("*5. Inventions where only methods or processes of manufacture patentable. In the case of inventions- (a) claiming substances intended for use, or capable of being used as food or as medicine or drug, or (b) relating to substances prepared or produced by chemical processes (including alloys, optical glass, semi-conductors and inter-metallic compounds), no patent shall be granted in respect of claims for the substances themselves, but claims for the methods or processes of manufacture shall be patentable*." This section was omitted by the Amendment in 2005.

[5] *See,* Padmashree Gehl Sampath, *Economic Aspects of Access to Medicines after 2005: Product Patent Protection and Emerging Firm Strategies in the Indian Pharmaceutical Industry* (2005), https://ideas.repec.org/p/ess/wpaper/id3336.html *as cited in* AMAKA VANNI, PATENT GAMES IN THE GLOBAL SOUTH: PHARMACEUTICAL PATENT LAW MAKING IN BRAZIL, INDIA AND NIGERIA 119 (2020).

[6] Though the TRIPS Agreement was signed in 1995, developing countries including India had a 10 year transition period to comply with all the provisions. India ensured compliance through a series of amendments in 1999, 2002 and 2005. *See generally,* Shamnad Basheer,

India's domestic industry had already gained not only substantial expertise and capacity in reverse engineering but also market agility.[7] At the same time, the changes introduced by the integration of the TRIPS Agreement in domestic patent laws, allowing product patents, led to the diminishing of reverse engineering opportunities, something that process patents inherently encouraged. This tide of change also led to the added emphasis on trade secrets and the importance they possessed, resulting in the propagation of trade secrets protection in the pharmaceutical industry.

The pre-TRIPS Agreement policies in India initially envisaged and encouraged the development of local capacity for manufacturing local medicines, which in turn has helped the availability and accessible pricing of medicines. However, whether intentionally or inadvertently, the last two decades have arguably seen a reduction in this focus on local capacity building and accessible medicines and, instead, have seen an increase in the tendency towards favouring requests/demands from pharmaceutical firms. In other words, the earlier policy focused on the ends has become less prominent, while the new policy focused on the "*actors*" has become more prominent, regardless of whether those "*ends*" are still being targeted or not. One prominent example of this is perhaps the dilution of the unique provision India had regarding transparency of local working of patents.[8] In large part, this

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India's Tryst with TRIPS: The Patents (Amendment) Act 2005, 1 INDIAN JOURNAL OF LAW AND TECHNOLOGY 15 (2005).

[7] A significant reason for this was the HIV AIDS crisis at the time, wherein Indian generic manufacturers, led by Cipla, started becoming major suppliers for AIDS treatment in several countries in the world, at prices that were remarkably cheaper than the existing prices by originator companies at the time. This opened up a number of networks which helped further open the path for Indian generics to other markets in the world.

[8] Praharsh Gour, *Comments on the Draft Patent (Amendment) Rules, 2023*, SPICYIP (Sep. 23, 2023), https://spicyip.com/2023/09/comments-on-the-draft-patent-amendment-rules-2023.html; Swaraj Paul Barooah, *Draft Patent Amendment Rules – Increasing Efficiency of*

dilution came after industry actors maintained that it was too difficult to adhere to this requirement.[9] Other examples include concerns that patent grants are being seen as the purpose of the patent office, leading to, *inter alia*, inadequate focus on utilising existing safeguards against over-broad patenting. One study shows that more than 70% of pharmaceutical patents granted between 2009-2016 were granted for marginal improvements over previously known drugs for which patents already exist, thus calling into question the efficacy of ever-greening safeguards in Indian patent law.[10]

The reduction in focus on balancing industry demands with accessible medicines incidentally comes at the same time as profitable international markets becoming easier to enter for Indian generic pharmaceutical companies. Earlier, addressing India's local needs more clearly aligned with the generic industry's profit motives. There was also, for instance, more incentive for generic-focused pharmaceutical companies to utilise the various flexibilities in India's patent law to challenge existing or potentially over-broad patents so that they could introduce generic alternatives.[11] These no longer necessarily align, as generics have more access to international markets, which can provide higher revenues. This development has also brought an added incentive to maintain good working relationships with originator-focused pharmaceutical companies in order to enter into voluntary

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Granting Patent Monopolies While Forgetting the Reason for Allowing Them in the First Place, SPICYIP (Sep. 15, 2023), https://spicyip.com/2023/09/draft-patent-amendment-rules.

[9] Prashant Reddy T., *A 'Captured' Patent Office?,* THE INDIA FORUM (Oct. 12, 2023), https://www.theindiaforum.in/law/captured-patent-office.

[10] Dr. Feroz Ali et al., *Pharmaceutical Patent Grants in India: How Our Safeguards Against Evergreening have Failed, and Why the System Must be Reformed*, ACESSSIBSA (Apr. 01, 2018), https://accessibsa.org/media/2018/04/Pharmaceutical-Patent-Grants-in-India.pdf.

[11] George T. Haley & Usha C.V. Haley, *The Effects of Patent-law Changes on Innovation: The Case of India's Pharmaceutical Industry*, 79 TECHNOLOGICAL FORECASTING AND SOCIAL CHANGE 607 (2012).

licensing agreements for those or other markets.[12] Simultaneously, pharmaceutical innovation and manufacturing processes are progressing in new and more complex or intricate directions.[13] For example, large molecule drugs or "*biologics*" that involve manufacturing processes carried out inside or via living organisms are being increasingly preferred over small molecule or chemical products that have been the primary direction of pharmaceutical innovation thus far. That is to say, not all products can be reverse-engineered easily or at all due to more complex manufacturing processes, different types of pharmaceutical products, and non-aligned incentives in business practices. All these factors together have modified the interaction between exclusive rights and pharmaceutical manufacturing and innovation. Therefore, while patented products and processes still affect generic production and, consequently, affordability and accessibility of healthcare, newly added factors such as confidential information, technical know-how, critical biological materials, and so on are increasingly becoming stronger factors to consider. This highlights not only the requirement for more industry expertise and capacity building but also for updated policy and regulatory measures.

A. Trade Secrets and Test Data in Indian Law

Article 39 of the TRIPS Agreement discusses the standards required for the protection against unfair competition of a) undisclosed information and b) data submitted to governmental bodies, *i.e.*, regulatory information. As Reddy notes, historically, right from its earliest communications on the matter in the

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[12] ANAND GROVER, *Pharmaceutical Patents and Evergreen Battle for Access to Medicines* in SRIVIDHYA RAGAVAN & AMAKA VANNI (eds), INTELLECTUAL PROPERTY LAW AND ACCESS TO MEDICINES: TRIPS AGREEMENT, HEALTH AND PHARMACEUTICALS 230 (2021).
[13] KRISTINA LYBECKER, THE BIOLOGICS REVOLUTION IN THE PRODUCTION OF DRUGS *in* STEVEN GLOBERMAN (eds), INTELLECTUAL PROPERTY RIGHTS AND THE PROMOTION OF BIOLOGICS, MEDICAL DEVICES AND TRADE IN PHARMACEUTICALS 9 (2016).

TRIPS Agreement negotiations, India had maintained that trade secrets could not be considered to be intellectual property rights.[14] In fact, while meeting its obligations under the TRIPS Agreement, India did not need to enact any new laws for the protection of trade secrets as it protected confidential information either under contract law or under an equitable duty of confidence.[15] Nonetheless, India may soon be enacting a trade secret legislation, with a draft already prepared by the 22nd Law Commission of India.[16]

The Law Commission Report, published in March, 2024, extensively discussed trade secrets and the need for a separate trade secret legislation in India.[17] The comprehensive Report included a draft Trade Secrets Bill, the history and previous attempts to introduce a trade secrets policy and legislation, the global standards, and consultation with key stakeholders,

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[14] The Satwant Reddy Committee was constituted as an inter-ministerial committee to examine whether India was required to take any steps to confirm with the provisions of Article 39.3 of the TRIPS Agreement, and in the context of pharmaceuticals, concluded that submitted test-data could be relied upon by regulators to grant approval to generics, while still being considered confidential for the purposes of Article 39.3. *See,* Satwant Reddy & Gurdial Singh Sandhu, *Report on Steps to be Taken by Government of India in the Context of Data Protection Provisions of Article 39.3 of TRIPs Agreement* (2007), https://chemicals.gov.in/sites/default/files/Reports/DPBooklet%5B1%5D.pdf (Interestingly, though this committee and the government has maintained that data-exclusivity regimes are not required for the pharmaceutical industry, India has been pushing for a data-exclusivity regime for the agro-chemical industry).

[15] Prashant Reddy, *The 'Other IP Right': Is it Time to Codify the Indian Law on Protection of Confidential Information?*, 5 JOURNAL OF NATIONAL LAW UNIVERSITY DELHI 1, 7 (2020).

[16] In 2021, a Department Related Parliamentary Standing Committee on Commerce, in its "Review of the Intellectual Property Rights Regime in India" had recommended enacting a separate legislation or framework for the protection of trade secrets. *See also*, Law Commission of India, *Trade Secrets and Economic Espionage* (2024), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2024/03/2024030619823188 41.pdf.

[17] *Id.* Additionally, a Parliamentary Standing Committee Report had in July, 2021 recommended to consider enacting a separate legislation or a framework for protection of trade secrets). *See*, Department Related Parliamentary Standing Committee on Commerce, *Review of the Intellectual Property Rights Regime in India* (2021), https://files.lbr.cloud/public/2021-07/161_2021_7_15.pdf?VersionId=S01fCQEC5DzDqKNymsGgxal6YXmJbUwM.

including the judiciary, academia, industry and government. The Report acknowledged India's historical opposition to the inclusion of data exclusivity within the TRIPS Agreement while emphasising the emerging, data-driven technologies requiring the transfer of technology and cross-border cooperation in the current economic climate as an enabling factor for a trade secret law. The Report suggested that trade secrets cannot have a "*property-like conception*" as is the case with other intellectual property, citing the absence of definite monopoly rights. Exceptions such as whistleblower protection, compulsory licensing, public interest, and freedom of speech and expression were extensively discussed in the Law Commission's recommendation, and the draft law has also included most of these exceptions. This paper will further discuss different aspects of these exceptions as well as the implications they will have on public health.

Internationally, there has been an increasing interest in how India approaches this question. For example, the United States Trade Representative's Office ("USTR"), which has historically been used as a method of applying unilateral pressure on other countries, brought up the lack of trade secret legislation as a concern in their 2021 USTR 301 Report.[18] This came about at the same time as when India and South Africa, in a joint statement at the WTO, had urged for the waiver of intellectual property rights, including protection of undisclosed information to prevent any barriers to timely access to vaccines or to scaling up of research, development, manufacturing and supply of

[18] Office of the United States Trade Representative, *2024 Special 301 Report* (2024), https://ustr.gov/sites/default/files/2024%20Special%20301%20Report.pdf; *See also,* Adyasha Samal & Nikhil Purohit, *Special 301 Report 2021: Trade Secrets, Patents and Technology Transfer*, SPICYIP (May 18, 2021), https://spicyip.com/2021/05/special-301-report-2021-trade-secrets-patents-and-technology-transfer.html.

essential medical products.[19] As is well documented now, the proposal was met with staunch opposition from several developed countries and, after nearly two years of negotiation, finally resulted in a very watered-down version of the initial proposal that was limited to patent rights over COVID-19 vaccines.[20]

B. The Public Health Crisis

As noted at the beginning of this paper, the fast-growing Indian pharmaceutical industry is expected to achieve a market size of $130 billion by 2030. However, the same growth story has not been reflected in Indian public health. Though India has come a long way in terms of improved life expectancy, there are still many areas of great concern. A large study conducted by the Indian Council of Medical Research, Public Health Foundation of India and the Institute for Health Metrics and Evaluation notes that "*while the disease burden rate in India has improved since 1990, it was still 72% higher per person than in Sri Lanka or China in 2016.*"[21] India's spending on public health has remained more or less stagnant at around 1.3% of its GDP for the last 3 decades prior to 2020, with the only rise of significance coming after the pandemic, rising to 1.6% in 2020-21 and 1.84%

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[19] Council for Trade-Related Aspects of Intellectual Property Rights, *Waiver From Certain Provisions of the Trips Agreement for the Prevention, Containment and Treatment of COVID-19 (Communication From India And South Africa)* (2020), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True.

[20] World Trade Organisation, *TRIPS Council welcomes MC12 TRIPS waiver decision, discusses possible extension*, https://www.wto.org/english/news_e/news22_e/trip_08jul22_e.htm.

[21] Indian Council of Medical Research, *Public Health Foundation of India, and Institute for Health Metrics and Evaluation., India: Health of the Nation's States – The India State-level Disease Burden Initiative*, 17 (2017), https://www.healthdata.org/sites/default/files/files/policy_report/2017/India_Health_of_the_Nation%27s_States_Report_2017.pdf

in 2021-22.[22] Amongst Brazil, Russia, India, China, and South Africa ("BRICS"), India has the lowest per capita health spending projection for 2030.[23] The COVID-19 pandemic brought public health to the forefront of global issues in an unprecedented manner through the enormous disruption it caused all around the world. At the time of writing this, the world has seen more than 7 million documented deaths since the pandemic began, with the documented death toll in India accounting for approximately 534,000 of those.[24] However, the massive failures and unpreparedness in India's healthcare infrastructure do not come as a surprise after decades of public health advocates pointing to various systemic issues affecting the public health regime in the country.

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[22] *See*, Ministry of Health and Family Welfare, *National Health Account (NHA) Estimates 2020-21 and 2021-22 A Comprehensive Overview*, PBI (Oct. 4, 2024), https://pib.gov.in/PressNoteDetails.aspx?NoteId=153237&ModuleId=3&reg=3&lang=1; *See also*, Bhatia M. & Singh D.P., *Health Sector Allocation in India's Budget (2021–2022): A trick or Treat?*, 3 INT'L J COMM SOC DEV. 177 (2021).

[23] *See*, Mihajlo Jakovljevic et al., *Future Health Spending Forecast in Leading Emerging BRICS Markets in 2030: Health Policy Implications*, 20(1) HEALTH RESEARCH POLICY AND SYSTEMS 1, 23 (2022). Per capita health spending in 2030 is projected to be as follows: Brazil, $1767; Russia, $1933; India, $468; China, $1707; South Africa, $1379. Other BRICS nations have spendings of around 3-4% of their GDP, and countries like Switzerland, France and Germany are spending around 11-12% of their GDP on public health. *See*, Our World Data, *Government Health Expenditure As a Share of GDP, 1995 to 2021*, https://ourworldindata.org/grapher/public-health-expenditure-share-gdp-owid?time=1995..&country=BRA~CHN~IND~RUS~ZAF~USA~NPL~SWE~LKA~BTN~GBR~AFG; *See also* Abantika Gosh, *Explained: What National Health Profile says about targeted, actual health spend*, INDIAN EXPRESS (Nov. 1, 2019), https://indianexpress.com/article/explained/national-health-profile-nhp-report-2019-healthcare-india-6096911/.

[24] World Health Organisation, *WHO COVID-19 dashboard*, https://data.who.int/dashboards/COVID19/deaths?n=o. This data is updated till December 29, 2024. It is to be noted that the documented deaths may be grossly under-reported as compared to the actual number of deaths.

C. The Role of Non-Patent Exclusion Rights in Pharmaceuticals[25]

Though the current spotlight on the role that exclusion rights and information sharing play in the public health landscape may be new, the debate has been long stirring. The last several decades have seen patent policy as a significant lever to generating more access to medicines. However, the assumption that a patented drug would invariably become more accessible in the absence of a patent or patents covering a drug is a flawed one, as there are several factors involved in whether a generic product becomes accessible or not. While patent specifications are available, they often inadequately or only vaguely disclose enough for the product to actually be reproduced on the basis of that specification. Thus, while reverse engineering can be done in cases of known chemicals and chemical processes, it is also possible that the information and materials available in the public domain are insufficient to adequately duplicate a product. In the case of biologics, direct duplication is impossible as biologic materials need to be grown from organic matter. Even after a generic version or biosimilar version of a drug is made, the ability to manufacture the drug in question in a commercially viable manner requires it to be manufactured at scale, which involves another set of processes that may affect the final outcome.

[25] For the scope of this paper, we have limited the discussion to non-patent exclusion rights which are directly relevant to the pharmaceutical product and its development. There are other non-patent exclusion rights which are equally, if not more, important but they arrive at a later stage in the pharmaceutical product development. Trademarks, for example, are relevant at the stage of marketing pharmaceutical products. *See,* Swaraj Paul Barooah & Murali Neelakantan, *The Monopoly Purple – Colours, Shapes and Sizes in the Pharmaceutical World*, SPICYIP (Apr. 15, 2021), https://spicyip.com/2021/04/the-monopoly-purple-colours-shapes-and-sizes-in-the-pharmaceutical-world.html.

Regardless of how the drug is manufactured, it finally needs to be approved by regulatory authorities for safety and efficacy before it can be sold in the market. In order to make the "*risk-benefit analysis prerequisite to such a determination*",[26] drug regulators require, *inter alia*, the data from experimental testing or clinical trials. Companies that make new drugs often point to these costs as part of the reasons for claiming the need for stronger patent and data exclusivity rights. However, while the generation of this test data accounts for a non-trivial portion of the total drug discovery and development costs,[27] there is still a remarkable lack of transparency as to the exact costs involved in the drug development process. The pre-launch R&D cost estimates across various studies range from $161 million to $4.54 billion.[28] Regardless of what the actual numbers may be, it is clear that a substantial amount of resources is required to conduct these clinical trials, and this is why test-data becomes contentious. Companies that seek to introduce generic versions of these drugs are reluctant to repeat these trials as it is both expensive and time-consuming. Instead, they would prefer to rely on test data already submitted by the innovator company and use this data to show that their product is bio-equivalent to the existing originator drug. By the same

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[26] *See generally*, Thomas McGarity & Sidney Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies*, 93 HARVARD LAW REVIEW 837, 837 (1980).

[27] *See*, Linda Martin et al., *How much do clinical trials cost*, 16 NAT REV DRUG DISCOV 381 (2017). Different studies have given varying estimates for the total cost of clinical trial costs. One study estimates for the trials in its data set, the median cost of conducting a study from protocol approval to final clinical trial report as US$3.4 million for phase I trials, $8.6 million for phase II trials and $21.4 million for phase III trials. *See also*, DiMasi et al., *Innovation in the Pharmaceutical Industry: New Estimates of R&D Costs*, 47 JOURNAL OF HEALTH ECONOMICS 20-33 (2016). A higher range in another study estimates the median clinical period costs for investigational compound as US$17.3 million for Phase I trials, $44.8 million for Phase II and $200 million for Phase III trials.

[28] *See* Michael Schlander et al., *How Much Does It Cost to Research and Develop a New Drug? A Systematic Review and Assessment*, 39 PHARMACOECONOMICS 1243 (2021).

token, innovator companies prefer to keep this data protected or confidential so that they can retain *de facto* exclusivity over the market for the drug in question. Irrespective of ability, there are serious ethical concerns with repeating clinical trials on humans when the efficacy of the originator drug has already been proven. At the same time, there are also competing ethical concerns regarding whether the populace that the originator data has been tested upon is adequately representative of the populace that the generic/biosimilar is to be used.[29] While test data is a significant informational asset, other important informational assets include genomic information and other biologic materials,[30] as well as test results from non-pivotal clinical trials.[31]

During the unfolding of the COVID-19 crisis, as several commentators pointed out, a mere waiver of patent rights could be insufficient to work the technology covered by the patent rights. Given that the vaccines were mostly biologic in nature, other types of assets, such as know-how and information covered by trade secrecy, were seen to be equally important.[32] A prominent critique of the much-discussed TRIPS waiver proposal (as it originally was introduced) was the futility of attempting to mandate the sharing of confidential information or trade secrets. Meanwhile, in contrast to the "*business as usual*" approach of accepting the pharmaceutical innovation and

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[29] Carol Kirchhoff et al., *Biosimilars: Key Regulatory Considerations and Similarity Assessment Tools*, 114 BIOTECHNOL BIOENG. 2696 (2017).
[30] Olga Gurgula & John Hull, *Compulsory Licensing of Trade Secrets: Ensuring Access to COVID-19 Vaccines via Involuntary Technology Transfer*, 16 JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE 1244 (2021).
[31] Joel Lexchin et al., *Regulators, Pivotal Clinical Trials, and Drug Regulation in the Age of COVID-19*, 51 INT J HEALTH SERV. 5 (2021).
[32] David Levine & Joshua Sarnoff, *Compelling Trade Secret Sharing*, 74 HASTINGS LJ 987 (2023).

manufacturing process as sacrosanct, several policymakers and researchers stressed the need to share more information so as to move faster towards the vaccines and treatment options for COVID-19.[33] These approaches, however, were mostly put on the backburner once the first vaccines came out, with the focus then shifting towards the questions of purchasing and distribution of these vaccines. It should be noted that several experts have predicted that global crises like COVID-19 are not expected to be a one-time issue. World Health Organisation's ("WHO") Director General at the time, Tedros Adhanom Ghebreyesus, also noted that it was a "*dangerously short-sighted*" cycle to throw cash at one disaster but not prepare for the next one, as the world seems to be doing.[34]

i. Case Study Example: Moderna's Patent Enforcement Pledge

Moderna's pledge of not enforcing patents related to its COVID-19 vaccine Spikevax[35] in Low and Lower-Middle-Income Countries ("LMICs") was an interesting test of the extent to which non-patent-related factors would play a role in the making of a biosimilar version of Moderna's drug.[36] At first, in 2020, Moderna had pledged to "*not enforce COVID-19 related patents against those making vaccines intended to combat the pandemic*", updating it later in March, 2022 to not enforce its patents against companies supplying to

[33] *Id.*
[34] Tedros Ghebreyesus, *Munich Security Conference* (Feb. 15, 2020), https://www.who.int/director-general/speeches/detail/munich-security-conference.
[35] Moderna, *Moderna's Updated Patent Pledge* (Mar. 07, 2022), https://investors.modernatx.com/Statements--Perspectives/Statements--Perspectives-Details/2022/Modernas-Updated-Patent-Pledge/default.aspx.
[36] E. Richard Gold, *What the COVID-19 Pandemic Revealed About Intellectual Property*, 40 NAT BIOTECHNOL 1428 (2022).

LMICs.[37] Although seemingly altruistic at first, it is important to factor in the refusal by Moderna to share the secret know-how and recipe for constructing their m-RNA vaccine, even with the WHO's South African Hub ("WHO Hub"), delaying the development of an mRNA vaccine by the hub. For times like the COVID-19 pandemic, this know-how is vital information, and the speed at which it can be gained or transferred is of significant importance. The WHO Hub, based out of South African company Afrigen Biologics, after failing to bring on board Moderna, used the publicly available sequence of Moderna's mRNA COVID-19 vaccine to make its own version in February, 2022 with clinical trials in November, 2022,[38] a timeline much later than what might have been possible with Moderna's assistance.

Interestingly, after updating its patent pledge, in August 2022, Moderna filed a patent infringement lawsuit against Pfizer and BioNTech in the United States ("US"),[39] Germany,[40] and the United Kingdom ("UK"),[41] stating that Pfizer had continued to infringe its patent to produce their COVID-19 vaccine Comirnaty in higher-income countries such as the US.[42] The UK High Court has ruled in favour of Moderna, holding that Pfizer and BioNTech have

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[37] Jorge Contreras, *No Take-Backs: Moderna's Attempt to Renege on its Vaccine Patent Pledge*, THE PETRIE-FLOM CENTRE (Aug. 29, 2022), https://blog.petrieflom.law.harvard.edu/2022/08/29/no-take-backs-modernas-attempt-to-renege-on-its-vaccine-patent-pledge/.

[38] Naomi Grimley, *COVID: South Africa Makes Its Own Version of Moderna Vaccine,* BBC (Feb. 04, 2022), https://www.bbc.com/news/health-60258088.

[39] Modernatx, Inc., and Moderna SS, Inc. v. Pfizer Inc., Biontech Se, Biontech Manufacturing Gmbh, and Biontech US Inc., Case No. 2022-11378-Rgs (D. Mass. 2021).

[40] Düsseldorf Regional Court, Case ID: 4b O 62/22 (Ger.).

[41] Modernatx, Inc. v. (1) Pfizer Limited (2) Pfizer Manufacturing Belgium Nv (3) Pfizer Inc. (4) Biontech Manufacturing GMBH (5) BioNTech Se, [2024] EWHC 1648 (Pat); (1) Pfizer Inc. (2) BioNTech SE -v- ModernaTX, Inc., [2024] EWHC 1695 (Pat).

[42] Scott Berinato, *Moderna v. Pfizer: What the Patent Infringement Suit Means for Biotech*, HARVARD BUSINESS REVIEW (Sep. 16, 2022), https://hbr.org/2022/09/moderna-v-pfizer-what-the-patent-infringement-suit-means-for-biotech.

infringed on Moderna's one of two patents and owe damages from March 8, 2022, onwards, after Moderna's updated pledge. In the US, the District Court of Massachusetts allowed Pfizer and BioNTech's motion to put on hold Moderna's lawsuit pending a review by the Patent Trial and Appeal Board ("PTAB") of Moderna's patent claims of the vaccine.[43] The PTAB decision is pending publication but sources indicate that all challenged claims on Moderna's COVID-19 vaccine patents have been invalidated and were held to be invalid based on prior art.[44] In Germany, the Düsseldorf Regional Court suspended the infringement proceedings concerning both patents by Moderna after revocation by the European Patent Office ("EPO") and a Dutch Court.[45] However, the EPO Opposition Division upheld EP 949 (one of the two patent claims).[46] The Düsseldorf Regional Court subsequently held that BioNTech and Pfizer had infringed Moderna's EP 949 patent, accepting the latter's argument that the permission to use the patent during the Covid-19 pandemic was revoked vide a press release on March 7, 2022. The Court has ordered Pfizer and BioNTech to provide information of prices and profits achieved on the use of EP 949.[47]

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[43] Justia, *ModernaTX, Inc. et al. v. Pfizer Inc. et al.*, https://dockets.justia.com/docket/massachusetts/madce/1:2022cv11378/247673.
[44] Eileen McDermott, *Moderna COVID Vaccine Technology Struck Down by PTAB*, IPWATCHDOG (Mar. 06, 2025), https://ipwatchdog.com/2025/03/06/moderna-covid-vaccine-technology-struck-ptab/id=186883/.
[45] Mathieu Klos, *Düsseldorf Regional Court can proceed with trial after EPO upholds Moderna patent*, JUVEPATENT (May 24, 2024), https://www.juve-patent.com/cases/dusseldorf-regional-court-can-proceed-with-trial-after-epo-upholds-moderna-patent/.
[46] *Id.*
[47] Mathieu Klos, *Moderna and Freshfields triumph in Düsseldorf against BioNTech and Pfizer*, JUVEPATENT (Mar. 05, 2025), https://www.juve-patent.com/cases/moderna-and-freshfields-triumph-in-dusseldorf-against-biontech-and-pfizer/.

For mRNA vaccines specifically and biologics in general, the manufacturing process information is usually not sufficient to reverse engineer the drugs, and several allied issues associated with the process need to be factored in.[48] First, even with sufficient knowledge of the process, it is crucial to know the precise details of the critical raw material, such as cell lines.[49] These cell lines in a genomic sequence[50] are not only costly investments but can also be difficult to acquire. Second, in a scenario where all the prerequisites are available, even for advanced facilities with capacities to produce replicas or, better yet, biosimilars, the critical nature of the genomic sequence will require either bridging studies or Phase 3 trials similar to the originator drugs. This arises out of the concern that the genomic sequence may not be the same. In the context of bridging studies, the same would require cooperation and support and create dependency on the data possessed by the originator drug manufacturer. Third, building such a specific facility is, again, not just a question of cost, but in a critical situation like the pandemic, it is of time as well. The issues outlined above cease to be simply legal complications. Take, for example, during the pandemic, it was reported that India had several unused vaccine manufacturing facilities. In fact, a relatively new facility for production was created in 2012 to minimise the demand-supply gap, yet this did not see the light of day during the pandemic woes.[51] Additionally, in 2008,

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[48] For a detailed study on the Biologics Manufacturing, *see*, Steven J Shire, *Formulation and Manufacturability of Biologics*, 20 CURRENT OPINION IN BIOTECHNOLOGY 708 (2009).

[49] A cell line refers to a population of cells that can be maintained in culture for a long time while retaining specific characteristics and functions.

[50] A laboratory method that is used to determine the entire genetic makeup of a specific organism or cell type.

[51] Revathi Krishnan & Abantika Gosh, *India needs vaccines now, but this Rs 904-crore PSU in Tamil Nadu has been idle for 9 years*, THE PRINT (Apr. 1, 2021), https://theprint.in/india/india-needs-vaccines-now-but-this-govt-plant-in-tamil-nadu-has-been-idle-for-9-years/631770/.

failure to comply with good manufacturing practices ("GMP") norms led to the shutdown of three public sector undertakings engaged in vaccine manufacture.[52] Restarting these existing facilities in the midst of a pandemic is not a straightforward task, and it would involve updating facilities with the most recent technological advancements in manufacturing and training personnel, amongst other logistical issues. The new technological advancement here primarily refers to the difference in the production and purification of mRNA from protein-based drugs. Leading Indian manufacturers, like the Serum Institute of India and Biocon, were amongst the few Indian drug developers who were reportedly building a mRNA vaccine facility during the COVID-19 pandemic.[53] Issues like the time required to purchase and install new manufacturing technology, validate existing equipment, and bring on board trained personnel to initiate and maintain large-scale manufacturing capacity, all during a critical pandemic-like situation, are significant ones that point to the requirement for pre-planned interventions, rather than reactionary ones.

Interestingly, a Report by Médecins Sans Frontières ("MSF") in December, 2021 claimed that at least 55 pharmaceutical manufacturers in India possess the technical requirements and quality standards to manufacture mRNA vaccines.[54] The Report, based on a study authored by Zoltan Kis and

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[52] Sudip Chaudhuri, *Decline of Public Sector Vaccine Manufacturing in India*, 8 SSRN (Mar. 11, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4055411.
[53] Anuradha Mascarenhas, *SII to ramp up Covishield production to 200 million doses monthly from October*, THE INDIAN EXPRESS (Sep. 18, 2021), https://indianexpress.com/article/cities/pune/sii-to-ramp-up-covishield-production-to-200-mn-doses-monthly-from-oct-7516767/.
[54] *See*, Achal Prabhala & Alain Alsalhani, *Pharmaceutical manufacturers across Asia, Africa and Latin America with the technical requirements and quality standards to manufacture mRNA vaccines* (2021), https://msfaccess.org/sites/default/files/2021-12/COVID19_TechBrief_Manufacturing-mRNA-Report-10DEC2021_ENG_0.pdf.

commissioned by MSF,[55] states that any pharmaceutical facility manufacturing sterile injectables satisfies the minimum criteria for mRNA vaccine manufacturing. The list only includes companies in Asia, Africa, and Latin America that manufactured sterile injectables and were certified by a reputable agency for GMP. The methodology of the study included shortlisting from the European Medicines Agency's EudraGMDP database, WHO's Pre-Qualification project for vaccines, and the US Food and Drug Administration ("FDA") database, keeping both the above-mentioned criteria in mind. This methodology led to a shortlist of 120 companies from the three continental regions. The Report, however, notes gaps that may arise before venturing into mRNA vaccine manufacturing. These include the required investment ability, the strength of the drug regulatory authority in the country, and the prospect of a business case. The Report also underscores the importance of the necessary technology transfer from mRNA vaccine manufacturers like Moderna to make this venture a possibility. Nonetheless, it appears that this is one of the few studies that make this type of claim. The larger question of what is required to make local manufacturing processes possible in the country remains an open one that would benefit from much more attention.

III. Regulatory Data Policy and Pharmaceutical Disclosures

From the above discussion, it is clear that there is a variety of commercially valuable information that pharmaceutical companies would like to keep confidential from their competitors so as to safeguard their position or control

[55] Zoltan Kis, *Process-cost modelling for producing 100 million COVID-19 mRNA vaccine doses per year at injectable medicines manufacturing sites* (2021), https://msfaccess.org/sites/default/files/2021-09/COVID19_TechBrief_Process_cost_modelling_ENG.pdf.

in the market. Trade secrets and data-exclusivity are perhaps the two most relevant legal instruments to consider in this regard.

In the international context, Article 39 of the TRIPS Agreement deals with these areas. Broadly speaking, trade secrets are often understood as confidential information in the Indian context. Trade secrets are not protected in India under any specific legislation in the manner that exclusivities such as patents, copyrights, and other forms of intellectual property are. Instead, Indian courts have considered the protection of confidential information to come under common law, including breach of confidence or contract, as well as based on principles of equity. While there has been a wide array of case laws around trade secret protection in India,[56] for the purposes of the discussion in this paper around confidential information in the pharmaceutical sector *vis-à-vis* public health concerns, this section will focus on policy issues arising from the sharing of confidential information with regulators.

As mentioned in the earlier section, in order to ensure safety and efficacy, pharmaceutical products require approval by drug regulators in order to receive marketing authorisation in the country. In India, this drug regulating authority is the Central Drugs Standard Control Organisation ("CDSCO"), and the regulatory approval is governed by the Drugs and Cosmetics Act, 1940, the Drugs and Cosmetics Rules, 1945 ("1945 Rules"), and the New Drugs and Clinical Trial Rules, 2019.[57] As per Rule 122B of the 1945 Rules,

[56] For a detailed discussion on the position and development of the law of trade secrets in India, *see*, Reddy, *supra* note 15; *see also*, Chandni Raina, *Trade Secret Protection in India: The Policy Debate* (2015), https://wtocentre.iift.ac.in/workingpaper/Trade%20Secret%20Protection%20in%20India-%20The%20policy%20debate.pdf.

[57] Drugs and Cosmetics Act, 1940, No. 23, Acts of Parliament, 1940; Drugs Rules, 1945; New Drugs and Clinical Trial Rules, 2019.

manufacturers of "*new drugs*" are required to submit data from Phase 1, Phase 2 and Phase 3 clinical trials,[58] including trials conducted within India. Certain relaxations are permitted if no serious adverse have been reported and there are no significant differences in the metabolism pathways in the Indian population.[59] "*New drugs*" are defined in Section 2(w) of the 2019 Rules as:

> "a) drugs which have not been used in the country to any significant extent and have not been approved by the DCGI or
> b) drugs which have been approved for claims other than the proposed use, claim or modification, or
> c) a fixed-dose combination or two or more drugs that have been approved individually but not in combination or
> d) a modified, sustained release form, or novel drug delivery system of an approved drug; or
> e) a vaccine, r-DNA derived product, living modified organism, monoclonal antibody, stem cell-derived product, gene therapeutic product or xenografts intended to be used as a drug."

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[58] In Phase I clinical trials, researchers test a new drug or treatment for the first time in a small group of normal, healthy volunteers (about 20 to 80) to evaluate its safety, determine a safe dosage range, and identify side effects. In Phase II clinical trials, the study drug or treatment is given to a larger group of people (about 100 to 300), including patients with the particular disease, to see if the drug or treatment is effective, and to further evaluate its safety. In Phase III clinical trials, the study drug or treatment is given to large groups of people (from 1,000 to 3,000), including patients, to confirm its effectiveness, monitor side effects, compare it to other commonly used treatments, and collect information that will allow the drug or treatment to be used safely.

[59] Akhilesh Dubey, Bhasini Khotian & Ravi Gundadka Shriram, *New drugs and clinical trials rules, 2019: Towards fast-track accessibility of new drugs to the Indian population*, 53 IJPER 451 (2019); *See also* Prashant Reddy, *IPA Alleges that New Rule Change will Bring in a Data Exclusivity Regime – Here's Why I Think it Does no Such Thing*, SPICYIP (Nov. 04, 2016), https://spicyip.com/2016/11/ipa-alleges-that-new-rule-change-will-bring-in-a-data-exclusivity-regime-heres-why-i-think-it-does-no-such-thing.html.

It is relevant to note that while drugs in the first three categories above will retain their "*new drug*" status for 4 years, the drugs in the latter two categories will remain "*new drugs*" indefinitely. This means new manufacturers of the first three types will no longer have to supply clinical trial data after the first 4 years of initial introduction in India. In contrast, for the latter two categories, new manufacturers will be required to submit this data regardless of when they enter the market.

As Reddy notes, on products from the first three categories, the 59th Report of the Parliamentary Standing Committee on Health[60] indicates that generic companies appear to have regularly received a waiver of these clinical trial data requirements by virtue of Rule 122A. This provision allows the Drugs Controller General of India ("DCGI") to waive this requirement in the public interest on the basis of data available from other countries and, if satisfied, that there is adequate published evidence regarding the safety of the drug.[61] Instead, generic companies are simply required to submit bioequivalence[62] and bioavailability studies[63] if they wish to enter within this first four-year period. Reddy also notes with concern that despite the Ranjit Roy Choudhury Committee recommendation[64] to make these bioequivalence and

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[60] Prashant Reddy, *Parliamentary Standing Committee on Health tables damning report on the dangerous liaisons between the DCGI & the pharmaceutical industry*, SPICYIP (May 9, 2012), https://spicyip.com/2012/05/parliamentary-standing-committee-on.html.
[61] Prashant Reddy, *The Data Exclusivity Debate in India: Time for a Rethink?*, 10 INDIAN JOURNAL OF LAW & TECHNOLOGY 8, 30 (2014).
[62] Bioequivalence is generally used to establish similarity between a generic drug and reference drug and is defined as the absence of significant differences in the availability of the active ingredient at the site of drug action.
[63] Bioavailability is defined as the rate and extent at which a drug reaches the general circulation from an administered dosage form.
[64] *Actions on the Recommendations of Prof. Ranjit Roy Chaudhary Expert Committee to Formulate Policy and Guidelines for Approval of New Drugs, Clinical Trials and Banning of Drugs*, available at https://dineshthakur.com/wp-content/uploads/2016/03/2016.03.11-PIL-1-Annexure-E-1A.pdf (last visited on 20 January 2025).

bioavailability studies mandatory for all generics, the CDSCO's drugs consultative committee rejected this recommendation, thereby permitting the entry of generics pharmaceuticals to the Indian population, that have not been tested at all.

A. Trade Secrets, Biologics and Biosimilars

The size of the Biologics and Biosimilars market is expected to reach $12 billion by 2025 in India alone.[65] Even before the arrival of COVID-19 vaccines, the pharmaceutical industry had long begun tilting towards biologics. For Biologics, the manufacturing process creates challenges that are different and more complex than the manufacturing process of a chemical drug. The process involves genetic engineering by transferring a gene encoding the desired protein into a "*production cell*."[66] These production cells are then allowed to grow and multiply in a bioreactor containing the required growth conditions, and then subsequent purification of these cell lines takes place.[67] Each step of the "*manufacturing process*" can, therefore, be valuable confidential information - from gene encoding, required optimal conditions, and purification process to the steps involved in scaling a laboratory process into large manufacturing output, each of them depending on the type of biologics in question.[68] Add to that, as discussed before, significant raw materials such as cell lines and precise genomic sequences are also significant information that is kept confidential by biologics manufacturers. For

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[65] BIRAC, *India: The Emerging Hub for Biologics and Biosimilars*, 2 (2019), https://birac.nic.in/webcontent/Knowledge_Paper_Clarivate_ABLE_BIO_2019.pdf.
[66] LYBECKER, *supra* note 13, 13.
[67] *Id.*, 14.
[68] Robin Feldman, *Trade Secrets in Biologic Medicine: The Boundary with Patents Trade secrets in Biologic Medicine: The Boundary with Patents*, 24 THE COLUMBIA SCIENCE AND TECHNOLOGY LAW REVIEW 1, 35 (2022).

biosimilar development, this confidential information is crucial in manufacturing. Additional hurdles include confidential but necessary testing protocols and clinical trial data, which significantly delay the development and entry of biosimilars into the market.[69] Courts in the US have held earlier held competitive harm to be of focus, thus allowing more disclosure of safety and efficacy data on that basis.[70] However, recent case law including from the US Supreme Court have focused on customary confidentiality of such information, allowing redaction of key documents.[71]

In the absence of trade secret legislation in India, what can and cannot be afforded such protection remains to be seen. Interestingly, in the academic consultation carried out by the Law Commission Report on Trade Secrets and Economic Espionage, Prof. N.S. Gopalakrishnan noted that the need for a (separate) trade secret law in the Indian context was absent. He had submitted that primary reliance to overcome competition was directed towards the difficulty in reverse engineering, preparation and standardisation of products, and quality of raw materials used. Prof. Gopalakrishnan's view seems to be in alignment with the earlier US jurisprudence that trade secrets and/or test data do not materialise in safeguarding competitional advantage.

B. Patents and Trade Secrets

The prominence of trade secrets as an intellectual property mechanism also creates a potential tension with patents. The latter requires full disclosures in

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[69] *Id.*, 5.
[70] Public Citizen Health Research Grp. v. F.D.A, 704 F.2d 1280, 227 U.S. App. D.C. 151 (D.C. Cir. 1983); Pub. Citizen Health Rsch. Grp. v. FDA, 964 F. Supp. 413 (1997); Pub. Citizen Health Research Grp. v. Food & Drug Admin., No. CIV.A. 99-0177 (JR), 2000 WL 34262802 (D.D.C. Jan. 19, 2000).
[71] Seife v. FDA, et al., No. 20-4072 (2d Cir. 2022); Food Marketing Institute v. Argus Leader Media, 588 U.S. (2019).

exchange for being granted a patent, and the former promotes withholding of information and disclosures, creating an antithetical situation. The Ayyangar Committee had acknowledged this difficulty, though in the context of compulsory licensing of patents.[72] It is pertinent to note that patent applications are filed in the early stage of development. The necessary manufacturing disclosures, therefore, may not be entirely sufficient on their own. By the time such patents are approved, the manufacturing process adopted may have significantly changed, with complex manufacturing issues likely to come up during the development process, resulting in the patent disclosures' inability to capture the exact know-how. As is reflected from the process, for disclosures made in the patent applications, commentators have noted that manufacturers/companies submit wide-ranging data critical to manufacturing, such as temperature and host cell.[73] As much as this may complete the required disclosure requirements, future drug manufacturers attempting replication will have significant difficulty in the absence of precise information. This lack of precise information forms the part of trade secrecy that can be retained by the manufacturing company in perpetuity. The Ayyangar Committee, therefore, noted that stricter laws regarding patent disclosures may not be sufficient given the stage of patent applications.[74] If, somehow, in the Indian context, trade secrets find their way as the subject matter of legislated protection and patents continue to provide protection to products, specifically in the pharmaceutical industry, this would mean an

[72] Ayyangar, *supra* note 3, 61.
[73] Jayson Singh Sohi, *Changes to the Best Mode Requirement: Weakening Enforcement Undermines the Purpose of Patent Law and Exacerbates an Ethical Patent Trilemma*, 17 INTELL. PROP. L. BULL. 157, 164 (2013) as cited in Feldman, *supra* note 68, 27.
[74] Ayyangar, *supra* note 3, 61.

inevitable collision and conflict if sufficient safeguards and exceptions are not provided.

IV. Public Health Considerations

A. Data Exclusivity

Internationally, from debates around the TRIPS Agreement to Free-Trade Agreements and Bilateral Trade Agreements, there has been a strong push from several Western countries for India to incorporate "*data-exclusivity*" norms. Data exclusivity essentially refers to the protection of data generated in the course of clinical trials submitted to regulatory agencies.[75] This leads to time-bound exclusion rights over clinical data submitted, which would allow them to prevent it from being used by the regulators to grant regulatory approval to other manufacturers, usually generic versions of their approved product. While patent rights are granted based on legislated criteria (novel, inventive, utility), data exclusivity is granted based on the submission of clinical data to the regulator.[76]

As mentioned before, while it is clear that Article 39.3[77] of the TRIPS Agreement does require some form of protection for test data from "*unfair commercial use*", the Indian position has been that a "*data protection*" regime

[75] Srividhya Ragavan, *Data Exclusivity: A Tool to Sustain Market Monopoly*, 8 JINDAL GLOBAL LAW REVIEW 241 (2017).
[76] Animesh Sharma, *Data Exclusivity With Regard To Clinical Data*, 3 INDIAN JOURNAL OF LAW AND TECHNOLOGY 82 (2007).
[77] The Agreement on Trade Related Aspects of Intellectual Property Rights, art. 39.3, 1869 U.N.T.S. 299 (Adopted on April 15, 1994) ("*Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use."*).

would be sufficient to satisfy Article 39.3 of the TRIPS Agreement. Under this rationale, while the information submitted to drug regulators would remain "*confidential*", regulators would be able to rely on originator data in granting regulatory approval to follow-on entrants. While India does not have any explicit legislation on trade secrets or data protection, as was seen in the earlier section, it does formulate a *de facto* framework in the context of test data. Manufacturers of generic versions of "*new drugs*" may be required to submit their own test data or, upon satisfaction of the other provisions, may have this requirement waived, instead, simply being required to show the regulator that their product is comparable to the original product in terms of bioequivalence and bioavailability. Indeed, concerningly, as also described earlier, in some situations, even these studies may not be required.

The standard argument in favour of data exclusivity relies upon the understanding that clinical trials are extremely expensive, risky and laborious to undertake. Data exclusivity, it is assumed, would incentivise companies to undertake these costs, as the additional period of protection would prevent follow-on entrants from eating into their potential market share. While patents also operate on a similar logic of incentives, data exclusivity is not dependent upon legal technicalities and instead would be granted upon submission. Thus, unlike a patent, it would be a more certain outcome for business strategy purposes. On the flip side, this type of incentive relies upon the inefficient use of information, which leads to wasteful and duplicative activity, as well as increased prices and decreased welfare gains due to delayed generic entry.[78] Other commenters, though, have noted that the results of clinical trial data on

[78] Gregory Jones et al., *Strategies that delay or prevent the timely availability of affordable generic drugs in the United States*, 127 BLOOD 1398 (2016).

local populations are a matter of significant public health concern, one which could potentially be addressed by incentivising local clinical trials through a data-exclusivity regime, especially in the context of non-patentable drugs.[79] Due to the opaque nature of the pharmaceutical industry's workings, including confidential information about negative results, it is also often not clear what type of costs are actually being incurred in the generation of this data, making it difficult to accurately estimate what, if any, additional incentives are required, beyond the already existing potential patent incentive and potential first mover advantage incentive.[80]

Outside of the data-exclusivity debate, there are also other public health considerations regarding clinical trial data. As shown in the COVID-19 context, access to clinical trial data and post-market surveillance data can help researchers around the world understand, collaborate and progress faster and further in understanding the virus, interpreting the data results, as well as increase confidence in regulatory processes and vaccines.[81]

B. Compulsory Licensing, Trade Secrets and Public Health

Compulsory Licensing ("CL") for a patented product refers to the legal use of the product without the authorisation of the patent holder. This non-authorised license may be permitted by the government in situations of national emergency, extreme urgency, unmet public requirement, and unaffordable pricing, amongst others. For trade secrets, a CL provision will work out differently. Amongst various non-minor challenges, its enforcement, to some

[79] Reddy, *supra* note 58.
[80] Trudo Lemmens & Candice Telfer, *Access to information and the right to health: the human rights case for clinical trials transparency*, 38 AMERICAN JOURNAL OF LAW & MEDICINE 63 (2012).
[81] Allison Durkin et al., *Addressing the Risks That Trade Secret Protections Pose for Health and Rights*, 23 HEALTH AND HUMAN RIGHTS JOURNAL 129 (2021).

degree, would require voluntary cooperation by the party against whom the provision is being exercised.

The Law Commission's Report on trade secrets included consultation with the Confederation of Indian Industry ("CII"), which flagged the issue of CL for trade secrets.[82] The CII had submitted that there seemed to be an inherent fallacy to the issue of CL since, in the absence of any disclosure, the applicability of CLs on trade secrets would not result in the desired outcome. Alternatively, CII had suggested that during public health emergencies, licensing to third parties could be a viable step to fill the know-how and trade secrets gap. These licenses would, however, cease once the necessary requirements of an emergency are met or till the emergency is over.

A timely reference to the general observations on CL by both the Ayyangar Committee and the Swan Committee is warranted here. The Ayyangar Committee in particular picked up from the Swan Committee's recommendations and pointed out the difficulties of having a compulsory license of patents regime without a technology transfer system. For example – patents could not (necessarily) be exploited on the basis of the specifications in the patent disclosure. Additional know-how requirements were necessary to understand the workings of a patent, without which manufacturing may not be possible or practical. The existing CL system for patents does not require disclosure of this additional know-how, the absence of which makes the system without much use for specific types of drugs like biologics.

The Ayyangar Committee had also flagged practical difficulties in enforcing something along the lines of compelled sharing of trade secrets. The most

[82] Law Commission of India, *supra* note 16.

important of them is the extent of knowledge shared. This "*know-how*" within the ambit of trade secrets is a secret recipe of sorts, and there is no check to determine what "*all*" a manufacturer or inventor, for that matter, possessed. This also means that the extent of knowledge shared cannot be a subject of adjudication. Commentators, in the context of vaccines and biologics, have also referred to this know-how as "*show-how*" primarily because of the several allied techniques involved, such as laboratory practice, sampling techniques, and the requirement of demonstration to be shown how exactly it is done. How compulsion may work out in the context of this know-how/show-how remains to be seen.

The Defence Production Act ("DPA") in the US and its use during the COVID-19 pandemic to equip two Merck facilities to the standards necessary to safely manufacture the Johnson & Johnson vaccine is a potential strategy that can be adopted to enforce sharing of necessary know-how in a public health emergency situation.[83] Any confidential information withheld contrary to national interest was mandated to be published or disclosed. The effective result was precisely the knowledge sharing that Johnson & Johnson put to use in enhancing production capacity, simultaneously requiring the upgrade of Merck facilities to cater for vaccine production. Scholars such as Levine and Sarnoff have also pointed to the use of additional incentives or mandates to "*induce disclosure*."[84] These additional incentives and/or mandates include the introduction of a licensing mechanism that imposes a requirement of secrecy on the licensed party, amendment of the existing disclosure requirements under patent law and adding additional disclosure requirements,

[83] Jilian Stern, *The COVID-19 Pandemic and the Defense Production Act: Government Misuse and Failures*, 51 PUB. CONT. LJ 323 (2021).
[84] *See,* Levine and Sarnoff, *supra* note 22.

offering additional exclusivity periods and accelerated regulatory approval, and legislative actions that "*condition government funds*" on voluntary agreements to share trade secrets. In times of an emergency, reasonable compensation may be granted to trade secret rights holders for the use of their intellectual property when expanding capacity and assuring affordable access. However, this compensation must not be based on "*lost profits on monopoly prices*" or "*unreasonably high royalties.*"[85]

C. Clinical Trials and Transparency in Test Data

As part of regulatory approvals, pharmaceutical manufacturers submit a range of clinical data. This data, in addition to being of regulatory value, is also of informational value. For example, during the COVID-19 pandemic, researchers felt a critical absence of clinical data in advancing their understanding of the pandemic.[86] Data secrecy, therefore, does not assist in ensuring safety in patient outcomes and independent analysis, for example, can add a layer of additional scrutiny. The Vioxx debacle, explained below, is a significant indicator of the possible negative consequences of data secrecy maintained by the regulators. Rofecoxib (Vioxx), marketed as a safer alternative to aspirin, became a blockbuster drug. From its approval by the FDA in 1999 to its withdrawal in September, 2004, the drug had resulted in more than 84 million prescriptions worldwide and brought in $2.5 billion annually for its manufacturer, Merck.[87] In September 2004, a 3-year clinical trial evaluating the efficacy of the drug revealed an "*increased relative risk for*

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[85] *Id*., 1037.
[86] Christopher Morten & Amy Kapczynski, *The big data regulator, rebooted: Why and how the FDA can and should disclose confidential data on prescription drugs and vaccines*, 109 CAL. L. REV. 493 (2021).
[87] Eduardo Ortiz, *Market withdrawal of Vioxx: is it time to rethink the use of COX-2 inhibitors?*, 10 J. MANAG CARE PHARM. 551 (2004).

serious cardiovascular events, including heart attacks and strokes, beginning after 18 months of treatment among patients taking the drug."[88] Merck faced legal claims from nearly 30,000 patients who had cardiovascular events, later agreeing to pay $4.85 billion in settlement.[89] Most significantly, for our purposes, research later revealed that indicators for negative heart outcomes were present in the data held by the FDA even before the withdrawal of the drug.[90]

Examples such as the Vioxx debacle strengthen the case for providing access to independent researchers in scrutinising data for accuracy and conducting follow-up studies crucial in filling the gaps from previous studies or assessing and validating previous outcomes. Another issue in the context of data transparency is "*reporting bias*", which can add to misinformation in the research or result in the non-filing of negative studies, omitting key information related to significant side effects.[91] In addition to that, data transparency with respect to trials would allow assessing methodological flaws, if any, and preventing duplication of similar studies. In India, clinical trial registration has been made mandatory in the Clinical Trial Registry of India ("CTRI") since 2009. But, the transparency in clinical trial data reporting has been under scrutiny. Between 2018 and 2020, a total of 357 interventional clinical studies were reported as complete, but only 50 reported results of their

[88] Barbara Sibbald, *Rofecoxib (Vioxx) voluntarily withdrawn from market*, 171 CMAJ 1027 (2004).
[89] Lewis Krauskopf, *Merck agrees to pay $4.85 billion in Vioxx settlement*, BBC (Nov. 10, 2007), https://www.reuters.com/article/business/healthcare-pharmaceuticals/merck-agrees-to-pay-485-billion-in-vioxx-settlement-idUSL09297266/.
[90] Richard Horton, *Vioxx, the implosion of Merck, and aftershocks at the FDA*, 364 THE LANCET 1995 (2004).
[91] Morten & Kapczynski, *supra* note 86.

clinical trials on the CTRI website.[92] This flags a bigger issue of lack of transparency of clinical trial data even when regulatory bodies have mandated the same. As this discussion shows, there is a significant need for transparency in regulatory approaches to test data, especially when such concealment or non-transparency leads to critical and large-scale public health failures affecting thousands.

For comparison, in the European Union, Clinical Trial Regulation No. 536/2014 which became applicable from January, 2022 is the relevant regulation to look at. This regulation also introduced the Clinical Trials Information System ("CTIS"). Under this, access and disclosure to clinical trial data is differentiated at two stages. The first stage involves data related to trial registration, reporting and publication of results upon completion of respective phases. The second stage involves clinical study reports ("CSRs") and individual patient data.[93] The access and transparency component for clinical trial data was strengthened by European Medicines Agency's ("EMA") Policy 0070 introducing an obligation to publish regulatory clinical documents after a product's market authorisation. Earlier on, a bone of contention between the EMA and pharmaceutical manufacturers was the disclosure of CSRs, considered to be commercially confidential information ("CCI"). However, the Court of Justice of the European Union remained

[92] Renuka Munshi, Chaitali Pilliwar & Miteshkumar Maurya, *Public disclosure of clinical trial results at Clinical Trial Registry of India-Need for transparency in research!*, 14 PERSPECTIVES IN CLINICAL RESEARCH 81 (2023).
[93] Zaneta Zemła-Pacud and Gabriela Lenarczyk, *Clinical Trial Data Transparency in the EU: Is the New Clinical Trials Regulation a Game-Changer?*. 54 IIC, 732–763 (2023). https://doi.org/10.1007/s40319-023-01329-4.

unconvinced on refusing CSRs as part of the Policy 0070 mandate.[94] Similarly, "*Clinicaltrials.gov*", launched in 2000 is the US clinical trial reporting database and perhaps one of the world's foremost authority in clinical trial disclosures. The Food and Drug Administration Amendments Act of 2007 ("FDAAA")[95] lays down the subjects for clinicaltrials.gov requirements also known as applicable clinical trial ("ACT"). Criteria for a clinical study to be considered an applicable clinical trial is:

> "I. Study must be interventional (a clinical trial)
> II. Study must evaluate device product at least one FDA-regulated drug, biological, or
> III. Study must be other than:
> 1) A phase 1 trial of a drug or biological product, OR
> 2) A small clinical trial evaluating device feasibility or testing a prototype device
> IV. Study must meet at least one of the following:
> 1) At least one study facility located within U.S./U.S. territory, OR
> 2) Conducted under an U.S. FDA investigational new drug application (IND) or investigational device exemption (IDE), OR
> 3) Involves a drug, biological, or device product manufactured in and exported from U.S./U.S. territory for study in another country."

The FDA is authorised to enforce compliance under the FDAAA for a subset of interventional clinical trial limited to FDA-regulated drugs, biologics, and

[94] Orders of the Vice-President of the Court of 28 November 2013 in EMA v. AbbVie, Case C-389/13 P (R) (ECLI:EU:C:2013:794); and EMA v. InterMune, Case C-390/13 P (R) (ECLI:EU:C:2013:795).
[95] The Food and Drug Administration Act (2007) (United States).

medical devices. In August 2020, the FDA issued "*Civil Money Penalties Relating to the ClinicalTrials.gov Data Bank*" which allows for penalties against parties failing to register and publish results of ACTs.[96]

D. Technological Advances

The last decade has seen the rise of Artificial Intelligence ("AI") being used across sectors, including in various stages of the drug development process, as well as healthcare in general. Indicatively, in the drug discovery stage, AI can assist in drug design by predicting target protein structures and in drug screening by predicting bioactivity, toxicity, and physiochemical properties.[97] Similarly, in the product development stage, it can aid in deciding suitable excipients, monitoring the development process and ensuring specific compliances.[98] With the presence of several open-access chemical databases, virtual screening is also possible. Currently, nearly all major pharmaceutical companies have recognised the role that AI can play in drug development and are utilising it in some aspect or the other, with several predictions and statements as to the boost in efficiency and reduction of risk that the use of AI will bring to the drug development process.[99]

Similarly, the use of biomarkers in clinical studies is expected to bring down the time and costs it takes to create a drug with more specific patient eligibility criteria, strengthening efficacy signals, reducing side effects, etc.[100] It is

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[96] US Food and Drug Administration, *Civil Money Penalties Relating to the ClinicalTrials.gov Data Bank* (2020), https://www.fda.gov/regulatory-information/search-fda-guidance-documents/civil-money-penalties-relating-clinicaltrialsgov-data-bank.
[97] Debleena Paul et al., *Artificial Intelligence in drug discovery and development*, 26 DRUG DISCOV TODAY 80 (2021).
[98] *Id.*
[99] Jonathan Kimball, Srividhya Ragavan & Sophia Vegas, *Reconsidering the rationale for the duration of drug exclusivity*, 51 UNIVERSITY OF THE PACIFIC LAW REVIEW 525 (2020).
[100] *Id.*, 533.

expected that biomarkers will yield a 34% average increase in productivity across all phases of development.[101]

While this appears to be a positive step towards drug innovation and manufacturing, it does raise certain issues to bear in mind in the current discussion. There has been a consistent upward harmonisation of exclusion standards, whether patent rights or the push towards data exclusivity internationally, based on the argument that incentives are needed for the vast costs involved in this process. However, there has not been substantial discussion on how the reduction of these costs due to AI-assisted drug development should affect these incentives.[102] While the opaqueness of actual costs involved in drug development has historically been glossed over despite the drive to maximise exclusion standards on that basis, the reduction of costs and risk must now also play a role in re-calibrating the nature of these incentives, so as to ensure more accurate, and likely lower amounts of unnecessary inaccessibility to medicines.

AI also brings with it another question in the realm of trade secrecy. With algorithms and machine learning software now able to parse data and recognise patterns faster and more efficiently than ever before, there arises a significant question of how ethical it is to allow regulatory data to remain confidential when it could shed light on the safety and efficacy of various approved as well as yet to be approved (or even discovered) drugs, side-effects, etc.[103] This is especially true when there are questions about

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[101] *Id.*, 533. *See also*, IQVAI, *The Changing Landscape of Research and Development*, 58 (2019), https://www.iqvia.com/insights/the-iqvia-institute/reports-and-publications/reports/the-changing-landscape-of-research-and-development.
[102] Nic Fleming, *Computer-calculated compounds*, 557 NATURE 55 (2018).
[103] Morten & Kapczynski, *supra* note 86, 542.

understaffed or non-transparent regulatory procedures, and mistakes may not be scrutinised despite the significant public health concern in these outcomes. Certain commenters have proposed proactive disclosure of safety and efficacy data and nuanced calls of openness, such that "*data use*" agreements, limited to health researchers, be used by drug regulators towards this end.[104]

E. Regulatory Failure, Moral Hazard and the Public Interest

With a domestic revenue of $260 million and international sales of $1.3 billion in 2006, Ranbaxy Laboratories was India's largest pharmaceutical company and a significant player in the international market. Within 8 years from then, Ranbaxy would be sold twice, with the first buyer, Daiichi Sankyo, not only selling its 64% shares for $1.4 billion less than it paid just a few years earlier but also filing legal proceedings against Ranbaxy's former promoters for concealing and misrepresenting critical information about the company. At the time of Sun Pharma's purchasing of Ranbaxy from Daiichi Sankyo, four of Ranbaxy's plants had been barred from selling in the US, and it had also admitted to falsifying data in its submissions to the US FDA. [105] The story of Ranbaxy Laboratory's fall from grace is now well known, serving not only as a stark indicator of the dangers of a bad actor in the health space but also of the regulatory failure that allowed this at such a large scale.[106] Indeed, there were signs of incomplete or problematic test data in the early 2000s as well, including with its international agreements to provide HIV drugs to the United Nations International Children's Emergency Fund ("UNICEF"). Dinesh

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[104] *Id.*

[105] Vinti Agrawal et al., *A Failure of Regulatory Diligence: A Case Study of Ranbaxy Laboratories Ltd,* 15th AIMS INTERNATIONAL CONFERENCE ON MANAGEMENT 126, 127-128 (2018), http://www.aims-international.org/aims15/15ACD/PDF/A228-Final.pdf.

[106] KATHERINE EBAN, BOTTLE OF LIES: THE INSIDE STORY OF THE GENERIC DRUG BOOM (2019).

Thakur, the whistleblower who helped in large part to unravel this issue, had found that the bio-equivalence data that Ranbaxy used for several of its drugs either did not exist or was made up.[107] It must also be emphasised that even for this giant regulatory failure, it took several years of effort and communication by the whistleblower, Dinesh Thakur, for the US FDA to finally get past their reluctance to shake the boat and complete their investigations.[108] Meanwhile, the Indian regulators did not take any action until late 2014, after Ranbaxy was finally banned and the promoters fined $500 million. They stated their reasons for inaction to be that they did not have the resources and infrastructure to do the same level of vetting. This raises serious questions not only about the CDSCO's competency to check even for bioequivalence data but also questions about accountability for their failure at the cost of Indian public health.

This also brings up the issue of the granular nature of information, which could or should be considered confidential. Safety and efficacy, in particular, present a compelling case for not just exemption from being protected but perhaps also for proactive disclosures. For example, while it may be in a pharmaceutical company's interest to keep confidential information about its products which shows that its drug is harmful, this should not be the type of information that is protected by law. Conversely, proactive disclosure requirements can advance the public interest.[109] Along similar lines, clarifications on what type of regulatory information is of public interest can enable more effective usage of the Right to Information ("RTI") Act, 2005.

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[107] Agarwal et al., *supra* note 105.
[108] *Id*; *See also*, Katherine Eban, *How Ranbaxy hurtled towards a meltdown*, LIVEMINT (Jul. 11, 2019), https://www.livemint.com/companies/news/how-ranbaxy-hurtled-towards-a-meltdown-1562861830620.html.
[109] Durkin et al., *supra* note 81.

For example, data fraud and ethical violations in clinical trials have a clear bearing on public health and public interest. In 2018, an RTI request was made for an inquiry committee report examining the approval process of 4 drugs flagged in the Parliamentary Standing Committee on Health. The CDSCO, in its first response to the RTI request, stated that the report was not traceable. Pursuant to an appeal at the Central Information Commission ("CIC"), an unsigned Report was made available with missing crucial annexures.[110] The Report made several serious remarks about the drug approval process and the bureaucrats involved therein. The missing annexures were pursued via a petition at the Delhi High Court, ultimately resulting in the CDSCO admitting under oath that the annexures were missing.[111] An RTI request to a premiere public medical university with the "institute of national importance" label met with a similar fate. The RTI request was with respect to internal report on drug quality and a related incident including death of 5 patients by the use of substandard propofol as sedative, and it was met with unsatisfactory reply and no report being produced.[112] Another RTI request was filed pursuant to allegations made by the French drug regulator Agence nationale de sécurité du médicament et des produits de santé ("ANSM") against GVK Biosciences based in Hyderabad, India, where the CDSCO set up a committee to examine the allegations. In its reply, the CDSCO had allegedly not provided the correct information and a subsequent second appeal was disposed of without the

[110] Prashant Reddy v. Ministry of Health & Family Welfare, Second Appeal No. CIC/MH&FW/A/2018/159460-BJ (Central Information Commission).
[111] Prashant Reddy T. v. Drugs Controller General Of India & Ors, W.P.(C) 7213/2020(Delhi High Court). *See also*, Prashant Reddy T., *Lessons on the RTI Act: Of Missing Records at the DCGI's Office & Litigation Fatigue at the Delhi High Court*, SPICYIP (Sep. 5, 2024), https://spicyip.com/2024/09/lessons-on-the-rti-act-of-missing-records-at-the-dcgis-office-litigation-fatigue-at-the-delhi-high-court.html.
[112] Prashant Reddy v. PG Institute of Medical Education & Research, Chandigarh (Second Appeal No. CIC/PGIME/A/2023/617621).

parties being present.[113] The petitioner in all these cases had also highlighted the role of the Chief Information Commissioner in passing orders devoid of reasoning resulting in withholding of key information of public interest.[114] The case highlights the concerning attitude of the government regulatory bodies in retaining critical records combined with the significant delay in pursuing the issue of seeking information before the courts.

F. Whistleblowing, Right to Information, and Public Health in India

As discussed before, the Ranbaxy saga posed serious questions as to the regulatory affairs of medicines manufactured in India. Although whistleblowing actions take place only after much has happened and the primary policy focus should remain on strengthening the regulatory affairs of clinical trials, the whistleblowing act in itself cannot be undermined in the public interest. In this regard, it is critical that India bring into place an effective whistleblower protection law that allows whistle-blowers to share confidential information with the relevant authorities without threat of harm or legal action. Despite several recommendations over the years, attempts to bring in whistleblower legislation in India have not resulted in anything concrete.[115] Whistleblowing is crucial for several reasons. In addition to promoting accountability, it also acts as a deterrent to otherwise illegal actions,

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[113] Prashant Reddy v. Public Information Officer, CDSCO (Second Appeal No. CIC/CDSOK/A/2022/601071).

[114] Prashant Reddy, *How I lost eight out of nine cases before the Chief Information Commissioner*, NEWSLAUNDRY (Feb. 4, 2025), https://www.newslaundry.com/2025/02/04/how-i-lost-eight-out-of-nine-cases-before-the-chief-information-commissioner.

[115] The Whisteblowers Protection Bill, 2011 was passed by the parliament in 2014. In 2015, amendments were passed which diluted the earlier Act. However, the Whistleblowers Protection Act is yet to be operationalised.

creating a risk of exposure. Circling back to the Ranbaxy example, without a whistleblowing expose, it would have been a nigh impossible task to even "*know*" of such irregularities. Even with such knowledge, it took substantial time for an investigation to reach the necessary conclusion. An added protection via legislation, therefore, creates a layer of safety net for the whistleblower, prompting more such actions, which may have been otherwise swept under the rug. Importantly, from a public health perspective, pharmaceutical research and development is a complex process that demands high-level accuracy and compliance mechanisms, specifically given the impact it may consequently have. The regulatory compliance system is critical, and any gaps or loopholes in this system would force a public health crisis where there could have been none.

Another aspect that has been discussed before is the role of effective disclosures. Whistleblowing provisions will allow pharmaceutical manufacturers to disclose actual data with respect to investments made into clinical trials – a significant marker for the high cost of medicines. In addition to information on clinical trials and the ignorance of regulatory affairs, whistleblowing, as seen in the US context, has been helpful in figuring out marketing and pricing frauds, independent of clinical trial factors.[116]

In the UK, Dr. Andrew Millar, Director of Clinical Trial for British Biotech, disclosed clinical trial data for two investigational drugs – for pancreatitis and cancer.[117] The company had been misrepresenting the progress of such clinical

[116] The *Tap Pharmaceutical* case, for example, resulted in a settlement of $875 million. The primary allegation was that *Tap* had paid an administrative fee to physicians to prescribe their drug Lupron versus the competing and less expensive AstraZeneca's Zoladex.
[117] Sylvester J. Boumil et al., *Whistleblowing in the pharmaceutical industry in the United States, England, Canada, and Australia,* 31 JOURNAL OF PUBLIC HEALTH POLICY 17 (2010).

trials and, therefore, manipulating stock value. Dr. Millar was eventually fired but won a settlement amount of 500,000 GBP.[118] This case paved the way for the Public Interest Disclosure Act in the UK in 1999. And although India has already had its "*Millar Moment*" (Ranbaxy and Dinesh Thakur), it has still not seriously considered the Whistleblowers Act.

In the context of public health, a whistleblowing system was implemented in India in 2010 by the Ministry of Health and Social Welfare and the CDSCO to combat substandard and falsified medical products.[119] The scheme, named the "*Reward Scheme for whistleblowers in the fight against the menace of spurious or fake drugs, cosmetics and medical devices*", included a reward scheme equivalent to 20% of the value of the seized consignment of fake medicines to a maximum value of Rs. 25 Lakh (approx. $54,750 USD). Rewards for individual government officials were capped at Rs. 5 Lakh (approx. $10,950) per consignment and Rs. 30 Lakh (approx. $65,700) maximum during the officer's career.[120] However, critiques pointed to a problem within this scheme.[121] The existing regulations, including the aforementioned ones, offer a solution to counterfeit drugs but ignore the more prevalent problem of substandard drugs. In addition to this, the use of criminal tactics to prevent whistleblowing activity and the scheme's seemingly

[118] *Id*.
[119] Ministry of Health and Family Welfare, *Reward Scheme for whistleblowers in the fight against the menace of spurious or fake drugs, cosmetics and medical devices* (2018), https://cdsco.gov.in/opencms/resources/UploadCDSCOWeb/2018/UploadConsumer/WhistleBlowerScheme.pdf.
[120] *Id.*
[121] Killugudi Jayaraman, *Failure of Indian whistleblower scheme points to deeper woes*, 16 NATURE MEDICINE 364 (2010).

insufficient protection of whistleblowers do not allow the scheme to reach its expected outcome.

Whistleblowers Protection Act, 2014 was a similar attempt to revisit the necessity of whistleblowing in capturing, amongst other issues, regulatory ignorance. The Act has not yet seen the light of the day, but the draft Act has its fair share of issues. The amendments brought in 2014 created multiple layers of administrative obstacles before sensitive information could be investigated.[122] The biggest issue, however, was the Act's interplay with the RTI Act. Any information disclosed under the Whistleblowers Act would not be considered if the same was also excluded under the RTI Act. The list of excluded information under the RTI Act also includes trade secrets and intellectual property under Section 8(1)(d), if such disclosure would harm the competitive position of a third party. At the same time, it also provides for an exception for this in the situation that the competent authority can allow for this disclosure if there is a larger public interest that warrants it.[123] This exclusion seemingly underscores the importance of critical information, which may be a trade secret but also reasonably expected to be in the public domain, such as clinical trial data. Similarly, under the proviso of Section 11(1)[124] of

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[122] Krishn Kaushik, *Unscrupulous Act*, THE CARAVAN (Sep. 1, 2015), https://caravanmagazine.in/perspectives/unscrupulous-act-amendments-whistleblowers-act.

[123] 8. Exemption from disclosure of information. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen – *(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information.*

[124] 11. Third party information. (1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of

the RTI Act, disclosure of trade or commercial secrets is allowed "*if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party*." Therefore, a compelling case for the disclosure of such information under the ambit of the RTI Act can also be made.

The Law Commission Report on Trade Secrets, however, promisingly discusses the necessity of including a whistleblower exception to the trade secrets legislation. This provision will be aimed at protecting the whistleblower while balancing competing interests.

V. Conclusion

In the absence of trade secret legislation in India, some issues underlined in this paper remain anticipatory. However, from a public health perspective, issues in test data transparency, the advent of biologics and biosimilars in the pharmaceutical industry, know-how and confidential manufacturing information for critical vaccines remain contentious. For questions raised on CL, it remains to be seen how exactly the forthcoming legislation, if any, tackles the complex issues involved therein. Whistleblowing, as we have noted, will be an empowering tool for public interest, especially in public health. The goal is not only to increase accountability and transparency in regulatory affairs but also to force introspection and subsequent focus on pro-public health policies. The COVID-19 pandemic was a glaring pronouncement

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the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information: *Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.*

on the capacity and ability to ensure equitable vaccines. As discussed extensively in this paper, key drugs, like vaccines in times of critical health emergencies, require collaborative efforts to ensure equitable access. These efforts are not only in the nature of financial assistance but also empowerment. Empowering countries that lack urgent capacities to manufacture vaccines, transferring the necessary technical know-how and technology, and creating supply chains for effective distribution. Actions involving leading pharmaceutical manufacturers in declining know-how for critical vaccines, not just to competitors but the WHO as well, defeat public health objectives for society. Actions like these are all the more reason to strengthen local capacities. The WHO Pandemic Treaty, currently undergoing rounds of discussion, also remains an optimistic step towards ensuring equitable access.[125] The provisions on know-how and technology transfer being discussed for the treaty will shape future collective actions by governments during public health emergencies like COVID-19. But the draft negotiations have also been nothing short of a string of contradictory commitments.[126] The provisions, as they stand, do not create a binding obligation on global collaboration for pandemic-like situations.[127] In the Indian context, as the paper has underlined, the absence of sufficient manufacturing capacity or facility, while important to address, is perhaps better prioritised after ensuring maintenance and proper upgrades and usage of existing facilities – Add to that, quality concerns related to manufacturing in India and the non-transparency of clinical trial data. For the former, a rigid system that ensures that regulatory

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[125] Public Health on Call, *Why We're Still Waiting for a Pandemic Treaty*, JOHN HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH (Aug. 12, 2024), https://publichealth.jhu.edu/2024/is-a-pandemic-treaty-still-possible.

[126] *Id*.

[127] David P. Fidler, *The Pandemic Agreement Fractures in the Latest Negotiations*, THINK GLOBAL HEALTH (Oct. 29, 2024), https://www.thinkglobalhealth.org/article/pandemic-agreement-fractures-latest-negotiations.

requirements are met by pharmaceutical manufacturers will accompany the latter, which includes filing relevant clinical trial data for public and external researchers. An overhauling of the current drug manufacturing regime in India, right from facilitating raw materials to the stage of bringing the drug into the market, seems long due.

Reforming Indian Suicide Laws: A Global Comparative Analysis and Impetus for Change with Bharatiya Nyaya Sanhita, 2023

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Abstract

This research paper delves into the evolution of suicide laws in India, juxtaposed with global legal frameworks, tracing historical shifts from criminalisation to more compassionate approaches. It scrutinises key legal provisions under the Indian Penal Code, revealing complexities in determining punishment for "abetment to an attempted suicide." With the impending implementation of the Bharatiya Nyaya Sanhita, 2023, in July 2024, this article advocates for a dedicated chapter within the legal code to comprehensively address all aspects of suicide-related offences, reflecting the updates and implications of the BNS as it has now become an Act. The paper offers a comparative analysis of suicide laws across continents, examining criminal legislation and penalties for abetment of suicide and abetment to attempted suicide. This analysis illuminates diverse global approaches and advocates for legislative amendments in India to align with international best practices, fostering a compassionate legal system that upholds the rights and dignity of all individuals. Furthermore, the paper stresses the need to address the lack of punishment for perpetrators based on the severity of injuries inflicted on individuals attempting suicide. It highlights the lack of accountability of such perpetrators who assist the individuals dependent on them in attempting or committing suicide, particularly in cases where neglect or mistreatment leads to such extreme actions.

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I. Introduction

The legal landscape surrounding suicide has evolved significantly over time, reflecting shifting societal attitudes, cultural norms, and ethical considerations. From ancient civilisations to modern societies, diverse perspectives have shaped the treatment of suicide within legal frameworks.

Historically, suicide was often regarded as a criminal act, with the concept of *felo de se*[1] characterising it as a punishable behaviour. Influenced by philosophical and religious doctrines, societies viewed suicide as dishonourable and deserving of societal stigma. However, the 19th and 20th centuries witnessed a gradual shift towards decriminalisation of suicide as an offence, which started with countries like Sweden in 1864 and later on with the enactment of the Suicide Act of 1961[2] in England and Wales.

Over time, countries have become progressively sensitive towards the act of suicide and the individuals who attempt it. This growing awareness has led to a more nuanced understanding and response to the related issues. As a result, legislation in various countries has gradually evolved to address offences related to the act of suicide. Other countries have made developments in regard to the severity of their suicide-related offences; they have not confined the offence to only "*Abetment to Suicide*" but also other offences like "*Abetment to Attempted Suicide*", "*Injuries Sustained during the Abetted-Suicide Attempt*", and situations where the victim was in a position of "*Dependency over the Perpetrator***"** who orchestrated the suicide attempt. These legal developments showcase a broader commitment towards addressing the complexities surrounding suicide and providing appropriate protection and

[1] BLACK'S LAW DICTIONARY (2nd. ed., 1910) ("*meaning; felon of himself*").
[2] The Suicide Act, 1961 (United Kingdom) (hereinafter "1961 Act").

intervention. However, India has not yet developed suicide laws that specifically address and punish the above-mentioned offences in their Criminal Code other than "*Abetment to Suicide*."

Despite the growing discourse on mental health and suicide prevention in India, there remains a notable scarcity of scholarly work and journals that specifically address the broader spectrum of offences related to acts of suicide, such as the ones mentioned above and cases involving victims in positions of "*Dependency over the Perpetrator*", where power dynamics and emotional manipulation can significantly impact the circumstances surrounding these offences. Most of the existing literature focuses primarily on advocating for the decriminalisation of attempted suicide[3] or on the significance of India's newly launched National Suicide Prevention Strategy ("NSPS") and its potential impact on suicide prevention,[4] often neglecting the nuanced legal and social implications of these other specific offences.

This gap highlights the need for more extensive research and publications in this critical area to inform better legal reforms and support systems for affected individuals. This paper seeks to engage with the ongoing discourse surrounding transformative changes in suicide legislation. With the Bharatiya Nyaya Sanhita, 2023,[5] now enacted, there is an urgent necessity to reevaluate India's laws in relation to suicide-related offences. The author delves into the historical evolution of suicide laws from being a punishable offence, known as *felo de se*, to the beginning of intercultural sensitivity towards victims committing suicide. Through a comprehensive analysis of legal precedents,

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[3] Farhana Helal Mehtab et al., *Right to Commit Suicide in India: A Comparative Analysis with Suggestion for the Policymakers*, 8 TAYLOR & FRANCIS ONLINE (2022).
[4] Ramdas Ransing et al., *National Suicide Prevention Strategy of India: implementation challenges and the way forward.* 10 LANCET PSYCHIATRY 3 (2023).
[5] Bharatiya Nyaya Sanhita, 2023, No. 45, Act of Parliament, 2023.

philosophical perspectives, and contemporary debates, the author aims to illuminate the multifaceted nature of suicide-related offences and propose suitable punishments that India can incorporate into its new Criminal Code. The offence is analysed in depth, taking into consideration various essential sections of the Indian Penal Code that may contribute to its formation. Additionally, the paper explores the offences from a global perspective by comparing them with the established legal frameworks of selected countries to understand their global approach. The paper will be divided into four sections, each scrutinising and addressing these issues separately, offering a refined approach for legislative consideration.

II. ***Felo De Se*: Historical Perspectives on Suicide**

Understanding the historical perspective is crucial in examining the transition from legislative punishment for the criminal act of committing or attempting suicide to the growing legislative sensitivity towards victims of suicide across different cultures. This understanding is crucial before we can comprehend how various other laws were formed in different countries, which gradually encapsulated the idea related to the enactment of other offences related to the act of suicide. For that, we must understand what *felo de se* is and why it is no longer used in legislation.

The term *felo de se*, also known as *felonia de se* in Latin, was historically used to describe suicide.[6] *Felo de se* translates to "*felon of himself*", an archaic legal term commonly used to denote suicide as a criminal act.[7] Adults who committed suicide were viewed as criminals and subject to punishment by the ruling authority.

[6] BLACK'S LAW DICTIONARY, *supra* note 1.
[7] *Id.*

According to Plato, individuals who took their own lives were not accorded honour. In ancient Athens, individuals who took their own lives faced posthumous consequences, such as the removal of their hands, symbolically enacted upon their corpses.[8] Aristotle elaborates on this, suggesting that the hand, being an instrument of action, could be seen as the executor of the act and thus symbolically regarded as the perpetrator.[9]

These perspectives reflect a broader cultural disdain for suicide in ancient Greece, where the act was perceived not only as a personal failure but also as a violation of societal norms. Both philosophers highlight the severe consequences of suicide, indicating that it was viewed as an affront to the values of the community. Ultimately, their views suggest that suicide was not merely a private matter but one with significant implications for both the individual and society at large.

Even in 1823, there was a statute requiring persons committing suicide to be buried at the crossroads with a stake driven through their bodies,[10] which was later repealed and replaced with a less severe form of punishment. Continuous efforts were made to dissuade the individual from committing the crime, and as a consequence, posthumous punishment was imposed on the deceased's body. Additionally, his property was forfeited as a means to punish his family vicariously.[11]

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[8] Terry Madenholm Mentre, *A Suicide Manual from Ancient Greece and Rome*, HAARETZ (May 31, 2023), https://www.haaretz.com/archaeology/2023-05-31/ty-article/a-suicide-manual-from-ancient-greece-and-rome/00000188-7112-d2d1-afbe-7d1f1b430000.
[9] *Id.*
[10] Burial of Suicide Act, 1823 (United Kingdom).
[11] The Forfeiture Act, 1870 (United Kingdom).

In the past, individuals who took their own lives were often barred from burial in Catholic cemeteries.[12] Traditional Christian doctrine has regarded suicide as a serious offence and sin.[13] The Old Catholic Church used to believe that;

> "Suicide dishonoured the sacrifice of Jesus, harmed an individual's entire community, and dishonoured God's gift of life. As a result of declaring suicide as sinful, it became Christian law that the body of a person who died by suicide was desecrated by the church and denied a proper Christian burial."[14]

However, individuals who were mentally incapacitated or unable to perform their own tasks and subsequently took their own lives were not considered *felo de se* and, therefore, not subjected to punishment.

The shift towards interpersonal and cultural sensitivity concerning suicide evolved significantly over time. The decriminalisation of suicide began in the late 19th century, with Sweden taking the lead in 1864.[15] That year, the punishment for suicide and attempted suicide was abolished, and by 1908, all specific regulations pertaining to suicide were removed.[16] This shift in cross-cultural empathy spread to other Western countries in the 20th century.

In England and Wales, concerns about the use of criminal law to discourage suicide were raised earlier in *R. v. Burgess.*[17] It was held that an attempt to

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[12] Robert Barry, *The Development of the Roman Catholic Teachings on Suicide*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 449 (1995).
[13] MCDONALD O., THE NEW INTERNATIONAL DICTIONARY OF THE CHRISTIAN CHURCH (1938).
[14] CHOLBI, M., STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall edn., 2017).
[15] Lindelius R., *Trends in Suicide in Sweden 1749 -1975,* ACTA PSYCHIATRICA, 60, 295-310 (1979).
[16] *Id.*
[17] R v. Burgess [1862] 169 E.R. 1387.

commit suicide was a misdemeanour and not the felony of attempting to commit murder within the meaning of Sections 11 to 15 of the Offences Against the Person Act, 1861. Subsequently, suicide was decriminalised in 1961, following a Report from the British Medical Association and Magistrates Association in 1958. This Report urged a "*more compassionate and merciful outlook*" and concluded that legal powers to mandate incarceration for individuals who attempted suicide were unnecessary, as the focus should be on providing support rather than punishment.[18] The legislation enacted in 1961 abolished suicide as a criminal offence while maintaining penalties for other suicide-related offences. Similarly, Finland decriminalised suicide in 1910, followed by New Zealand in 1961 and Canada in 1972.[19]

Interestingly, the shift towards interpersonal and cultural sensitivity was further emphasised when the Roman Catholic Church reversed its stance on suicide in Canon Law on January 25, 1983.[20]

Subsequently, other countries such as Northern Ireland (1993), Sri Lanka (1998), India (2017), and Singapore (2020) decriminalised suicide within a reasonable period of time.[21] It's worth noting that the term *felo de se* is no longer widely used in contemporary legal practice.

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[18] J. Neeleman, *Suicide as a crime in the UK: legal history, international comparisons and present implications* 94 ACTA PSYCHIATRICA SCANDINAVICA 4, 252 - 257 (1996) .
[19] Lifeline International, *Position Statement on Decriminalisation of Suicide* (Aug. 01, 2023), https://lifeline-international.com/app/uploads/2023/09/LLI-_Position_Statement_Decriminalisation_of_Suicide_Aug_2023-1.pdf.
[20] Charlotte L. Wright, *The English Canon Law Relating to Suicide Victims,* 19(2) ECCLESIASTICAL LAW JOURNAL, 193 – 211 (2017).
[21] Bob Lew et al., *Decriminalizing suicide attempt in the 21st century: an examination of suicide rates in countries that penalize suicide, a critical review* 22 BMC PSYCHIATRY 424 (2022).

All these historical events described above led to significant changes in legislation among various countries regarding suicide. Different drafts were enacted to show the state's sensitivity towards the act of suicide and the victim who committed it. Among them was the enactment of a 1961 piece of legislation related to suicide in the United Kingdom ("UK"), whose legislation can help India improve its suicide laws. The author elaborates on this point further in the different sections of the paper.

III. Evolution of Suicide Laws in India: A Comprehensive Overview with Special Reference to Bharatiya Nyaya Sanhita, 2023

The act of suicide, as such, is not a punishable offence in India, but its attempt is. In the Indian Penal Code, 1860 ("IPC"),[22] there are only three laws about the act of suicide, which declare its attempt and abetment as an offence. Chapter XVI of the IPC talks about the "*offences affecting the human body*", in which we have Sections 305, 306, and 309, which talk about offences related to the act of suicide. These three sections of the IPC deal with different aspects of suicide and its abetment.

However, the new Criminal Code introduces updates to laws regarding suicide-related offences, reflecting evolving perspectives on these issues. This paper analyses the updated Sections and their implications within the new framework. Additionally, it examines the historical evolution of these laws by comparing them to the initial draft of the IPC from 1837, highlighting the strengths and shortcomings of the current provisions in the new Criminal Code.

[22] The Indian Penal Code, 1860, No. 4, Acts of Parliament, 1860 (hereinafter "IPC").

This historical perspective is crucial for understanding contemporary legislative reforms and ensuring that these laws evolve to provide adequate protection and justice concerning suicide-related offences. The ultimate goal is to advocate for a legal framework that offers adequate protection and justice for individuals affected by suicide-related offences, ensuring that these laws evolve in a manner that not only addresses all aspects of suicide-related offences but also treats the victims with compassion and sensitivity.

A. Historical Evolution of Section 305 of IPC

Interestingly, in the initial draft submitted in 1837 by the members of the Law Commission of India to George Lord Auckland, Governor-General of India, in Council,[23] there was no penal provision regarding the "*Attempt to Suicide*" but only for abetment of suicide by aid "*of a person*"[24] or "*of any child under twelve years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication*."[25] There was no mention of punishment for the act of attempting to commit Suicide, but only for its abetment.

The wording and the punishment given in the first draft of the Code for the sections on "*Abetment of Suicide*" were also different from the ones we have in our current IPC, and the numbering of the sections was different, too.

For instance, Section 305 of IPC and Section 306 of the Code presented by the Indian Law Commission in 1837 talks regarding the punishment in "*Abetment of Suicide of a Child or of an Insane Person.*"

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[23] THOMAS BABINGTON MACAULAY, MACAULAY C. H. & CAMERON DANIEL ELIOTT, *Preface* in INDIAN PENAL CODE: AS ORIGINALLY FRAMED IN 1837 (1888).
[24] IPC, §307.
[25] *Id.*

Section 305 of the 1860 Code focuses on the abetment of suicide of vulnerable individuals, such as children below the age of 18, insane persons, delirious persons, idiots, or those in a state of intoxication.[26] If a person belonging to any of these categories commits suicide, whoever aids or encourages the commission of such suicide is subject to punishment.[27] The penalties include death, imprisonment for life, or imprisonment for a term not exceeding ten years, along with the possibility of a fine.[28] In contrast, Section 306 of the 1837 Code included specific provisions regarding the abetment of suicide by these vulnerable individuals, imposing similar severe penalties, including death or life imprisonment.[29]

In both of these provisions, the age of the child is mentioned differently. Section 305 of the 1860 Code mentions the "*child below the age of 18*", and Section 306 of the 1837 Code mentions the "*child below the age of 12*." Punishment here in mention is "*death, or transportation for life, or rigorous imprisonment for life, and shall also be liable to a fine*." On the other hand, in Section 305, punishment for abetment is described as "*death, imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to a fine*."

The differences in age in the Code of 1860 and 1837 reflect legal and societal shifts. The variation reflects evolving perspectives on capacity and responsibility at different developmental stages. Recognising individuals under 18 as minors with distinct needs and support systems likely influenced the change in age mentioned in Section 305 of the final draft of the Code of

[26] IPC, §305.
[27] *Id.*
[28] *Id.*
[29] *Id.*

1860. Overall, the difference in age and punishment between the two provisions likely reflects changes in societal attitudes, legal reforms, and a growing recognition of the unique needs of the criminal justice system.

Now, with the emergence of the new Criminal code in 2023, amendments have been made to the reading of Section 305 of the IPC, reflecting a more compassionate approach. Notably, in Section 305, which is now Section 105 of the new Criminal Code, the term "*any idiot*" has been replaced with "*person with mental illness*." This change recognises the need for sensitivity and respect towards individuals with mental health issues.

B. Historical Evolution of Section 306 IPC

The provisions for "*Abetment of Suicide*" mentioned in Section 306 of the 1860 Code and, on the other hand, in Section 307 of the 1837 Code differ. Section 306 states that if any person commits suicide, the one who abets the act is held accountable.[30] The punishment for abetment of suicide under this section is imprisonment for a term of up to ten years, along with the potential for a fine. In contrast, Section 307 of the 1837 Code included specific language regarding punishment for those who aided in the commission of suicide, stipulating a term of imprisonment of up to fourteen years, with a minimum of two years, along with a fine.[31]

The key difference in the wording between these two provisions is in the phrase "*whoever previously abets by aid*", which can be found in Section 307 of the 1837 Code but is nowhere to be found in our present Code. Section 306

[30] IPC, §306.
[31] IPC, §307 ("*If any person commits suicide, whoever previously abets by aid the commission of such suicide shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine"*).

simply states, "*Whoever abets the commission of such suicide.*" This wording does not specify whether the abetment occurred via instigation, encouragement, or by simply providing aid, nor does it mention the element of prior abetment, as it is implied that it does not need mentioning; it is implied. In contrast, Section 307 of the 1837 Code limits the abetment by aid only.

Another essential difference between Section 307 of the 1837 Code and Section 306 of the 1860 Code lies in the maximum term of imprisonment prescribed for abetment of suicide. Under Section 307, individuals abetting suicide could face imprisonment for up to fourteen years with a fine, while Section 306 imposes a term which may extend to ten years along with a fine.

The legislative evolution from Section 307 of the 1837 Code to Section 306 of the 1860 Code highlights a shift towards a broader and more flexible approach to the abetment of suicide. The 1860 Code's provisions' language covers all forms of abetment, such as instigation, encouragement, and aid, without specifying the manner, thus broadening the scope of accountability. Additionally, the reduction in the maximum term of imprisonment from fourteen years to ten years reflects a reassessment of the severity of the crime, possibly indicating a more balanced approach. This change allows for greater judicial discretion in tailoring sentences to fit the unique circumstances of each case, demonstrating an adaptation to evolving legal and social perspectives on the nature of abetment and its impact on individuals.

The provision is faultless in itself, as evidenced by the fact that since the introduction of the new Criminal Code of 2023, Section 306 (now Section 106) has remained unchanged, indicating continuity in addressing the abetment of suicide without significant alterations.

C. Historical Evolution of Section 309 of IPC

Over time, laws regarding suicide and its abetment in India have evolved. While the act of committing suicide in itself is not punishable, the attempt to commit suicide was decriminalised in 2017. As stated earlier, the attempt to commit suicide was never mentioned in the initial draft of the Penal Code in 1837; it was neither mentioned in the first nor in the second reports of revisions or amendments provided by the Governor General in the council.[32] However, it was still included in the 1860 Code as an offence. This suggests a subsequent decision by the government to classify attempted suicide as a crime against the State.[33] Today, Section 309 of the Code provides that if an individual makes an attempt to end their own life and takes any action towards the commission of the act, they can be held liable and will be punished with simple imprisonment for a term that can extend up to one year, or a fine, or both.[34]

The provision of Section 309 of the Code had a major amendment in 1882, where the punishment for the "*Attempt to Commit Suicide*" was made more flexible. Before the amendments made to Section 309 by Act 8 of 1882, the punishment for this offence was "*Simple imprisonment for a term, which can be extended to one year, and shall also be liable to a fine.*"[35] However, with the amendments in 1882, the words "*and shall also be liable to fine*" were deleted and replaced with the words "*or with fine, or with both.*"[36] This amendment indicates that the legislature recognises the distinction between

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[32] THOMAS BABINGTON, *supra* note 23.
[33] Ritik Dhankar, *An Analysis on The Constitutional Validity Of Section 309 Of The Indian Penal Code, 1860,* DE JURE LEXUS LAW JOURNAL (2021).
[34] IPC, §309.
[35] State of Himachal Pradesh v. Nirmala Dev, (2017) 7 SCC 262.
[36] The Indian Penal Code (Amendment) Act, 1882, Act No. 8 of 1882. ("*Subs.* for "*and shall also be liable to fine*").

punishment by imprisonment and punishment by fine. It provides the option for the court to impose either simple imprisonment for a specified period, a fine, or both as a punishment for attempting to commit suicide.

The amendment aimed to grant courts flexibility in sentencing for attempted suicide, including imprisonment, a monetary fine, or a combination of both, depending on the circumstances of the case.[37] It recognized that imprisonment might not always be suitable, considering factors like the severity of the offence and the mental state of an individual. By introducing fines as an alternative punishment, the amendment reflected a nuanced approach. This legal change might have been influenced by the passing of the Interments (*felo de se*) Act in 1882[38] in England and Wales, indicating the impact of colonial legal developments on British India's criminal law evolution in India.

The 1882 Act passed in England and Wales amended the law relating to the interment of any person found *felo de se*, as it aimed to alter and amend the laws and usages concerning the burial of individuals who died by suicide. The specific objective of the Act, as can be inferred from its introductory paragraph, was;

> "WHEREAS it is expedient that the laws and usages relating to the interment of the remains of persons against whom a finding of felo de se shall be had should be further altered and amended."[39]

From this statement, it can be understood that the Act sought to modify and update the existing laws and practices concerning the interment of individuals found *felo de se*. It recognised that changes were necessary to address the

[37] *Id.*
[38] Interments (*felo de se*) Act, 1882 (United Kingdom).
[39] *Id.*

specific circumstances surrounding the burial of individuals who died by suicide. It sought to provide guidance on where such individuals should be buried, specifying that their remains should be interred in the churchyard or other burial ground of the parish or in a place where they would typically be buried if the finding of *felo de se* had not been made.[40] The Act repealed the provisions which had previously governed the interment of persons found *felo de se*.[41] By doing so, it sought to replace outdated or inadequate provisions with new regulations that better addressed the needs and sensitivities surrounding the burial of individuals who died by suicide. The Act updated and improved the laws and practices related to the internment of individuals found '*felo de se'*, with a focus on ensuring appropriate burial procedures and addressing any shortcomings in the existing legislation.

Subsequently, India, like other nations, began to question the constitutional validity and rationality of the "*Attempt to Suicide*" as an offence. This shift occurred when the Law Commission sent their reports recommending the repeal of Section 309 of the IPC.

The legal status of suicide attempts in India has undergone significant evolution, reflecting changing societal attitudes and judicial interpretations. Initially considered a criminal offence under Section 309 of the IPC, attempts to end one's life were subject to punishment. However, over the years, a series of legal challenges and judicial reviews have led to a re-evaluation of this stance, culminating in the enactment of the Act of 2017.

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[40] Interments (*felo de se*) Act, 1882, §2 (United Kingdom). Coroner to give directions for interment.

[41] *Id*, §1. The Act of the fourth year of George the Fourth, chapter fifty-two, intituled "*An Act to alter and amend the law relating to the interment of the remains of any person found felo de se*," shall be and the same is hereby repealed.

The Law Commission first deemed Section 309 of the IPC as harsh and unjustifiable in their 42nd Law Commission Report.[42] They recommended its repeal to the government, citing an English writer's view that punishing someone for attempting suicide only adds further pain to an already troubled individual. The recommendations were included in the IPC (Amendment) Bill, 1972, but the bill lapsed after the dissolution of Lok Sabha in 1979.[43]

However, in 1991, in its 156th Law Commission Report,[44] the Committee reversed its stance, supporting its legality in cases involving serious offences like drug trafficking and terrorism.[45] By 2008, in its 210th Law Commission Report,[46] the Commission deemed Section 309 of the IPC, 1860, unconstitutional, advocating for its removal from the Code. They argued that punishing distressed individuals who fail to end their lives is cruel and instead advocated for support and treatment. They urged the government to eliminate Section 309, regardless of its constitutional status, emphasising the need for compassionate intervention over punitive measures.[47]

The perception of the attempt to suicide in India underwent a shift in 1981, when the Delhi High Court criticised Section 309 of the IPC as "*unworthy of*

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[42] Law Commission of India, *42nd Report on Indian Penal Code* (1971), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082456.pdf.
[43] Indian Penal Code (Amendment) Bill, 2012, Bill No. I of 2012, Statement of Objects and Reasons (Aug. 9, 2012).
[44] Law Commission of India, *156th Report on Indian Penal Code* (1991), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/09/2022092329.pdf.
[45] *Id.*
[46] Law Commission of India, *Humanization and Decriminalization of Attempt to Suicide* (2008), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081095.pdf.
[47] *Id.*

society" in the case of *Sanjay Kumar Bhatia,*[48] calling it outdated and advocating for psychiatric care over punishment. However, the constitutional validity of Section 309 was not addressed in this judgment.[49]

The Andhra Pradesh High Court, in the case of *Chenna Jagadeshwar*,[50] upheld the constitutional validity of Section 309 but emphasised exempting mentally ill individuals and providing them with psychiatric care. They also asserted the court's authority to ensure fair treatment and attention for people in need.[51]

The Supreme Court, in the case of *P. Rathinam,*[52] agreed with the decisions of the Bombay and Delhi High Courts and rejected the view of the Andhra Pradesh High Court, declaring Section 309 unconstitutional, citing violations of Articles 14 and 21 of the Constitution. The courts reasoned that the right to live includes the right not to live, and therefore, punishment for suicide is inconsistent with the Constitution.[53]

Yet, in the case of *Gian Kaur,*[54] the Supreme Court ("SC") upheld the validity of Section 309, stating the right to die isn't protected under Article 21. The court opined that while the right to life is protected, the concept of suicide is inconsistent with this article, and therefore, the right to die is not included in Article 21.[55]

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[48] State v. Sanjay Kumar Bhatia, 1985 SCC OnLine Del 134.
[49] *Id.*
[50] Chenna Jagadeshwar v. State of Andhra Pradesh, (1987) Cr LJ 549.
[51] *Id.*
[52] P. Rathinam v. Union of India, 1994 AIR 1844.
[53] *Id.*
[54] Gian Kaur v. State of Punjab, 1996 AIR 946.
[55] *Id.*

However, in the case of *Aruna Shanbaug,*[56] the SC legalised passive euthanasia and urged Parliament to repeal Section 309 as it has become anachronistic, emphasising assistance over punishment for those attempting suicide.[57]

After years of discussion and advocacy from various stakeholders, including the judiciary and the general public, the Indian government enacted the Mental Healthcare Act[58] in 2017. This legislation brought about significant changes in the protection of rights for individuals with mental illness. The effect of Section 309 was read down in Section 115 of the 2017 Act.[59]

Based on the aforementioned provisions, if an individual attempts suicide, they are presumed to be experiencing severe stress unless proven otherwise. As a result, they won't be prosecuted under Section 309 of the 1860 Code. However, attempting suicide still remains a criminal offence. The prosecution must prove that the survivor didn't experience severe stress or mental health issues to secure a conviction. Section 309 also applies when suicide attempts threaten public safety or national sovereignty.[60]

India's evolving legal perspective on suicide recognises it as a mental health concern, emphasising care over punishment post-enactment. This shift

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[56] Aruna Shanbaug v. Union of India, (2011) 4 SCC 454.
[57] *Id.*
[58] Mental Healthcare Act, 2017, No. 10, Acts of Parliament, 2017.
[59] *Id,* §115 (*"Presumption of severe stress in case of attempt to commit suicide.—(1) Notwithstanding anything contained in Section 309 of the Penal Code (45 of 1860) any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code*
(2) The appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide").
[60] *Id.*

prioritising care and rehabilitation over punishment signifies progress towards a compassionate, rights-based approach to mental health in the legal system.

Following the enactment of the new Criminal Code, which has decriminalised attempted suicide, except for cases obstructing a public servant, which is punishable under Section 224 of the new Criminal Code,[61] community service is now an alternative penalty to deter extreme protests like self-immolation. However, discrepancies between the Mental Health Act, 2017[62] and the new Criminal Code, which still references the old Code's stance on suicide attempts, require alignment. The new Criminal Code also lacks a clear definition of community service as a punishment, necessitating clarification. These amendments would prioritise support over punishment for individuals attempting suicide, reflecting a compassionate approach to mental health.

But despite these amendments and decriminalisation of suicide attempts, both old and new Codes lack the qualities of legislation similar to the Suicide Act of 1961, which penalises the "*abetment to an attempted suicide*" or "*abetment to a non-committal of suicide*." This gap in the legal framework fails to punish those who encourage or assist in suicide when the victim survives. Addressing this gap is crucial for comprehensive legal protection and promoting a nuanced understanding of individual autonomy in India's legal system.

IV. The Evolution of Suicide Laws in the UK: A Comparative and Analytical Study of the Suicide Act, 1961 and Its Implications

In this section of the paper, the author will discuss and analyse one of the most significant enactments in the legislative history of suicide laws, the Suicide

[61] Bharatiya Nyaya Sanhita, *supra* note 5.
[62] Mental Healthcare Act, *supra* note 58.

Act, 1961. This enactment, frequently mentioned in previous sections, warrants an in-depth analysis to provide a comprehensive understanding of the evolution of suicide laws in the UK. Through this analysis, the author aims to draw insights that could inform the development of more effective and nuanced suicide legislation in other jurisdictions, such as India.

By the early 1960s, the Church of England was reconsidering its position on the legality of suicide.[63] The public debate and criticism surrounding the English law on suicide led to reconsideration by the Home Secretary, who tasked the Criminal Law Revision Committee with examining the technical aspects of potential reform.[64] The Committee's focus was on the legal drafting rather than the policy. They proposed a Suicide Bill draft that would abolish suicide as a criminal offence while maintaining penalties for assisting others in their suicide attempts. The government and Parliament were asked to act on these proposals during the parliamentary session.[65]

Charles Fletcher-Cooke played a pivotal role in championing and securing the passage of this legislation. Despite facing resistance, he persistently attempted to introduce a Bill for the decriminalisation of suicide for more than a decade before its introduction in July 1961.[66]

On 3rd August 1961, the Suicide Act 1961[67] came into force. The Act abrogated suicide as a crime.[68] The Act abolished *felo de se* and, in

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[63] H. M., *Attempted Suicide*, 3 THE BRITISH JOURNAL OF CRIMINOLOGY 1, 275 (1961).
[64] *Id.*
[65] *Id.*
[66] Wicks, E, *Assisted dying reframed in the context of English law's approach to suicide,* 20(4) MEDICAL LAW INTERNATIONAL, 287 (2020).
[67] THE SUICIDE ACT, *supra* note 2.
[68] *Id*, §1.

consequence, repealed the Interments (*felo de se*) 1882 Act and extended its territory to England and Wales.[69]

In comparison, this legislation is notable when considering the laws in the rest of the UK. Scotland and Northern Ireland have their own distinct legal positions regarding attempted suicide. The Suicide Act 1961 was the first Act to decriminalise suicide in England and Wales[70] and to remove the possibility of prosecution for those who survived suicide attempts.

The Suicide Act, 1961 represented a pivotal legal development. While it abolished the notion that suicide itself is a crime, it also introduced a new offence termed "*complicity in suicide.*" This concept later influenced the Suicide Law in Northern Ireland, which was incorporated under Section 12 of the Criminal Justice Act (Northern Ireland) of 1966. This Section stated that anyone who does an act capable of encouraging or assisting the suicide or attempted suicide of another person and does an act intended to encourage or assist suicide or an attempt at suicide could face imprisonment for up to fourteen years upon conviction.[71]

Section 2 of the Suicide Act, 1961 talks about the "*Criminal liability for complicity in another's suicide*." The Section starts by explaining the liability incurred with the help of an illustration.[72]

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[69] *Id*, §3(3) ("*This Act shall extend to England and Wales only, except as regards the amendments made by Part II of the First Schedule and except that the Interments (felo de se) Act 1882, shall be repealed also for the Channel Islands").*
[70] *Id.*
[71] Criminal Justice Act, 1966, §2(1) (Northern Ireland).
[72] Coroners and Justice Act, 2009, §2(1)-(1C) (United Kingdom) ("*(1) A person ("D") commits an offence if—*
(a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and

Section 2 of the Suicide Act, 1961 provides a clear illustration of how complicity in suicide is defined. If a person (here in the Section-mentioned 'D') commits an act that is capable of making a person commit suicide or attempt suicide (the attempt here means the victim tried to commit suicide but survived), and the act committed is done with the intention to instigate a person to take his or her own life either through engagement or assistance, that person will be criminally liable for their complicity in another person's suicide.

Here, the person can't take the defence that the victim survived the suicide because the Suicide Act, 1961 does not differentiate with the offender while applying punishment to him or her on the basis of the victim's survival because the Act, under Section 2(1) and 2(1B) of the Suicide Act, 1961, specifically says,

> "It is an offence for a person to do an act capable of encouraging or assisting the suicide (or attempted suicide) of another with or without the intention of encouraging or assisting suicide or attempted suicide."[73]

The Act also equally punishes a person whose act of encouraging and assisting the suicide was successful, but the victim doesn't even attempt the suicide, as given in Section 2(1B) that *"one may commit an offence under this section*

(b) D's act was intended to encourage or assist suicide or an attempt at suicide.
(1)(A) The person referred to in subsection (1) (a) need not be a specific person (or class of persons) known to, or identified by, D;
(1)(B) D may commit an offence under this section whether or not a suicide, or an attempt at suicide, occurs;
(1)(C) An offence under this section is triable on indictment and a person convicted of such an offence is liable to imprisonment for a term not exceeding 14 years")
[73] *Id.*

whether or not a suicide or an attempt at suicide occurs."[74] On the other hand, Section 2(1C) specifically says that the offender is liable to imprisonment for a term not exceeding 14 years for the offence committed under Section 2 (irrespective of whether the victim survives the act or not).

However, one may think in a broader sense that the Suicide Act, 1961 doesn't specifically explain why the punishment for the offence committed where the victims commit suicide or attempt suicide is the same or why the punishments are not made according to the end outcome because one cannot deny the fact that the victim survived.

Though the Act explicitly doesn't mention the reason, one can still understand that the Act sends a clear message that the act of encouraging or assisting suicide is inherently dangerous and morally reprehensible. Treating the offence equally, regardless of the outcome, prevents manipulation and ensures accountability. Making a distinction based on survival could incentivise ensuring death. Consistent punishment underscores the gravity of the offence, deters manipulation, and upholds societal values of life preservation.

To conclude, the Suicide Act, 1961 revolutionised the legal treatment of suicide in England and Wales by decriminalising it and recognising the ineffectiveness of punishing suicide attempts. It introduced the offence of complicity in suicide, treating it equally regardless of the survival outcome, aiming to deter such behaviour. While specific to England and Wales, the Act represented progress. Northern Ireland eventually aligned with England and Wales, but Scotland did not. However, the Act's significance lies in its unique legislative feature, which is a learning opportunity for the legislature in India.

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[74] *Id.*

The Act's positive features can be incorporated into its new Criminal Code so that the Code does not leave any stone unturned in relation to other aspects of suicide-related offences.

V. Reforming India's Suicide Law: Addressing the Need for Change

It's pertinent to understand that the Suicide Act, 1961 in England and Wales recognises that acts that are capable of encouraging or assisting suicide can be prosecuted as separate offences, irrespective of whether suicide is actually completed. This broader scope of criminal liability in England and Wales allows for the prosecution of individuals who engage in conduct that encourages or assists another person's suicide, even if the suicide is not ultimately carried out.

On the other hand, in India, the abetment of suicide provisions under Sections 305 and 306 of the Code requires an actual suicide to occur for the offence to be established. In other words, if a person aids or abets another person in committing suicide, they can be charged and punished only if the suicide is completed. Mere encouragement or assistance towards suicide, without the actual occurrence of suicide, may not be considered a criminal offence under these sections.

One may think that reading certain sections of the Code together may provide an answer related to the punishment for the abetment to an attempted suicide. To answer this question, the author will read certain sections along with the sections on suicide provided in the Code to see if any reading of these sections together can help us define the offence and provide a proper punishment that justifies the offence.

To comprehensively analyse the legal issue at hand and understand the interplay of relevant sections, it is crucial to frame a clear legal question. By examining the punishment for abetment to attempted suicide under Indian suicide law, the author aims to identify any gaps or inconsistencies. A concise and structured legal question guides our exploration, enabling us to propose effective solutions or recommendations.

A. Addressing the Gap: Punishment for Abetment to Attempted Suicide

Issue: If 'A' encourages 'B' to commit suicide, leading 'B' to attempt suicide but be saved before completion, what charges does A face under Indian law? Furthermore, if 'B' inflicts injury upon themselves during the attempt, leading to permanent disability or harm, what charges does 'A' face in this circumstance? Lastly, if it is discovered that 'A' was in a position of subordination or financial dependency on B', how does this impact the charges against 'A'?

To answer this question, we have to break down the answer into three separate issues, as the question itself contains three sub-issues.

i. Reading Suicide-related Sections with Section 109 of IPC, 1860

First, the question asks for the punishment to be imposed on '*A'* for the offence of the "*abetment to an attempted suicide.*" Abetment as such has been defined in Section 107 of the 1860 Code. The Section reads about "*Abetment of a thing*";

> "A person abets the doing of a thing, who;
> (1) Instigates any person to do that thing; or
> (2) Engages with one or more other person or persons in any conspiracy for the doing of that

> thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
> (3) Intentionally aids, by any act or illegal omission, the doing of that thing." [75]

But Section 107 does not make the abetment of an "*offence*" but of a "*thing*." Section 107 does not constitute an offence in itself, as abetment can be for either a lawful or unlawful thing; abetment becomes an offence when a person abets an offence or abets either the commission of an offence or the commission of an act that would be an offence,[76] as provided in the Section 108[77] IPC, where the definition of an abettor is provided;

> "A person abets an offence, who abets either the commission of an offence or the commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor."[78]

According to the issue, the abetment has been done for the commission of an offence, which is the committing of suicide, but the facts of the issue state that the suicide is not completed but is merely attempted. If the suicide as an act had been completed, the offence would have been punishable under Section 307 of the 1860 Code. But in our issue, non-completion of the suicide raised the question of which section the section of abetment would be read with.

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[75] IPC, §107.
[76] Subrahmania Aiyar v. Queen Empress, 10 Mad LJ 147 (FB).
[77] IPC, §108.
[78] *Id.*

The abetment of an offence, as provided under Sections 107 and 108, is already complete, as Section 108, Explanation 2 provides;

> "Explanation 2.—to constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused."[79]

So, reading Explanation 2 of Section 108 gives us a clear understanding that abetment in itself is completed as the essentials of the abetment are completed, which are "*instigating, encouraging, providing aid or assistance, or promoting a person into committing an offence*", and here 'A' has abetted 'B' to commit an offence, which is "*Attempt to commit suicide*" as provided in Section 309 through instigating, encouraging, or providing aid or assistance.

However, punishment for abetment cannot be given in isolation; it has to be read in some other section to complete the punishment. Here, Section 107, read with Section 108 (Explanation 2), has to be read with Section 109, which provides for punishment of abetment if the act abetted is committed in consequence and when no express provision is made for its punishment in the code. Section 109 reads;

> "Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.
> Explanation.—An act or offence is said to be committed in consequence of the abetment when

[79] *Id.*

> it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment." [80]

Here, the "*offence*" abetted is "*Attempt to commit suicide*", as mentioned in Section 309, now substituting this word with "*offence*" provided in Section 109 states;

> "Whoever abets any 'Attempt to commit suicide' shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the 'Attempt to commit suicide."

Though on a plain reading, it may seem that reading Section 107 read with Section 108 (Explanation 2) and Section 109 answers the question we have raised and provides punishment for the offence committed, one should understand that nobody would abet a mere "*Attempt to suicide*."[81] The intention of the offender was the completion of the act of "*suicide*", not "*attempt to suicide*." It is important to recognize that the intention of the offender in cases of abetment is typically aimed at the completion of the act of suicide, not merely the attempt. Here, the intended effect was death, not the survival of the victim. One can also understand from the reading of the illustration (b) provided in Section 109, it states;

> "A instigates B to give false evidence. B, in consequence of the instigation, commits that

[80] IPC, §109.
[81] Satvir Singh and Ors. v. State of Punjab and Anr., AIR 2001 SC 2828.

> offence. A is guilty of abetting that offence and is liable to the same punishment as B."[82]

As provided in the illustration, the act committed has to be completed. In our case, the act of suicide was not completed; it was intervened, so the offence remains incomplete, and the act that is committed in consequence of the abetment is an "*attempt to suicide*"; therefore, reading the Section together does not do justice to the offence committed, and the punishment provided is also not equivalent to the gravity of the offence committed, *i.e.*, 1 year. Hence, the offence and its punishment are not made out with the reading of these particular Sections.

One may also feel so after reading Section 109, the word "*offence*" with the wording of Section 306 "*Abetment of suicide*." But when we substitute these words with the words of Section 109, it states;

> "Whoever abets any *'Abetment of suicide'* shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the *'Abetment of suicide.'*" (emphasis supplied)

But it is inconceivable to have abetment of an abetment of a suicide[83] in the case of a single abetment. If 'A' would have abetted or instigated 'C' to further abet or instigate 'B', then reading Section 107 read with Section 108 (Explanation 2) and Section 109, where "*Abetment of Suicide*" from Section 306 as an "*offence*" would have worked, and 'A' and 'C' would have been

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[82] *supra* note 80.
[83] Srilal Chamaria v. Emperor, (1919) ILR 46 Cal 607; Empress v. Troyluckho Nath Chowdhry, (1878) I.L.R. 4 Calc. 366; Spier v. Empress, (1887) P.R. No. 49.

equally liable for the punishment of "*Abetment to an attempted Suicide*" of 'B.' One can also understand from Explanation 4 of Section 108 that "*the abetment of an offence is an offence; the abetment of such an abetment is also an offence*",[84] and the illustration provides;

> "A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and, as A instigated B to commit the offence, A is also liable to the same punishment."[85]

But in our case, there is only a single abetment, and from 'A' to 'B', there cannot be an "*Abetment to an Abetment of a Suicide.*" Hence, the conjoint reading of these sections also does not read out the offence and its punishment.

ii. Reading Suicide-related Sections with Section 116 of IPC, 1860

Now, after juggling with the provision that provides for the punishment for the abetment where the act abetted is committed in consequence and when no express provision is made for its punishment, we move on to the provision where punishment is prescribed for the abetment of the offence that is not committed in consequence of that abetment and where the Code makes no express provision for the punishment of such abetment. The punishment can

[84] *supra* note 77.
[85] *Id.*

be found in Section 116 of the 1860 Code, which states, "*Abetment of an offence punishable with imprisonment if the offence is not committed*."[86]

Now, when we substitute the word "*offence*" with the offence mentioned in Section 309, we will read;

> "Whoever abets an *'Attempt to suicide'* punishable with imprisonment shall, if that *'Attempt to suicide'* be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence; or with such fine as is provided for that offence." (emphasis supplied)

There are two reasons why Section 116, read with Section 309, will not work: As mentioned in the previous arguments, nobody will abet a mere attempt to commit suicide. Here, the intention of the offender was the completion of the act of "*suicide*", not "*attempt to suicide.*" In cases of abetment of suicide, the abettor's primary aim is typically for the individual to successfully complete the act of suicide, resulting in their death, rather than merely attempting suicide. One should understand here that the abettor's intention overrides the intention of the abetted person; here, the abetted person does not commit suicide out of one's will but out of someone else's will, making the abettor

[86] IPC, §116 ("*Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence; or with such fine as is provided for that offence*").

primarily responsible for the act; hence, Section 309 cannot be read as an offence here.

The second reason is that if we take the punishment prescribed in Section 309 for the "*attempt to suicide*", which is simple imprisonment for one year, when we do one-fourth of that punishment to punish the abettor as mentioned in Section 116, the punishment is only 3 months, and to punish the offender with only three months of imprisonment may not serve as an effective deterrent for individuals contemplating abetting suicide attempts. Hence, the conjoint reading of these sections also does not read out the offence and its punishment.

Another possible combination which can be referred to is reading Section 116 along with Section 306. When we substitute the word "*offence*" with the offence mentioned in Section 306. Then Section 116 reads;

> "Whoever abets an *'Abetment of suicide'* punishable with imprisonment shall, if that *'Abetment of suicide'* be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence; or with such fine as is provided for that offence." (emphasis supplied)

There are two reasons why Section 116 read with Section 306 will not work; the plain reading of the section after substitution states that "*Whoever abets an 'Abetment of Suicide' punishable with imprisonment shall if that 'Abetment of Suicide' is not committed in consequence of the abetment",* but as discussed

above, there cannot be such a thing as '*Abetment of an Abetment of a Suicide*' in case of a single abetment. The SC, in the case of *Satvir Singh*,[87] has stated:

> "Learned Sessions Judge went wrong in convicting the appellants under Section 116 linked with Section 306 IPC. The former is *"abetment of an offence punishable with imprisonment if the offence is not committed."* But the crux of the offence under Section 306 itself is abetment. *In other words, if there is no abetment, there is no question of the offence under Section 306 coming into play. It is inconceivable to have abetment of an abetment. Hence, there cannot be an offence under Section 116 read with Section 306 IPC.* Therefore, the High Court was correct in altering the conviction from the penalising provisions fastened with the appellants by the Sessions Court."[88] (emphasis supplied)

Secondly, the section also states that "*Abetment of suicide"* is not committed in consequence of the abetment, and punishment shall be up to one-fourth of the longest term for that offence, or a fine, which in the end gives us only two and a half years as a punishment. Though the offence was not committed, it remains incomplete, but it was still attempted, and the commission of abetment was complete. The victim was a moment away from death before he or she was rescued, so punishing the abettor with only two and a half years may not be able to do justice to the offence committed. Hence, the conjoint reading of these sections also does not read out the offence and its punishment.

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[87] Satvir Singh, s*upra* note 81.
[88] *Id.*

To conclude, the inadequate penalties that result from applying Section 116 in conjunction with Section 309 or even Section 306 fail to provide an effective deterrent against abetting suicide attempts. As seen in the case of *Vegulla Leela Krishna*,[89] where the accused was not indicted for abetment because the victim survived their suicide attempt, the court emphasized that**;**

> **"**Registration of FIR on the basis of the aforesaid facts for the offence punishable under Section 306 r/w 116 IPC is clearly unsustainable under law. So, the entire F.I.R. cannot be quashed, and it can only be quashed with respect to the offence registered under Section 306 r/w 116 IPC. Resultantly, the Criminal Petition is partly allowed to quash the F.I.R for the offence punishable under Section 306 r/w 116 IPC**."**[90]

Hence, the conjoint reading of these sections also does not read out the offence and its punishment.

iii. Reading Suicide-related Sections with Section 511 of IPC, 1860

In last, we have Section 511 read with Section 306, where Section 511 provides the punishment for "*attempting to commit offences punishable with imprisonment for life or other imprisonment*";[91]

> "Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall,

[89] Vegulla Leela Krishna v. State of Andhra Pradesh, 2022 SCC OnLine AP 393.
[90] *Id.*
[91] IPC, §511.

> where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both." [92]

Now, read Section 511 with Section 306, where we substitute the word offence with "*Abetment of suicide*." The conjoint reading gives us the following:

> "Whoever attempts to commit an '*Abetment of suicide'* punishable by this Code with imprisonment for life or imprisonment, or to cause such an *'Abetment of suicide'* to be committed, and in such attempt does any act towards the commission of the *'Abetment of suicide'*, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the *'Abetment of suicide'*, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that *'Abetment of suicide'*, or with such fine as is provided for the *'Abetment of suicide'*, or with both." (emphasis supplied)

The reason why Section 511, read with Section 306, will not apply is because, as we know, the first step towards the commission of this offence is abetment, which we do not know is completed or not. There can be abetment to a non-

[92] *Id.*

committal of suicide where the accused was trying to induce the victim to commit suicide, but the victim did not even attempt it, let alone commit it. There is a difference between the abetment to an attempted suicide and the abetment to a non-committal suicide.

This elucidates the uncertainty surrounding whether an attempt at the abetment of suicide is incomplete due to the abetment itself not being finished or because the abetment was completed but the suicide did not occur. This ambiguity stems from the lack of a clear definition of "*attempt*" in the context of abetment to suicide within Section 511.

Consequently, the conjoint reading of Section 511 with Section 306 is not a viable option towards the "*abetment to an attempted suicide*", as it fails to address the nuanced nature of attempts in cases where the suicide is not completed. This underscores the necessity for precise legal provisions to ensure equitable and consistent application of the law.

The punishment prescribed for the offence comes out to be five years because Section 511 makes the punishment half of the longest term of punishment provided for the offence (here in 10 years). However, this penalty may not be appropriate for the offence of "*Abetment to an attempted suicide*" and might be more suitable for "*Abetment to non-committal of suicide*." It is essential to align the punishments for abetment to suicide and abetment to attempted suicide because, as previously explained, treating both offences equally, regardless of the outcome, helps prevent manipulation. If punishments differ based on survival, it could inadvertently incentivise actions aimed at ensuring death. Therefore, the punishment for abetment to attempted suicide should be consistent with the punishment for abetment to suicide, similar to the approach taken in the UK's 1961 Act, which imposes a uniform penalty of 14 years, irrespective of whether the victim survives.

Another reason why this conjoint reading of these provisions would also fail is that it is unable to prescribe punishment for specific scenarios like injury caused to the victim during the time of the suicide and where the victim was in a position of subordination or dependency on the abettor.

iv. Projecting Forward

In the end, after thoroughly exploring the various combinations of provisions related to abetment and suicide within the legal framework, it becomes evident that none adequately addresses the specific scenario of abetment leading to attempted suicide.

Moreover, considering the last two sub-issues raised above, the omission of punishment based on the degree of injury caused to individuals attempting suicide, including permanent or temporary disability, is concerning. In the absence of punishment for aiding dependent individuals who are in a state of subordination or dependence, subjecting them to cruelty and leading to suicide or attempted suicide, the law neglects accountability and disregards the harm caused, especially to vulnerable individuals. This legal gap calls for nuanced interpretation in complex suicide cases. Absence of abetment provisions in attempted suicide warrants evaluating statutes and potential legislative amendments, as also mentioned in the case of *Berin P.Varghese*[93] where the court stated that;

> "Law has to serve its purpose. To hold that a person can go on abetting the commission of suicide, but his conduct will not be culpable if the offence of suicide proper is not committed, would certainly defeat the purpose of the law. Such 'ad absurdum' construction must certainly be

[93] Berin P. Varghese v. State of Kerala, (2008) 1 KER LJ 227.

> avoided, if possible. The interpreter also has a responsibility to ensure that the law serves its purposes and that the interpretation does not lead to irrational, unreasonable, perverse or absurd results. If a hapless victim is goaded to commit suicide and the abetters abet her to jump into the funeral pyre of her husband, it would be preposterous for the law to hold the abetters not guilty of any offence merely because she escapes or is saved from death later."[94]

In conclusion, India has to improve its laws related to suicide to comprehensively address all outcomes related to the offence of abetment of suicide, akin to the 1961 Act of England and Wales otherwise, as seen in the case of *Vegulla Leela Krishna*[95] where the accused was not indicted for abetment to an attempted suicide because the victim survived the suicide attempt and the court ruling reinforced the notion that if abetment does not lead to the completion of the act, the corresponding legal repercussions are insufficient.

Thus, the legal framework surrounding abetment must be reevaluated to ensure that it adequately addresses the complexities of such offences while providing just and effective penalties for abettors.

B. Mapping Suicide Laws: A Comparative Analysis of Global Legal Frameworks and Penalties

Other than the 1961 Act, there are other legislations of other countries or regions which punish the abetment to attempted suicide or the injury caused to the victim while attempting the suicide but later saved or rescued. In this

[94] *Id.*
[95] Vegulla Leela Krishna, *supra* note 89.

section of the paper, the author will provide an in-depth exploration of the legislation surrounding suicide in different countries.

The author has meticulously selected countries whose criminal codes address laws about suicide and prescribe penalties for abetment to suicide or attempted suicide. To facilitate a comprehensive understanding of this complex legal landscape, the author has structured it into tables. These tables are organised by continents, with rows representing individual countries within each continent. The columns of the tables are divided based on specific criteria, including Country/Region, Criminal Legislation, Punishment for Abetment to Suicide (Committed), Punishment for Abetment to Suicide (Attempted), and Punishment for Abetment of an Individual Dependent on the Offender (Committed or Attempted). This systematic approach enables a comparative analysis of suicide laws and associated penalties across diverse geographical regions, offering valuable insights into global legislative frameworks addressing this sensitive issue. It needs to be remembered that the different socio-cultural aspects surrounding the act of suicide among these different nations are immaterial to us. What is important is only to understand whether they recognise the various other offences related to suicide and what proper punishment, according to them, they have provided for the offences and how many of them have kept the punishment for the abetment to suicide and its attempt the same, which Indian legislatures can consider later on.

Table 1: Europe

Country/Region	Criminal Legislation	Punishment For Abetment of Suicide (Committed)	Punishment For Abetment to Suicide (Attempt)	Punishment For Abetment of an Individual Dependent On The Offender (Committed Or Attempted)
Slovakia	Section 154(1)[96]	6 month - 3 years	6 month - 3 years	Silent
	Section 154(2)[97]	The Act referred to in sub-section (1) committed in a more serious manner of conduct or out of a special motive. Punishment: 3 - 8 years	Same	
Serbia	Art.119[98]	Incites or Aids:- 6 month - 5 years	Same	6 months - 5 years
		Assists:- 3 months - 3 years	Same	

[96] Slovakia SK149 Law No. 300/2005 Coll., §154(1), 2005 (Slovakia).
[97] *Id*, §154(2).
[98] Republic of Serbia Criminal Code Belgrade, art.119, 2019 (Serbia).

Russia	Art. 110[99]	3 – 5 years	Same	Silent
Romania	Art. 191[100]	3 – 7 years	Will be reduced to half	Silent
North Macedonia	Art.128[101]	3 months – 3 years	The Court may punish more leniently.	6 months – 5 years
Montenegro	Art. 149[102]	1 – 5 years	Same	6 months - 5 years
Latvia	Section 124[103]	3 years or temporary deprivation of liberty, or community service	Same	5 years, or community service with or without probationary supervision for a maximum of 3 years, or temporary deprivation of liberty
Hungary	Section 162[104]	1 - 5 years	Same	Silent
Georgia	Art. 115[105]	Imprisonment for 2 - 4 years or up to 3 years restriction of liberty	Same	Silent

[99] The Criminal Code of The Russian Federation, art. 110, 1996 (Russia).
[100] Romania Penal Code, 2009, art. 191 (Romania).
[101] Republic of Macedonia Criminal Code, 1996, art.128 (Macedonia).
[102] Criminal Code of Montenegro, 2003, art. 149 (Montenegro).
[103] Criminal Law, 1998, §124 (Latvia).
[104] The Criminal Code, 2013, §162 (Russia).
[105] Law of Georgia, 2006, art. 115 (Georgia).

Slovenia	Art. 120 [106]	6 months - 5 years	Court discretion to reduce the punishment for the perpetrator	6 months - 5 years
Croatia	Art. 96[107]	6 months - 3 years	Same	Fine or by imprisonment not exceeding 3 years
Bulgaria	Art. 127[108]	1 - 6 years	Same	2 - 8 years
Belarus	Art. 145[109]	Incitement to Suicide :- Imprisonment for the same amount of time or up to 3 years' worth of freedom	Same	Imprisonment for a period of 1 - 5 years or restriction of freedom for a maximum of 5 years
	Art. 146[110]	Inclination to Suicide:- Correctional work for up to 2 years or the same length of time in prison	Same	

[106] Criminal Code (KZ-1) of the Republic of Slovenia, art. 120, 2008 (Slovenia).
[107] Croatia Criminal Code, art. 96, 2011 (Croatia).
[108] Criminal Code, art. 127, 1968 (Bulgaria).
[109] Code of the Republic of Belarus on Administrative Offenses, art. 145, 2003 (Belarus).
[110] *Id*, art. 146.

Azerbaijan	Art. 125[111]	Imprisonment: 3 - 7 years Restriction up to 3 years	Same	Silent
Armenia	Art. 110[112]	Silent	Silent	Assisting someone in committing suicide or making an attempt at suicide, restricting their freedom for up to 3 years, or imprisoning them for 3 - 7 years
Albania	Art. 99[113]	3 - 7 years imprisonment	Same	Same

[111] Criminal Code of the Azerbaijan Republic, art. 125, 1999 (Azerbaijan).
[112] Criminal of the Republic of Armenia, art. 110, 2003 (Armenia).
[113] Criminal Code of the Republic of Albania, art. 99, 1995 (Albania).

Table 2: Asia

Country/Region	Criminal Legislation	Punishment For Abetment of Suicide (Committed)	Punishment For Abetment to Suicide (Attempted)	Punishment For Abetment of an Individual Dependent On The Offender (Committed Or Attempted)
Uzbekistan	Art.103[114]	Imprisonment for a maximum of 5 years or correctional work for 3 years	Same	Same
Tajikistan	Art. 109[115]	Deprivation freedom from 3 - 5 years	Same	Detention for a period of 5 - 8 years
Taiwan	Art. 226[116]	Convicted to life in prison or at least 10 years in prison	Causes aggravated injury in an attempt to commit suicide, they will be imprisoned for a minimum of 10 years.	Same

[114] Criminal Code of the Republic of Uzbekistan, art.103, 1994 (Uzbekistan).
[115] Criminal Code of the Republic of Tajikistan, art. 109, 2015 (Tajikistan).
[116] Criminal Code of the Republic of China, art. 226, 1979 (Republic of China).

Philippines	Art. 253[117]	Prison mayor 6 - 12 years assistance to another to the extent of doing the killing himself. Carries up to 12 year sentence of temporary exclusion	The maximum and medium terms of the *Arresto Mayor* penalty for up to 6 years	Silent
Kyrgyzstan	Art. 136 – Incitement to Suicide[118]	(1) If committed through negligence imprisonment of category II	Same	Imprisonment of category III for up to 3 years without the ability to occupy particular posts or carry out specific activities
		(2) If committed with the aim punishable by imprisonment of category IV	Silent	
	Art. 137 – Inducement to Suicide[119]	Inciting another person to commit suicide imprisonment of category II	Imprisonment of category III for up to 3 years without the ability to occupy particular posts or carry out specific activities	Imprisonment of category III for up to 3 years without the ability to occupy particular posts or carry out specific activities

[117] The Revised Penal Code of the Philippines, art. 253, 1930 (Philippines).
[118] Criminal Code of the Kyrgyz Republic, art. 136, 2017 (Kyrgyzstan).
[119] *Id*, art. 137.

Kazakhstan	Art. 105[120]	Restriction of freedom for a period of up to 3 years/ imprisonment for the same term	Same	Maximum 5 year period of freedom restriction or imprisonment for the same amount of time
Jordan	Art. 339[121]	Temporary detention up to 8 years	3 months - 2 years, and up to 3 years if it causes permanent disability or harm	Silent
Iraq	Art. 408[122]	Imprisonment not exceeding 7 years	Detention	Silent

On a close examination of suicide-related laws across various countries provided in the above table, 16 countries out of 24 have notably kept the punishment for abetment to suicide and abetment to an attempted suicide the same. They have not discriminated based on the survival of the victim regarding the punishment to be provided to the perpetrator, highlighting the need for accountability and deterrence in cases of abetment, underscoring the gravity of this offence.

[120] Criminal Code of the Republic of Kazakhstan, art. 105, 2014 (Kazakhstan).
[121] Jordanian Penal Code, art. 339, 1960 (Jordan).
[122] Iraqi Penal Code, art. 408, 1969 (Iraq).

Regarding the offence of "*Injuries Sustained during an Abetted Suicide Attempt*," a closer examination of suicide laws reveals that countries like Jordan and Taiwan have established penalties for injuries or disabilities resulting from the abetment of suicide attempts. This reflects an acknowledgement of the grave consequences of the actions that facilitate or encourage suicidal behaviour.

What stands out, however, is the maximum penalty for the abetment of suicide by an individual in a position of subordination or dependency on the offender. This penalty is notably higher compared to the punishments prescribed for committed or attempted abetment of suicide in many other countries. This approach emphasises the greater responsibility and severity associated with such offences, acknowledging the victim's vulnerable position and the exploitative nature of the perpetrator's actions.

VI. Conclusion

With the impending implementation of the Bharatiya Nyaya Sanhita, 2023,[123] in July 2024,[124] there's an urgent call to reassess India's laws concerning suicide. Despite the updates introduced in the new legal framework, it remains clear that these changes do not adequately address the complexities of suicide-related offences compared to the 1860 Code.

Specifically, there is a pressing need for the introduction of a dedicated chapter within the legal code that comprehensively covers all aspects of suicide-related offences. The current provisions fail to incorporate vital reforms that are essential for effectively addressing the nuances of these issues, leaving

[123] Bharatiya Nyaya Sanhita, *supra* note 5.
[124] Ministry of Home Affairs, *Notification of the Bharatiya Nyaya Sanhita* (Feb. 23, 2024), https://www.mha.gov.in/sites/default/files/BhartiyaNyayaSanhita_24022024.pdf.

significant gaps that must be filled to ensure justice and support for vulnerable individuals, as previously explained in the paper.

Moreover, several countries have distinct chapters in their Criminal Codes for suicide-related offences, unlike India. This reveals a need for legislative adjustments to address complexities and safeguard vulnerable individuals adequately. India must revise its laws to meet global standards, ensuring comprehensive legal protection for its citizens as it moves forward.

The legislature can mirror its meticulous approach taken with offences like dowry death, where the legislature has shifted Section 304-B IPC,[125] which is now Section 79 in the new criminal code, from the "*offence related to the human body*"[126] to the "*offence related to marriage*"[127] to give the citizens convenience when they read all the offences that are relating to marriage. This strategic restructuring would not only streamline legal provisions but also provide citizens with convenient access to all relevant laws pertaining to suicide in one consolidated section.

The recent decriminalisation of "*attempt to suicide*" under Section 224[128] of the new Criminal Code is also a significant step forward, indicating a legislative stance that stands with citizens rather than against them. Invaluable guidance can be drawn as an inspiration from other nation's legislative practices, as outlined in this paper. It has to be understood that the absence of robust suicide laws isn't merely a technical oversight; it has tangible consequences for vulnerable individuals that need to be acknowledged.

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[125] IPC, §304-B.
[126] *supra* note 22.
[127] *Id.*
[128] Bharatiya Nyaya Sanhita, *supra* note 5.

In light of India's recent criminal legislative reforms, offences related to suicide require a legal framework that not only acknowledges the complexities of these situations but also holds perpetrators accountable for their actions, irrespective of whether those actions result in death or not. Enacting comprehensive and empathetic laws is essential to ensure justice and protection for all individuals, especially those most vulnerable to exploitation and neglect.

Supreme Court's Transformative Quest for Political Reforms: Pro-democracy Verdict in *Sita Soren* and Its Implications on Constitutional Jurisprudence

Anand Shankar*

Abstract

Parliamentary privileges are special rights, immunities, and exemptions enjoyed by the parliament and the state legislative assembly or its members considered necessary in the exercise of constitutional functions. It is incorporated in the independent India's Constitution inspired by the English jurisprudence to give base to the deliberative parliamentary democracy. The Constitution is silent as to what exactly the privileges are, its juxtaposition with people's Fundamental Rights ("FRs"), and its extent of enforcement and scope for judicial review. Several confronted questions have been raised due to its non-codifications of the privileges as it left upon the government of the day to legislate upon by the drafter of the Constitution. The case of bribery as a tool that has been shielded under parliamentary privilege, often wielded by governments to undermine electoral fairness, parliamentary democracy, constitutionalism, and the rule of law. The Supreme Court ("SC"), in P.V. Narasimha Rao v. State (CBI/SPE), ruled that legislators who accept bribes for their votes in Parliament are immune from prosecution as a privilege granted under Article 105(2) of the Constitution. This interpretation effectively shielded corrupt practices within the legislature by equating bribery with free speech and parliamentary privilege, thereby creating a legal loophole that undermined electoral fairness and constitutional accountability. The SC's seven-judge bench decision in Sita Soren v. Union of India (2024) marks a significant departure from the precedent set in P.V. Narasimha Rao v. State (CBI/SPE) (1998), the court ruled that legislators accepting bribes for their votes in the House cannot claim immunity under Article 105(2) or Article 194(2) of the Constitution. This piece will begin with the analysis of the

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constitutional mechanism that enabled this loophole and, arguably, the broad and largely undefined scope of parliamentary privileges under Articles 105 and 194 by revisiting the constitutional text through the lens of modern constitutional doctrine. In this regard, it will proceed to the analysis of Sita Soren v. Union of India (2024) and the SC's evolving role in political reformation to place its argument to showcase the SC's changing shift towards Political Reformation and the quest for transformative and contextual interpretation of the Constitution where the issue holds scope of misuse by escaping its commands.

I. Introduction

Could a lawmaker who accepts a bribe to vote or speak in a particular manner be exempt from judicial proceedings under parliamentary privilege? In the recent case of *Sita Soren v. Union of India (2024)*,[1] the SC was confronted with determining whether the offence of bribery is included under parliamentary privileges. The case turns on the interpretation of the provisions of Article 105[2] of the Constitution, which deals with the powers, privileges, and immunities of the members of parliament and parliamentary committees, and the corresponding provision in Article 194[3] of the Constitution, which confers *mutatis mutandis* to the members of the state legislatures. For the purpose of this paper, discussing both the provisions separately might not be very significant.

Legislative privileges and immunities are crucial for both the efficient execution of legislative duties and the preservation of the institution's authority, respect, and prestige. While such privileges first emerged in England as a means for the parliament to safeguard its freedoms from the

[1] Sita Soren v. Union of India, (2024) 5 SCC 629.
[2] INDIA CONST., art. 105.
[3] INDIA CONST., art. 193.

monarchy, they continue to be vital for legislative bodies across the globe today.[4] Erskine May, a leading expert on parliamentary procedure, describes parliamentary privileges as "*the collective and individual rights enjoyed by each legislative body and its members*" individually without which they could not discharge their functions and which exceeds those possessed by other bodies or individuals.[5] These rights are considered essential for legislators to fulfil their responsibilities and protect them from coercion and external influence. Thus, the members also have certain privileges, although these exist for the benefit of the House and not for the personal benefit of the members, though part of the law of the land is, to a certain extent, an exemption from the general law.[6]

The invocation of privileges in post-independent India has been contentious on a number of occasions, and the urge for codification of the provisions relating to it by the legislature has been sparked by the ambiguity in the relevant provisions and interrelation with other statutes ranging from criminal and civil procedures, rules and procedure of parliament and disciplinary conventions and orders.[7] Several questions have been raised regarding the constitutional validity of the privileges of the Public Representative ("PR") ever since the Constitution was enacted. The question of whether the rights of PRs hold supremacy over those of the citizens they represent was answered in

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[4] *See,* A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW *in* Chap. XI, *Privileges of Parliament,* 214 (13th ed. 2003).
[5] *See,* ERSKINE MAY, PARLIAMENTARY PRACTICES 92 (25th ed. 2019); *See also,* 34(4) HALSBURY'S LAW OF ENGLAND ¶1486, at 586 (2020).
[6] DR. DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 8362 (9th ed. 2017).
[7] Harshad Kapoor, *Codification of Parliamentary Privileges in India: An Unexplored Dimension of Law,* 2(2) ROSTRUM'S LAW REV. (2015).

the case of *Kihoto Hollohan v. Zachillhu (1992).*[8] The case dealt with the anti-defection law, and the SC ruled that while elected representatives enjoy certain privileges and powers, these must align with the rights of citizens in a democratic society. PRs, being part of a democratic system, do not have supremacy over the rights guaranteed to all citizens under the Constitution.[9]

The relevant question is whether this protection also extends to corrupt and illegal activities like bribery. The constitutional bench of SC in the case of *P.V. Narasimha Rao v. State (CBI/SPE)* (1998)[10] ruled 3:2 that bribing for voting in the legislative process was under the purview of parliamentary privileges. The SC held that the privileges outlined in Articles 105(2) and 194(2) are absolute, special and constrained from ordinary laws. The majority concluded that since Article 105(2) states "*what has been said or voted*" in the House, the immunity provided to legislators under that clause extended to every member who had cast a vote. It was held that a Member of Parliament ("MP") should not be answerable in a court of law for something that has a nexus to his speech or vote in Parliament.[11]

The SC recently, in the case of *Sita Soren* with a constitutional bench containing seven judges, overruled its previous judgement in the *P.V. Narasimha Rao* and unanimously held that MPs and state legislators do not enjoy parliamentary immunity for acts of bribery taken for the vote in the

[8] Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651.
[9] Alok Prasanna Kumar, *Defecting from the Law*, 52 ECONOMIC AND POLITICAL WEEKLY, 12-13 (2017).
[10] P.V. Narasimha Rao v. State (CBI/SPE), AIR 1998 SC 2120.
[11] Advay Vora, *MLA Bribery Seven-Judge Constitution Bench | Day 1: Counsels argue about the correctness of Narasimha Rao,* SUPREME COURT OBSERVER (Oct. 4, 2023), https://www.scobserver.in/reports/mla-bribery-seven-judge-constitution-bench-day-1-counsels-argue-about-the-correctness-of-narasimha-rao/.

house.[12] It was held that the acceptance of the bribe itself was an offence under the Prevention of Corruption Act, 1988, and actions thereafter would not have any bearing on the application of parliamentary immunity.[13] It was further held that, in India, parliamentary privileges under Articles 105(2) and 194(2) were granted solely where the same is considered necessary to the collective function of the legislature and if the act is essentially related to the discharging essential duties of the legislator, and granting immunity for receipt of bribes did not fulfil the requirements of the test of necessity.

The shift from its earlier precedent on this issue escaping the *stare-decisis* is now well-established by the SC that "*corruption and bribery of members of the legislature erode the foundation of Indian parliamentary democracy*" and cannot be allowed.[14]

This piece would stem its arguments basing it on the acts of corruption by elected representatives in furtherance of parliamentary processes like electing individuals or saving the elected ones from impeachment, which are an antithesis to the spirit of constitutionalism, which upholds social justice, public welfare, and interest, accountability, good governance and so on. Thus, drawing from the above argument, it analyzes the loophole in the textual interpretation of the constitutional provisions, the stance of the judiciary on

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[12] Ajoy Sinha Karpuram, *As SC overturns Narasimha Rao decision, remembering its 1998 ruling in JMM cash-for-votes case*, THE INDIAN EXPRESS (Mar. 4, 2024), https://indianexpress.com/article/explained/explained-law/sc-overturns-narasimha-rao-decision-jmm-cash-for-votes-case-9195208/.

[13] *Explained: Supreme Court judgment on the Sita Soren case*, THE LEAFLET (Mar. 4, 2024), https://theleaflet.in/explained-supreme-court-judgment-on-the-sita-soren-case/.

[14] Sanket Jain & Param Gupta, *Bribery Not Protected by Parliamentary Privileges: Supreme Court*, MONDAQ (Mar. 26, 2024), https://www.mondaq.com/india/white-collar-crime-anti-corruption--fraud/1442828/bribery-not-protected-by-parliamentary-privileges-supreme-court.

various politically charged confronted issues, and how it has greater harm and bearing on the ideals of constitutional morality, rule of law and constitutionalism. Further, it would find the way to the answer, which lies in the Constitution itself, which constitutional scholars have pointed out as transformative constitutionalism.[15] Additionally, this analysis will examine how an issue that appeared straightforward required the concerted effort of a seven-judge constitutional bench to reach a decision in the *Sita Soren* case. It also aims to delve into this question in the context of the validity of such an inclusion *vis-à-vis* the Constitution's basic structure and the concept of constitutional morality.

II. Evolution of Parliamentary Privileges in India

Parliamentary privileges originated during the long struggle for democracy and citizens' rights in Britain, between a monarch and parliament, as kings used to get members who spoke or were likely to speak against the king arrested.[16] Thomas Thorpe, Speaker of the House of Commons, was arrested for the non-payment of some small fine in 1453; parliamentarian Strode was arrested in 1512 for introducing Bills which the Crown did not like; Elliot, Hollis and Valentine were arrested in 1629 for what the Crown considered to be seditious speeches in the House.[17]

Under the rule of the East India Company, lawmaking lay in the exclusive domain of the executive till 1833. The Government of India Act, 1833 redesignated the Governor-General of Bengal as the Governor-General of

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[15] *See generally*, GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS (2019).
[16] Faizan Mustafa, *Bring the House up to date*, THE HINDU (Jul. 11, 2025), https://www.thehindu.com/opinion/op-ed/bring-the-house-up-to-date/article19253239.ece.
[17] THE PARLIAMENTARY PRIVILEGES OF THE COMMONS *in* THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1386-1421 (1993).

India with exclusive legislative powers.[18] However, reflecting the need for legislative privileges in carrying out the duties of the legislators, the first law member, Lord Macaulay, made efforts to secure some special facilities in the nature of powers by his draft standing orders. These special facilities included providing complete information on the subject of the legislation, the right to be present in all meetings of the Council of the Governor-General, freedom of speech, and freedom of voting.[19]

The incorporation of parliamentary privileges in independent India was extensively discussed and deliberated in the Constituent Assembly. It was later incorporated to stem the principles and ideals of parliamentary democracy, which suited India the most, where every say from each and smallest part of the country would be entertained and scrutinised on the national forum.

Mr. H. V. Kamath proposed an amendment to change Article 85 of the draft Constitution, removing the reference to the House of Commons in the United Kingdom and replacing it with the Dominion Legislature in India, just prior to the Constitution's ratification. In opposition to the proposed amendment, Mr. Shibban Lal Saxena stated, "*As far as I'm aware, we don't have any privileges. Feel free to have his amendment approved if he wishes to completely eliminate all of our benefits*." The Constituent Assembly members were, therefore, acutely aware that, unlike the House of Commons in the UK, their privileges

[18] Hans Raj, *Evolution of Parliamentary Privileges in India*, 41 THE INDIAN JOURNAL OF POLITICAL SCIENCE, 2 295-308 (1980).
[19] SK NAG, EVOLUTION OF PARLIAMENTARY PRIVILEGES IN INDIA TILL 1947 317, 318 (1978).

under colonial authority were statutory grants created by enactments and assertions by legislatures and not "*ancient and undoubted.*"[20]

The key privileges granted to MPs *inter alia* are the freedom of speech and the act of voting for the parliamentary process,[21] which grants members the right to express their views and opinions within the chamber without fear of legal repercussions.[22] Additionally, members enjoy immunity from arrest during parliamentary sessions and a period extending forty days before and after, and the court does not inquire about any publication in the chambers of the House.[23] This protection ensures that MPs can fulfil their duties without undue interference. Moreover, the House possesses the power to punish contempt, allowing it to enforce its authority and uphold the integrity of parliamentary proceedings.[24]

III. Constitutional Crafting and Scope of Misuse: Assault on Constitutional Morality

Parliament and the state legislative assembly play a crucial role in facilitating "*deliberative democracy*" and discourse among the representatives to address the aspirations of the people.[25] It also serves as a platform for considering the criticism and grievances of various stakeholders, including people, to hold the government accountable, underlining the importance of transparency and access and flow of information on the floor of the house holding the thread of

[20] 8 CONSTITUENT ASSEMBLY DEBATES (May 19, 1949), https://eparlib.nic.in/bitstream/123456789/763315/1/cad_19-05-1949.pdf.
[21] INDIA CONST., art. 105(1) & 105(2).
[22] INDIA CONST., art. 122 & art. 212.
[23] INDIA CONST., art. 105(2).
[24] RAJYA SABHA SECRETARIAT, POWERS, *Privileges and Immunities of Parliament and State Legislatures* in THE LEGISLATURE AND THE JUDICIARY: JUDICIAL PRONOUNCEMENTS ON PARLIAMENT AND STATE LEGISLATURES 4 (2010).
[25] Rajeev Suri v. Delhi Development Authority and Others, (2022) 11 SCC 1.

constitutionalism and rule of law for a fruitful parliamentary democratic structure.

The ambiguity and unanswered question of privileges led us to look back into the constitutional efficacy and relevance in a diverse democracy where the political environment can work detrimentally on the pretext of constitutional principles. Despite being the lengthiest Constitution in the world, it leaves several things undefined. It says what and how of the procedure, but it fails to address what is not and how certain acts capable of arbitrariness are limited to constitutional privileges. In the case of parliamentary privileges, Article 105(3)[26] left it upon the legislature to rule out and substantiate the number and extent of the privileges granted, which leaves the scope of misuse by including the acts of bribery within the horizons of parliamentary privileges, although the provision was changed in the year 1978, which earlier says that privileges recognised or customarily practised in the British parliament will be applicable in India, after the Constitution Amendment in 1978[27] ("amendment"). After that, with no legislation defining privileges being enacted to date, the powers and privileges of the Indian parliament continue to be those of the British House of Commons at the commencement of the Constitution without material change even after the amendment as a tool for broad interpretation in the hands of legislators.[28]

[26] INDIA CONST., art. 105(3).
[27] The Constitution (Forty-fourth) Amendment Act, 1978.
[28] Dalip Singh, *Parliamentary Privileges in India,* 26 THE INDIAN JOURNAL OF POLITICAL SCIENCE 75-85, (1965).

A. From the Lens of Constitutionalism, Democracy, and Fair Electoral Politics

A prominent argument put forth by Mr. H.M. Seervai in his digest Constitutional Law of India[29] states that the fundamental right of speech of citizens (though not absolute) must be balanced with the parliamentary privileges of debate and discussion. He further states that when people draw the analogy of the Indian privileges in parliament with the British ones, they miss out on important distinctions. It must be noted that the British parliament reigns supreme owing to its unitary structure of governance. They don't have a written constitution, and the legislative supremacy of the parliament has been recognized by the courts for hundreds of years. However, in India, the situation is quite different. In a federal structure, the concept of supremacy is defined. It is not the parliament that is supreme in our country, but rather the Constitution.[30]

Parliamentary privileges are nothing but a special arrangement based on the principles of democracy.[31] The parliament, one of the most prominent democratic institutions, has the power to legislate upon the privileges under the Constitution. The parliament formulates itself and its rules to ensure that it can function independently and discharge its functions freely. The elected chairman/speaker of the house has a pivotal role in the scheme of parliamentary democracy and is the guardian of the privileges and rights of the House as established after the *Kihoto Hollohan* case.[32]

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[29] 3 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY (1975).
[30] *Id.*
[31] K.C. Joshi, *Parliamentary Privileges: A Sword or a Shield,* 42 JOURNAL OF THE INDIAN LAW INSTITUTE, 422-431 (2000).
[32] Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651.

Another contentious point is that the moment a legislator acts according to his promise undertaken in exchange for a bribe, his view expressed is no longer free and not in furtherance of the interest of the house but rather his selfish interest. The very fact that the voting process was rigged due to bribery of the elected members of the house defeats the principle of free and fair elections embedded within the concept of democracy itself. Thus, providing immunity to such a deplorable act would undermine the institution of democracy itself.

B. In Relation to Constitutional Morality

Constitutional interpretation must flow from constitutional morality. Constitutional morality's values are a non-derogable entitlement.[33] The content of constitutional morality is also founded upon the precepts of the preamble of the Constitution.[34] Consequently, democratic ideals are to be protected, sustained, and guided by the presence of constitutional morality. It plays a predominant role in a democratic set-up and basically means obeisance to the norms of the constitution, making sure not to act arbitrarily. The democratic values survive and turn out to be successful when the common masses and concerned officials of institutions do not go astray but rather strictly adhere to the constitutional parameters. Their act should reflect their regard for institutional integrity and requisite constitutional restraints. By placing responsibility and duties on occupiers of constitutional institutions and offices, it acts as a check on the functionaries and citizens alike. It highlights the need to preserve the public's trust in democratic institutions and provide the means to ensure the deliverance of justice in all its dimensions.

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[33] Indian Young Lawyers Association and Ors. v. State of Kerala and Ors., (2019) 11 SCC 1.
[34] INDIA CONST., Preamble; *See*, AAKASH SINGH RATHORE, AMBEDKAR'S PREAMBLE: A SECRET HISTORY OF THE CONSTITUTION OF INDIA (2020).

Adding on, the courts have to ensure that what is protected conforms with the fundamental values, guarantees and morality of the Constitution. Corruption, especially by elected representatives who are supposed to discharge public function with all sincerity and the welfare of the people in mind, thus goes against the tenets of the preamble, including social, political, and economic justice, by impinging upon the welfare and development of the state (defeating the ideal of a socialist welfare state), the integrity of democratic institutions, fraternity amongst the citizens, fairness, equality, the rule of law and so on. It, thus, seriously violates constitutional morality and should not be given immunity by the courts since no privilege should be so absolute as to violate the basic constitutional principles.

IV. Bribery Erodes Parliamentary Democracy: Pro-democracy Verdict in *Sita Soren* and Its Implications on Constitutional Jurisprudence.

Article 105(2) makes it quite clear that "*anything said*" or "*any vote given*" in parliament shall not subject any MP to civil liability or criminal prosecution. In the case of *Keshav Singh v. the Speaker,*[35] the then Chief Justice of India, P.B. Gajendragadkar, enunciated the legislative intent behind this provision that grants protection to MPs:[36]

> "It is plain that the constitution makers attached so much importance to the necessity of absolute freedom in debates within the legislative chambers that they thought it necessary to confer

[35] Keshav Singh v. Speaker, AIR 1965 SC 745.

[36] The case revolves around the issues of whether the House is the exclusive body to judge the punishments for contempt committed within the House, and whether a petition can lie in the High Court to entertain a *habeas corpus* petition filed for the appearance of convicted MPs by the Chairman of the House

> complete immunity on the legislators from any court."

The SC has ruled time and again that MP and legislative assemblies have unrestricted and unfettered immunity in the House.[37] In fact, the courts have gone so far as to rule that since the words "*anything said*" in Article 105 (2) have the broadest amplitude.

The issues revolving around the privileges present a set of interesting and politically charged issues, and the case of bribery has always been an issue that kept the fire of Indian politics lightened, which, though never thought of by the Constitution makers yet, was seen as soon after India gained independence.[38]

The case of granting immunity to the members of parliaments and state legislative assemblies came under the major ruling of *PV Narasimha Rao.* A motion of no-confidence against the then Prime Minister Narashima Rao in 1993 put his government in jeopardy, in accusation of various political uprisings, ranging from economic slowdown, communal tensions caused by the demolition of Babri Masjid in Ayodhya, high price-rise, etc. Rao and his top cabinet colleagues bribed ten members of the Lower House to vote against the motion of no-confidence in an attempt to defeat the motion of no-confidence. One member disqualified herself from voting after accepting the bribe, but the other nine members complied. Charges were filed invoking the

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[37] In the cases like M.S.M. Sharma v. Sri Krishna Sinha, AIR 1959 SC 396; S. Godavari Mishra v. Speaker, Orissa Legislative Assembly, AIR 1953 Orissa 111; Kihoto Hollohan v. Zachillhu, (1992) Supp (2) SCC 651; Keshav Singh v. Speaker, 1964 SCC OnLine SC 21, the court gave textual and broadest meaning to the parliamentary privileges, excepting legislators from criminal liability.

[38] Sidharth Chauhan, *Legislature Privileges and Process, in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 301-303, (Sujit Choudhry et al. eds. Oxford University Press 2015).

provisions of criminal conspiracy under Sections 7, 12, and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 ("PC Act") and Section 102B of the Indian Penal Code, 1872 against all bribe givers and takers at the trial court. An inquiry was initiated by the Central Bureau of Investigation ("CBI"). After the appellant's plea to overturn the trial court's charges was dismissed by the High Court, they turned to appeal in the SC. The appellants argued that their actions were protected by constitutionally mandated parliamentary privileges. In the SC, one more issue was framed with regard to whether an MP can be regarded as a "*public servant*" under the ambit of Section 2(c) of the PC Act, 1988, and whether the authorities are competent to initiate prosecution against them in clause (a), (b), and (c) of sub-section (1) of Section 19 of the PC Act, 1988.

The five Judge Bench split into a 3:2 opinion authored by SC Agarwal, J. (for himself and Dr. AS Anand, J.), SP Bharucha, J. (for himself and S Rajendra Babu, J.), and an opinion by GN Ray, J.

Bharucha J., writing for the majority, held that the bribe-takers were immune under Article 105(2). He stressed that "*in respect of*" entails broader character and construction for anything said or any vote cast in the House. According to him, considering the role MPs perform, the broad protection or immunities was "*absolute and necessary*." The judgments invoked the earlier precedent of the SC and comparative analysis of the constitutional law of England, the United States, Canada, and Australia.[39] Finally, he concluded that those who had accepted bribes were not accountable in a court of law for the purported conspiracy and agreement, while those who had provided bribes would not be

[39] P.V. Narasimha Rao v. State (CBI/SPE), (1998) 4 SCC 626 ¶121.

protected in the same way because their actions had nothing to do with their votes cast in parliament.[40] Members were immunized against the broad and precise interpretation of Article 105(2) to "*proceedings in court that relate to, or concern, or have a connection or nexus with anything said, or a vote given, by him in parliament*."[41] The prosecution was required by the circumstances of the case to take into account the reasons behind the nine members' votes against the resolution of no-confidence.

In the minority dissenting opinion, Agarwal J., although evaluated a similar methodological analysis, came to a diverging holding. Agrawal J. considered that the expression "*in respect of*" had to be construed only to immunize legitimate acts of members; it could not be invoked to secure immunity against criminal acts.[42] He added that the object of the immunity was to ensure the independence of the individual legislators. However, any interpretation that immunized members from prosecution for criminal acts would be repugnant to the healthy functioning of parliamentary democracy and subversive to the idea of the rule of law. Consequently, he would find both bribe-takers and givers answerable in ordinary courts of law.

The decision in *PV Narasimha Rao* by this court depended on two phrases in Article 105 (2). The terms "*in respect of*" and "*anything*" were used in these sentences. When the court is asked to interpret a constitutional provision, it is required to do so in a way that does not undermine the fundamental principles of the document.[43] In *State (NCT of Delhi) v. Union of India*,[44] Dipak Misra,

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[40] *Id*, ¶143.
[41] *Id*, ¶ 133.
[42] *Id*, ¶43
[43] Venkatesh Nayak, *The Basic Structure of the Indian Constitution*, CONSTITUTION NET VIRTUAL LIBRARY, https://constitutionnet.org/vl/item/basic-structure-indian-constitution.
[44] State (NCT of Delhi) v. Union of India, (2018) 8 SCC 501.

C.J. made the observation that the court should read a constitutional clause by using the other context under the provision to determine the meaning of any particular words in the text in the context in which they occur. In the present case, the court decided that the word "*any*" might have different meanings depending on the context in which it is used and that "*any matter*" did not necessarily mean "*every matter*."

The verdict in *PV Narasimha* was taken as outrageous and condemned as a "*travesty of constitutional interpretation*."[45] Eminent constitutional law scholar A.G. Noorani condemned it as follows:

> "In the nearly half a century of its existence, few rulings of the Supreme Court incurred such odium, and so deservedly, than that so merrily handed down in *Narasimha Rao*."[46]

The position of the court's intervention has been challenged and contested at the same time, paving the way for the flourishing of jurisprudence in India since *PV Narasimha*. In the early 2000s, the SC's stance turned towards more transformative construction of the provisions, such as in the case of *Raja Ram Pal v. Hon'ble Speaker of Lok Sabha and Ors.*[47] The majority in Narasimha Rao bent over backwards to find constitutional immunity for the members.

The present case before the SC, *Sita Soren vs. Union of India*, arose from an appeal filed against an order of the Jharkhand High Court, which had refused

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[45] Shubhankar Dam, *Parliamentary Privileges as Façade: Political Reforms and The Indian Supreme Court: Raja Ram Pal v. Hon'ble Speaker, Lok Sabha and Others*, SINGAPORE JOURNAL OF LEGAL STUDIES, 162-183 (2022).
[46] *Id*; *See also,* A.G. Noorani, *Bribes in Parliament: A Shocking Ruling by the Supreme Court, in* CONSTITUTIONAL QUESTIONS IN INDIA 222-225 (Oxford University Press New Delhi, 2000).
[47] Raja Ram Pal v. Hon'ble Speaker, Lok Sabha and Ors., (2007) 3 SCC 184.

to quash criminal proceedings initiated against Sita Soren, a member of the JMM, who was accused of accepting a bribe to vote for a particular candidate in the Rajya Sabha Elections of 2012.

It was held that, in India, parliamentary privileges under Articles 105(2) and 194(2) were granted solely where the same is considered necessary to the collective function of the legislature and if the act is essentially related to the discharging essential duties of the legislator, and granting immunity for receipt of bribes did not fulfil the requirements of the test of necessity.

V. Supreme Court's Transformative Quest For Political Reforms

The holding in *PV Narasimha,* leaving the legislators unaccountable for the criminal acts, is a clear antithesis to some of the essential features of our constitution, including the principles of the rule of law, constitutionalism, democratic values, free and fair elections, justice and fairness, integrity and fraternity etc. As Mr. Seervai opined, by limiting absolute parliamentary privileges to FRs, the abuse of privileges would be greatly minimised if not prevented altogether. An inclusion of bribery would not be in the interests of our democracy and would undermine our constitutional values. Rather, an exclusion of the same might also serve as a needed deterrent for such acts in times to come. The main concern and task of the three fundamental democratic institutions is to ensure proportionality, such that these limitations don't create a chilling effect upon the legislators to impede the freedom and independence of the body. An application of well-established doctrines of harmonious construction, pith and substance, transformative constitutionalism, etc., by the SC in recent times has been significant in making such a decision. The SC plays a crucial role in minimizing the defects that have emerged over time in the political landscape of our country while upholding the doctrine of political

thicket[48] and the theory of limited review, all grounded in the principle of transformative constitutionalism.[49]

Subhankar Dam, in his paper, terms the approach as the "*come alive*" approach of SC as a protector of the Constitution, where the broader interpretation takes the shape of a tool in the hands of parliamentarians to use for personal benefit.[50] While analyzing the *Raja Ram Pal* case, he reflected on what had changed in the course of ten years between 1998 and 2007. Dam opinions;

> "The pattern is impossible to miss. The Supreme Court has "come alive" in matters of political reform in a way it had not previously done. The cluster, to use our earlier vocabulary, is the result of an increasing realization that the political process is incorrigibly unwilling to pursue reforms. And without some judicial prodding, political parties would perpetually exploit the crime-politics nexus that has long afflicted Indian democracy. *Raja Ram Pal*, I would argue, is but a small piece in this larger jigsaw: it explicates the Supreme Court's 'zero tolerance' towards corruption and its supposed determination to reform the political process. *Raja Ram Pal* was hardly about parliamentary privileges. Rather, it was about reforms using the façade of privileges.

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[48] Amlan Mishra, *The Supreme Court's Madhya Pradesh Government Formation Judgment – III: A Response to Anmol Jain,* INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Apr. 27, 2020), https://indconlawphil.wordpress.com/2020/04/27/the-supreme-courts-madhya-pradesh-government-formation-judgment-iii-a-response-to-anmol-jain-guest-post/.
[49] Apurva Singhi & Khushi Joshi, *Transformative Constitutionalism Obliterating the Political Thicket : Dangers of Judicial Overreach,* CONSTITUTIONAL LAW SOCIETY NUJS BLOG (Oct. 3, 2021) https://wbnujscls.wordpress.com/2021/10/03/transformative-constitutionalism-obliterating-the-political-thicket-dangers-of-judicial-overreach%EF%BF%BC/; *See also*, GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS 34 (2019).
[50] *supra* note 45, at 181.

> That was precisely what Narasimha Rao lacked: the background 'force' of a cluster that would have carried the Supreme Court to an opposite conclusion."

Hence, the decision in *Sita Soren* must be understood besides its own terms and the larger canvas of political reforms that the SC has deliberately pursued in the last five years and in the preceding period in the political arena.

VI. Conclusion

In conclusion, the recent judgment in *Sita Soren v. Union of India (2024)*, along with other politically charged rulings, notably in *Association for Democratic Reforms v. Union of India (2024),* concerns recent political problems pertaining to loss of opposition, asymmetrical federalism, crime-free politics, etc. showcases the SC's transformative quest for political reforms and its positive impact on Indian democracy. The verdicts reflect the judiciary's commitment to upholding constitutional principles, rule of law, and democratic values. Overruling previous decisions in *PV Narasimha (1998)* and *Sita Soren (2024)* by giving a contextual interpretation shows the challenge of finding answers to political issues within the Constitution. These judgments underscore the importance of accountability, transparency, and fairness in governance, serving as a deterrent to those who seek to undermine the democratic process for personal gain. However, many issues, such as contesting crime-free elections and educational criteria for political participation, have yet to be solved, as these questions give direction to society. Overall, the SC's evolving jurisprudence in politically sensitive cases signals a promising direction for Indian democracy, reinforcing the principles of constitutionalism, rule of law, and public accountability.

Fair Dealing Doctrine and Royalty Payment in India: Navigating Creativity and Copyright in Comparison to the United States

Siddhartha Sethi*

Abstract

In order to shed light on the difficulties faced by musicians, producers, and copyright holders in navigating the fine line between creative expression and copyright infringement, this research paper delves into the complex relationship between music sampling and the fair dealing doctrine in India. This paper explores the changing legal landscape and offers insights into potential solutions for striking a balance between safeguarding the rights of copyright owners and encouraging innovation in the Indian music industry through an analysis of relevant statutes, case laws, and commentaries. This paper examines the various tests under the Copyright Act, 1957 concerning the scope of fair dealing in India, providing a critical analysis while offering suggestions and alternatives where appropriate. The paper also gives a strict comparison to the fair use law in the United States, analysing which is better. Moreover, it goes into the payment of royalties and how artists are not adequately compensated, specifically in comparison to that of the United States, hence critically comparing the two. It shows how the Copyright Amendment of 2012 shed light upon the law, following the commendable work done by the music societies and courts to protect rights, but it still leaves us with a long way ahead.

I. Introduction

The Copyright Act, 1957 serves as a sentinel in a landscape where creativity and commerce collide, protecting the rights and interests of music producers while simultaneously maintaining an environment favourable to artistic

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innovation and cultural vibrancy. An intricate knowledge of copyright law is increasingly important for artists, music industry players, and regulators as the Indian music business develops. Under Section 2(p) of the Copyright Act, 1957, "*musical work*" refers to a substance that only contains music and any accompanying graphic notation but excludes any words or actions that are intended to be sung, spoken, or performed in conjunction with the composition.[1] Section 2(d)(i), Section 2(d)(ii), and Section 2(q) of the Act protect lyricists, composers, and singers for the music they create.[2] While it may seem that there is one copyright for all stakeholders, there are multiple facets enclosed within, which are:[3]

- ⇒ Compositional copyright: This is the copyright that is held by lyricists, composers, or songwriters and protects the specific arrangement of the song's melodies or chords.
- ⇒ Master copyright: This is the copyright held by the companies or their performers, that is, the label that protects the uniqueness of the sound recording produced by the artist who has used the particular musical composition.

Section 18 permits the transfer of rights for music creators, and Section 31A addresses compulsory licensing for cover versions of both unpublished and published songs, demonstrating that the law does provide protection for the copyright of musicians in India. Similarly, there are many ancillary provisions, such as Section 13(a), that state one requires originality for copyright, even for

[1] The Indian Copyright Act 1957, §2(p), No. 14, Acts of Parliament, 1957 (hereinafter "Copyright Act").
[2] Copyright Act, §2(d)(i), §2(d)(ii) and §2(qq).
[3] *Id.*

musical compositions. The law has been expanded by the courts in its landmark judgements such as *Tips Industries Ltd. v. Wynk Music Ltd*., which states the need for digital streaming platforms to adhere to copyright laws and enter into licensing agreements with music copyright owners to avoid copyright infringement claims under Section 31D of the Act.[4] Similarly, in *Saregama India Ltd. & Ors. v. Alkesh Gupta & Ors*., the court opined how streaming or filtering a sound recording under a website would lead to copyright infringement under the doctrine of fair dealing as it was personal property.[5] While the reference to the above is appreciable, it is to be noted that it is not comprehensive enough, as while we thoroughly see all the different facets of copyright law, in critical comparison to the United States, where the law is largely developed, we can come to an inference that a lot needs to be done.

C. Fair Use and Fair Dealing

While both terms are often interchangeable, considering the similarity in meaning, they have stemmed from different jurisdictions. The doctrine of fair use was introduced in the United States under Sections 106 and 107 of the 1976 Copyright Act, which gave the copyright holder five rights - the right to reproduce, prepare a derivative work, distribute, perform, and publicly display it.[6] It was first introduced in *Folsom v. Marsh*, where the court asserted that there was an infringement of copyright, laying down the four-pronged test to determine if there existed fair use or not:[7]

[4] Tips Industries Ltd v. Wynk Music Ltd and Anr., N.M(L) 197/2018 in C.S. I.P(L) 114/2018.
[5] Saregama India Ltd. & Ors v. Alkesh Gupta & Ors, CS No. 347of 2013.
[6] The Copyright Act of 1976, §§106 and 107 (United States of America).
[7] Folsom v. Marsh, 9. F.Cas. 342 (C.C.D. Mass. 1841).

⇒ Purpose and character of the use

⇒ Nature of the copyrighted work

⇒ Amount of copyrighted work used

⇒ Effect of the use on potential market for the work

Section 52 of the Copyright Act, 1957 is the only provision which remotely talks about fair dealing. It allows certain copyrighted material to be reproduced without permission from the copyright holder.[8] The reasoning finds support in the Delhi High Court's judgement in *Wiley Eastern Ltd. v. Indian Institute Of Management*, which reiterates the importance of Section 52, culminating in the protection of an individual's speech and expression under Article 19(1)(a) of the Indian Constitution.[9] In *Civic Chandran v. Ammini Amma*, the Kerala High Court provided an explanation of the idea of fair dealings. The court stated that "*it may be reasonable to hold that the reproduction of the whole or a substantial portion of it as such will not normally be permitted and that only extracts or quotations from the work will alone be permitted even as fair dealing*." If the replication constituted infringement, the court, in the same case, would present a number of elements to take into account. These elements include the quantum and value of the matter taken in relation to the comments or criticism, the purpose for which it is taken, and the likelihood of competition between the two works.[10]

D. Sampling, Substantial similarity, and *de minimis*

In *Nash v. CBS Inc.*, Judge Easterbrook stated that:

[8] The Copyright Act, 1957, §52 (United States of America).
[9] Wiley Eastern Ltd. v. IIM, 61 (1996) DLT 281.
[10] Civic Chandran and Ors. v. C. Ammini Amma and Ors., MANU/KE/0675/1996.

> "Intellectual (and artistic) progress is possible only if each author builds on the work of others. No one invents even a tiny fraction of the ideas that make up our cultural heritage."[11]

The Indian Copyright Act, 1957 does not specifically mention sound recording sampling, but Section 14 does shed some light on it. Under Section 14, the copyright owner has the exclusive right to protect their work or a substantial part of it.[12] Under Section 14(a), the copyright owner has the right to reproduce the work, make translations and adaptations of the original work, issue copies to the public, communicate to the public, etc., while under Section 14(e), the rights of the individual creating or owning the sound is as follows:[13]

- ⇒ Right to create any sound recording which encapsulates the original one;
- ⇒ Right to sell any copy of the sound recording, or give it on rent, or offer it for sale or hire, or
- ⇒ Right to communicate the work to the public.

Sampling a musical work without the consent of the original copyright holder leads to infringement of the same. The criteria used to determine sampling is checking whether a "*substantial portion*" of the pre-existing song was used. This can change depending on the particulars of each case. It doesn't have to be a note-by-note analysis; instead, it focuses on whether the core ideas and components of the original work have been retained. In the landmark case of *Hawkes & Son v. Paramount Film Service Ltd.*, out of a 4-minute piece, 20

[11] Nash v. CBS, Inc. 899 F.2d 1537 (1990).
[12] Copyright Act, §14(a).
[13] Copyright Act, §14(e).

seconds was considered to be a "*substantial component*", and the court held that two significant facets of music could be covered by copyrights:[14]

⇒ The physical representation of a particular performance of the musical composition, typically in the form of a master recording;
⇒ The musical composition typically consists of the composition and lyrics.

In India, the questioning of deciding such similarity has been determined in various cases such as *Twentieth Century Fox Film Corpn. v. Sohail Maklai Entertainment (P) Ltd.*, where the Bombay High Court said that it was not the quantity of work which determined infringement of a substantial part of the work, but it was the "*quality*" of work infringed.[15] Similarly, according to the Apex Court's ruling in *R.G. Anand v. Deluxe Films,* there is no copyright violation when the same theme used is presented and handled differently, resulting in an entirely new work. Moreover, in *India TV Independent News Service (P) Ltd. v. Yashraj Films (P) Ltd*., the term "*substantial work*" having similarities has been defined as falls under two categories:[16]

⇒ Complete non-literal similarity: In this case, courts have attempted to pinpoint the "*fundamental essence of the structure*" that is being reproduced, even though a specific statement is not.
⇒ Fragmented literal similarity: In which only specific expressions' individual components—not their entire expressions—are replicated.

[14] Hawkes & Son, Ltd. v. Paramount Film Service, Ltd., 103 L. J. 281 (Ct. App. 1934).
[15] Twentieth Century for Film Corporation v. Sohail Maklai Entertainment Pvt Ltd & Anr., 2010(6) ALL MR 857.
[16] India TV Independent News Service Pvt. Ltd. and Ors v. Yashraj Films Pvt. Ltd, MANU/DE/3928/2012.

Sometimes, the portion of material copied is so minimal, referred to as *"de minimis,"* that courts allow it without even going through a full fair use analysis. A well-known example is the movie Seven, where a few copyrighted photographs briefly appeared on screen. However, the court excused the same as they were "*unidentifiable.*" The Delhi High Court has also spoken about the defence of *de minimis,* stating it is based on the adage that "*the law does not concern itself with trifles*" (*de minimis non-curat lex*).[17] *De minimis* will apply when the alleged infringement is very minor or inconsequential. Analysing the same, there are five factors which the court will look into while looking into the defence of *de minimis*:

⇒ Size and type of harm
⇒ Cost of adjudication
⇒ Purpose of violated legal obligation
⇒ Effect on legal rights of third parties
⇒ Intent of wrongdoer

II. Critically Analysing the Doctrine of Fair Dealing in the Music Industry

As seen above, there are various prongs to determine whether there exists fair use or not. We will be analysing the same below in comparison to the United States ("US").

A. Purpose and Character of Use/ Section 52 of the Copyright Act

The main facet of the test for improper use is the purpose and character of use. The first factor mainly focuses on whether the "*use*" is commercial or non-

[17] *Id.*

commercial and whether it is transformative in nature. If the use is commercial, it is less likely to be fair use under US law, and if it is non-commercial, it is more likely to be fair use. In *Sony Corp. of America v. Universal City Studios, Inc.*, the US court held that making personal recordings of full television shows for time-shifting reasons does not violate copyright but rather qualifies as fair use.[18] The court further stated that home video recorder manufacturers such as Betamax and other videocassette recorders are not responsible for copyright violations.

Similarly, in India, Section 52 deals with fair dealing under the Copyright Act, 1957. In *Super Cassettes Industries v. Mr. Chintamani Rao & Ors.*, the court held that the defendant was held liable as there was illegal reproduction and distribution of its copyrighted music.[19] Moreover, in cases such as *Tips Industries Ltd. v. Wynk Ltd.*, the court held that copyright infringement had taken place as there was unauthorized use of copyrighted music in the film, which was a clear case of copyright infringement.[20] This case reaffirmed the importance of obtaining proper licenses for the use of copyrighted music in films.

Hence, it is important to assess the purpose and character of use, particularly in situations where music is being reviewed or critiqued, as such uses should be permitted. This is because if we are talking about freedom of speech and expression, and an artist has expressed their opinion via a creation of their own, the right to reply to the same should be allowed. The same has been

[18] Sony Corporation of America et al. v. Universal City Studios, Inc., et al, 464 U.S. 417.
[19] Super Cassettes Industries Limited v. Mr. Chintamani Rao & Others., LNIND 2011 DEL 3611.
[20]Tips Industries Ltd v. Wynk Music Ltd and Anr., N.M(L) 197/2018 in C.S. I.P(L) 114/2018.

reiterated in *Red Chillies Entertainment Pvt. Ltd. v. M/s. Gaurav Ghai & Others*, where it was held that critical commentary is a valid and protected use under copyright law.[21] Similarly, multiple YouTube videos reacting to a particular music video count as fair dealing as it is a reaction video. The copyright laws for the same should be less stringent, and creators should not be barred where they are forced to cut down on certain parts for copyright purposes as, if anything, they are spreading more awareness of the music.

Moreover, in cases where the work has not been used for monetization purposes, the court has played a vital role in maintaining fairness, even when it was difficult. In cases such as *Shemaroo Entertainment Limited v. News Nation Network Private Limited*, the plaintiff sued the defendant for using their content in an agreement made between the two parties, which was later terminated.[22] Using the *de minimis* analysis along with the purpose, the court said it did not make a huge difference as the main goal was reporting the news. This is mainly because the purpose of the same was not to commercialize the same. Therefore, wherever monetization is not a goal for copyright infringement, there should be no punishment, and it should be done under fair dealing.

Lastly, and more importantly, the courts in India have been extremely mindful. In situations where the purpose is for education or research, they have put it under the fair dealing ambit. A perfect example of this is *Amar Nath Sehgal v. Union of India*, where a particular copyrighted material, in the form of a sculpture and music, was used for a documentary film.[23] Keeping in mind that

[21] Shemaroo Entertainment Limited v. News Nation Network Private Limited, 2022 LiveLaw (Bom) 166.
[22] *Id.*
[23] Amar Nath Sehgal v. Union of India, 2005 (30) PTC 253 (Del).

it was a documentary film, which is exactly what falls within the facet of educational and informative purposes, aligning with the exception for educational and research purposes, the doctrine of fair dealing has been rightfully allowed. This is something which stands out in our country, as our laws are not as stringent. In the US, in *Association for Information Media and Equipment v. Regents of the University of California*, even though the central issue was whether the university's streaming of copyrighted music as part of its instructional videos qualified as fair use, the court ruled in favour of the copyrighted holders.[24]

Moreover, while seeing the character of use, as long as one is not using the music for monetization purposes solely, which is the main use of copyrighted work, there should not be a problem. In the *Indian Performing Rights Society Ltd. v. Eastern Indian Motion Pictures Association*, the main issue was the public performance of copyrighted songs in cinemas, which was not allowed.[25] This follows the precedent laid down by US cases such as *Sony/ATV Music Publishing LLC v. Tenenbaum*[26] and *Capitol Records, LLC v. Thomas-Rasset*, where the main objectives were shared copyrighted music files through peer-to-peer file-sharing networks and file-sharing networks for personal use, respectively.[27] It is important to note that the court has set the correct precedent in this matter. Upon closer examination, the primary purpose of creative art is to generate profit. Therefore, if someone illegally shares your music, causing

[24] Association for Information Media & Equipment v. Regents of the University of California, No. CV 10-9378 CBM (MANx) (C.D. Cal. Oct. 3, 2011).
[25] Indian Performing Right Society Ltd. (IPRS) v. Eastern Indian Motion Pictures Association (EIMPA), AIR 1977 SC 1443.
[26] Sony BMG Music Entertainment v. Tenenbaum, 672 F. Supp. 2d 217.
[27] Capitol Records, Inc. v. Thomas–Rasset, 692 F.3d 899.

harm to your earnings, it is clearly unjust when assessed using the reasonable person test.

An interesting observation when it comes to seeing the purpose and character of use is that of parody and satire. In the US, as seen in *Campbell v. Acuff-Rose Music, Inc.*, where the lyrics in Roy Orbison's song "*Oh, Pretty Woman*" were altered by the rap group 2 Live Crew.[28] The court upheld 2 Live Crew's appeal, setting a significant precedent for the fair use theory.[29] The court determined that 2 Live Crew's transformative and fair use of the copyrighted song for parodying purposes. Similarly, even in India, in *Super Cassettes Industries Ltd. v. Mr. Chintamani Rao & Ors.*, the defendants had created a parody of the song "*Koi Kahe Kehta Rahe*" from the movie "*Dil Chahta Hai*" and used it in a television advertisement for a detergent brand.[30] As per the court, the use of a parody of the song for a hilarious television commercial did not violate copyright. The usage was transformational and intended as satire and humour, the court emphasised. This paper does not align with this approach, as while humour has its place, there's a fine line where excessive ridicule crosses into what could reasonably be considered hate speech. While Article 19(1)(a) protects freedom of speech and expression, there are also reasonable restrictions to the same under the ambit of Article 19(2).[31]

When evaluating the purpose and character of use, the court has largely exercised sound judgment. However, there remains a need to standardize and consistently apply the reasonable man test across all cases. If this is achieved, we will have a well-balanced legal framework for every time someone needs

[28] Campbell v. Acuff-Rose Music, Inc., MANU/USSC/0019/1994.
[29] *Id.*
[30] Super Cassettes Industries Ltd. v. Mr. Chintamani Rao & Ors., I.A. No. 13741/2006 in CS(OS) 2282/2006.
[31] INDIA CONST., art. 19(2).

to decide whether the character and purpose of use falls under the fair dealing doctrine.

B. Nature of the Copyrighted Work

Secondly, in the US, one sees the nature of the copyrighted work, that is, whether it is factual or fictional. In such situations, the law protects fictional and creative works much more than it protects works of reality/factual works. Even in India, while there is no legislation for the same, the courts have to consider the nature of the work. In creative works like music, the court usually uses the originality test to see how much of the copyrighted work is original work. The test demands that the challenged work be a copy of the original work and that the original work and the infringing work be significantly similar. In *Eastern Book Co. v. D.B. Modak*, the court maintained the same, first determining if the entire work is original or whether there are any notable parallels between the original work and the work in question.[32]

While the case has been withdrawn, a study would be that of *Pritam Chakraborty v. Iranian Music Band*, who has repeatedly been accused of stealing the works of artists. This paper argues that while the beginning of both songs has a stark similarity, the genre and tone of the songs are very different from one another, making the song "*Pungi*" quite different from the Iranian counterpart. If the test of originality becomes so high, creativity and sampling would be extremely imbalanced. Therefore, when considering originality, it appears that the court could have established a more precise test to determine what constitutes a certain degree of originality. While acknowledging the inherent ambiguity in defining originality, it seems that there is considerable

[32] Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1.

arbitrariness involved, as what one judge deems sufficiently creative may not be viewed the same way by another.

Following the guidelines established in *CCH Canadian Ltd. v. Law Society of Upper Canada*,[33] the court concluded in *Eastern Book Co. v. D.B. Modak* that "*the original work should be the product of an exercise of skill and judgement, and it is a workable yet reasonable criterion*."[34] The "*sweat of the brow*" threshold for determining originality is excessively lax, tipping the scales of copyright protection too much in favour of the owner's rights and preventing copyright from serving its intended purpose of safeguarding the public's interest in maximising the creation and dissemination of intellectual works. However, the bar for originality and inventiveness is too high. We are living in a time period where being original by itself, in a space of music, is extremely difficult, especially when there are millions of tunes already used by artists in the past. Requiring to maintain an exceptionally high level of originality makes it even more difficult.

There are several methods through which a song can exist, the most common of which include the following-

⇒ Remix: Remixing a song requires changing the pitch, rhythm, vocals, instruments, and other elements of the original composition. A remix is essentially a different take on the original song that offers a different interpretation. In one significant case, Hindustan Coca-Cola Beverage Pvt. Ltd, Hindustan Coca-Cola Holdings Pvt. Ltd, and Viacom 18 Media Pvt. Ltd were served with a legal notice for allegedly violating copyright. The Rangabati remix, which incorporated English-Tamil

[33] CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC OnLine Can SC 13.
[34] *Id*, at 32.

rap and the Orissa Anthem, is what sparked the issue. Later, the remixed version was broadcast on MTV Coke Studio. The claimant claimed that copyright infringement occurred and requested compensation in the sum of Rs. 1 crore. Hence, be it the hit song Masakali, which was remixed into Masakali 2.0, or any other song such as Tamma Tamma, a modern-day remix of the classical song in Badrinath Ki Dulhania, there is so much ambiguity in the law as people continue to remix old music, because of a lack of mention in the legal framework. Whilst it falls under the ambit of Section 51 of the Copyright Act, 1972, the law should be better worded as remixes are seldom made at the smaller level due to the lack of awareness.

⇒ Mashup: A mashup is a form of recorded music that consists solely of samples from other recordings, which are remixed and combined to create a new, unified composition. Typically, a mashup combines elements from two or more songs, often by different artists, by altering aspects such as vocal tempo, pitch, and instrumental arrangement. It is vital to distinguish between mashups and remixes because the former only uses pre-existing tracks, whereas the latter also uses samples and fresh material. Legally speaking, the *Bridgeport v. Dimension* case clarified the potential copyright infringement problems related to mashups. The court pointed out that mashup artists could potentially be accused of copyright infringement even if they employ a one-second sample of music.[35]

Therefore, it appears that the courts could do a better job of upholding the test of originality. Even though it is difficult to maintain a set standard, there can

[35] Bridgeport v. Dimension, 410 F.3d 792.

be a better criterion to determine the same as India does not have a set standard, as the US does. The entire concept of having a standard such as that of fair use or fair dealing is to increase the facets of law and have several important factors which can be used for determination.

C. Amount of Copyrighted Work Used/ *De Minimis* Analysis

A really important factor in determining fair dealing is the number of songs used in the new work. The *de minimis* analysis, as outlined in the paper before, states that when the sampled piece of the copyrighted work is so insignificant or unimportant that its use will not depreciate the original work's value or drive away its market, it will constitute fair use and, in such circumstances, the courts will refrain from intervening in the dispute. Led Zeppelin, for instance, was successful in establishing that their song "*Stairway to Heaven*" did not violate the band Spirit's song "*Taurus,*" but the band chose not to pursue the fair use defence offered in its response.

Under the law set out by the US, the courts check two things: similarity and substantiality. With respect to substantiality, there is a lot of debate. The US and other countries have taken it on a case-to-case basis, which is the usual test, as reiterated in *Twentieth Century Fox Film Corpn. v. Sohail Maklai Entertainment (P) Ltd*., where the court found that the "*substantial similarity*" between the original and the copied work is determined by the quality of the copied work, not the quantity and that this is the case when comparing the two.[36] It is insignificant to determine whether the similarity is substantial based on the fact that only four notes were selected for the sample. There may

[36] Twentieth Century for Film Corporation v. Sohail Maklai Entertainment Pvt Ltd & Anr., 2010(6) ALL MR 857.

have been an infringement if a qualitative review of the work reveals a glaring similarity between the works.

The issue already came with the above, as we cannot really, in the position of a judge, check the quality of the original work with that of the copyrighted work. Hence, the courts rightfully came up with the "*look and feel*" or "*audience test*" to fairly determine the infringement. In *R.G. Anand v. Deluxe Films*, they came up with this concept where the court rightfully held that *"reader, spectator or viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original*."[37] Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises. The recent copyright strike on the movie's Singham title track, which led to the makers taking the movie down, is the perfect illustration of substantial similarity. While it was just the first ten seconds that were in contention for copyright, it is to be noted that Singham's background music was extremely popular amongst the masses as it reflected the character's fighting spirit. Thus, T-Series (which made the music for the original movie) filed a claim against Saregama's song (the new music label behind the music). I argue that the court would have held that it was not fair dealing as they had taken the "*heart*" of the work.[38]

However, after going through a thorough analysis, we see a lot of inconsistency in the court's rulings. They have, in some situations, adapted

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[37] RG Anand v. Deluxe Films, AIR 1978 SC 1613.
[38] Aishee Choudhury & Yukta Bhatia, *Copyright Clash: Singham Theme Pulled from YouTube after T-Series Copyright Strike*, NAIK NAIK & CO (Nov. 09, 2024), https://naiknaik.com/2024/11/09/copyright-clash-singham-theme-pulled-from-youtube-after-t-series-copyright-strike/.

US Jurisprudence in cases of *Newton v. Diamond* in cases such as *India TV Independent News Service (P) Ltd. v. Yashraj Films (P) Ltd* where they identified two types of substantial similarity: (i) comprehensive non-literal similarity; where courts have strived to identify the "*fundamental essence of the structure*," and it is copied, even where specific expression is not copied. (ii) Fragmented literal similarity, in which bits of specified expressions are copied, but the overall structure is not.[39] While the court's decision is acknowledged, and the improper use of the doctrine is recognized, it appears that the reasoning employed by Indian courts would yield more favourable results. The tests outlined in this case law have been discussed earlier in the paper under the section about sampling.

This is owing to the complexity of the tests used by the US courts. It makes one inclined to believe that the audience test is much clearer and more adaptable to almost any situation. It clearly shows that whether the similarity is fragmented or not, especially in terms of structure, it does not matter. It is proposed that the best way to come to a decision for the same is presented in the case of *Bridgeport Music, Inc. v. Dimension Films*, where a two-second sample from the song "*Get Off Your Ass and Jam*" by Funkadelic in a hip-hop song was copyrighted.[40] This case demonstrates the test perfectly, as even though the sample was so negligible, it could potentially affect future work considering the impact of that sample. This is a perfect example of copyright because a particular mix of notes, even if it be for one distinct melody, can be the main part of the song that stands out and hampers it.

[39] India TV Independent News Service Pvt. Ltd. and Ors v. Yashraj Films Pvt. Ltd, MANU/DE/3928/2012.
[40] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792.

The paper suggests that an effective test for the same would be to use the chorus or hook of the song. Even though it may be a negligible part of a song, it is usually repeated throughout the song multiple times, thus making it extremely catchy. The same can go for a particular rhyme scheme. While there might be other similar lyrics and compositions of songs, they may fall under the ambit of sampling. Hence, one must be careful about this.

D. Effect of the Use on Potential Market for the Work: Likelihood of Competition

This element is "*undoubtedly the single most important element of fair use*," according to the courts in the US. However, the same is not really true in India. The benefit to the copyright owner when use is found unfair must be weighed against the benefit to the public when use is deemed fair by the court when taking this aspect into account. The court ruled that *"[a]ctual present injury need not be proven. Nor is it required to show with certainty that future harm will occur*." Moreover, in *Sony Corp. of America v. Universal City Studios, Inc.,* the court held that it is important to demonstrate that there is a serious possibility of future harm by a preponderance of the evidence.[41]

In India, the same factor has been worded as "*the likelihood of competition between both works*." In *ESPN Stars Sports*, the court endorsed the "*likelihood of competition*" and held that if the work was being used to convey the same information as the author for a rival purpose, it might be unfair.[42] Despite that, the same is not mentioned under the law; however, it should be. This is because copying, creating and then sharing a new work derived from an existing one raises an important question: could the new release harm the

[41] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417.
[42] ESPN Stars Sports v. Global Broadcast News Ltd and Ors, 2008 (36) PTC 492 (Del).

market for the original work? This consideration is crucial. If the new work negatively impacts the original's market, it would likely be deemed unfair use due to the harm caused to the source material. If it does, it would probably be considered unfair use due to what it was doing to the source you had borrowed from. When it comes to musical works, courts take into account a number of factors, including whether the usage threatens the original work's market, replaces it, or could otherwise impair the copyright owner's capacity to make money from their creation. Musicians, producers, and other artists should be aware that even transformative or parodic usage would not be deemed fair if they materially diminish the demand for the original music.

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the court clearly held that the "*Effect on Market*" aspect is quite significant.[43] It was argued that even if the challenged use does not currently affect the market for the original work, it may nonetheless count against fair use if it has the potential to do so in the future. It is of extremely paramount significance as the music industry is huge in a country like India and is of significant importance. More importantly, in India, the term of copyright for published literary, dramatic, musical, and artistic works under Section 22 of the Copyright Act, 1957 lasts for the lifetime of the author and continues for sixty years from the beginning of the calendar year following the year of the author's death.[44] This clearly shows us the likelihood of competition, as even though sampling old work is extremely popular in today's date, the music within the last century is usually sampled. Even in the US, it is the life of the author plus 70 years after the author's death.[45]

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[43] Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985).
[44] The Indian Copyright Act, §22, No. 14, Acts of Parliament, 1957.
[45] United States Code, Copyright, 17 U.S.C. §302.

In conclusion, even though the "*Effect on Market*" component isn't mentioned expressly in India's copyright legislation, its concepts are present within the framework of fair dealing. By supplying a clear and thorough framework for evaluating fair use and bringing the nation's copyright legislation more firmly in line with international standards and jurisprudence, recognising and codifying this aspect will improve it even more. Hence, to protect the original work, it is proposed that judges use this test in India to see whether a copyrighted song would damage it. They should apply the test the court used in *Rogers v. Koons*, where, in that situation, selling the sculptures brought in several hundred thousand dollars for the artist.[46] The artist claimed his sculptures were of fair use because the photographer would never have thought to make sculptures when the photographer sued. The judge disagreed, saying that whether or not the photographer had considered creating sculptures was irrelevant because there was a market for sculptures of the shot. Similarly, even in our country, it does not matter if, for example, an artist decides to give a song to play on the radio station or even if he performs his song. The main principle is that he would make a lot of money performing it, and that would potentially be of high value. Hence, this should be a facet in India as well.

III. Royalties from Music: Lack of Proper Regulatory Corundum?

Music royalties are remuneration payments that are given to the owners of the rights to use the music (songwriters, composers, recording artists, and their respective representatives). The majority of the time, these royalties are paid by organisations that use the music, such as TV channels, radio stations, venues, streaming platforms, and others and are collected on behalf of the

[46] Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

rights holders by middlemen. In India, in the case of *Indian Performing Rights Society ("IPRS") v. Aditya Pandey & Ors.*, it was determined that authors of musical and literary works included in sound recordings were entitled to an equal part of the royalties generated by the use of their works.[47] Under Section 17 of the Copyright Act, 1957, in the absence of an agreement, the person who makes the literary, dramatic, or artistic work is the owner of the same.[48] Through the 2012 Amendment, Section 38A was added, granting royalty rights to even performers whose work is exploited commercially.[49] However, that has not always been the case when it comes to the implementation of the same.

Even though Section 33 of the Copyright Act, 1957 provides for the collection of royalties by Copyright Societies, it has been nothing but a long-fought journey for essential justice. In India, the Indian Performers Rights Association ("IPRA") and Recorded Music Performance Limited ("RMPL") are the registered societies for copyright. Despite this, there is a range of artists who have not received royalties for their work over the years. Popular artists such as Lucky Ali have not received royalty for their work over the years and have brought up a valid point of having labels do the same but still not getting the job done.[50] Moreover, popular singer-composer Raghu Dixit did not get a single penny for any of his performances over two decades, which is just

[47] Indian Performing Rights Society v. Aditya Pandey & Ors., 2012 SCCOnLine Delhi 2645.
[48] Copyright Act, §17.
[49] Copyright Act, §38(a).
[50] *Lucky Ali Reveals He Hasn't Received Royalty for Many Years, Hopes That Changes Soon*, TIMES OF INDIA (Jun. 28, 2022), https://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/lucky-ali-reveals-he-hasnt-received-royalty-for-many-years-hopes-that-changes-soon/articleshow/101329922.cms?from=mdr&gt.

absurd.[51] Copyright societies must ensure quarterly distribution of royalties to registered artists and composers, with publicly available annual audit reports certified by an independent third-party auditor.

While the Indian Singers' Rights Association ("ISRA") existed, it is to be noted that they were never the registered copyright society under the law in *IPRS v. Eastern India Motion Pictures Association*, the court clearly stated that radio stations had to pay royalties for playing music that was protected by copyright.[52] The court decided that in order to play music protected by copyright and get royalties for it, radio stations had to apply for a licence from the IPRS. The court made clear the copyright owner's exclusive right to receive royalties for the use of their copyrighted work as well. Still, things looked bad as so many artists were still not receiving royalties. This is in spite of the 2012 Amendment, which amended Section 17 of the Act and added the clause of "*performance rights*."

This shortfall can largely be attributed to the long-standing practice of filmmakers and artists signing over all recording rights to music labels. This was due to the fact that labels were the sole organisations in the music industry. There was no option, even if someone wished to look at a different publisher. From the perspective of the musicians, they desired the album's public distribution and promotion. It was and still is extremely uncommon for artists to inquire about a contract's terms or bargain over royalties. The musicians are eager to release the album. They enter into contracts without reading them or

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[51] Likitha Pransanna, *With Stronger Laws, Musicians Are Now Making a Run for Their Royalties*, TIMES OF INDIA (Mar. 25, 2023), https://timesofindia.indiatimes.com/life-style/spotlight/with-stronger-laws-musicians-are-now-making-a-run-for-their-royalties/articleshow/98975443.cms?from=mdr&gt.

[52] Indian Performing Rights Society v. Eastern India Motion Pictures Association, AIR 1977 SC 1443.

seeking legal counsel. Up-and-coming musicians, in particular, would be afraid to try a negotiation for fear of losing the agreement. Over the years, even well-known musicians have not given royalties much thought. Since they believed it would not be compensated. Even if it were, the sum would be so insignificant that it would not be worth worrying about. It is to be noted that artists have rights as both the composition and lyrics are protected under the law.

It would be wrong to say that progress has not been made after the cases of *IPRS v. Rajasthan Patrika Pvt Ltd*[53] and *IPRS v. Music Broadcast Limited,*[54] where the court stated that PRS is entitled to repayment in the form of royalties when its literary and musical creations are used in films or sound recordings, things have looked much better. Recently as well, in *Saregama India Limited v. Next Radio Limited*, the court set aside the ruling in a case where they tried bypassing the time period for obtaining notice for broadcasting music on the radio and reducing the same. This was crucial as it left room for flexibility in a situation where approval was required before using the artist's music.[55] During times of the pandemic, when musicians had literally no proper source of income, they did help in the distribution of around 220 crores in the form of royalties. It is also to be noted that they had an approximate revenue of around 400 crores in the first half of 2023.[56] However, it is to be noted that this is not supposed to be a reason to celebrate. This is because it's a legal right which they have had since forever, which has been exemplified over the past decade. It is sad to see that most people do not even

[53] Indian Performing Right Society Limited v. Rajasthan Patrika Pvt. Ltd., 2023 SCC Online Bom 94.
[54] Indian Performing Rights Society Ltd. v. Music Broadcast Ltd., Suit No.2401 of 2006.
[55] Saregama India Limited v. Next Radio Limited, Civil Appeal Nos 5985-5987 of 2021.
[56] *supra* note 51.

know about this right. The law must be amended to have a reasonable man's standard for cases of royalty as well.

Hence, knowing your copyright rights is extremely important; otherwise, these big, exorbitant organizations will illegally exploit you using loopholes under the Indian Contracts Act, 1872. However, the reasonable man's test can protect such situations, as there is always a solution under the Contracts Act. A case study is that of Bhuban Badyakar, who went from selling peanuts to becoming a superstar overnight with his hit single. However, a Birbhum-based music record label exploited him by making him sign an agreement, promising that he would get a monthly royalty and 60% of the song's rights.[57] Shockingly, when he tried to upload his own song a while back, the website struck it down. He was also told that the rights to his song were purchased by a one-time payment of Rs. 3 lakhs, and the label had completely ghosted him, forcing him to sell his class and have no source of income.

This is extremely sad to watch, as while awareness is an alarming issue, even legally, the standard is not up to the mark, that too for a song which can be copyrighted on the website for a registration fee of Rs. 500. For all the copyrights of a song, the overall cost is Rs. 1,500 which is nothing compared to the money you earn by legally protecting it. As per Atul Churamani, the Founder of Turnkey Music, many musicians fail to do the same, or as a matter of fact, pay a lawyer or agent to do the same for them.[58]

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[57] *Id.*

[58] Plus M., *Lack of Music Publishing Knowledge Robbing Indian Artists of Royalties*, MUSICPLUS (Mar. 2, 2022), https://www.musicplus.in/lack-of-music-publishing-knowledge-robbing-indian-artists-of-royalties/.

A. Critical Comparison of the Law with that of the United States

The Indian legal system could benefit significantly from inspiration from the US, where the law is precise and well-defined. They have a section for almost everything to protect the rights of the artists in matters relating to royalty payment. The paper does not suggest that singers are not exploited in the US by their record labels; they are, at the very least, protected by basic rights and have remedies to fight exploitation. The Digital Performance Rights in Sound Recordings Act of 1995 ("DPRA") illustrates the same.[59] In accordance with 17 U.S.C. 106(6), the owners of sound recordings have the sole right to use digital audio transmission to perform their works publicly.[60] The statutory licence for the digital public performance of sound recordings, as well as the rates and conditions for digital performance royalties, are established in 17 U.S.C. 114.[61] Additionally, it enables the development of collective management organisations ("CMOs") to handle the administration of these royalties.

Similarly, the Digital Millennium Copyright Act of 1998 ("DMCA") protects the rights of musicians. Under 17 U.S.C. § 112(e), the legislative licence for specific digital audio broadcasts of sound recordings produced by already-running subscription and satellite digital audio radio services (such as SiriusXM) is established.[62] It details the fees and conditions associated with these transmissions. Moreover, Section 17 U.S.C. 114(f) specifies the methods

[59] The Digital Performance Right in Sound Recordings Act, 109 Stat. 336, 1995 (United States).
[60] *supra* note 45, §106.
[61] *Id*, §114.
[62] *Id*, §112.

and criteria for calculating the amounts and conditions of the statutory licence for royalties on digital performances.[63] Lastly, the payment of royalties to music publishers and songwriters for certain digital audio transmissions, such as downloads and interactive streaming services, is covered under 17 U.S.C. 115(b), which principally deals with the mandatory mechanical licensing of musical works.[64] They even have performance rights organizations under 17 U.S.C. §116-118, which helps in the licensing of compositions, and SoundExchange, which operates under the DPRA and DMCA to collect and distribute digital performance royalties to both recording artists and record labels, thus helping in smoother administration.[65]

The best example of how the law should be with respect to royalties is that of the landmark US precedent, *Mills Music, Inc. v. Snyder*, where the court ruled that even if the grant is later revoked, the conditions agreed upon in exchange for the creator of a work authorising derivatives stand.[66] The law does not distinguish between derivative works and those specifically authorised by the copyright holder if the copyright holder deputises another person to do so. There are many cases pertaining to royalty payment in the US which have paved the way for royalty payment. An interesting one is that of *Robin Thicke & Pharrell Williams v. Marvin Gaye*, where the Marvin Gaye estate claimed that Thicke and Williams plagiarised the "*general vibe*" of "*Got to Give It Up*" and some of its percussion for their song "*Blurred Lines*." Gaye won his case

[63] *Id*, §114.
[64] *Id*, §115.
[65] *Id*, §116.
[66] Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985).

in court. One of the largest payments in the history of music copyright, Thicke and Williams paid $5.3 million in damages and will pay a 50% royalty rate.[67]

There are many other cases that show how developed the law is in the US, such as that of *Turtles v. SiriusXM Radio, Inc.*, where state law mandated that SiriusXM pay fees for the use of sound recordings made before 1972.[68] The decision had repercussions for the digital radio industry's payment of royalties on older recordings. An interesting one is that of *Estate of Michael Jackson v. Commissioner*, which involved the valuation of Michael Jackson's estate, which included significant music royalty assets, which was an important precedent surrounding the valuation of intellectual property assets, including music royalties, within the context of estate taxation.[69]

However, with digital streaming platforms emerging this past decade, there have been several disputes in the US, including disputes regarding both record labels and streaming services. In *Mechanical Licensing Collective v. Spotify*, Spotify had misled customers by automatically switching millions of music-only subscribers to pricier bundled plans that included audiobooks—without their consent.[70] They announced higher prices publicly but didn't provide an option to return to the original music-only plan. On top of that, they made cancelling subscriptions unnecessarily difficult through confusing website designs and deceptive tactics. This led to them reducing royalties for musicians in the context that users were paying for content other than music, thus violating both antitrust and copyright laws. Therefore, stricter compliance

[67] Williams et al v. Gaye et al., 9th U.S. Circuit Court of Appeals, No. 15-56880.
[68] Inc. v. Sirius XM Radio, Inc., 849 F.3d 14.
[69] Estate of Jackson v. Comm'r, T.C. Memo. 2021-48.
[70] Kristin Robinson, Spotify Sued by MLC for Bundling and Cutting Songwriter Royalties BILLBOARD (Jun. 05, 2024), https://www.billboard.com/business/publishing/spotify-sued-mlc-bundling-cutting-songwriter-royalties-1235684122/.

is needed, along with greater transparency in the distribution of royalties, regular audits across all digital platforms, and the implementation of a proportionality model for royalty payments. This will ensure that musicians who work hard to release their music are not left to face new loopholes that may emerge in the evolving digital markets.

IV. Conclusion

In conclusion, while Indian copyright law generally aligns with international standards, its approach to the music industry remains inadequate. A comparison between the US fair use doctrine and the UK's fair dealing framework highlights a shared strength in their laws: a systematic structure with clearly defined guidelines. This exposes a key shortcoming in India—the lack of established tests for nuanced scenarios. Agreed that the courts, as we can see above, have rightly interpreted the law via its precedents, but there is a long way to go. When it comes to seeing the nature of the work, the law could be better framed to have a clause for remixes, mashups, etc., because music can be recreated and expressed in so many ways, and more importantly, it is such a large market in India. Once this is done, we can delve into Section 52, where we see how copyright is allowed for education or research purposes, even for criticism. Even though the law is really well laid out for cases of the former, when it comes to criticism, in matters such as that of parody, the courts can do a better job. By applying the reasonable man test in all situations, things will be easier. More importantly, unlike the US, considering that this is the single most important factor in India, it should be given more importance. Similarly, even in the *de minimis* analysis, even though the concept is extremely necessary, as one should see the amount of work copyrighted, it is important to note that there is no standard test the courts have been using as there are so many different precedents without a set law. The law laid down in "*look and feel*" and "*audience test*" should be permanently applied as more

than the courts, the audience is the main target here and would give a better perspective, that too in a matter with so much ambiguity where you have to see the amount of work copyrighted. Moreover, in the "*likelihood of competition*", it is somewhat predictable how the market is in general and the effect it would have. Hence, by giving more importance to copyright law in the music industry, it is going to be nothing but beneficial to all parties, such as the record labels, music societies, and most importantly, the music artists, who are extremely exploited as we can see in the form of royalties. Again, even though the 2012 Amendment did some justice with the precedents recently, we are nowhere close to the US, which has had a century-long legal regime concentrating on royalties. Seeing it as the major issue has just come to light, as having a definite source of income is extremely important in this industry to maintain a healthy lifestyle, as we can see from the case studies above.

Therefore, to conclude, even though there have been cases where courts have backed the rights of copyright owners, there have also been decisions that have acknowledged the value of transformative and avant-garde artistic expression. In conclusion, India's policy on music sampling is at a crossroads, balancing artistic creativity and copyright preservation. It cries out for a sophisticated, context-sensitive strategy in line with the shifting creative environment. The healthy cohabitation of artistic freedom and copyright protection remains a crucial concern as the Indian music business grows and diversifies. To make sure that the song of creativity continues to resound while respecting the rights of copyright owners, policymakers, artists, and the legal community must work together. India's path of music sampling is still far from reaching its climax in this symphony of difficulties and chances.

Navigating Grey Areas: Child Marriage as a Loophole Favouring POCSO Offenders

Aviral Singhai[*] & Radhika Baderia[*]

Abstract

This research paper delves into the intricate relationship between child marriage and the Protection of Children from Sexual Offences, 2012 ("POCSO Act") in India. It explores how child marriage is used as a defence strategy by offenders facing charges under the POCSO Act, unfolding significant loopholes in the legal system. Despite stringent provisions designed to protect minors, socio-cultural acceptance, personal laws, economic hardships, ignorance of the law, and out-of-court settlements are often exploited to evade accountability. The research highlights the conflicts between the POCSO Act and personal laws, especially Muslim personal law, which sometimes take precedence over child protection statutes, leading to the acquittal of offenders. Economic dependency and ignorance of the law are also used as defences, decreasing the gravity of the crimes and weakening the enforcement of the POCSO Act. Additionally, out-of-court settlements compromise the non-compoundable nature of sexual offences, allowing perpetrators to avoid legal consequences. It is proposed that the enforcement of the POCSO Act and the Prohibition of Child Marriage Act, 2006 ("PCMA") over personal laws, ensuring judicial consistency, raising societal awareness, and aligning India's legislative framework with international commitments under the United Nations Convention on the Rights of the Child ("UNCRC") must be done. These measures will strengthen legal protection for minors and create a safer environment.

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I. Introduction

Child marriage is still a prominent social concern in Indian societies with far-reaching consequences, and thus often interferes in the legal domain in complex ways, especially in the context of offences under the POCSO Act.[1] The PCMA[2] was also instituted to combat a major social concern of child marriage in India. However, in many cases, perpetrators charged under the POCSO Act exploit the existence of child marriages as a defence strategy, complicating the prosecution's ability to establish instances of sexual offences against minors. This tactic leverages the ambiguity surrounding the legal status of marriages solemnised before the legal age of consent, thereby undermining the protective intent of both the PCMA and the POCSO Act.[3]

The paper delves into the complex relationship between child marriage and the POCSO Act, exposing how systemic loopholes allow offenders to exploit child marriage as a defence. By analyzing judicial precedents, the research highlights the conflict between statutory protections like the POCSO Act and the PCMA with personal laws such as Muslim personal law, which often take precedence in practice. The paper explores how socio-economic factors, including economic dependency and cultural acceptance of child marriage, weaken the enforcement of legal protections, resulting in judicial inconsistencies and even acquittals. Further, it analyzes the misuse of out-of-court settlements and the defence of ignorance of the law, which erode the

[1] The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (hereinafter "POCSO Act").
[2] The Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2007 (hereinafter "PCMA").
[3] Muskan Malhotra & Prachi Sehgal, *POCSO Act, 2012: A Tale of Delay in Justice*, 1 JUS CORPUS L.J. 257 (2021).

principle of non-compoundability and risk normalizing child marriage. Through these insights, the paper advocates for the need to harmonize India's legislative framework with international commitments under the UNCRC, advocating for judicial consistency and comprehensive reforms to strengthen protections for minors.

II. Child Marriage as a Defense

Child marriage is an evil that has plagued Indian society for more than a century. Not only is it harmful to the very fabric of society by itself, but it also provides a defence to POCSO Act offenders.[4] This is because, in cases of child marriage, the POCSO Act is also usually attracted because the offender usually has sexual relations with the minor party before she reaches the age of majority. However, courts often acquit the offender despite the existence of Section 42 of the POCSO Act, which provides an overriding effect on the POCSO Act over other laws. Child marriage provides a defence to POCSO Act offenders in various ways.

III. Muslim Personal Laws as a Shield

The POCSO Act was enacted in 2012 to curb the increasing cases of child sexual abuse in India and serves as a significant legal framework protecting the well-being of children below the age of 18 years from such sexual offences. Section 42A of the POCSO Act[5] establishes the primacy of the Act over all other laws. There remains uncertainty regarding whether this supremacy extends to personal laws. Despite the significant judgment of

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[4] International Centre for Research on Women & World Bank., *Economic Impacts of Child Marriage: Global Synthesis Report* (2017), https://documents1.worldbank.org/curated/ar/530891498511398503/pdf/116829-WP-P151842-PUBLIC-EICM-Global-Conference-Edition-June-27.pdf.

[5] POCSO Act, §42A.

Independent Thought v. Union of India[6] by the Supreme Court stating that POCSO will have an overriding effect over personal laws, there have still been multiple instances where the judges have allowed the sentences of POCSO Act offenders to be suspended.

In the case of *Khaledur Rahman v. State of Kerala and Anr,*[7] the Kerala High Court was of the view that marriage between "*Muslims under personal law is not excluded from the sweep of the POCSO Act. If one of the parties to the marriage is a minor, irrespective of the validity or otherwise, offences under the POCSO Act will apply*." Thus, it upholds the primacy of the POCSO Act over all other laws in conflict with it, as provided in section 42A of the POCSO Act.[8]

However, in the current legal context, personal laws have become a prominent defence mechanism for offenders charged under the POCSO Act since these personal laws, specifically the Muslim personal law, conflict with the provisions of the POCSO Act and the PCMA. While the POCSO Act, as well as the above cases, have clearly stated that the POCSO Act should take precedence over personal laws, there have been instances where judges acquitted offenders on the grounds that the marriage of the minor was permitted by their personal law.

Contrastingly, cases like *Yunusbhai Usmanbhai Shaikh v. State of Gujarat*[9] reveal a different judicial approach. In this case, the minor girl was 16 years and 4 months old when she became romantically involved with a man. The

[6] Independent Thought v. Union of India, (2017) 10 SCC 800.
[7] Khaledur Rahman v. State of Kerala, (2023) SCC OnLine Ker 3.
[8] POCSO Act, §42A..
[9] Yunusbhai Usmanbhai Shaikh v. State of Gujarat, (2015) SCC OnLine Guj 6211.

accused's defence was that as per Muslim personal law - "*A Muslim girl, who is above 15 years of age or has attained puberty, is at liberty to marry even if there is no consent from the parents.*" The court was of the opinion that the Muslim Personal Law (Shariat) Application Act, 1937,[10] statutorily recognises that in all questions relating to marriage, the rule of the decision shall be the Muslim personal law. Therefore, no case has been made out so far as the offence under Sections 363[11] and 376[12] of the Indian Penal Code ("IPC"), including Section 18 of the POCSO Act,[13] which prescribes punishment for an attempt to commit an offence.

Similarly, in *Fija v. State (NCT of Delhi)***,**[14] the girl was only 15 years and 5 months old and got married according to Muslim rites and rituals. Subsequently, the couple was living peacefully with each other. However, the parents of the girl filed a case against her husband under Section 6 of the POCSO Act.[15] It was contended by the counsels that as per Mohammedan Law, the girl who had attained the age of puberty could marry without the consent of her parents and had a right to reside with her husband even if she was less than 18 years of age and thus otherwise minor girl, according to Article 195 of "*Principles of Mohammedan Law*"[16] which provides that "*every Mohammedan of sound mind, who has attained puberty, may enter into a contract of marriage*." As per the Article, puberty is presumed, in the absence of evidence, to be completed at the age of fifteen years. The court accepted the

[10] Muslim Personal Law (Shariat) Application Act, 1937, No. 26, Acts of Parliament, 1937.
[11] The Indian Penal Code, 1860, §363, No. 45, Acts of Parliament, 1860.
[12] *Id*, §367.
[13] POCSO Act, §18.
[14] Fija v. State (NCT of Delhi), (2022) SCC OnLine Del 2527.
[15] POCSO Act, §6.
[16] SIR DINSHAH FARDUNJI, PRINCIPLES OF MOHAMMEDAN LAW (1905).

arguments of the defendant and thus proceeded to acquit the husband. Furthermore, In *Mohammad Waseem Ahamad v. State*,[17] the court deemed further proceedings futile since the minor had delivered a child and turned hostile during trial, thus acquitting the accused based on practical considerations.

These situations, thus, raise significant concerns regarding the proper implementation and enforcement of child protection laws in India. By allowing personal laws to supersede POCSO Act, the legal system, therefore, has provided a strong defence to POCSO Act offenders. This undermines the very essence of child protection and justice, as it creates a potential loophole for perpetrators to evade accountability for their heinous acts against minors.[18]

Moreover, the precedence given to personal laws dilutes the statutory prohibition on sexual relations with minors, effectively permitting such acts if justified by cultural or religious norms.[19] To ensure the rights and welfare of minors are upheld, it is imperative that the judiciary interprets and applies laws uniformly, giving precedence to the PCMA and POCSO Act over personal laws.

Additionally, the allowance for personal laws to supersede the POCSO Act not only sets a concerning precedent but can also destroy the broader framework of the POCSO Act because the precedence of Muslim personal law over the POCSO Act allows an adult to have sexual relations with a minor as long as she has attained puberty.[20] To address this, judicial interpretation must

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[17] Mohammad Waseem Ahamad v. State, (2022) Live Law (Kar) 436.
[18] Rajarshi Sen, *Analysis of Majority Age under Muslim Law for Marriage: A Study with Reference to POCSO Act*, 7 NUJS J. REGUL. STUD. 11 (2022).
[19] *Id.*
[20] *Id.*

consistently prioritize the POCSO Act and PCMA over conflicting personal laws to protect minors effectively. Furthermore, the lack of uniformity in judgments highlights the need for explicit statutory reforms that reinforce the POCSO Act's overriding effect across all contexts, ensuring child protection remains the central focus of legal adjudication.

IV. Mitigating Factor being used for providing Acquittal

In many cases of child marriage, the offender has been acquitted from the provisions of the POCSO Act for the reason that the offender provides support to the family or the condition of the family is very poor. This can be seen in the following cases:

In *Rukshana v. Govt. of NCT of Delhi*,[21] both the petitioners lived together after marrying each other. The marriage was solemnised according to Muslim law. They were living together as husband and wife and leading a blissful married life. They had been blessed with a male child who was still an infant. The only hurdle sought to be created by the respondents was that she was 16 years and six months of age and, thus, minor at the time of the commission of the alleged offence. The court held that it would be in the interest of not only the petitioner but her child as well to quash the proceedings since both of them would be rendered without any financial support, and the consequences could be disastrous; her sufferings and miseries should not be compounded when she willingly went with the petitioner and married him.

Similarly, in *Veekesh Kalawat v. State of Madhya Pradesh*,[22] the court suggested that the application of the POCSO Act in the marginalised section of society leads to various negative effects. The court firmly believed that the

[21] Rukshana v. Govt. of NCT of Delhi, (2007) SCC OnLine Del 2059.
[22] Veekesh Kalawat v. State of Madhya Pradesh, (2023) LiveLaw (MP) 50.

application of the Act was causing disruption and severe distress to families in rural areas of Madhya Pradesh. The court even considered the situations when the primary breadwinner of the family is being incarcerated for a long period of time, highlighting this situation to be challenging for the spouse and children being exposed to social exploitation, particularly if the wife's parents and in-laws are unwilling to support her, leading to injustice.[23]

Hence, the suffering of the victim if the accused is incarcerated was considered as a mitigating factor. These factors are circumstances that can lead to a reduced sentence for a convicted individual without undermining the conviction itself.[24] This is problematic because these can only be used for suspending or reducing the sentence of the accused and not for suspension of the conviction itself. Such misuse not only undermines justice but also diminishes the gravity of the crime committed. Completely removing the conviction sends a wrong message to society and fails to address the harm caused to the young victim. While the need to provide for one's family is undoubtedly a relevant factor, it should not be used to evade accountability. Instead, the court should focus on adopting a balanced approach that preserves the conviction while considering appropriate measures for rehabilitation[25]

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[23] Law Commission of India, *Age of Consent under the Protection of Children from Sexual Offences Act, 2012* (2023), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2023/09/20230929466194485.pdf.

[24] Sanjay Vashishtha, *Sentencing Policy in Indian Penal System: Aggravating and Mitigating Factors*, SCC TIMES (Apr. 07, 2023), https://www.scconline.com/blog/post/2023/04/07/sentencing-in-indian-penal-system-aggravating-and-mitigating-factors/.

[25] Sapana Pradhan Malla, *Failure of Child Marriage Law and Recent Interventions of the Supreme Court*, 1 NJA L.J. 201 (2007).

since a conviction represents the legal acknowledgement of the crime committed and must stand as a testament to the gravity of the offence.

Moreover, using this mitigating factor for acquittal in child marriage and POCSO Act cases would normalise the harmful practice of child marriage. Offenders could exploit this loophole, believing that their actions can be excused based on familial obligations, leading to an increase in child marriages and perpetuating a grave violation of children's rights.

The effects of such a precedent are not limited to POCSO Act cases alone. Allowing mitigating factors[26] to lead to acquittals can set a dangerous precedent for other criminal proceedings involving heinous offences. Offenders may seek to misuse such factors in other criminal cases, therefore undermining justice and accountability across the legal system.

The reason for not applying POCSO here, as given by courts, is because the condition of the victim is very poor; if the child is not supported by the offender (often the husband of the child), then the victim herself will suffer.

But rather than acquitting the offender for a crime that they committed and ensuring that other offenders can use this loophole in order to escape conviction. An alternative approach would be to strengthen the rehabilitation programs for the victims, which should not just include recovering from their trauma but, in cases of child marriage, should also include steps to ensure that

[26] State of Maharashtra v. Sukhdev Singh, (1992) 3 SCC 700.

the victim is able to support herself along with her family without the offender.[27]

V. Ignorance of Law Used as a Defence

In *Veekesh Kalwat v. State of Madhya Pradesh*,[28] a girl eloped, got married to the accused, and had a child through wedlock. When the court questioned her about her educational qualifications, she replied that she had studied till the seventh standard. However, when further questions were asked related to her educational qualification, through her answers, she was not even able to read a newspaper.

Therefore, the court considered the literacy rate of the State of Madhya Pradesh[29] and suggested that it would be grossly unjust to apply the maxim "*ignorantia juris neminem excusat*",[30] which means ignorance of the law is no excuse. According to this principle, individuals cannot evade liability or punishment for their actions simply because they were unaware that their actions were against the law.[31] The maxim upholds the notion that everyone is presumed to know the law, regardless of their educational background or literacy level.

Despite the existence of this principle, the court, in the above case, acquitted the offender for the reason that he was illiterate and, thus, not aware of the

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[27] Debasmita Panda & Rucha Bhimanwar, *Quashing of a Criminal Proceedings in Respects of Non-Compoundable Offences on the Basis of Compromise*, 4 SUPREMO AMICUS 146 (2018).
[28] Rajarshi Sen, *supra* note 18.
[29] Population Census, *Madhya Pradesh Population, Sex Ratio, Literacy* (2011), https://www.census2011.co.in/census/state/madhya+pradesh.html#:~:text=Madhya%20Pradesh%20Literacy%20Rate%202024,literacy%20is%20at%2059.24%20percent.
[30] Mohammad Ali v. Sri Ram Swarup & Ors., AIR 1965 ALL 161.
[31] R. L. Narasimham, *Ignorantia Juris Non Excusat: Ignorance of Law is no Excuse*, 13 JOURNAL OF THE INDIAN LAW INSTITUTE 70 (1971).

existence of laws against marrying and having sexual relations with a minor, the POCSO Act and the PCMA. The defence is deeply flawed and also raises some significant concerns over the most basic principles of law, *i.e.*, ignorance of law is no excuse. It ignores the fundamental rights of children, including the right to education,[32] health,[33] and protection from exploitation.[34] Moreover, it also goes against the fundamental provisions of the POCSO Act and PCMA.

Disregarding the principle of ignorance of the law for illiterate offenders creates a dangerous imbalance, which would imply that individuals can escape legal consequences based on their educational background. This weakens the very foundation of the rule of law, eroding trust in the legal system. By acquitting offenders due to illiteracy, the legal system risks normalizing the practice of child marriage. Offenders could exploit this defence, perpetuating child marriage and infringing upon the rights of young girls who are forced into early unions, often with dire consequences for their health and well-being.[35]

VI. Out-of-Court Settlements

Out-of-court settlements are allowed only in cases where the offences are compoundable. Offences under the POCSO Act are non-compoundable due to the grave and serious nature of such offences. However, out-of-court settlements have been allowed in various cases involving offences under the POCSO Act for providing acquittal to the accused.

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[32] INDIA CONST., art. 21.
[33] Consumer Education and Research Centre v. Union of India, AIR 1995 SC 922.
[34] INDIA CONST., art. 23.
[35] Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1940).

In *Machhindra Appaji Patil and Ors. v. State of Maharashtra*,[36] **t**he petitioner got married to the respondent when she was merely 14 years old. She then filed an FIR under the PCMA.

However, during the court proceedings, she filed an affidavit stating that the dispute between them had been settled and, therefore, she was willing to quash the FIR under PCMA. She even further submitted that she was ready and willing to cohabit with the respondent.

The court considered the peculiar facts and circumstances of the case and believed that, ultimately, the girl would suffer if the FIR was not quashed, and no one in the society would accept her as a wife. Therefore, in order to secure her future, the court quashed the FIR.

Similarly, in *Honest Raj v. State***,**[37] A case was filed under the PCMA and POCSO Act, and when the court examined the victim, she testified that she was in a consensual relationship with the accused when they had married, with the marriage duly registered. However, when she expressed a desire to dissolve the marriage, stating some irreconcilable differences. Both parties reached a settlement, and as a result, the petition was closed as it was deemed unnecessary to continue the proceedings.

Additionally, in *Shri. John Franklin Shylla v. State of Meghalaya & Anr*.,[38] The case was filed under the POCSO Act.[39] The respondent was in a relationship with a minor girl and eventually had sexual intercourse with her. The learned counsel argued that the sexual intercourse was consensual

[36] Machhindra Appaji Patil v. State of Maharashtra, (2019) SCC OnLine Bom 769.
[37] Honest Raj v. State, (2018) SCC OnLine Mad 4932.
[38] John Franklin Shylla v. State of Meghalaya, (2023) SCC OnLine Megh 303.
[39] POCSO Act, §3.

and, therefore, provisions of the POCSO Act could not be attracted. The court accepted the arguments of the court, and thus, the proceedings were quashed.

The precedents in the above cases hinge upon the very essence of the POCSO Act to safeguard children from sexual offences. Therefore, allowing out-of-the-court settlements to circumvent its provisions in cases of child marriage severely compromises child protection efforts.

Furthermore, permitting offenders to escape POCSO Act provisions through settlements in child marriage cases may inadvertently normalise the practice of child marriage. A precedent that enables offenders to avoid the consequences of non-compoundable offences[40] by reaching settlements erodes the very concept of accountability. Justice requires that perpetrators face the repercussions of their actions, regardless of their ability to negotiate or reach a settlement.

Additionally, if settlements can circumvent the consequences of non-compoundable offences, it sets a worrisome precedent for other criminal matters. Offenders may exploit this loophole to evade justice in cases where accountability is crucial. Therefore, the use of settlements to escape non-compoundable offences in child marriage cases would undermine the integrity of the legal system.[41]

These issues have been addressed, and potential solutions have been discussed in the next section.

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[40] The Indian Penal Code, 1860, §320, No. 45, Acts of Parliament, 1860.
[41] Chirayu Jain, *Compoundability of Offences: Tracing the Shift in the Priorities of Criminal Justice*, 7 J. INDIAN L. & SOC 20 (2016).

VII. Addressing Conflicts and Challenges

The main issue as of now is that if there is a conflict between the POCSO Act and other laws, the POCSO Act is not prioritised in order to ensure that stringent punishment is enforced on the offenders. In order to strengthen the legislation in India, an active approach must be taken. Fulfilling international commitments will not only create the importance of a child's safety from sexual offences but also strengthen the country's own legislation for the same, like the POCSO Act, by giving them international support and backing.[42]

The UNCRC[43] is a significant legislation on child rights, which serves as a testament to the global commitment towards safeguarding the well-being of children. India's ratification of this treaty in 1992[44] and its alignment with the principles enshrined in the UNCRC has led to the enactment of the POCSO Act.

Additionally, Article 51(c) of the Indian Constitution[45] stipulates that the government shall strive to "*foster respect for international law and treaty obligations.*" Therefore, our status as a signatory of the convention highlights the constitutional importance of adhering to the principles of this convention. The UNCRC upholds the rights and welfare of children, emphasising their protection from all forms of exploitation and abuse.[46] In this light, the enactment of the POCSO Act serves as a crucial step toward translating these principles into actionable legislation. However, while the POCSO Act is

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[42] Dr. Puspanjali Mallick, *Comparative Analysis of the POCSO Act with International Child Protection Laws: Lessons and Suggestions*, 6 INT'L J. POL. SCI. & GOVERNANCE 247 (2024).
[43] United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3 (hereinafter "UNCRC").
[44] *Id.*
[45] INDIA CONST., art. 51(c).
[46] UNCRC, art.19.

undoubtedly a pivotal stride towards child protection, it is essential to recognise the interconnectedness of India's obligations under the UNCRC and the broader implications of child marriage on child rights.

India's commitment to the UNCRC is not a standalone endeavour; it extends to various aspects of child protection. Child marriage, a practice that directly impacts the rights and futures of children, is inextricably linked to India's UNCRC obligations. The UNCRC emphasises the right of the child to protection from harmful practices, including child marriages. Therefore, we should strive to harmonise the legislative framework to create a comprehensive and cohesive approach to child protection.

VIII. Resolving Ignorance of Law as a Defence

The case of *Veekesh Kalawat v. State of M.P.*[47] highlighted the lack of awareness of laws like the POCSO Act and PCMA among the general populace, which ultimately led to ignorance of the law being allowed as a considerable defence for consideration in the case. In order to address this, various things can be done.

Firstly, the UNCRC reporting process requires the Indian government to regularly assess the state of child rights, including their awareness of legal protections. This national evaluation can identify areas where knowledge about the legal age of consent and marriage is lacking.[48]

[47] Veekesh Kalawat v. State of Madhya Pradesh, (2023) LiveLaw (MP) 50.
[48] United Nations International Children's Emergency Fund & Child Rights Connect, *The Reporting Cycle of the Committee on the Rights of the Child: A Guide for NGOs and NHRIs* (2016), https://www.childrightsconnect.org/wp-content/uploads/2013/10/CRC_Reporting_Guide_WebVersion.pdf.

Furthermore, the Supreme Court in the case of *Just Rights for Children Alliance v. S. Harish* clarified that the case involved "*ignorance of law*," which should not be conflated with "*unawareness or inconstancy of law*."[49] Drawing from the judgment in *Motilal Padampat Sugar Mills*,[50] the court distinguished between these concepts, emphasising that unawareness of the law, grounded in the doctrine of equity, operates in a fundamentally different sphere from the criminal jurisprudence rule that ignorance of the law excuses no one. Equity seeks to achieve fairness in individual cases, but when something is specifically made punishable under the law, such as offences under the POCSO Act or the PCMA, the rule of law supersedes equity.[51] Consequently, pleas of ignorance of the law cannot absolve or dilute liability for punishable offences. The court further noted that accepting such a plea would undermine justice and negate statutory mandates.

These practices would help prevent using ignorance of the law as an excuse, to a considerable extent, in such a situation where there is ignorance of the law among the people, leading to statutory rape and the commission of unintended offences under the POCSO Act and PCMA.[52]

IX. Ensuring Non-Usage of Mitigating Factors for Acquittal

The UNCRC's core principle of "*best interests of the child*"[53] requires prioritising a child's well-being in all legal proceedings. By integrating this principle, courts might be less inclined to view mitigating factors as reasons

[49] Just Rights for Children Alliance v. S. Harish 2024 INSC 716.
[50] Motilal Padampat Sugar Mills v. State of Uttar Pradesh 1979 AIR 621.
[51] Independent Thought v. Union of India, AIR 2017 SC 4904.
[52] Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Non Criminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 487 (2012).
[53] UNCRC, art. 3(1).

for complete acquittal, especially in severe cases. Furthermore, The Criminal Procedure Act 1986 ("NSW") of Australia provides clearly in sections 3,[54] 7,[55] and 8[56] that certain offences categorised as indictable offences that are serious offences must be prosecuted formally and cannot be privately settled or compounded. Further, the charges against these offences cannot be quashed simply through settlements or compounding. These indictable offences also include sexual offences against children due to their severity. Thus making them non-compoundable. This categorisation further creates a robust framework, which provides legislative backing in order to ensure that due process of law is followed.

By creating a similar framework in India by taking inspiration from the provisions of the NSW, it can be ensured that the non-compoundable nature of serious offences attracted under the POCSO Act is maintained and out-of-court settlements do not undermine the provisions of the legislation. Despite the fact that the non-compoundable nature of these offences has been provided in the POCSO Act, they are often not followed by the judiciary.[57] This problem can be prevented by adopting Australia's approach, where better results are achieved simply because of more specific and comprehensive provisions of the Act, which have a much better enforcement mechanism than that of India.

Moreover, in order to ensure that the victim does not suffer due to the incarceration of the accused, the Law Commission, on the suggestions provided in the *Veekesh Kalawat v. State of M.P.*,[58] came out with the 283rd Law Commission Report where after reviewing the existing child protection

[54] Criminal Procedure Act, 1986, (Cth), §3 (Austl.).
[55] *Id*, §7.
[56] *Id*, §8.
[57] Om Prakash v. State of Uttar Pradesh, 2023 SCC OnLine All 93.
[58] Veekesh Kalawat v. State of Madhya Pradesh, (2023) LiveLaw (MP) 50.

law, various judgments and considering the maladies of child abuse, the Commission was of the view that cases of tacit approval do not merit to be dealt with the same severity as the cases that were ideally imagined falling under the POCSO Act. Therefore, the Commission introduced guided judicial discretion in the matter of sentencing such cases, ensuring that the law is balanced, thus safeguarding the best interests of the child.[59]

Therefore, by adopting a framework inspired by the NSW and by applying the Law Commission's recommendation in the POCSO Act, India can make the legislation more specific and comprehensive with a more efficient enforcement mechanism.

X. Preventing the Overriding Effect of Personal Laws

Personal laws are also an area that requires attention because of the possibility of them conflicting and subsequently superseding important legislations like the POCSO Act. Firstly, the UNCRC emphasises harmonising international child rights conventions with traditions and cultural values.[60] This can push India to examine its legal framework and identify inconsistencies between the POCSO Act and personal laws that permit child marriage. By advocating for legal reforms that prioritize UNCRC principles, India can create a stronger legal foundation that upholds the POCSO Act's provisions in child marriage

[59] Law Commission of India, *Age of Consent under the Protection of Children from Sexual Offences Act*, 201 (2023), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2023/09/2023092946619448 5.pdf.
[60] *supra* note 44.

cases. This would leave no room for personal laws to be used as justification for the practice.[61]

Further, in the case of *Javed v. State of Haryana*,[62] the court again held that a Muslim girl aged 15 years could enter into a legal and valid marriage as per personal law but also cautioned that the case should not be relied upon as a precedent in any other case. This is also in line with Section 42A of the POCSO Act, which states that the POCSO Act would have an overriding effect over any other conflicting laws.[63] By following the judgment in this case along with section 42A of the POCSO Act,[64] the courts can ensure that POCSO Act offenders do not get an acquittal in cases where Muslim personal law is involved.

XI. Focus on Rehabilitation

All the above-discussed issues will persist if the focus is not shifted toward the rehabilitation of the child because, in most cases, the reason for the acquittal of the accused is that the condition of the victim herself will be detrimental if the accused is incarcerated, as in most of the case the offender is also the breadwinner. But if the focus is shifted to the rehabilitation of the child bride, this would not only ensure that the condition of the victim improves when the offender gets incarcerated, but the act of incarceration of the offender will also create a clear precedent that the offender will not be able

[61] Rajarshi Sen, *Analysis of Majority Age under Muslim Law for Marriage: A Study with Reference to POCSO A*ct, 7 NUJS J. REGUL. STUD. 11 (2022).
[62] Javed v. State of Haryana AIR 2003 SC 3057.
[63] POCSO Act, §42A.
[64] *Id.*

to use the defence of the victim's condition to escape liability. All of this would be possible through rehabilitation for the victim.

The UNCRC[65] promotes a child's right to education and reintegration. This can translate into government programs offering child brides access to education and vocational training. These skills can empower them to achieve financial independence and build a future outside of child marriage. The UNCRC[66] framework emphasises mental health as part of the right to health. Increased availability of psychological support services for child brides can help them heal from the trauma and rebuild their self-esteem. It also encourages safe spaces for children, which can lead to shelters or care homes designed specifically to support child brides. These safe havens can provide a nurturing environment, access to social services, and a chance to heal.

Moreover, as per the judgment of the Supreme Court in *Re: Right to Privacy of Adolescents* provided that Sub-section (6) of Section 19 of the POCSO Act[67] is completely ignored while considering rehabilitation of the victim. The importance of rehabilitation of the victims of offences under the POCSO Act, a mandatory requirement of law, is being overlooked by all stakeholders.[68]

Furthermore, under sub-section (6) of Section 19 of the POCSO Act,[69] it was the duty of the police to report the matter to the Child Welfare Committee ("CWC") and the Special Court within a period of twenty-four hours from the time the police had the knowledge about the Commission of the offence

[65] *supra* note 44.
[66] *supra* note 44.
[67] POCSO Act, §19(6).
[68] Re: Right to Privacy of Adolescents, 8 S.C.R (2024).
[69] POCSA Act, §19(6).

Section 27 of the Juvenile Justice Act ("JJ Act")[70] provides for setting up the CWC. The authority of the CWC is to dispose of the cases for care, protection, treatment, development, and rehabilitation of children in need of care and protection, as well as to provide for their basic needs and protection. The JJ Act[71] provides for making their basic needs and protection available. The JJ Act takes care of all the needs of the victims under the POCSO Act who fall under the category of children in need of care and protection. The object is to undertake the rehabilitation and social reintegration process of such victims based on individual care plans as provided under Section 39 of the JJ Act.[72] Section 46 is a provision that requires the State Governments to frame rules to provide financial support to any child living in a childcare institution upon completion of 18 years of age. The financial support has to be very exhaustive as the object of financial support is to facilitate a child's reintegration into mainstream society.[73]

By applying the provisions of these different acts strictly in the POCSO Act and child marriage cases in line with the UNCRC guidelines, the safety and support for the child brides and even their children can be guaranteed.

XII. Conclusion

The interplay between child marriage and the POCSO Act reveals a complex problem that often hinders the protection of minors from sexual offences. Despite the stringent provisions of the POCSO Act designed to safeguard children, child marriage continues to be exploited as a defence mechanism by offenders. This exploitation is compounded by socio-cultural acceptance in

[70] Juvenile Justice (Care and Protection of Children) Act, 2015, §27, No.2, Acts of Parliament, 2015.
[71] *Id.*
[72] *Id,* §39.
[73] *Id,* §46.

certain communities, personal laws, poor socioeconomic conditions, ignorance of the law, and out-of-court settlements. These factors collectively create significant loopholes that undermine the efficacy of the POCSO Act and compromise the well-being of minors.

Personal laws, particularly Muslim personal law, often conflict with the provisions of the POCSO Act and the PCMA. While the POCSO Act categorically criminalises any form of sexual exploitation of children, personal laws have been allowed to take precedence, thus providing a defence for offenders. This inconsistency in judicial interpretation dilutes the enforcement of the POCSO Act and perpetuates the practice of child marriage, leaving minors vulnerable to exploitation. Economic hardship is another factor that has been used in POCSO Act cases. Courts have not just reduced the sentences of the offenders but have, at times, acquitted them on the grounds that the accused provided financial support to the victim's family. This practice not only undermines the seriousness of the crime but also sets a dangerous precedent that financial dependency can justify child exploitation. Ignorance of the law has been allowed as a defence, which weakens the legal principle that ignorance of the law is no excuse and risks normalising child marriage by allowing offenders to escape accountability. Out-of-court settlements further erode the integrity of child protection laws. Allowing settlements in cases involving child marriage and sexual offences undermines the non-compoundable nature of such crimes and sets a worrying precedent for other criminal matters. It compromises the pursuit of justice and the enforcement of the POCSO Act, making it easier for offenders to evade legal consequences.

In order to address these challenges, it is imperative to prioritise the implementation and enforcement of the POCSO Act and PCMA over personal laws and other mitigating factors. Judicial consistency in interpreting these

laws is crucial to uphold the rights and welfare of minors. Additionally, raising societal awareness about the harmful effects of child marriage and strengthening support systems for vulnerable children and families can help mitigate the socio-cultural and economic factors that perpetuate this practice.

Further, alignment of India's legislative framework with its international commitments under the UNCRC is essential to ensure comprehensive child protection. By harmonising laws to enforce the minimum age for marriage, India can demonstrate its dedication to safeguarding children from exploitation and abuse. Such measures will not only strengthen the legal protection of minors but also reinforce the nation's commitment to creating a safe and nurturing environment for all children.