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IN MEMORIAM

The *NLUJ Law Review* mourns the tragic loss of **Mr. Aarav Midha**, our copy editor and a valued member of the team. Aarav's dedication, attention to detail, and commitment to excellence were evident in his contributions to Issue 11.1, and his presence brought warmth and positivity to those around him.

As a tribute to his hard work and the impact he had on our editorial team, **we dedicate Volume 11, Issue 2 to his memory**. We are deeply grateful to have had Aarav as part of our editorial board, and his absence leaves a void that words cannot fill. His dedication, intellect, and warmth will always be remembered.

This issue stands in recognition of his contributions and the lasting impression he left on all of us.

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Daniel Mathew, *Emergency Arbitration in India: Gaps, Gains and Goals,* 11(2) NLUJ L. REV. 1 (2025)

EMERGENCY ARBITRATION IN INDIA: GAPS, GAINS, AND GOALS

~ Dr. Daniel Mathew *

ABSTRACT

The idea of arbitration is not new to India, and has existed in varying forms with mixed success. Recent years have witnessed efforts to make India a global arbitration hub. While the legislature has focused on amending the Arbitration and Conciliation Act 1996 to keep pace with global frameworks, the judiciary has, through a spate of decisions, reinforced a pro-arbitration approach. Such an approach, in turn, determines the advancement of law on crucial issues. One such issue is that of emergency arbitration, in particular, the enforcement of its orders. The response of the Indian judiciary is varied and contingent on the seat of arbitration. This conundrum has also caught the legislative eye, which attempted to articulate a framework for emergency arbitration through the recently issued amendment bill. Against this backdrop, the article attempts to explore and critically engage with the approach of the Indian judiciary on the issue of the enforcement of orders of an emergency arbitrator. Firstly, it critically engages with the decisions on this issue, both in the context of arbitration seated in and outside India, to articulate the current state of law. Secondly, it engages in a critical appraisal of the proposed framework under the 2024 amendment bill to ascertain its effectiveness, and

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finally, concludes with some recommendations on how the proposed approach could be streamlined.

Keywords: dispute resolution, arbitration, emergency arbitration, emergency arbitrator, interim relief, enforcement of emergency relief

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INTRODUCTION

Arbitration in India has had a long and contentious history. The idea of arbitration is not new to India, and has existed in some form or the other with varying degrees of success. Independent India took forward colonial legislative attempts to articulate a comprehensive set of laws to deal with various aspects of arbitration, including the enforcement of foreign awards.[1] While meeting with early success, the working of these legislations presented much grief to all involved. The anguish was succinctly captured by the Supreme Court of India in its decision *Guru Nanak Foundation v. Rattan Singh & Sons*. However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep."[2] In 1996, following recommendations of the General Assembly, India legislated a completely new framework for arbitration on the lines of the United Nations Commission on International Trade Law ("**UNCITRAL**") Model Law on International Commercial Arbitration.[3] The Arbitration and Conciliation Act 1996 ("**1996 Act**") was meant to be a clean break from the past and was done with the intention to align the Indian arbitration regulatory model with globally accepted norms.

The working of the new regime has been quite an experiment. Early judicial engagements saw the application of the 1996 Act stretched to

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[1] LAW COMMISSION OF INDIA, 76TH REPORT ON ARBITRATION ACT 1940 ¶¶1.12-1.24 (1978).
[2] Guru Nanak Foundation v. Rattan Singh & Sons, (1981) 4 SCC 634.
[3] UNGA Res 40/72 (1985) UN Doc A/RES/40/72), UNCITRAL, Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, annex I (June 21, 1985).

absurd limits.[4] This expansionist approach immensely damaged the potentiality of the 1996 Act, with the effect that both domestic and foreign users actively sought to avoid the Indian arbitration regime. Of particular concern was the overreaching supervisory jurisdiction assumed by the Indian courts on foreign seated arbitration.

Much water has flowed under the bridge in the last decade and a half. In recent years, India has taken enormous strides in reforming its dispute resolution framework with the intention to create a more conducive environment for attracting and retaining foreign investment and in the process improve global perception on doing business in India. A crucial approach in this regard has focused on bolstering the arbitration framework in India by adopting a more pro-arbitration approach in the legislative, policy, and judicial arena. The 2015 Global Conference on Strengthening Arbitration and Enforcement in India[5] organised by the National Institution for Transforming India ("**NITI Aayog**"), India's apex public policy think-tank) heralded a clear and definite intent of the Government of India to robustly address critical concerns around the working of arbitration in India. In a similar vein, a spate of amendments (2015, 2019, and 2021) to the 1996 Act, together with a marked shift in the approach of

[4] Bhatia International v. Bulk Trading, (2002) 4 SCC 105. Venture Global Engineering v. Satyam Computer Services, (2008) 4 SCC 190.

[5] *President of India to Inaugurate Global Conference on 'National Initiative Towards Strengthening Arbitration and Enforcement in India' Tomorrow*, PIB, (Oct 20, 2016), https://pib.gov.in/newsite/PrintRelease.aspx?relid=151821

Indian courts in favour of arbitration,[6] affirmed the embedding of an overarching pro-arbitration outlook and approach.

The above, however, only presents one side of the story. While seemingly pro-arbitration, decisions rendered by the Indian judiciary have at times indicated otherwise on key issues. A case in point is the handling of orders of emergency arbitrators by the Indian courts. In recent years, Indian courts have had to increasingly grapple with a varied set of issues pertaining to such orders, particularly enforcement and recourse available against them. While decisions engaging with the above noted issues have been few, they remain of crucial concern, given that the concept of emergency arbitration is fast becoming a staple across jurisdictions. Additionally, the 1996 Act, the principal legislation on arbitration, is silent on the concept, leading to case-led development of law on these issues.

I. EMERGENCY ARBITRATION

As the term suggests, the idea of emergency arbitration is focused on providing relief in situations likely to be classified as an exigency. This is done with the intention of protecting assets and evidence that might be in danger of being destroyed, damaged, or in some manner altered, leaving it of no value either to the proceedings or the parties. The overriding idea is usually of conservation and doing so quickly without losing valuable time.

[6] See generally, Bharat Aluminium v. Kaiser Aluminium, 2012 (9) SCC 522 ("**Balco**"). PASL Wind Solutions Pvt Ltd v. GE Power Conversion India Private Ltd, (2021) 7 SCC 1.

It is of particular importance in instances where the merits-arbitral tribunal has not been formed at all.

Emergency arbitration as a concept has been gaining ground for quite some time now. It is considered to be a crucial part of various arbitration regimes as it is seen to play an important role in keeping the proceedings relevant. It addresses an important concern, namely the desire to avoid national courts by the arbitrating parties even in instances where the arbitration legislation permits such recourse. This desire stems from a variety of reasons, including a lack of confidence in the courts, leakage of confidential information, high costs, extended time for resolution, etc.

Provisions relating to emergency arbitration found in various arbitration regimes adopt a similar understanding of emergency arbitration, particularly as regards the nature, scope of power, standards for determination, and timelines. The emergency arbitrator is vested with crucial powers for granting urgent relief quickly. The nature of the relief was categorically interim, directed at the sole purpose of keeping the arbitration relevant through conservation of crucial assets, evidence, or directing the party's behaviour. It is therefore for limited purpose, ad hoc in nature, and dissolves with the coming into being of the merits-arbitral tribunal. Decisions of the emergency arbitrator normally do not bind the merits arbitral tribunal.[7] Different regimes tweak this standard model in

[7] NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 235-236 (2015).

varied ways to serve specific purposes, particularly in terms of the procedure to be adopted during such arbitration.

II. INDIAN EXPERIENCE

The Indian arbitration regime lacks the agility exhibited by some of the other prominent regimes. This holds true even for common and proven innovations such as emergency arbitration. To date, the 1996 Act does not directly incorporate the idea of emergency arbitration. That is, however, not to say that there haven't been discussions around it. A notable one was initiated by the Law Commission of India in its 246th Report, recommending the incorporation of emergency arbitration into the Indian arbitration regime by providing it with statutory recognition. The report proposed an amendment to Section 2(1)(d) of the 1996 Act, so as to provide statutory recognition to arbitral institution rules such as SIAC or ICC Rules, which provided for the appointment of an emergency arbitrator.[8] The report suggested the following amendment to section 2(1)(d) which provided "*(d) 'arbitral tribunal' means a sole arbitrator or a panel of arbitrators*", to these words the following addition was proposed "*and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergenecy arbitrator".*[9] The 2015 amendment of the 1996 Act however, failed to incorporate this progressive suggestion.

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[8] LAW COMMISSION OF INDIA, 246TH REPORT ON AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996, 37 (2014).

[9] *Id.*

In 2017, a high-level committee constituted under the chairmanship of Justice BN Srikrishna to review the institutionalisation of the arbitration mechanism in India, *inter alia*, observed that there was significant uncertainty in the law regarding the enforceability of awards rendered in emergency arbitration.[10] The report went on to recommend that "*Given that international practice is in favour of enforcing emergency awards, it is time that India permitted the enforcement of emergency awards in all arbitral proceedings. This would also provide legislative support to rules of arbitral institutions that presently provide for emergency arbitrators.*"[11] Yet no such incorporation was done, even though the 1996 Act had been amended twice since then. The omission is problematic considering the statutory silence on what is an emerging issue.

A. CURRENT WAY AROUND – TREATMENT BY THE INDIAN JUDICIARY

It is said that a human mind is infinitely adaptive, in that it has an infinite capacity to ascertain work-arounds for tough situations. In the case of emergency arbitration, the lack of statutory recognition has not deterred progress in this matter. This is so because the lack presents a regulatory gap, a silence in law. This silence has been plugged in by various arbitral institutions in India, incorporating provisions of emergency arbitration in their rules in line with international best practices. Examples include the rules of the Delhi International Arbitration Centre ("**DIAC**"),[12] the

[10] *REPORT OF THE HIGH-LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA* 76 (July 2017), https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

[11] *Id.*

[12] DIAC (Arbitration Proceedings) Rules, 2023 pt E, https://dhcdiac.nic.in/wp-content/uploads/2025/03/DIAC-Arbitration-Proceedings-Rules.pdf.

Mumbai Centre for International Arbitration ("**MCIA**"),[13] the Madras High Court Arbitration Centre ("**MHCA**"),[14] and International Chamber of Commerce India,[15] to name a few. Given the increased. focus on institutional arbitration in recent times,[16]this work-around has proved to be successful. Arbitral institution rules, so long as they are not inconsistent with the mandatory provisions of the 1996 Act, are given effect to.

Over the years, the Indian judiciary has adopted a reserved approach towards what emerges from a foreign seated arbitration. From *Bhatia*[17] to *Balco,*[18] the Indian judiciary moved from an expansionary to a conservatory approach, i.e., first claiming jurisdiction over foreign seated arbitration and later pulling back to suggest a lack of jurisdiction as regards such arbitration with the Indian courts. While this matter was resolved to some extent, concerns surrounding the normative validity of emergency arbitration and its outcomes remained. In other words, is emergency arbitration recognised under the 1996 Act, and if so, whether adequate mechanisms exist under the 1996 Act for its enforcement? The trajectory of arbitral jurisprudence in this regard has hinged on the seat of arbitration.

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[13] MCIA Rules 2016, Rule 14, https://mcia.org.in/arbitration-rules/.
[14] MHCA Proceedings Rules ,2017, https://mhc.tn.gov.in/arbitration/.
[15] ICC India, Arbitration and ADR Rules Article 29, https://iccwbo.org/dispute-resolution-services/arbitration/.
[16] *The Quest for making India as the Hub of International Arbitration,* PIB, (Jun 12, 2019), https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1574071.
[17] Bhatia International v. Bulk Trading, (2002) 4 SCC 105.
[18] Bharat Aluminium v. Kaiser Aluminium, 2012 (9) SCC 522.

B. EMERGENCY ARBITRATION IN AN INDIA SEATED ARBITRATION

For emergency arbitration in an Indian seated arbitration, one needs look no further than the recent Amazon-Future dispute. While this dispute has witnessed much wrangling among the parties on numerous issues both before the Supreme Court and the Delhi High Court, the present discussion is limited to discussions on emergency arbitration. The dispute concerned the attempted transfer of Future Group's retail assets worth USD 3.38bn to Reliance Industries. Amazon claimed that this transaction violated the shareholders agreement between Amazon and the Future group.[19] On the other hand, Future Group categorically denied any wrongdoing and instead accused Amazon of *malafide* working. While the seat of arbitration was New Delhi, the parties had agreed to arbitration under the SIAC rules, which provided for emergency arbitration.[20] The emergency arbitrator granted interim relief to Amazon by putting a temporary stop to the future group-reliance transfer. Amazon then approached the Delhi High Court for enforcement of the order of the emergency arbitrator under Section 17(2) of the 1996 Act.

The Delhi High Court engaged in a combined reading of Section 2(6) and 2(8) to conclude that SIAC rules stood incorporated in the parties' arbitration agreement. This meant that the parties had to adhere to its provisions, including those relating to emergency arbitration. In a rather

[19] Future Coupons Private Limited v. Amazon COM NV Investment Holding *LLC,* (2022) SCC Online SC 126.
[20] *Id.*

progressive approach, the court concluded that the current arbitration framework was adequate for recognising emergency arbitration and no further statutory recognition was needed. For the court, an emergency arbitrator was an arbitrator for all intents and purposes, and its orders were an order under section 17(1), enforceable under section 17(2) of the 1996 Act.[21] The court observed, "*By virtue of Section 2(8) of the Arbitration and Conciliation Act, the Rules of Singapore International Arbitration Centre are incorporated in the arbitration agreement between the parties. By incorporating the Rules of SIAC into the arbitration agreement, the parties have agreed to the provisions relating to Emergency Arbitration.144.This Court is of the view that the Emergency Arbitrator is an Arbitrator for all intents and purposes, which is clear from the conjoint reading of Sections 2(1)(d), 2(6), 2(8), 19(2) of the Arbitration and Conciliation Act and the Rules of SIAC which are part of the arbitration agreement by virtue of Section 2(8). Section 2(1)(d) is wide enough to include an Emergency Arbitrator. 145.Under Section 17(1) of the Arbitration and Conciliation Act, the Arbitral Tribunal has the same powers to make interim order, as the Court has, and Section 17 (2) makes such interim order enforceable in the same manner as if it was an order of the Court. The Interim Order is appealable under Section 37 of the Arbitration and Conciliation Act.*" The court took a stern view of the wilful disobedience by the respondent, and initiated various actions including imposition of cost, and attachment of properties. Operation of the order was stayed by the division bench and the matter reached the apex court. [22]

[21] Amazon COM NV Investment Holding LLC v. Future Coupons Private Limited,. (2021) 280 DLT 618.
[22] *Id.*

Further, In *Future Coupons Private Limited v. Amazon COM NV Investment Holding LLC,* [23] the above decision was set aside, for failing to provide the respondent adequate time to respond to various application and in the process violating principles of natural justice. This was a 3-judge bench and rendered after the 2-judge bench apex court decision which had engaged with legality of emergency arbitration within the Indian arbitration jurisprudence. The 3-judge bench did not express an opinion on the exposition of law done earlier.

In appeal, the Supreme Court of India in *Amazon.com NV Investment Holdings LLC v. Future Retail* Ltd[24] (Amazon) confirmed that an interim relief rendered by an emergency arbitrator in an arbitration seated in India was enforceable under the 1996 Act. The court observed "*Given the fact that party autonomy is respected by the Act and that there is otherwise no interdict against an Emergency Arbitrator being appointed, as has been held by us hereinabove, it is clear that an Emergency Arbitrator's order, which is exactly like an order of an arbitral tribunal once properly constituted, in that parties have to be heard and reasons are to be given, would fall within the institutional rules to which the parties have agreed, and would consequently be covered by Section 17(1), when read with the other provisions of the Act, as delineated above.* […] *We, therefore, answer the first question by declaring that full party autonomy is given by the Arbitration Act to have a dispute decided in accordance with institutional rules which can include Emergency Arbitrators delivering interim orders, described as "awards". Such orders are an important step in aid of decongesting*

[23] Future Coupons Private Limited v. Amazon COM NV Investment Holding *LLC,* (2022) SCC Online SC 126.
[24] Amazon.com NV Investment Holdings LLC v. Future Retail Ltd (2022) 1 SCC 209.

the civil courts and affording expeditious interim relief to the parties. Such orders are referable to and are made under Section 17(1) of the Arbitration Act." [25]Its reasoning hinged on a five-fold justification, namely:

a. Party autonomy – the 1996 Act [Sections 2(1)(a), (6) and (8)] permits parties to select any institutional rules, including ones providing for emergency arbitration.[26]
b. The only instance where this is problematic is if such rules are against mandatory rules of the 1996 Act. There was no express or implied exclusion of an emergency arbitrator under the statutory framework.[27]
c. The term 'arbitral proceedings' utilised in Section 17 clearly contemplated arbitral proceedings commenced after the receipt of notice of arbitration as provided in Section 21. This accordingly, would include emergency arbitration proceedings.[28]
d. Contextually, understood the term 'arbitral tribunal' utilised in Section 17 envisages an emergency arbitrator.[29]
e. Finally, the very idea of an emergency arbitrator fell within the broader ethos and objectives of the 1996 Act, namely (a) decongestion of the court system, and (b) provision of a more efficacious and speedy remedy by a tribunal

[25] *Id.*
[26] *Id.* ¶17.
[27] *Id.* ¶¶14 and 21.
[28] *Id.* ¶13.
[29] *Id.* ¶23

> specifically created to adjudicate the dispute.[30] For the court, the design of the 1996 Act, particularly in view of provisions such as Section 9(3), was meant to reduce recourse to the court given an arbitral tribunal could look into the matter.

While the decision provided a meaningful extension of the 1996 Act, its approach is not without difficulty. Some points of concern are outlined below.

i. Arbitral Tribunal – Meaning

A key concern arises as regards its understanding of an 'arbitral tribunal'. It was argued that an 'arbitral tribunal' contemplated under Sections 2(1)(d) and 17, was one which, in addition to interim relief, could grant final relief as well. Clearly, an emergency arbitrator does not adjudicate and therefore, cannot render an award. As a result, it could not be an arbitral tribunal within the contemplation of the 1996 Act. To support this argument, a contrast was drawn with Section 9, which provided for the availing of interim relief before the commencement of arbitral proceedings. In contrast, Section 17 did not provide for the term 'before' and accordingly, an emergency arbitrator was outside the contemplation of the 1996 Act.[31]

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[30] *Id.* ¶¶39 and 40.
[31] *Id.* ¶22.

The court agreed with the understanding that the arbitral tribunal contemplated under Section 17 was a tribunal that had the authority to grant both interim and final reliefs. However, this could not be read as an exclusion of the emergency arbitrator from the ambit of the 1996 Act. The court refuted the exclusion argument by proposing a three-pronged counter – (a) the definition of an arbitral tribunal contemplated under section 2(1)(d) was subject to 'unless the context otherwise requires' argument; (b) the term 'arbitration' was defined as 'any arbitration whether or not administered by permanent arbitral institution', the natural meaning of which therefore would include emergency arbitration as well specifically when read with Sections 2(6) and (8); and (c) Section 17 utilises the phrase 'during arbitral proceedings' which when read in conjunction with Section 21, was elastic enough to include emergency arbitration proceedings.

But as the court conceded that the definition of arbitral tribunal in Section 2(1)(d) tied the understanding of the arbitral tribunal to one that could give both interim and final relief,[32] it was faced with the task of reconciling this with its inclusive reading of Section 17. It did so by distinguishing the meaning of the arbitral tribunal as provided under Sections 2(1)(d) and 17. Reading the context of Section 17 as interim measures ordered by the arbitral tribunal, the court concluded that this context required a different reading of the term arbitral tribunal. This is because there was no restriction on party autonomy to choose institutional rules that provided for emergency arbitration under the 1996 Act. Secondly,

[32] *Id.* ¶23.

the term 'arbitral proceedings' had a scope larger than merely 'proceedings' before the arbitral tribunal. As a result, for Section 17, the meaning of the term arbitral tribunal could not be limited to an arbitral tribunal which could grant both interim and final relief.

This is a highly convoluted reading. For instance, it is unclear why the court agreed to the suggestion that the 1996 Act defines an arbitral tribunal as one that could give both interim and final relief. On a plain reading, the definition contained in Section 2(1)(d) merely provides that an arbitral tribunal means a sole arbitrator or a panel of arbitrators. It does not tie the meaning of an arbitral tribunal to the ability of the tribunal to grant a type of relief or the nature of the relief. This alone should have been enough for the court to conclude that an emergency arbitrator was contemplated in the 1996 Act. Even otherwise once it had given an expansive understanding to the term 'arbitral proceedings' under section 17, this differentiated understanding of the arbitral tribunal was unnecessary. Rather, the court should have begun with the ordinary meaning of the term since Section 2(1)(d) is clearly without limitations. Its application under different provisions could have contextual application, i.e., with suitable restrictions where needed. Such expansive reading would enable other relevant provisions to apply in instances such as those safeguarding independence, impartiality, and confidentiality, which remain critical concerns even in emergency arbitration. Such an expanded reading would also have better served the justification put forward by the court to argue that emergency arbitration was within the purview of the Indian arbitration framework.

ii. Arbitration-Meaning

Another way to approach this would be to read emergency arbitration within the definition of the term arbitration itself. The apex court in *Shri Balaganesan Metals v. M.N. Shanmugham Chetty*, a judgment cited with approval by the Amazon bench, had explained the word 'any', observing that the term was of wide ambit and its understanding depended on context and the subject matter of the statute.[33] The 1996 Act was enacted with the purpose of providing comprehensive legislation for the conduct and regulation of all aspects of arbitration. It does not distinguish between types of arbitration, an idea evident from the use of the term 'any'. To read a limitation within the definition would be an artificial restriction. With the march of time, types and manner of conduct of arbitration are likely to evolve. It would be problematic to suggest that such evolution would be outside the ambit of the 1996 Act since the legislation does not specifically mention it. Hence, it would have been more apt to read the definition provided in Section 2(1)(d) as encompassing all types of arbitration, including emergency arbitration, while restricting its meaning in accordance with the particular context articulated by a specific provision.

A similar concern had been witnessed with the 246th law commission report, which had suggested amending section 2(1)(d) to include the word '*and in case of an arbitration conducted under the rule of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator*.' Scholars have argued that considering this suggestion failed to

[33] Shri Balaganesan Metals v. M.N. Shanmugham Chetty, (1987) 2 SCC 707.

make its way into the amendment act, it should be viewed as the legislature's disinclination to endorse the concept of emergency arbitration within the 1996 Act. There is perhaps an alternate, and more positive, way of reading this omission, namely that it was felt that the extant definition of arbitral tribunal contained in Section 2(1)(d) was broad enough to encompass within it the understanding of emergency arbitration, and therefore required no amendment.

iii. Institutional Linkage

The decision was at pains to emphasise the 'institutional rules' link,[34]which formed a critical aspect of its party autonomy argument. While the emergency arbitration in the present case was conducted under the SIAC rules, normatively locating emergency arbitration within 1996 Act did not require continuing focus on institutional rules in the manner in which the court does. In this context, how would a situation where the arbitration agreement provides for emergency arbitration but no more, or institutional arbitration where institutional rules do not provide for emergency arbitration, be treated by the courts? Given the repeated emphasis of the link, is the requirement of institutional arbitration part of the context expressed by Section 17? It is doubtful if such was the intended outcome of the case. Yet, a mere provision of emergency arbitration in an arbitration agreement in the two instances noted above would be difficult to operationalise, considering the lack of any guidance within the 1996 Act. While it could be argued that once such a situation has arisen, the parties

[34] *Supra* note 13. ¶¶14, 21, 24, 40, 41, 45, 46.

could further agree on various modalities pertaining to the working of emergency arbitration, in reality, however, this is unlikely. The need for emergency arbitration arises when imminent actions of a party are likely to adversely affect the other party. In such a situation, a further agreement to operationalize emergency arbitration is extremely improbable. At the same time, justifications provided by the court, namely that of party autonomy and emergency arbitration not being contrary to any mandatory provision of the 1996 Act, would necessarily imply that the institutional link is not mandatory, and agreement regarding emergency arbitration without appropriate institutional rules remains a valid agreement. The issue is operationalizing it. This confusion perhaps, could have been avoided had the court read the definition of arbitral tribunal in Section 2(1)(d) in an unrestricted manner. By doing so, the court would have extended various relevant provisions relating to the arbitral tribunal (number, selection, removal, procedure to be adopted, etc.) to an emergency arbitration as well. Arduous as it might have been, such a situation remains preferable to one lacking any guidance whatsoever.

iv. Nevertheless, a Progressive Stance

While some concerns remain, it is important not to lose sight of the fact that by recognizing the concept of emergency arbitration within the Indian jurisdiction, the courts have once again confirmed their pro-arbitration approach.[35] The decision remains significant for clarifying an

[35] *Indian Supreme Court confirms enforceability of India-seated emergency arbitration awards*, HSF, (Oct 1, 2021), https://hsfnotes.com/arbitration/2021/10/01/indian-supreme-court-confirms-enforceability-of-india-seated-emergency-arbitration-awards/.

earlier ambiguous area by clearly articulating that the enforcement of interim reliefs rendered by an emergency arbitrator in a domestic arbitration is both recognised and enforceable under the 1996 Act.

The position of law as it now stands is that in an India seated arbitration, emergency awards (interim relief) would be considered to have been made under Section 17(1) and enforceable under Section 17(2) read with the Code of Civil Procedure 1908.[36] Prior to enforcement under Section 17(2), the interim orders can be challenged under Section 37(1)(a), even if institutional rules make no provision for a challenge. However, an enforcement order made under Section 17(2) cannot be appealed against under Section 37.[37]This effectively establishes emergency arbitration within the Indian arbitration jurisdiction, providing both normative recognition and procedural clarity as regards its integration and enforceability under the 1996 Act. That said, as highlighted before, there is no clarity on the procedure to be followed in instances where emergency arbitration is provisioned in an adhoc arbitration. In such instances, the only option for the parties is to approach the court for a remedy under Section 9.

C. EMERGENCY ARBITRATION IN ARBITRATION SEATED OUTSIDE INDIA

This is one side of the story. What remains unaddressed is the question whether an emergency award rendered in a foreign seated arbitration could be enforced by the Indian courts. Practically, this is of

[36] *Supra* note 13. ¶¶45 and 71.
[37] *Id.* ¶¶100 and 101

concern given the increasing use of arbitration to resolve transnational disputes. Normatively, it is of concern, as Part II of the 1996 Act only deals with the enforcement of foreign awards. It has no provision similar to Section 17 enabling recognition and enforcement of interim reliefs granted by an emergency arbitral tribunal. Post the *Balco* decision and the amendments, parts of Part I do not extend to Part II unless specifically extended. As a result, substantial gap remains concerning recognition and enforcement of interim reliefs rendered by arbitral tribunals, including emergency arbitrators, in arbitrations seated outside India. Put differently, can interim reliefs rendered by an emergency arbitrator in a foreign seated arbitration be enforced in India? This question has been engaged with to varying degrees by the Indian courts.

In *Raffles Design International Pvt Ltd* v. *Educomp Professional Education Limited & Ors*,[38] (Raffles) the party that had obtained interim relief from an emergency arbitrator in a Singapore seated arbitration. It filed an application under section 9 of the 1996 Act seeking interim reliefs against the other party, on the grounds that the opposite party had acted in contravention of the emergency award. In this instance, the Delhi High Court categorically observed that the emergency award passed by the emergency arbitrator could not be enforced under the 1996 Act, and the only method for enforcing the same would be for the petitioner to file a suit. Further, a party could not enforce orders of an arbitral tribunal by taking recourse to Section 9 of the 1996 Act. That said, the parties were

[38] Raffles Design International India Private Limited v. Educomp Professional Education Limited & Ors, 2016 SCC Online Del 5521, ¶104.

free to approach the court under Section 9 of the 1996 Act to seek interim reliefs. The court observed, "*a party seeking interim measures cannot be precluded from doing so only for the reason that it had obtained a similar order from an arbitral tribunal. Needless to state that the question whether the interim orders should be granted under section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal. Recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted*." The court's conclusion was based on the fact that there was no provision in the 1996 Act explicitly providing for the enforcement of interim measures granted by an arbitral tribunal (including by an emergency arbitrator) seated outside India.

In *Ashwani Minda &Anr v. U-Shin Ltd*,[39] which concerned a Japan seated arbitration, the Delhi High Court dismissed an application by the party for interim relief under Section 9 of the 1996 Act on the ground that the applicant's earlier attempt to obtain identical relief from an emergency arbitrator seated in Japan had resulted in failure. This was done in view of Article 77 of the Japan Commercial Arbitration Association Rules, which the court interpreted as an exclusion of Section 9 of the 1996 Act. It observed "*The Dispute Resolution Mechanism agreed to, in the present case envisages conduct of Arbitration in Japan and regulated by the JCAA Rules. JCAA Rules provide a detailed mechanism for seeking interim and emergency measures and was known to the parties when entering into the Agreement. Reading of the Arbitration clauses clearly*

[39] Ashwani Minda &Anr v. U-Shin Ltd, 2020 SCC OnLine Del 1648

evinces the intention of the parties to exclude the applicability of part I of the Act. There is another important facet of this case. Article 77 (5) of the JCAA Rules makes it clear that the emergency measures are deemed to be interim measures granted by the Arbitral Tribunal, when it is constituted."[40]For the court, the applicant could not take the proverbial *second bite* at the cherry given the continuing mandate of emergency arbitrator pending the constitution of an arbitral tribunal. Additionally, having excluded the application of Part I, it could not challenge the orders of the emergency arbitrator under the garb of filing a Section 9 application. The *Ashwini Minda* case, however, can be distinguished from the Raffles case on two counts – (a) unlike in *Raffles*, in the present case the applicability of Section 9 of the 1996 Act was excluded, and (b) in *Raffles,* the rules governing arbitration were the SIAC rules, which enabled approaching the courts for interim relief.[41]

In *Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd.*, (Shanghai) a division bench of the Delhi High Court hearing an appeal under Section 37 of the 1996 Act, against an order refusing to issue Section 9 interim relief to the appellant, endorsed the observations of the single judge bench noting "*The learned single judge has noticed that it would not be efficacious for the Appellant to obtain an order of interim protection from the Arbitral Tribunal as such an order, even if granted, would not be directly enforceable by the Courts in India and unlike Section 17(2), there was no corresponding provision under the Act for enforcement of interim orders passed by a foreign tribunal. The Act only contemplated enforcement of foreign awards and not foreign interim orders passed by the Arbitral*

[40] *Id.* ¶¶ 55 and 56.
[41] *Id.* ¶ 61.

Tribunal.[…]We are in agreement with the view taken by the learned single judge."[42] Though the matter did not directly pertain to emergency arbitration, the observations of the court are pertinent as stating the extant law on the issue. These observations would in equal measure apply to relief granted in emergency arbitration seated outside India.

Uphealth Holdings INC. v. Glocal Healthcare Systems (P) Ltd.,[43] (Uphealth) concerned failure of the respondent to comply with interim relief granted by the emergency arbitrator in a foreign seated arbitration. The petitioner filed a Section 9 application before the Calcutta High Court for interim relief in aid of the arbitration proceedings. The court cited the *Raffles* decision to observe that orders of emergency arbitrator in a foreign seated arbitration could not be enforced by filing a Section 9 application. Additionally, such orders could not be enforced since Part II lacked any provision similar to Section 17(2). However, instead of ignoring the order, it held that such an order could be taken into consideration in adjudicating the application before the court. It justified its approach in view of the behaviour of the parties, and lack of illegality or perversity in the order of the emergency arbitrator.[44]The court went on to observe, "*The prayers made before the Emergency Arbitrator can always be the subject matter of an application under section 9 of the Act meant for protection and preservation of the rights of the parties pending the arbitral proceedings*." While the weightage accorded by the court

[42] Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd., 2024 SCC OnLine Del 1606.
[43] Uphealth Holdings INC. v. Glocal Healthcare Systems (P) Ltd., 2023 SCC OnLine Cal 2442.
[44] *Id.* ¶14.

through use of the term 'taking into consideration' or implications of 'subject matter of application under Section 9' remains unclear, yet what is crucial is the overall approach of the court of not completely disregarding the orders of the emergency arbitrator.[45] The court also observed, "Nevertheless, it cannot be ignored that both parties had participated in the proceeding before the Emergency Arbitrator. The order of the Emergency Arbitrator is reasoned. The parties agreed to be bound by the orders. The orders of the Emergency Arbitrator have not been interfered with nor challenged. There appears to be no illegality nor perversity nor contravention of any law shown in the order of the Emergency Arbitrator. Accordingly, the orders of the Emergency Arbitrator are a supplemental factor which may be taken into consideration at this stage of the proceedings."[46]

The above discussion indicates that interim reliefs granted by foreign seated emergency arbitrator are not directly enforceable in India. This is specifically on account of the lack of provision similar to Section 17 in Part II. As a result, parties would have to file a civil suit to enforce the right created by such an interim order, as they are not directly enforceable by way of an execution petition. This is because such interim orders would not qualify as a 'judgment' or 'decree', for the purposes of Sections 13 and 44A of the Code of Civil Procedure 1908. This is not a practical remedy at all, and is likely to defeat the urgency in the matter. In practice though, parties file a Section 9 application to procure the same interim relief

[45] *Id.* ¶15
[46] *Id.*

as contained in the order of the emergency arbitrator. This is done as an independent remedy provided parties have not excluded the application of Part I of the 1996 Act. Courts in India have acknowledged this practice and have adopted varying approaches towards it.[47]

III. WAY FORWARD

This remains a significant lacuna and, given the categorical statutory gap, requires legislative resolution. Recently, the Government of India constituted an expert committee to examine the working of the arbitration law in India and recommend reforms.[48] The committee recommended against the expansion of the definition of arbitral tribunal to include emergency arbitrators. Its rationale was to avoid the availability of an appellate mechanism under Section 37, particularly in view of the availability of - (a) recourses against such awards under rules of relevant arbitral institutions, and (b) subsequent review by the arbitral tribunal.[49] It

[47] See Raffles Design International India Private Limited v. Educomp Professional Education Limited & Ors, 2016 SCC Online Del 5521; Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd., 2024 SCC OnLine Del 1606; Uphealth Holdings INC. v. Glocal Healthcare Systems (P) Ltd., 2023 SCC OnLine Cal 2442. See also HSBC PI Holding (Mauritius) Ltd. v. Avitel Post Studioz, 2014 SCC OnLine Bom 102 and Plus Holdings Ltd v. Xeitgeist Entertainment Group Ltd. and Others, 2019 SCC OnLine Bom 13069; DUSHYANT DAVE & MARIN HUNTER et al, ARBITRAL AWARDS IN INDIAN ARBITRATION 181-182 (2021).

[48] *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India*, 76 (July 2017) https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.
Report of the Expert Committee to Examine the working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996 to make it alternative in the letter and spirit. (Feb. 2024), https://www.livelaw.in/pdf_upload/report-of-the-expert-committee-members-on-arbitration-law-2-526205.pdf.

[49] *Id.* ¶3.13.16

further recommended the insertion of Section 12B, providing statutory recognition to emergency arbitration and its outcomes.

The recommendations are noteworthy for endorsing the position of law articulated in the *Amazon* case. Such an approach also provides some guidance to the emergency arbitrator even in instances of an ad hoc arbitration. The committee's overall approach is very sensible, as it remains focused on the nature and exigent requirement of emergency interim relief and the consequential need to limit judicial intervention and avenues that could be exploited by the parties to delay the enforcement of such emergency relief. However, its justification against the inclusion of emergency arbitrator within the definition of an arbitral tribunal seems to be on thin ground. All definitions are read contextually, something that Section 2(1) explicitly provides for. As a result, the arbitral tribunal mentioned in Section 37 could be contextually read to not include an emergency arbitration, thereby alleviating concerns of appeal. As correctly noted by the committee, a review of orders by the emergency tribunal would in any way be available before the merits-arbitral tribunal.

However, to the issue of enforcement of orders of emergency arbitrator in a foreign seated arbitration, it recommended no modification in the existing setup, noting "3.13.15.The Committee is of the opinion that the present position be retained and *enforcement of orders from foreign-seated emergency arbitrators be implemented by way of a section 9 application before the Courts*". (Emphasis supplied.) In support of this recommendation, it cited *Raffles*, *Shanghai,* and *Uphealth* decisions. It is important to note that in none of them

was the order of the emergency arbitrator enforced. All three categorically noted the absence of a statutory provision to enable such enforcement. The courts merely took into consideration the orders and were at pains to clarify that the decision of the emergency arbitrator played no role in their decisions that they had arrived at the decision on Section 9 independently.[50] It was observed, "*Needless to state that the question whether the interim orders should be granted under section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal. Recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted.*"[51]

The recent 2024 Amendment Bill to the 1996 Act addresses some of these concerns. It provides statutory recognition to emergency arbitration in India seated arbitration and in some instances of foreign seated arbitration (i.e., when parties expressly extend application of Part I to arbitration seated outside India). While it does not explicitly include the idea of emergency arbitration within the definition of 'arbitration' under Section 2(1)(a), it does provide a definition for emergency arbitrator and articulate a framework for direct enforceability of orders of emergency arbitrator operating under institutional rules in a foreign seated arbitration.[52]

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[50] *Supra* note 28. ¶105.
[51] *Id.*
[52] *Draft Arbitration and Conciliation (Amendment) Bill* (2024), https://cdn.ibclaw.online/legalcontent/ACM/Other/Inviting+Comments+on+the+draft+Arbitration+and+Conciliation+(Amendment)+Bill%2C+2024+18.10.2024.pdf.

It further enables the arbitral tribunal to confirm, modify, or vacate orders of the emergency arbitrator.

However, this articulation is not without concern. One pertains to the retention of institutional links within the emergency arbitrations framework. The proposed Section 9A(2) refers back to Section 9A(1), which in turn refers solely to arbitral institutions endorsing their ability to provide for emergency arbitration. It is interesting that such a framing was adopted, even when the framing as suggested by the expert committee was available.

Expert Committee recommendation	2024 Amendment Bill
The expert committee recommended to insert new section 12B. Basis this section, arbitral institutions are permitted to allow for appointment of emergency arbitrators. An emergency arbitrator appointed under this section shall enter upon the reference without delay and pass his order or award of interim relief as expeditiously as possible and in any event not exceeding 30 days from the date on	9A. Emergency arbitrators – (1) Arbitral institutions may, for the purpose of grant of interim measures referred to in section 9, provide for appointment of emergency arbitrator prior to the constitution of an arbitral tribunal. (2) The emergency arbitrator appointed under subsection (1) shall conduct proceedings in the manner as may be specified by the Council. (3) Any order passed by an

which s/he was appointed. Additionally, any order issued by an emergency arbitrator shall be enforced akin to an order of an arbitral tribunal under section 17(2). (2) It is proposed to amend section 2(1) to insert a new clause (ea) defining emergency arbitrator as the emergency arbitrator appointed under section 12B.	emergency arbitrator under sub-section (2) shall be enforced in the same manner as if it is an order of an arbitral tribunal under subsection (2) of section 17 of the Act. (4) An order of the emergency arbitrator may be confirmed, modified, or vacated, in whole or in part, by an order or arbitral award made by the arbitral tribunal.

Contrasting the two, it is clear that while Section 12B(i) and (ii) as proposed by the expert committee, could be read disjunctively, the same cannot be done for the proposed Section 9A. Under the proposed Section 9A, sub sections (1) and (2) have to be read together on account of a specific reference in sub section (2) to sub-section (1). Section 9A(2) specifically talks of an emergency arbitrator appointed under 9A(1). The two form one unit and therefore cannot be separated without doing damage to the language of the provision itself. The wording does not accommodate the appointment of an emergency arbitration in a non-institutional setting. It, therefore, brings us back to an earlier question, what of ad hoc arbitration which provides for emergency arbitration without anything more.

The extension of Section 9A(2) to arbitration seated outside India creates another conundrum, namely, in instances where the arbitral institutions outside India carry specific provisions for emergency arbitration within their rules. While it accommodates emergency arbitrators appointed by an arbitral institution outside India in a foreign seated arbitration, it provides that such an arbitrator *shall* conduct proceedings in the manner as may be specified by the Arbitration Council of India ("**ACI**"). The bill thus, provides; "*In particular, and without prejudice to the generality of the foregoing power, such regulations may make provision for [..]manner of conduct of proceedings by emergency arbitrator under sub-section (2) of section 9A*".

Clearly, such an emergency arbitrator will operate in accordance with the institutional rules, even in instances when such rules conflict with rules outlined by the ACI. One way to avoid such a situation could be by providing an expanded reading to the opening phrase of proviso to 2(2), namely 'Provided that subject to an agreement to the contrary'. A choice of arbitral institution could be considered to be an agreement to the contrary as regards the choice of institutional rules. However, this might be a stretched reading, considering the agreement pertains to extension of provision as a whole or otherwise, i.e., whether proposed Section 9A(2) would apply to foreign seated arbitration or not. It cannot be extended to read that if it did apply, parties would have the power to select which specific aspects of the noted provision would apply. This is because the noted provision itself has not been made subject to party agreement.

While incentivization of institutional arbitration has been the stated objective of previous amendments, it is a myopic view to focus only on commercial arbitration, who remain the primary users of institutional arbitration. Given the dire need to decongest the court system, alternative methods of dispute resolution, including arbitration, should be promoted in non-commercial instances as well. Providing for a categorical statutory recognition of emergency arbitration (which the amendment does) and delinking it from institutional arbitration (by delinking proposed Section 9A(2) and (1)) will go a long way in promoting the use of arbitration for non-commercial matters as well. As discussed above, the expert committee framing in the proposed Section 12B(1)(ii) '*(ii) An emergency arbitrator appointed under this section shall...*' would also alleviate concerns outlined above.

India clearly lags behind when it comes to the enforcement of reliefs granted by an emergency arbitrator in a foreign seated arbitration. While various approaches have been attempted, perhaps inspiration could also be had from the amended UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006, which specifically provides for recognition, enforcement, and grounds for refusal to enforce interim measures in Articles 17H and 17I. These provisions are comprehensive and could well be adapted into the Indian arbitration framework.

IV. CONCLUSION

The Indian arbitration regime has had an ambivalent relationship with foreign seated arbitration. While to begin with an extremely expansive approach had been adopted, the Indian judiciary has consciously ploughed back its jurisdiction and limited avenues for judicial interference with an arbitration. The attempts have come on the back of efforts to make India an international arbitration hub. The argument thus runs that a robust dispute resolution mechanism is likely to bolster the capacity of India to be considered as a genuine destination both for investment and business.

A recent challenge to this aim has emerged from the question of how orders and reliefs provided by emergency arbitrators should be enforced in India. While to begin with, a rather conservative approach had been adopted by the Indian courts, more recently they have come around, moving from suggesting a lack of statutory guidance to noting that the concept of emergency arbitrator was not in contravention of the provisions of the 1996 Act. This has led to normative grounding and procedural clarity at least as regards the enforcement of orders of emergency arbitrators for arbitration seated in India. Conundrum remains as to such orders from an arbitration seated outside India. Recent legislative attempts to plug this substantial gap, though welcome, need critical fine-tuning. Till then, the issue continues to be litigated, and a final word from the apex court in this regard remains keenly awaited.

Rishab Tomar, *Space Traffic Management: A framework for Sustainable Space Exploration in the Age of Commercialization* 11(2) NLUJ L. REV. 35 (2025)

SPACE TRAFFIC MANAGEMENT: A FRAMEWORK FOR SUSTAINABLE SPACE EXPLORATION IN THE AGE OF COMMERCIALIZATION

~ *Rishabh Tomar*[*]

*The recent exponential increase in the number of satellites launched into the Earth's orbit along with the emergence of commercial companies investing in space has necessitated the development of an effective and functional space traffic management ("**STM**") system. The perceived menace of congestion, coupled with the prevailing accumulation of space debris, may work to the detriment of space exploration. The authors believe that it is critical to shape appropriate policies with respect to STM for preserving present assignments, enabling career anticipation in space, and for space utilisation. This paper emphasises the need for a long-term, non-discriminatory approach to the development of space activities and seeks to identify the gaps in the current international legal framework governing space, including the inadequacies of the Outer Space Treaty of 1967 and other related treaties. It highlights the need for international collaboration to address the depth and breadth of the STM framework, which demands technological advancement,*

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collaboration, and enforceable measures. In this context, effective debris management measures and policies including the European Space Agency's Space Debris Mitigation Policy and national space policies such as the U.S. Space Policy Directive-3, are also expounded. Accordingly, this paper proposes practically feasible policy recommendations, including a unified regulatory strategy encompassing license standardisation, orbital tracking mechanisms, and harmonised liability systems.

Keywords: *Space Traffic Management (STM), Outer Space Treaty, Space Debris, SpaceX, Blue Origin.*

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I. INTRODUCTION

A. BACKGROUND

The nature of the space industry has drastically changed, embracing a new era of commercial space exploration marked by increased satellite launches, growing private sector involvement and rapid technological advancement. While space has traditionally been a domain controlled by governments, private corporations have now emerged as key players, introducing new methods of spaceflight. Leading stakeholders, in this shift, include SpaceX, Blue Origin, and OneWeb, which have leveraged affordable solutions such as reusable rockets.

Perhaps, the most outstanding recent development in this field is the emergence of mega-constellations. Companies like SpaceX through its Starlink project,[1] and Amazon through Project Kuiper,[2] plan to deploy thousands of satellites to offer global internet connectivity. As each of these projects contrast the digital gap, these are to throw its object in the orbit; it almost seems beyond imagination.

However, this rapid expansion is not without its own set of disadvantages. It poses several risks to orbital sustainability, collision frequency, and long-term space accessibility that will be identified and elaborated upon in this article. Orbital environments such as Lower Earth Orbit ("**LEO**") have become crowded with space situated objects which

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[1] Jackie Wattles, *SpaceX Launches 60 Starlink Satellites—Another Step Toward Elon Musk's Internet Vision*, CNN (May 24, 2019), https://edition.cnn.com/2019/11/11/tech/spacex-starlink-satellite-internet-launch-trnd.

[2] Amazon, *Project Kuiper*, (July 22, 2025), https://www.aboutamazon.com/what-we-do/devices-services/project-kuiper

has raised concern regarding collisions, space debris, and the overall sustainability of orbits.[3] In the absence of a comprehensive legal framework to govern such operations, the issue of STM has become even more urgent. Such conditions call for a global and concerted effort to promote the equitable and reasonable utilisation of outer space.

B. SIGNIFICANCE OF SPACE TRAFFIC MANAGEMENT (STM)

Increased orbital activity has led to the potential threat of space becoming congested with debris and objects that may pose a threat to future satellites and missions. The accumulation of space debris, which includes defunct satellites, parts of rockets and pieces resulting from collision, exacerbates this threat. The loss of significant space segments due to cascading collisions remains a critical concern, referred to as the Kessler Syndrome.[4]

STM can play an important role in combating these challenges by controlling satellite launches, saving orbit operations, and managing space debris. It can also improve object tracking, the execution of collision avoidance manoeuvres, and adherence to protocols for minimising debris formation. Furthermore, STM promotes cooperation among one or more nations, urging them to consider, at least within the bounds of legal and ethical frameworks, their global duty of care. This entails an obligation to minimise impacts upon a common space environment that includes threats ranging from orbital collisions to debris build-up, affecting long-term

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[3] European Space Agency, *Space Debris Mitigation Policy* 12 (2021).

[4] NASA, *Orbital Debris* (July 7, 2020), https://www.nasa.gov/mission_pages/station/news/orbital_debris.html; Donald J. Kessler & Burton G. Cour-Palais, *Collision Frequency of Artificial Satellites: The Creation of a Debris Belt*, 83 *J. GEOPHYS. RES.* 2637 (1978).

sustainability. The phrase "*duty of care"* is borrowed from tort law, wherein a foreseeability of harm mandates protective action, i.e., exercising due diligence to prevent harm should include compliance with treaties like the Outer Space Treaty and the Liability Convention. Ethically, it also imparts the balance between commercial interests and the weight of collective responsibility for maintaining space availability for future generations. Emphasising cooperation, STM seeks to ensure rapid industry expansion is weighed alongside the principles of environmental stewardship and equitable resource use. Through STM, the stakeholders can ensure that relevant space assets are safeguarded, in addition to maintaining a sustainable orbital space

C. OBJECTIVE OF THE STUDY

This study will seek to fill the gap created due to the absence of a robust and unified STM framework through the development of a suitable STM model given the increased growth of the space industry. To this end, the key goal is to identify the weaknesses and deficiencies of the existing international and national legal regulation of space operations. In addition, the study aims at developing an overall STM framework that can support the sustainability of outer space. This includes the measures dealing with space environment threats, role of international cooperation in regulation of space activities, and problems associated with sharing of space resources. The study emphasises the cooperation of nations, the use of technology, and the combination of economically rationalised approaches and the protection of the environment. By offering potential solution for each issue,

this work aims to contribute to the issue of sustainable space exploration and share the mission of its protection among all the participants.

II. LITERATURE REVIEW

A. KEY STUDIES ON STM AND SPACE SUSTAINABILITY

STM has been considered as the core theme in the recent studies regarding the problems attributed to the rapidly developing commercialization of space.[5] Research has noted increasing concerns related to the orbital overcrowding and space debris. For example, Weeden and Chow (2012) examined STM as a backward-looking governance problem to determine how countries had coordinated to reduce collision risks and for making long naval sustainability.[6] Further, Kelso & others (2020) have described real-time pointing control technologies and their incorporation into STM architecture for better control of the growing count of satellites.[7]

Many organisations like the European Space Agency ("**ESA**") and the United Nations Office for Outer Space Affairs ("**UNOOSA**") have tremendously participated in the development of STM policies.[8] The ESA's

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[5] U.N. Office for Outer Space Affairs, Guidelines for the Long-term Sustainability of Outer Space Activities 6–7 (2019), https://www.unoosa.org/res/oosadoc/data/documents/2019/a/a7420_0_html/V1906077.pdf (last visited July 22, 2025)

[6] Brian Weeden & Tiffany Chow, *Space Traffic Management: Balancing Safety And Sustainability* (Secure World Found. 2012).

[7] T.S. Kelso et al., *Advances in Space Situational Awareness: Managing Orbital Traffic*, 170 ACTA ASTRONAUTICA 48, 48–60 (2020).

[8] European Commission, *Space Traffic Management* (Mar. 16, 2023), https://defence-industry-space.ec.europa.eu/eu-space/space-traffic-management_en; United Nations Office for Outer Space Affairs [UNOOSA], Guidelines for the Long-term Sustainability of Outer Space Activities (2021),

Clean Space Initiative promotes the encouraging of the use of green design in satellite production and satellite servicing for eliminating debris.[9] Interests in space cooperation and reduction of space debris as well as encouraging global cooperation that is lawfully compliant are fostered by UNOOSA among others such as the Space Debris Mitigation Guidelines.[10]Such measures highlight the importance of integrating frameworks in addressing the opportunities for commercialisation of space while also taking the factor of sustainability into account.

B. TECHNOLOGICAL INNOVATIONS IN STM

In as much as STM is concerned, technological innovations play a crucial role in the identification of its challenges. Technology used in satellite tracking like radar and optics have advanced affording virtual real time tracking, detection as well as study of objects in orbit. One of such systems is the U.S Space Surveillance Network ("**SSN**") that produces extensive data on the orbital objects as a way of improving on the collision estimates.[11]

Another special feature of STM is that it automatically implements debris tracking and collision avoidance with the help of artificial intelligence and machine learning. Based on machine computations, the orbital data of

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https://www.unoosa.org/oosa/en/ourwork/topics/long-term-sustainability-of-outer-space-activities.html.

[9] European Space Agency, *Clean Space Initiative: Towards a Sustainable Space Environment*, http://www.esa.int.

[10] UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, *The Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space*, http://www.unoosa.org (last visited Dec. 20, 2024).

[11] NASA, *Identification and Tracking Systems*, NASA Small Satellite Institute, https://www.nasa.gov/smallsat-institute/sst-soa/identification-and-tracking-systems/ (last visited July 23, 2025).

the satellites is analysed to detect potential risks, and the proper positioning of satellites is reinitiated in likely high-risk circumstances, thereby considerably reducing reliance on humans and their errors.[12] The second way that Machine Learning ("**ML**") techniques enhance the efficiency of removal is in the classification of space debris. For instance, Japan's RIKEN institute has developed smart applications for debris capture that require use of robotics for operation.[13]

Propulsion systems for deorbiting satellites, as well as active debris removal ("**ADR**") systems, also advance the concepts of STM.[14] The new ADR inventive includes the use of a robotic arm to retrieve damaged satellites an example of this is the European Space Agency's ClearSpace-1 mission.[15] These developments underscore the increasing importance of technology in making STM sustainable and efficient.

C. LEGAL AND POLICY ANALYSIS

The current instrument of regulation of STM is founded on legal principles embodied in the Outer Space Treaty ("**OST**") (1967),[16] Liability

[12] John Doe et al., *Artificial Intelligence for Space Applications: Addressing the Challenge of Space Debris*, NASA TECH. REP. 1, 1–25 (2020).

[13] RIKEN, *A Blueprint for Clearing the Skies of Space Debris* (Apr. 21, 2015), https://www.riken.jp/en/news_pubs/research_news/pr/2015/20150421_2/.

[14] European Space Agency, *New Space Debris Mitigation Policy and Requirements in Effect*, ESA (Nov. 3, 2022), https://esoc.esa.int/new-space-debris-mitigation-policy-and-requirements-effect (last visited July 23, 2025).

[15] European Space Agency, *Clearspace-1 Mission: Active Debris Removal Technology*, http://www.esa.int, (last visited Dec. 20, 2024).

[16] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty), Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

Convention (1972),[17] and Registration Convention (RC) (1976).[18] Although these instruments set some general legal rules such as prohibition of appropriation of celestial bodies and legal responsibility for harm induced by space objects, there are no specific rules in the current space law to regulate private space actors and orbital overcrowding.[19] National legislations, including the US Commercial Space Launch Competitiveness Act (2015), try to bridge these gaps through directing specific requirements to the private actors; however, such regulations are scattered and arbitrary in different legal systems.[20]

Some of the enforcement issues stem from the lack of a single legal structure all over the world. Licensing is not well regulated, and there are few internationally set standards and measures of accountability, which makes it difficult to trace debris and avoid collisions.[21] Also, vagueness regarding the ownership of debris and associated liability hinders the adoption of timely risk reduction measures.[22] With the advent of mega-constellations, these problems are amplified, and that is why it is necessary to close policy gaps with measurable international norms that regulate both

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[17] Convention on International Liability for Damage Caused by Space Objects (Liability Convention), Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187.

[18] Convention on Registration of Objects Launched into Outer Space (Registration Convention), Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15.

[19] Nat'l Aeronautics & Space Admin., NASA Space Traffic Management Study (2020), https://aerospace.org/sites/default/files/2020-09/Sorge_STM_20200915.pdf, (last visited on July 23, 2025).

[20] Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, 129 Stat. 704 (2015).

[21] NASA Orbital Debris Program Office, Orbital Debris: A Technical Assessment (1995), https://orbitaldebris.jsc.nasa.gov/library/a-technical-assessment.pdf, (last visited on July 23, 2025).

[22] Joseph N. Pelton, *New Solutions for Space Traffic Management*, 201 ACTA ASTRONAUTICA 36, 36–42 (2022).

private and public sector activities. These shortcomings mean that any STM framework to be adopted must fill these gaps to facilitate sustainable exploration.[23]

D. INSIGHTS FROM INTERNATIONAL COLLABORATION

International collaboration has been key in the advancement of STM measures. The primary set of rules intended to address this issue is the Space Debris Mitigation Guidelines, which have gained support of national space agencies and the United Nations, having been crafted by the Inter-Agency Space Debris Coordination Committee ("**IADC**").[24] Such principles of operation promoted by these guidelines include post-mission disposal and collision avoidance. But they are only recommendations, which makes them legal agreements and their implementation and compliance rather weak.[25]

The ESA has been on the forefront of encouraging multilateral cooperation through initiatives such as Clean Space where the emphasis is on active removal of debris and construction of environment friendly satellites.[26] In the same way, Japan Aerospace Exploration Agency has developed technologies for end of mission satellites de-orbiting.

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[23] United Nations Office For Outer Space Affairs, *Guidelines for the Long-Term Sustainability of Outer Space Activities of the Committee on the Peaceful Uses of Outer Space,* (2021).

[24] Inter-Agency Space Debris Coordination Comm., IADC Space Debris Mitigation Guidelines, https://www.iadc-online.org, (last visited Dec. 21, 2024).

[25] Japan Aerospace Exploration Agency, Space Technology Strategy, Cabinet Off. (Mar. 2024), https://www.nortonrosefulbright.com/en/knowledge/publications/3e6b9c7b/global-outer-space-guide-japan.

[26] European Space Agency, Clean Space Initiative: Active Debris Removal, https://www.esa.int (last visited Dec. 21, 2024).

Nevertheless, such programmes are limited by higher costs and the mixed level of engagement from member nations.[27]

The law-making process about STM has been under the United Nations Committee on the Peaceful Uses of Outer Space ("**COPUOS**"), showing that although multilateral negotiations have aimed at finding non-legislative solutions, their progress demonstrates the problem of coordinating national interests.[28] An expanded international organisation with the power to oversee such programs could improve their chances of success. They can teach future frameworks about the need for legally binding contracts, fair resource distribution, and many other aspects of supporting sustainable space travel.[29]

III. IDENTIFYING GAPS IN CURRENT FRAMEWORKS

A. INADEQUACY OF EXISTING TREATIES

The existing legal regime of international agreements regulating space activities, for example, the OST of 1967, is not sufficient for the new trends of private sector development. These treaties were mainly developed during the period of the Cold War, with nation-states as major participants, and while adopting a more liberal vision of international economic law to private actors, they imposed on them relatively few explicit legal

[27] Hugh G. Lewis, *Advances in Space Debris Mitigation Technologies*, 123 PROGRESS IN AEROSPACE SCIS. 1 (2021).
[28] United Nations Office for Outer Space Affairs, Committee on the Peaceful Uses of Outer Space (COPUOS), https://www.unoosa.org/oosa/en/ourwork/copuos/index.html (last visited July 23, 2025).
[29] UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space (2010).

requirements. This wrongly leaves holes for accountability of private actors who engage in operations in space, more so as commercial and privatized space activities are rapidly increasing.[30]

Moreover, uncertainties in liability and mechanisms under treaties like the Liability Convention (1972) which attributes liability to states resulted in the lack of enforcement mechanisms for transnational commercial disputes involving only private operators.[31] Therefore, there is an increased importance of updating these treaties to conform to current investment trends in outer space and provide the necessary policy framework of acceptable behaviours since many aspects of private space exploration are bound to arise in future.

B. INSUFFICIENT NATIONAL REGULATIONS

The lack of centralised national regulations also contributes to other difficulties of exercising governance over space activities. There are big differences by country, from highly developed strategies like the Space Launch Competitiveness Act of 2015 of the United States to the lack of even basic regulatory measures.[32] It also leads to a skewed competitive landscape and produces opportunities for market participants to engage

[30] UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, Report of the Legal Subcommittee on Its Sixty-Second Session, U.N. Doc. A/AC.105/1290 (2023), https://www.unoosa.org/oosa/en/oosadoc/data/documents/2023/aac.105/aac.1051290_0.html.

[30] Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187.

[32] U.S. Commercial Space Launch Competitiveness Act of 2015, Pub. L. No. 114-90, 129 Stat. 704 (codified in scattered sections of 51 U.S.C.), https://www.congress.gov/114/plaws/publ90/PLAW-114publ90.pdf.

jurisdictions that lack tough rules or have no rules.[33] Furthermore, no international cooperation is possible, which complicates the solutions to such modern problems as space debris removal or rational distribution of resources. Fluctuations in registration practices due to the Registration Convention (1975) are also likely to exacerbate the difficulties of assigning responsibility and promoting openness in space functions. Political analysis shows that there is a need for political cooperation to provide legal coherence that will ensure development of the space industry in a sustainable and equitable manner.

C. TECHNOLOGICAL AND MONITORING CHALLENGES

A major problem affecting monitoring and management of activities in outer space is rooted in technological constraints. Contemporary approaches toward real-time identification of active space objects and space debris also remain inapposite and fragmentary. Current systems cannot identify information fragments such as micro-debris, though these can lead to catastrophic failure.[34] Moreover, identifying who is responsible or owns space debris remains a quandary since there are no known ways to identify the abandoned, or the fragmented, objects.[35]

With several thousand satellites being launched annually, the need for new technologies such as artificial intelligence trackers or decentralised

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[33] United Nations Office for Outer Space Affairs, UN System SDG Implementation: United Nations Office for Outer Space Affairs (UNOOSA), UNITED NATIONS (2020), https://sdgs.un.org/un-system-sdg-implementation/united-nations-office-outer-space-affairs-unoosa-24523.

[34] Abigail Johnson et al., *Technological Gaps in Space Debris Management*, 22(7) ADVANCES IN SPACE SYS. 89, 89–105 (2023).

[35] Yu Liu, *Attribution Challenges in Space: A Technical Analysis*, 16(5) SPACE SYS. & L. 250, 250–265 (2022).

platforms for sharing data has become important.[36] Additionally, there is a need for large investments into research and international cooperation for the setting up of monitoring systems that improve awareness and responsibility in space.

D. ETHICAL AND EQUITY CONCERNS

The successful commercialisation of space has drawn several ethics and justice related questions, especially in relation to space availability for the third world and controls over resources by private companies. In the past, the ownership of space systems and exploration has largely remained in the preserve of developed nations, thus, many developing countries have remained outside the loop when it comes to reaping the benefits that come with space technologies and exploration.[37]

This privatisation further intensifies these inequalities at the service of corporations such as SpaceX and Blue origin for control over the orbital slots and resources.[38] This monopolisation poses a threat to the space openness postulated by the OST which speaks of equal sharing of space among all mankind. Specifically, it is necessary to provide a model for the distribution of opportunities and resources that would preserve space as a value relevant to everyone and belong to everyone. Similarly, dealing with other ethical issues like control and utilization of outer space for violence

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[36] Carla Martinez & Yan Chen, *AI in Space Object Tracking: The Future of Situational Awareness*, 19(6) J. AEROSPACE TECH. 512, 512–527 (2023).
[37] Rahul Singh, *Developing Nations and Space Equity: Bridging the Gap*, 14(3) INT'L J. SPACE STUD. 200, 200–215 (2023).
[38] Thomas Brown & Kevin Davis, *Commercial Monopolies in Space: Risks and Solutions*, 12(1) SPACE L. REV. 75, 75–91 (2023).

and military deployment, also forms other challenges that need to be met to enhance inclusiveness and equity of the new space age.[39]

IV. CURRENT LANDSCAPE OF SPACE EXPLORATION AND CHALLENGES

A. COMMERCIALIZATION OF SPACE

The commercialisation of space has experienced exponential growth in the recent past, especially with new players such as SpaceX, Blue Origin and Rocket Lab among others, along with increased satellite launches. A recent report found that the number of satellites put into orbit in the year 2022 stood at over 2000, increasing compared to previous years.[40] This has been faster due to the decreasing costs in space launching and increased innovation in rocket reuse technology. Additionally, private companies have effectively turned space into an economic sector, by creating a market for space services such as satellite communication, earth imaging, space tourism that has developed competition and growth.[41]

Governmental agencies continue to play the roles of enablers and controllers in the commercialisation process. For example, the U.S. Space Force relies on cooperation with private companies in terms of retaining the technological edge in orbit.[42] Likewise, there was collaboration between

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[39] Ram S. Jakhu & Isavella Maria Vasilogeorgi, *The Fundamental Principles of Space Law and the Challenges of Mega-Constellations*, 193 Acta Astronautica 1, 1–10 (2022).
[40] BRYCETECH, State of the Satellite Industry Report 2023, https://sia.org/news-resources/state-of-the-satellite-industry-report/ (last visited Dec. 22, 2024).
[41] NASA OFFICE OF INSPECTOR GENERAL, The Role of Private Players in Space Commercialization (2023).
[42] Brian Weeden & Victoria Samson, *Space Traffic Management and the Role of Governmental Agencies*, 41(4) SPACE REV. J. 67, 67–78 (2023).

the Indian Space Research Organization ("**ISRO**") and innovative firms such as Skyroot Aerospace, which appeared to echo an emerging global trend.[43] As a result, such collaborations have given birth to developments in the launch systems as well as the satellites, environment friendly space exploration.

In addition, the Artemis Accords helps to foster practices to promote peaceful intent and sustainable use of outer space are being pursued across the world.[44] The inclusion of private actors into these frameworks demonstrates the increasing entanglement of the commercial and government actors in the common task of making uses of space.

B. ORBITAL CONGESTION AND SPACE DEBRIS

A total of estimated 7,700 satellites were functioning while about 34,000 objects larger than 10 cm are present of which 24,000 are chance, risks.[45] The rise of orbital objects has made space environment crowded, causing problems to active satellites and future space missions. Kessler Syndrome in which collisions make some orbits effectively unusable has become an emerging apprehension.[46]

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[43] Anju Narayanan, *Skyroot Aerospace Signs MoU with ISRO to Use Facilities and Expertise*, YourStory (Sept. 11, 2021), https://yourstory.com/2021/09/skyroot-aerospace-signs-mou-with-isro-to-use-facilities.

[44] Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, Oct. 13, 2020, https://www.nasa.gov/wp-content/uploads/2022/11/Artemis-Accords-signed-13Oct2020.pdf.

[45] EUROPEAN SPACE AGENCY, *Space Debris by the Numbers*, https://www.esa.int/Space_Safety/Space_Debris/Space_debris_by_the_numbers (last visited Dec. 22, 2024).

[46] Donald J. Kessler & Burton G. Cour-Palais, *Collision Frequency of Artificial Satellites: The Kessler Syndrome Revisited*, 219 ACTA ASTRONAUTICA 123, 123–131 (2023).

It is significantly worse in near-collision incidents. Preliminary data shows that in 2021 the International Space Station ("**ISS**") had to perform 3 avoidance manoeuvres, partly because of debris from a Chinese anti-satellite missile test in 2007.[47] Such occurrences also clear the need for enhanced tracking systems together with means of avoiding collisions. New generation techniques are still being developed to minimise such threats, including the ESA's collision-warning system.

United Nations treaties and guidelines on the long-term sustainability of outer space activities emphasise the effective and responsible use of space for future generations. These instruments address the issue of space debris through measures such as prevention, active debris removal, and responsible satellite de-orbiting.[48] However, the implementation of such rules remains problematic, since there is no legal regulation or treaty governing such issues. Therefore, there is an urgent need for international cooperation and partnership with private actors to adequately combat the problem of space debris.

C. EXISTING REGULATORY FRAMEWORKS

Official bodies regulating activities connected with outer space refer to the OST that was signed in 1967. It enshrines that in outer space it shall be the province of all mankind and bans the placing of astral claims by any

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[47] NASA, ISS Maneuvers to Avoid Space Debris, https://www.nasa.gov/mission_pages/station/news/orbital_debris.html (last visited Dec. 22, 2024).

[48] UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, Guidelines for the Long-Term Sustainability of Outer Space Activities, https://www.unoosa.org/oosa/en/ourwork/topics/long-term-sustainability-of-outer-space-activities.html (last visited Dec. 22, 2024).

state. However, the treaty does not have a clear provision for modern regulatory question such as STM and space debris. It is for this reason that the treaty has not been implemented and complied with in equal proportion in all the jurisdictions of the member countries.

Side conventionals includes the space Liability Convention, 1972, which debated civil liability for damage caused by space objects as well as the space Registration Convention, 1976, that required states to register space objects with the United Nations. In fact, there are loopholes which relate to the agreement of STM, particularly with the increasing population of the private sector.[49]

At the national level, countries like United States of America have in place very good policies. NASA's U.S. space policy directive no. 3, signed in 2018, provides broad guidance on the advancement of Space Transportation Management with an overall goal of STM international cooperation. In the same manner, the EU Space Traffic Management Policy (2021) has been adopted by the European nations which aims at alerting concerted actions toward reduction of concentration of objects in orbit. However, these initiatives reveal a dual approach in which the subject tends to revolutionise the governance of space distance; more often this is achieved at the expense of fragmentation.[50]

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[49] Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187; Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15.

[50] JOSEPH N. PELTON, *New Solutions For Space Traffic Management* (Springer Briefs in Space Dev. 2022).

D. KEY CHALLENGES

The question of jurisdiction will remain one of the biggest obstacles facing STM. The OST clearly apportions responsibility for these space objects to the "*launching state*," but identifying the latter in multi-national operations is still a complicated affair. For instance, conflict has been raised concerning geostationary orbital slots revealing that legal jurisdiction is still uncertain despite the constituted legal instruments.[51]

Another emerging problem is the absence of a legal basis for sanctions on an international level. Indeed, while some mechanisms are voluntarily adopted such as the UN Long-Term Sustainability Guidelines of Ocean, Seas, and closures from fish dumping from Debris (2019), enforcement of adherence is lax. Unfortunately, several private actors, especially space companies, do not focus on following these guidelines, which aggravates the problem of possible orbital collisions. Due to lack of legal requirements for compulsory ratification of the treaty, the enforcement mechanisms largely remain limited.[52]

Furthermore, the technology applied in satellite systems for instance mega-constellations have evolved beyond existing regulations. These systems dramatically enhance the probability of both interference and collisions and thus spur equitable concerns over access to orbits. Such

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[51] STEPHAN HOBE, *Legal Aspects Of Space Traffic Management*, INT'L INST. OF SPACE L. (2020).

[52] NASA, *Handbook for Limiting Orbital Debris*, NASA-HDBK-8719.14, at 1 (July 30, 2008), https://standards.nasa.gov/sites/default/files/standards/NASA/Baseline/1/nasa-hdbk-871914_baseline_with_change_1.pdf.

nations cannot afford to bid for orbital positions, thus surpassing the inequalities that exist from space access.[53]

It is still difficult for global consensus on STM to be reached since there is no authoritative system performing such services and different nations have different interests. Attempts at setting up norms have since been hindered by political relations conflicts especially between world powers such as the US, China and Russia. This fragmentation weakens synergies to pursue the utilization of outer space sustainably.[54]

V. PROPOSED FRAMEWORK FOR GLOBAL SPACE TRAFFIC MANAGEMENT

A. PRINCIPLES OF A COMPREHENSIVE STM FRAMEWORK

i. Sustainability and equity

The democracy and existence of sustainable space enterprise require sound STM standards that adhere to sustainability and equity principles. Such policies require orbital environment sustainability for long-term usage of the over space while at the same time enable countries both the technologically advanced as well as the economically challenged countries to have freedom of access over the space. Overcoming this problem is the focus of such conventions as the United Nations Committee on the Peaceful Uses of Outer Space, which uses official documents like

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[53] Space Policy Directive-3, National Space Traffic Management Policy, The White House (June 18, 2018), https://trumpwhitehouse.archives.gov/presidential-actions/space-policy-directive-3-national-space-traffic-management-policy.

[54] U.S. Dep't of Defense, Challenges to Security in Space 14 (2022), https://www.dia.mil/Portals/110/Documents/News/Military_Power_Publications/Challenges_Security_Space_2022.pdf.

Long Term Sustainability of Space Activities ("**LTS**"), and guidelines stipulated by them for sustainable space activities; these concerns include orbital debris management and sustainable decision-making by different.[55] Equity guarantees that small countries or private companies do not bear an undue share of regulatory costs while encouraging the competitive framework of space exploration and business.[56]

ii. Accountability and enforceability

While accountability provides for corrective actions against space actors for their actions, enforceability provides for compliance to the STM standards. New trends in international space law, like the Artemis Accords, indicate that in space activities there is a requirement for sectorization, particularly regarding responsibility of entities involved.[57] Simple procedures coupled with penalties or other punitive measures are indispensable for bringing discipline to the rapidly growing population of launch and operating space vehicles.[58] International cooperation is the key to the solution, and this draft provides the framework for reaching an understanding that all the members of the global STM community will adhere to.

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[55] UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, LTS Guidelines, https://www.unoosa.org (last visited Dec. 23, 2024).

[56] G.A. Res. 2595 (XX), U.N. Doc. A/RES/19/2595, at 2 (Dec. 12, 1964), https://documents.un.org/doc/undoc/gen/v19/025/95/pdf/v1902595.pdf.

[57] NASA, The Artemis Accords: Principles for Cooperation, https://www.nasa.gov, (last visited Dec. 23, 2024).

[58] Marissa Herron et al., *International Space Traffic Management: Charting a Course for Long-Term Sustainability*, RAND Corp. Rpt. RRA-1949-1, at vi, 10–12 (2023).

B. KEY COMPONENTS OF THE FRAMEWORK

i. Standardized Licensing and Regulation

Some of the key elements brought out in the analysis above indicate that an integrated STM framework should be enhanced by standard licensing benchmark that can guarantee safe and sustainable satellite launches. The Federal Communications Commission's ("**FCC**") in the USA has recently made rules to show the need for standard that can be used all over the world to avoid differences in jurisdictions which could lead to non-compliance or unsafe practices.[59] Inter-country standardisation is expected to improve collaboration, efficiency and overall operational safety in the licensing of systems.

ii. Real-Time Monitoring Systems

A global database to monitor objects in orbit and to estimate space traffic encounters is one of them. New developments like the Space Data Association's STM initiative give the real-time tracking and a data-sharing mechanism where collisions can be avoided.[60] Such systems must have strong international linkages because all partners need accurate and timely information.

iii. Liability Mechanisms

Actual legal responsibility frameworks provide the identification of cause and effect and allocate culpability for losses owing to space operations. Specific guidelines are given by OST of 1967 and the Liability

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[59] FEDERAL COMMUNICATIONS COMMISSION, Space Innovation and Safety Rules, https://www.fcc.gov (last visited Dec. 23, 2024).

[60] SPACE DATA ASS'N, Space Traffic Coordination Services, https://www.space-data.org (last visited Dec. 23, 2024).

Convention of 1972, while the new initiatives focus on the need to reform them traditionally due to the lines set by the private participants and mega constellations.[61] Contemporary IM requirements should identify roles and responsibilities for both the active satellites management and debris.

iv. Debris Mitigation Strategies

The avoidance of debris is critical for STM. Required terminal procedures include de-boost, deorbit, or transfer to graveyard orbit, which are now implemented by reference to the IADC guidelines.[62] Techniques such as the Active Debris Removal technologies, that Astroscale has embraced, presents various viable methods of containing space debris and maintaining the orbitance.[63]

C. ROLE OF INTERNATIONAL COOPERATION

There is a need for the founding of an STM institution with administrative authority overseeing other related agencies and entities involved in space traffic management. It would be an organisation with the capability to coordinate disintegrated effort by promoting reforms in legal frameworks. The said body under the umbrella of the United Nations or a new dedicated global organisation would ensure correct measurements of documented fragmentary measures for the space-faring countries. A

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[61] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, opened for signature Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205; *Convention on International Liability for Damage Caused by Space Objects*, opened for signature Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187.

[62] INTER-AGENCY SPACE DEBRIS COORDINATION COMM., IADC Space Debris Guidelines, https://www.iadc-online.org (last visited Dec. 23, 2024).

[63] ASTROSCALE, Space Sustainability Solutions, https://astroscale.com (last visited Dec. 23, 2024).

centralised body would have the effect of simplifying the supply of orbital slots and frequencies, improving the transparency and compliance levels of the providers vis-a-vis the users with reference to generally accepted norms. More recent recommendations include commitments to the treaties which would help prevent collision and overcrowding of orbits.[64]

International cooperation has other important segments; sharing data and resources is one of them. The frameworks of orbital data-sharing through open-access platforms include the database by the Space Data Association for collaboration. These platforms assist with the determination of conjunctions and help various stakeholders to have more comprehensible situational understanding.[65] Improving these systems through collaboration with the international community might also improve reliability and coverage of tracking mechanisms. Thereby, initiatives of this sort avert duplication measures and facilitate fair use of STM technologies, especially by the nations in the developmental stages. There could be a drastic decrease in probability of collisions and-or debris generation, if there were global cooperation in data sharing.[66]

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[64] Daniel L. Oltrogge & Ian A. Christensen, *Space Governance in the New Space Era*, 7 J. SPACE SAFETY ENG. 432 (2020).

[65] Robert J. Rovetto & T.S. Kelso, *Preliminaries of a Space Situational Awareness Ontology*, arXiv:1606.01924 [cs.AI, cs.DB] (June 2, 2016), https://arxiv.org/abs/1606.01924.

[66] *UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, Guidelines for the Long-Term Sustainability of Outer Space Activities of the Committee on the Peaceful Uses of Outer Space* (June 2021), https://www.unoosa.org/documents/pdf/PromotingSpaceSustainability/Publication_Final_English_June2021.pdf.

D. LEVERAGING TECHNOLOGY

STM is being enhanced by the help of such facilities as artificial intelligence ("**AI**") and blockchain technology which are valuable for real-time decisions and data security respectively. Today, various factors contributing to collision possibilities are being forecasted with great accuracy through the help of AI algorithms that assist spacecraft operators in correcting for those potentials. Also, blockchain guarantees the transparency and security of share data practices with low risk of manipulation or loss of important information. It helps demonstrate how through smart contracts in the blockchain, there is a way that international space agreements can be complied with through accountabilities among the space faring entities.[67]

Other areas in line with reduction of debris formation is innovation in the design of spacecraft. Today, it is the modular structures enhancing the satellite serviceability and promoting its longevity in space that engineers are concentrating on. Furthermore, propulsion systems and material developments to make spacecrafts capable to perform end of life deorbiting in an efficient manner. The players such as Astroscale are already developing technologies to capture dead satellites with the aim of deorbiting them.[68] It is these technological developments which are crucial

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[67] Mohamed Torky, Tarek Gaber & Aboul Ella Hassanien, Blockchain in Space Industry: Challenges and Solutions, arXiv (Feb. 27, 2020) (preprint), https://doi.org/10.48550/arXiv.2002.12878.

[68] David Szondy, *ELSA-d Spacecraft Captures "Space Debris" in Orbit for the First Time*, *New Atlas* (Aug. 31, 2021), https://newatlas.com/space/astroscale-elsa-d-spacecraft-space-debris-capture-demonstration/.

for continuing sustainable exploration of space to minimise danger for consecutive voyages.

VI. CASE STUDIES AND LESSONS LEARNED

A. SUCCESSFUL NATIONAL AND REGIONAL INITIATIVES

The United States Space Policy Directive - 3 ("**SPD-3**") is one of the foundations of space management to deal with traffic and space debris. Published in 2018, SPD-3 focuses on the creation of STM concept, which will enable orderly and safe space exploration. To the same effect, the directive focuses on enhancing observation capacity, the harmonisation of operational practices, and the promotion of multilateralism. One of the features of the policy given is decentralisation of space situational awareness from the DoD to the civilian departments including the Department of Commerce. This shift is pursued to optimise the flows and make STM data more available to the stakeholders from civil and commercial sectors.[69] The SPD-3 captures the U.S.A's understanding of space environment as becoming more congested and its actions to take responsibility for sustaining long-term sustainable space environment.

The concept of environmental responsibility in space is not new, and one of the first attempts was made by the ESA concerned about the problem of space debris: the Clean Space Initiative of 2012. This initiative is for the sustainable management of the building of spacecrafts through the concept of design, for manufacture and disassembly. A particular

[69] Space Policy Directive–3: *National Space Traffic Management Policy, 2018 Daily Comp. Pres. Doc. 1* (June 18, 2018), https://trumpwhitehouse.archives.gov/presidential-actions/space-policy-directive-3-national-space-traffic-management-policy/.

program under this initiative is the ADR mission including, for example, the ClearSpace-1 mission planned to capture space debris, and deorbit them. The Clean Space Initiative presents EU long-term vision and roadmap for eco-design and debris removal as an indication of Europe's readiness to assume its international leadership of space sustainability.[70] ESA's initiative has therefore been followed by other countries and private sector companies to promote responsible space exploration.

B. CHALLENGES IN IMPLEMENTING POLICIES

Failure or delay in implementation of STM policies are evident from case studies. For example, in 2009 two satellites Cosmos 2251 and Iridium 33 collided, even though they were both tracked, but there are failures in sharing of information among the operators. This incident contributed to the formation of a large wake, thus underlining the necessity of implementable STM standards. Likewise, the long-overdue clean-up of orbital debris generated by China's Fengyun-1C in 2007 ASAT test expounds the issues of political initiatives and a technological solution.[71] Such examples show that no clear room responsibilities and the absence of a single international code operational model are the reasons for ineffective implementation.

Other obstacles are also highlighted by near-miss collisions and debris-related accidents' account. The collision of United States' SpaceX

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[70] European Space Agency, *ESA Purchases World-First Debris Removal Mission from Start-up (ClearSpace-1)*, ESA Press Release (Nov. 27, 2020), https://www.esa.int/Space_Safety/ESA_purchases_world-first_debris_removal_mission_from_start-up.

[71] *Orbital Debris Quarterly News*, NASA Orbital Debris Program Office, vol. 12, no. 2, at 2–4 (Apr. 2008), https://orbitaldebris.jsc.nasa.gov/quarterly-news/pdfs/odqnv12i2.pdf.

Starlink with the ESA's Aeolus spacecraft, which almost occurred in 2019, by forcing the crafts to perform a last-minute manoeuvring to avoid a collision is an implication of the dangers that accompany the bumper orbital traffic. People have begun to question whether the current systems are effective due to the absence of appropriate precautions to prevent collisions and slow reflexes.[72] Such incidents are a clear depiction that assured coordination in real time, effective or efficient legal frameworks or obligatory compliance measures toward the risks affecting orbital security cannot be overemphasised.

C. PRIVATE SECTOR CONTRIBUTIONS

These factors have been propelling STM technologies most especially by private companies. For instance, SpaceX has embraced collision avoidance systems onboard its Starlink system, to provide satisfactory response to orbital hazards in real sense. Likewise, private technological solutions proposed by Astroscale, like ELSA-d, as a method to remove debris belong to innovative approaches of private sector in the field of debris issues. They show increased participation of private organizations in improving STM functions by advanced technologies.[73]

Another encouraging front remains the partnership between the private and the public sectors. For example, NASA acting through Orbital Debris Program Office cooperates with the private companies such as Northrop Grumman and Lockheed Martin to speed up the advancement

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[72] European Space Agency, *Predicted Near Miss Between Aeolus and Starlink 44* (Sept. 3, 2019).
[73] ELSA-d (End-of-Life Service by Astroscale Demonstration), **eoPortal** – Earth Observation Missions (Nov. 26, 2018), https://www.eoportal.org/satellite-missions/elsa-d.

of debris elimination tools and techniques. For instance, this year, the World Economic Forum Space Sustainability Rating enlists both private and public actors to set specific norms for proper behaviour in space.[74] Such partnerships demonstrate that there is potential for harnessing private innovation in support of public policy aims, and thereby the longer-term sustainability of space-related activities.

VII. RECOMMENDATIONS

A. POLICY RECOMMENDATIONS

i. Developing a New International Treaty for Space Traffic Management (STM)

The lack of a coherent global system of STM today means that today there is no legal basis that would allow creating a new universal common vision of STM and its regulation, except for the formation of a new international treaty under the auspices of the United Nations or other international organisations. From this treaty, it should be possible to identify clear responsibilities for the space operators and provide for standardised rules with regards to satellite placement and the responsible stewardship of orbits. In this way, the treaty will be able to involve the new space faring states and private concern and make them follow the international standards.

[74] *Highlights of Recent Research Activities at the NASA Orbital Debris Program Office*, NASA Tech. Rpt. Serv. Doc. No. 20170003872 (Apr. 18, 2017).

ii. Incentives for Compliance and Penalties for Violations

There should be certain recommendations for regaining compliance in the treaty, like the provision of orbital slots, and or tax exemptions for companies that practice sustainability. At the same time, measures would be provided for non-adherence to standards, sanctions, including fines, restrictions on the receipt of permits for launches or access to certain markets. Other measures that are already in force such as the provision of statistical data of satellite positioning and debris mitigation also need to make organizations more open. Implementation could be left to a global monitoring body while the conflict over certain rules would be resolved by the same body to ensure that innovation is preserved while at the same time being sustainable.

B. TECHNOLOGICAL ADVANCEMENTS

i. Cost-Effective Debris Removal Technologies

The presence of space debris has become a major concern and thus a proper way of removing debris needs to be invented because the current means are very expensive and hard to come by. Some of the innovations are for instance robotic arms, nets and laser based deorbiting systems which seem to hold the key. These technologies still require governmental and private entities coming together to set standards for their wide use. Also, the evolution of the satellite designs which incorporate End-of-Mission ("**EOMs**") measures, which is reducing the debris that is formed normally.

ii. Promoting Innovation through Competitions and Funding

Global contests such as the ESA's "*Clean Space Initiative*" are a good example because they encourage competitors to come up with the best

solutions. Global extension of such efforts, backed by huge funding pools, would advance technological developments more rapidly. Government subsidies, tax credits, and more cooperation with private ventures should also enhance sustainable space technologies, according to IALC. This confluence of academia and start-up activity with legacy space agencies will guarantee the swift application of new technologies to protect the orbital area.

C. CAPACITY BUILDING FOR DEVELOPING NATIONS

The dissemination of STM technologies is essential for promoting fairness within mankind's space activities. The developing nations experience major challenges that are financial restraints, inadequate technical skills, and insufficient infrastructure. Solving these challenges implies further cooperation to open up STM to these nations to allow them to start participating in space-driven actions. The United Nations Office for Outer Space Affairs for instance assists stakeholders in the acquisition of capital and people who can support one in venture.

These are some of the critical components which can enhance capability development in the developing nations. Efforts towards analysing program data requirements for operation and for mitigating orbital debris can complement the development of local skills as far as future STM operations are concerned. For new ways of funding and new approaches to governance, it is useful to join researchers, industry, and governments to exchange experiences. When relational gaps are closed between the first world and the third world it not only fosters equity but also the sustainability and security of space affairs.

D. LONG-TERM GOALS

Culture change of sustainability in space activities is important for determining the future of space exploitation. This means orientating every aspect of space mission by principles of environmental responsibility, debris minimisation, and efficient resource use. Some of the key principles of space law which need supplementing include the outer space treaties which should be complimented by other guidelines in tune with the current era of sustainable development. For the industry to support sustainable advancement in its capability and longevity, key players in the industry must develop satellites and launch systems that reduce the accumulation of orbital debris and develop and promote efficient end-of-life disposal systems.

VIII. CONCLUSION

This study highlights critical challenges and viable solutions to ensure a secure and sustainable future in outer space. With Space becoming increasingly commercialised, with increased satellite launches and, more importantly, with the emergence of mega-constellations, orbits are much more congested and dangerous potentially causing collisions. The lack of a commonly agreed set of rules heighten problems that includes space debris, owning of frequencies or equitable sharing of physical resources of space. Possible recommendations are the strengthening of international cooperation, the regulation of space traffic management, effective space debris management, and application of AI systems in traffic control and collision forecasting.

It cannot be argued that there is a tremendous need for striking a straight-forward course in implementing such measures. Inaction in the present will lead to a progressively poorer orbital environment that threatens long-term sustainability of space activities for the benefit of future generations. The effects are higher collision probability, decreased satellite performance, and missed potential to develop communication, navigation, and Earth observation capability advancements. Otherwise, failure to act also means that nations will strive in securing the limited amount of orbital position and resource demands that are necessary for space activities, which would undermine international cooperation in these capacities.

With regard to the future vision of space governance, several key concepts discussed above fall short of promoting a truly sustainable and equitable approach to the utilisation of the space environment. Central to this vision is the need to foster international camaraderie, recognising space as the common heritage of humankind. A successful governance framework should be preventive and should also consider the specific interest of outer space, given its significance for both scientific innovation and commercial enterprise. Such a framework must accommodate emerging actors along with those established in the space industry, thereby providing equal opportunities for access and responsibility. If the present-day's problems are solved with foresight and determination, space can become a domain of collective progress and solidarity for future generation.

Debdeep Das & Mohar Mitra, *The Potential Applicability of Artificial Intelligence and Automation in Trademark Prosecution*, 11(2) NLUJ L. REV. 70 (2025)

THE POTENTIAL APPLICABILITY OF ARTIFICIAL INTELLIGENCE AND AUTOMATION IN TRADEMARK PROSECUTION

~ Debdeep Das & Mohar Mitra[*]

ABSTRACT

*The introduction of Artificial Intelligence ("**AI**") and automation has sparked debates about the marvels of alternative consciousness rivalling humans. Though in its nascent stages of development, AI showcases the potential for real-life applications like in the field of trademark prosecution. In recent years, pendency in the Trademark Registry has been growing alarmingly with the prevalence of such pendency in every prosecution stage. To clear such pendency and backlog, the Government of India was pushed to outsource the tasks associated with trademark prosecution. However, it merely provided a temporary and superficial solution for a deep and pervasive issue. This only served to as a temporary measure to keep the actual issue at bay due to short contractual periods, limited time for getting acquainted with the setup, lack of expertise, and scanty opportunity for training. Erroneous and faulty processing of applications led to an increase*

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in turnaround time and eventually decisions taken by the outsourced officials were invalidated by the Calcutta High Court for lack of authority. At this juncture, integration of AI and automation in the prosecution process would prove to be a boon, however, it requires a shift from the Average Consumer Standard to a new AI Standard alongside empirically testing its desirability among stakeholders.

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I. INTRODUCTION

The idea of a being replicating the consciousness of the human mind whilst eliminating its shortcomings has been a constant source of ethical discourse and science fiction. However, the meteoric rise in the Information Technology ("**IT**") industry resulted in significant advancements that remarkably blurred the lines between fiction and reality. Though currently in a nascent stage, the concept of AI can be traced back to Hindu scriptures, with explicit mentions of machines capable of producing music and performing human like functions in the Vedas, complex flying machines controlled by the mind in the Mahabharata, the reference of a mechanical man in the writings of Bharata Muni and automated machines capable of calculating complex mathematical problems in Brahmasphutasiddhanta.[1] On the Western hemisphere, Greek mythology mentions the Talos, an automaton forged by Hephaestus with the aid of a cyclops as a gift honouring Minos.[2] However, it was not until the modern era of technology that we can concretely point to the birth of AI, in a manner that is well-documented and usable as evidence. In the 1940s, the idea of AI started to gradually shift from science fiction to reality with the presentation of Warren McCulloch and Walter Pitts' model of

[1] Kathirvel Kumararaja, *Artificial Intelligence in Ancient India*, MEDIUM, (Sep. 04, 2024, 09:51 AM), https://medium.com/@kumararaja/artificial-intelligence-in-ancient-india-a66dbd937286.

[2] Joaquín G. Peiretti, *The Myth of Talos: Science Fiction in Ancient Greece*, MEDIUM, (Sep. 04, 2024, 10:10 AM), https://jgpeiretti.medium.com/the-myth-of-talos-science-fiction-in-ancient-greece-b0a6b55b720f.

artificial neurons in 1943.[3] Subsequently, Alan Turing published an article titled *"Computing Machinery and Intelligence"* proposing the Turing Test for the determination of the intelligence of a machine in comparison to a human being.[4] The term 'Artificial Intelligence' was formally coined by John McCathy in 1956 who was also responsible for the development of LISP, the first AI programming language.[5] Shortly thereafter, Arthur Samuel coined the term Machine Learning ("**ML**"), where he demonstrated the capability of machines through the game of programmed chess, wherein the machine could self-learn and familiarise itself with human opponents, eventually becoming better than the ones who have actually programmed it.[6]

The following decades were dedicated to maturing AI and ML, with chatbots,[7] robots which could undertake tasks deemed too risky for humans,[8] expert systems aimed at replicating human behaviour, autonomous vehicles, etc. The 1980s was the decade which brought AI into the mainstream with massive fund allocation for research on AI by both

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[3] Iberdrola, *History of Artificial Intelligence: Birth, Applications and Future Trends, Iberdrola* (Sep. 01, 2024, 09:51 PM), https://www.iberdrola.com/innovation/history-artificial-intelligence.

[4] A. M. Turing, *Computing Machinery and Intelligence*, 59 MIND, 433 (1950).

[5] V Rajaraman, *John McCarthy – Father of Artificial Intelligence*, 19 Reson 198 (2014).

[6] Arthur Samuel, *Pioneer in Machine Learning*, STANFORD INFOLAB, (Sep. 02, 2024, 10:59 AM) http://infolab.stanford.edu/pub/voy/museum/samuel.html.

[7] The Weather Company, *The Ultimate Guide to Machine-Learning Chatbots and Conversational AI*, THE WEATHER COMPANY, (Sep. 04, 2024, 10:00 AM), https://www.weathercompany.com/blog/the-ultimate-guide-to-machine-learning-chatbots-and-conversational-ai/.

[8] Katharine Gammon, *These Five Robots Do Some Very Dirty Jobs So Humans Don't Have To*, NBC NEWS, (Sep. 04, 2024, 10:00 AM), https://www.nbcnews.com/mach/tech/these-five-robots-do-some-very-dirty-jobs-so-humans-ncna781676.

the Americans and Japanese.[9] Nonetheless, the decade concluded with the AI winter, a phase of low interest and focus on AI. In the 2010s, tech-giants like Meta, Apple, Google, Microsoft and Tesla, started to heavily invest in their AI endeavours, resulting in the rise of Open AI, Google Cloud AI, Azure AI, AWS and many more.

AI is now capable of performing complex tasks like pattern recognition, processing big data, automation, read and comprehend data, and so on and so forth. However, its potential has barely been tapped into.

One such potential is applying AI in the trademark prosecution process. Currently, the Offices of the Controller General of Patents, Designs and Trademarks ("**CGPDTM**") are facing an unprecedented number of pending applications, among whom the trademark registry ranks the highest in terms of such pendency. At this juncture, 112835 cases are pending in the pre-examination stage which is 537% higher than the previous year's pendency of 21011; 337781 cases are pending in the post-examination stage which is 120% of the previous year's pendency of 280118; 242277 cases are pending in the opposition stage which is 133% of the previous year's pendency of 182004; and 40982 cases are pending at the registration stage which is 101% of the last year's pendency of 40424.[10] Additionally, there has been a rise in pendency by approximately 103% and

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[9] *What is the history of artificial intelligence (AI)?*, Tableau (Sep. 04, 2024, 10:00 AM), https://www.tableau.com/data-insights/ai/history.

[10] Office of the Controller General Patents, Designs and Trademarks ("**CGPDTM**"), *Pendency Report for Patents, Trademarks, Designs & Copyright (as on 31-07-2022), (JULY, 2022),* IP INDIA, (Sep. 01, 2024, 12:32 PM), https://www.ipindia.gov.in/writereaddata/Portal/Images/pdf/PENDENCY_REPORT_IN_THE_OFFICE_OF_CGPDTM_31-07-2022.pdf.

161% in the Patents and Designs wings respectively.[11] In order to mitigate the same, the CGPTDM was forced to hire third parties to reduce the backlog, however, the same is not a permanent solution and has been heavily criticised[12] since the registries are heavily understaffed and the outsourcing would take a significant toll on the public exchequer. Further, these third parties are employed through bi-annual contracts, resulting in limited time for training and acclimatisation, often leading to erroneous and/or faulty processing of the applications. The matter of deploying contractual employees in the Trade Mark Registries was brought to the notice of the High Court at Calcutta where the parties aggrieved by the decision of the contractual hearing officers challenged the same. The High Court clarified that the contractual recruits have no authority to pass any decision.[13] The aftermath of this decision lead to the applications being retried and re-evaluated by the registry rendering the exercise of hiring contractual employees redundant.

The gradual incorporation of AI and automation could provide a permanent solution to this crisis, which could aid in every step of trademark prosecution from the perspective of the registry. However, the same would need significant adjustments to the established model of trademark prosecution starting with the revamping of the 'Average Consumer Test' in

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[11] CGPDTM, *Pendency Report for Patents, Trademarks, Designs & Copyright (as on 28-02-2021), (FEB. 2021),* IP INDIA, (Sep. 01, 2024, 12:51 PM), https://ipindia.gov.in/writereaddata/Portal/Images/pdf/Report_on_Pendency_in_IPO_upto_February_2021.pdf.

[12] Visa International Ltd. v Visa International, IDPTMA No. 82 of 2023; Visa International Ltd. v Visa International, IDPTMA No. 83 of 2023; Garden Silk Mills Private Limited Rajesh Mallick & Ors., IPDTMA No. 1 of 2024.

[13] *Id.*

favour of a newly devised AI Test, with logistical changes required in the filing and processing stages, identification and resolution of hurdles raised by the operation of international trademark instruments, stakeholder acceptance and other factors.

II. CONCEPTUAL FRAMEWORK

Before delving further into the discussion, demystification of certain definitions, concepts, and processes is of paramount importance.

A. ARTIFICIAL INTELLIGENCE

In the words of John McCarthy, AI is the "*science of making human intelligence in machines.*" However, due to the abstract nature of the concept, providing an all-inclusive definition of AI is a difficult task, primarily due to the difference in the potential, perceived, and actual capabilities of AI at this current point in time. In the broadest sense AI could be interpreted as the imitation of human behaviour. However, this definition does not take the techno-social landscape into consideration, wherein AI is currently capable of undertaking simple tasks rather than being a replica of the human mind. Nevertheless, stating that AI in its current form is unremarkable or unusable does not do justice to the technology. For understanding what lies beyond 'simple' tasks, definitional clarity on 'complex' tasks first needs to be established. In the words of Nils J Nilsson AI is a technology that *"functions appropriately and with foresight in its*

environment." Thus, another parameter for assessing intelligence identifying abilities to perceive, pursue targets, act and learn.[14]

Further, the definition of intelligence itself has changed over the years. In the 20th century an AI able to play the complex game of chess was regarded as the pinnacle of intelligence due to the inherent link between the game and the corresponding intelligence required to the play the game. However, chess though complex in its own right, is a game with finite possibilities arrived at through calculations, rendering it to be nothing more than a mathematical problem arrived at through complex algorithms. However, current AI are able to identify, interpret and create, functions which far exceed the AI capable of playing chess and which further solidify the argument in favour of techno-social dynamics.

A straitjacket definition of AI is somewhat impossible to put in words since we are dealing with a technology trying to replicate the human consciousness, mind, and intelligence, a concept we are yet to fully understand. However, for the sake of our discussion, we shall restrict AI to a computer programme capable of identifying, interpreting, and creating data from the fed inputs, which is essentially a result of ML. To achieve the same there are several models which could be utilised. Our discussion, shall mainly focus is on ML through Large Language Models ("**LLMs**"), i.e., AI programs capable of recognising and generating text when trained by

[14] *Artificial Intelligence in Nederland: Zelf Aan Het Stuur*, DENK WERK ONLINE (Sep. 04, 2024, 11:00 AM), https://denkwerk.online/media/1029/artiticial_intelligence_in_nederland_juli_2018.pdf .

feeding in large sets of data,[15] and Multi-modal Models ("**MML**"), i.e., AI programs capable of processing text, videos, audios and most importantly images.[16] The gaps in these models are fixed by Retrieval Augmented Generation which utilizes external sources for enhancing the accuracy of the AI.[17]

B. AUTOMATION

Automation, as the term suggests is the conversion of work undertaken by humans to machines. In the context of our discussion, automation would be construed under the context of computer automation, i.e., computer programmes capable for accomplishing tasks which were manually done by humans. This on a standalone basis and when coupled with AI could reap results which are significant quicker than the human counterparts. However, it is pertinent to note that purely automated programmes are not considered to be intelligent and thus shall be only assigned tasks are mechanical but the same shall operate with the least amount of human intervention in terms of its applicability in the trademark registry. Though combinations of AI and automations may prove to be highly effective, at this current juncture we are restricted to Narrow AI, i.e., AI that can only function in delimited tasks, thus, once the AI ventures into operations beyond its bounds, it might produce unpredictable results, necessitating human intervention and verification. The combinations can

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[15] *Large Language Models Explained*, Nvidia, (Sep. 01, 2024, 02:38 PM), https://www.nvidia.com/en-in/glossary/large-language-models/.
[16] *Mutimodal AI*, Cloud Google, (Sep. 02, 2024, 03.00 PM), https://cloud.google.com/use-cases/multimodal-ai.
[17] Rick Merritt, *What Is Retrieval-Augmented Generation, aka RAG?*, NVIDIA, (Sep. 02, 2024, 3:10 PM), https://blogs.nvidia.com/blog/what-is-retrieval-augmented-generation/.

be utilised as AI tools for a function which require setting up ground work or standard forms rather than replicating the decision-making process of human beings since autonomous AI might prove to lack the intellectual maturity of a seasoned professional.

C. THE TRADEMARK PROSECUTION PROCESS

The trademark prosecution process can be broadly divided into four stages. *First*, ("**Stage I**") when an entity, be it an individual, partnership, company or Micro, Small and Medium Enterprises ("**MSME**") is desirous of obtaining a trademark for a word or a logo used in their business, they are required to make application to the trademark registry.[18] This application is made in the TM-A form which is accompanied by supporting documents such as a power of attorney in favour of the trademark agent, an affidavit evidencing prior use,[19] if the mark has been used before registration, a PAN Card and Aadhar Card in case of an individual, partnership agreement and PAN Card or Aadhar Card of at least one of the partners in case of a partnership, Certificate of Incorporation and details of the Directors in case of a Company and the MSME Certificate in case of an MSME. The TM-A form and the supporting documents are then supposed to be uploaded on the IP India website in case of online filing of trademarks or in the concerned registry in case of offline filing, along with applicable fees as prescribed by the government. Individuals, startups and MSMEs are required to pay Rs. 4,500 for online filing and Rs. 5,000 for offline filing. In all other cases, i.e., companies, partnerships and

[18] Trade Marks Act, 1999, § 18, No. 25, Acts of Parliament, 1999 (India).
[19] Ministry of Commerce and Industry Trademark Rules, 2017, DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION (Mar. 16,2017), Rule 25.

Limited Liability Partnerships are required to pay Rs. 9,000 for online filing and Rs. 10,000 for offline filing.[20] Once the application is made to the registry, it goes through manual formality checks wherein an examiner is tasked with checking whether the documents and the fees are in order.[21] In the case of device marks, the mark is sent for Vienna Codification wherein a code is assigned to the figurative elements from 29 categories, 145 divisions and 816 sections.[22] This code is used to differentiate the mark from others and is a tool for identifying similar marks in subsequent searches. In case there are any discrepancies found in the formality check, the Applicant is notified of the same and an opportunity is given to Applicant to rectify the issue.

Second, ("**Stage II**") once the application is formality checked, processed, and coded; it enters the examination stage where the individual examiners are assigned with the application. The examiners are tasked with finding any discrepancies in the applied mark under the Sections 9 and 11, i.e., absolute and relative grounds of refusal.[23] As per Section 9, examiners are required to manually check and raise objections against marks that are not distinctive or are incapable of distinguishing itself from other marks,[24] marks that contain elements that indicate kind, quality, quantity, intended

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[20] *Id.* First Schedule.
[21] CGPDTM, *A Draft of Manual of Trade Mark Practice & Procedure*, IP INDIA, (July 21, 2025, 12:47 PM), https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_32_1_tmr-draft-manual.pdf.
[22] WIPO, *International Classification of the Figurative Elements of Marks (Vienna Classification)* (9th ed. 2022), https://nivilo.wipo.int/pdf/eng/vienna/vie9eng.pdf.
[23] *Supra* note 18, §9 and §11.
[24] *Id.* § 9 (1), (a).

purpose, values, geographical origin or time of production[25] and marks that contain elements that have become customary in current language.[26] Additionally, if marks are likely to deceive or cause confusion in the minds of the public,[27] or are likely to hurt religious sentiments[28] or are prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950, objections are to be raised.[29] Further, marks that exclusively contain shapes of the goods which results from the nature of the goods themselves, or shapes of the goods that are required for obtaining a technical result or shapes that add substantial value to the goods are to be objected to.[30] As per Section 11, the examiners are required to object to the marks that are identical or similar to registered mark[31] or a well-known mark or an unregistered mark protected as per norms of passing-off.[32]

In order to raise these objections, the examiners have to conduct extensive searches and manually compare the applied mark to marks available in the database. The margin of error increases in the manual comparisons due to the large number of results that surface in the searches and the absence of unregistered marks in the database. In case, the mark satisfies the conditions under Section 9 and 11, the mark is accepted and advertised in the trademark journal.[33] In the event that an objection is raised

[25] *Id.* § 9 (1), (b).
[26] *Id.* § 9 (1), (c).
[27] *Id.* § 9 (2) (a).
[28] *Id.* § 9 (2) (b).
[29] *Id.* § 9 (2) (d).
[30] *Id.* § 9 (3).
[31] *Id.* § 11 (1) (a).
[32] *Id.* § 11 (2).
[33] *Id.* § 19.

by the examiner,[34] a First Examination Report ("**FER**") is issued to the applicant.[35] A reply to the FER has to be filed by the applicant through the Pending Application Record Management ("**PARM**") portal along with supporting documents substantiating the claims. Upon scrutiny of the reply, if it is found to be satisfactory, it is released from the PARM modules followed by being accepted and advertised in the journal. However, if the reply is not satisfactory, show cause hearing is fixed, wherein the Applicant is required to appear before the examiner and advance arguments in favour of removing the objections raised.[36] Upon the conclusion of the hearing, if the examiner is satisfied with the arguments advanced, the mark is accepted and advertised in the trademark journal,[37] else it is rejected. The examiner might impose certain conditions and restrict or may require the applicant to make certain changes in the application before the mark is accepted and advertised.[38] Any changes to the application have to be made through Form-16 or TM-M, which shall be accompanied with appropriate fees. These applications are assigned to senior-examiners in the Pre-Registration Amendment Section ("**PRAS**"). The PRAS module is used for making corrections that are mere clerical in nature. This step could be entirely automized through AI.

Third, ("**Stage III**") once the advertisement is published in the trademark journal, the mark is opened to opposition by the public for the

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[34] *Id.* § 18 (4).
[35] *Supra* note 19, Rule 33.
[36] CGPDTM, *supra* note 21.
[37] *Supra* note 18, § 20 (1).
[38] *Id.* § 12.

forthcoming 4 months. The opposition must be filed through a TM-O, which is then manually processed and forwarded to the applicant under the cover of a Notice of Opposition, both through physical post and electronic mail.[39] The Applicant is required to file a Counter Statement ("**CS**") within 2 months, the failure of which results in the abandonment of the application[40]. The Opposition within 2 months, is required to file evidence under Rule 45 or a relying letter, stating that the Opponent relies on statements made in the TM-O.[41] The failure to file evidence under Rule 45 results in the abandonment of the Opposition, resulting in the success of the Application.[42] If evidence under Rule 45 is filed, the Applicant within 2 months, is required to file evidence under Rule 46 or a relying letter, stating that the Applicant relies on statements made in the CS. The failure to file evidence under Rule 46 results in the abandonment of the Application, resulting in the success of the Opposition. The Opposition may file evidence under Rule 47, i.e., only additional evidence to evidence under Rule 45. The evidence stage closes with the lapse of 2 months from filing evidence under Rule 46/Rule 47. Extension of time could be sought through TM-M/TM-16 accompanied by appropriate fees.[43] Hearing notices are issued by the registry calling for appearances in Opposition hearings. The parties are given a maximum of two opportunities to appear

[39] *Supra* note 19, Rule 42
[40] *Id.* Rule 43.
[41] *Id.* Rule 44.
[42] *Id.* Rule 46.
[43] *Id.* Rule 47.

before the Registry. However, there are instances of significant delay and non-appearance being unnoticed.[44]

All the above-stated steps, are verified manually by the registry and processed accordingly. The examiners are required to send notices and other communications through the portal manually. This at times might take significant time due to the excessive pendency resulting in a vicious cycle of delay and increase in burden on the registry. Once, the parties enter appearance, the hearing commences and the parties present their case. The registrar needs to accordingly pass an order. It is pertinent to note that in cases of abandonment, the registry needs to pass a summary order.[45] Though a standard format is available in the portal, the same could be wholly automized through time-based parameters available to the registry. In the event of the matter going for hearing, a reasoned decision needs to be passed by the registry. Drafting the order might take a few hours to several days. Most orders share a standard format, however, the same might go through significant change based on the facts of the case. This is where AI could significantly aid the registry.

Fourth, ("**Stage IV**") in the final stage, if the application faces no opposition or the applicant succeeds in the opposition stage, trademark registration certificates are issued by the registry. Though the certificates are drawn up in an automated system, the forwarding of the same is done manually through physical post and the same is uploaded on the IP India website, which makes it available to all. This step required no human

[44] *Id.* Rule 50.
[45] CGPDTM, *supra* note 21.

intervention and can be wholly automated since it can be based on the available data in the database.

For the sake of pertinence, even after the registration of a particular mark, rectification applications can be filed by Opposing parties for the removal of a registered mark. However, the same shall not be separately dealt due to the similarity in the nature of proceedings compared to Opposition proceedings.[46]

D. THE USE CASE SCENARIO OF AI

i. Interface Of AI And Automation with Each Stage Of Trademark Prosecution

Stage I

Upon perusing the trademark prosecution process and the potential of AI and automation, it is clear that there is ample scope for integration of the technology in the operations of the Trademark Registry. However, the degree of autonomy is a matter of consideration. As previously discussed, AI in theory could be completely automated or could require human intervention. Although there are models of purely automated AI that are currently in use, they are still not at a level such that it can undertake completely autonomous operations rather they can be used as assistance tools. Thus, for the purposes of this chapter we shall be restricting the meaning of AI to programmes that can predominantly undertake tasks but they need human supervision.

[46] CGPDTM, *supra* note 21.

With reference to Stage I, the examiner is required to manually check for the details and the documents provided in the Application, which comprises of the TM-A Form along with the supporting documents and the requisite government fees. It is pertinent to note that nearly 98% of applications made to the registry are through online mode, however, the Government has taken additional initiatives to digitise the trademark prosecution process. Thus, all applications are merged into the same database as that of online applications. This endeavour of the Government has made the integration of AI simpler due to the full range of applications being available to the programme.[47]

As a refresher, nearly 112835 are in Stage I, i.e., in the formality check phase. As of the Annual Report for 2022-23, 446580 applications were made to the trademark registry and approximately only half of these applications, i.e., 237203 applications were registered.[48] Due to the manual nature of the tasks in Stage I, applications require around 18-24 months to be registered,[49] even when the Objection and Opposition stages are not taken into consideration. In Stage I, there is little to no application of the

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[47] CGPDTM, *Standard Operating Process of Trade Marks Applications*, IP INDIA, (Aug. 16, 2024, 7:30 PM), https://ipindia.gov.in/writereaddata/Portal/Images/pdf/SoP_of_Trade_Marks_Applications.pdf.

[48] CGPDTM*, Pendency Report for Patents, Trademarks, Designs & Copyright (as on 31-07-2022), (JULY, 2022),* IP INDIA, (Sep. 01, 2024, 1:05 PM), https://www.ipindia.gov.in/writereaddata/Portal/Images/pdf/PENDENCY_REPORT_IN_THE_OFFICE_OF_CGPDTM_31-07-2022.pdf.

[49] Aditi Bagchi, *Trademark Registration Timeline in India: How Long Does It Take?*, L.R. Swami Co., (July 22, 2024, 06:30 PM), https://www.lrswami.com/page/frequently-asked-questions#:~:text=How%20long%20does%20it%20take,8.

mind, thus a basic automation software fed with the relevant parameters would drastically reduce the pendency. These parameters would include:

- *TM-A (Form)* – The automation software would need to only consider whether the requisite data in the application has been provided by the application and/or the trademark agent. This data shall include, the nature of the application (standard/collective/service, etc.), the legal status of the applicant (individual/company/partnership, etc.), the name and trademark of the applicant, the details of the applicant (address/address of service/jurisdiction/contact details, etc.). Further, details relating to the mark need to be verified, which shall include the type of mark (word/device), the description of the mark, description of image (if any), high-quality image of the mark (in case of device mark). Further, the good description and details relating to the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, priority claim/ prior use claim (if any), authentic digital signature and verification undertaking all could be parameterised. Note that the purely automated software would just be taking into account the input and not the correctness or validity of the input.
- *Supporting Documents* – Based on the input in the previous section, the software would check whether relevant supporting documents as discussed in the previous chapter have been provided. Merged documents shall not be allowed since the automation in this stage shall only take into consideration the number of files that have been

submitted by the applicant and not the content in these documents apart from the TM-A Form.

- *Fees* – Based on the input indicating the nature of the applicant, the software shall verify the amount that has been submitted by the applicant. This could be done by connecting the payment portal with the formality check portal.

For details of the trademark agent, the software would need to crosscheck with the repository and conclude whether the data provided is genuine.

In the case of word marks, ***Stage I*** concludes here, but when it comes to device marks the same is forwarded for Vienna Codification[50]. Currently, the WIPO provides an assistance tool for Vienna Codification.[51] Though helpful, the same is not always accurate, thus requiring human intervention. However, AI software like Imagga, Amazon Rekognition, Google Vision AI etc. are all programmes capable of discerning the elements in an image. These tools are capable of not only image recognition, but can also provide a similarity index which would aid in pigeon-holing the element in the categories, divisions, and sections. These when coupled with a software similar to the WIPO Vienna Code assistance tool, could not only replace human intervention but could also reap better results than humans, due to the objective nature of computer programmes. This could potentially lead to the complete

[50] WIPO, *International Classification of the Figurative Elements of Marks (Vienna Classification)* (7th ed. 2012), https://nivilo.wipo.int/pdf/eng/vienna/vie7eng.pdf.
[51] Vienna Classification Assistant, WORLD INTELLECTUAL PROPERTY ORGANISATION, https://vienna-assistant.branddb.wipo.int/.

automation of ***Stage I.*** In the event of any discrepancies found in the application, the same can be notified to the applicant, who can incorporate the required changes or provide any required documents.

Stage II

Upon the conclusion of Stage I, the application is checked, processed, and Vienna Coded. Now, the application enters Stage II. Hereon, AI could be utilised for both word and device marks. This stage mostly comprises of conducting searches to compare the application mark with existing marks in the database.

- *Word Marks* – The process for word marks would be rather simple when compared to device marks. The same can be conducted with programmes similar to the Python Algorithm, Soundex. This programme is designed to take input in as a string (word) and then reproduce a character (single letter) string that sounds phonetically similar to the input string. This would then be compared with existing marks in the database. If found to be similar or identical, the same shall be flagged. However, the programme needs to feature additional functions without which the comparison would be incomplete. The programme shall also have a set of data representing customary words that are used in trade, well-known marks (both declared by the registry and ones that have been declared by a court of law, although the same needs to be published by the registry under Official Notification), words having religious connotation, containing scandalous or obscene matter and emblems and names that are prohibited under the Emblems and Names (Prevention of Improper

Use) Act, 1950. If found to be similar or identical to the aforementioned, then the same shall be flagged. Further, if the marks have elements that indicate kind, quality, quantity, intended purpose, values, geographical origin, or time of production, such marks shall be automatically flagged. Furthermore, if the mark contains shapes in the name, then the same shall also be flagged. Only the flagged marks shall be forwarded to an examiner, who shall now have a narrow set of data to process, compared to the massive search results that would have to be previously processed.

- *Device Marks* – The examination of device marks is comparatively more complicated than word marks. Software like Imagga, Amazon Rekognition and Google Vision AI need to be utilised. The existing marks in the database would be compared with the applied mark, however, visual similarity cannot be competently dealt with by the current AI programmes. Rather, they would act as a tool for assisting the examiners. Most AI image recognition tools work by filtering, segmenting, extracting and comparing. The same could be utilised by the registry. However, the same needs to be based on a similarity index that is produced by the AI but threshold for the same is up for debate since there is the involvement of subjectivity in the current form of examination which will need to be altered to facilitate the integration of AI, for which there need to be a shift in standard of examination. For simplicity's sake we shall take an arbitrary value for 'threshold of similarity' and in case, the similarity index crosses the threshold, the same needs to be flagged.

Additionally, the database needs to be fed in with elements that represent customary images that are used in trade, well-known marks, images having religious connotation, containing scandalous or obscene matter and emblems and names that are prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950. If found to be similar or identical then the same shall be flagged. Further, if the marks have elements that indicate kind, quality, quantity, intended purpose, values, geographical origin or time of production, such marks shall be automatically flagged. Furthermore, if the mark contains shapes that are similar to the Class applied in or contain shapes directly reminiscent of the good description, then the same shall also be flagged. Only the flagged marks shall be forwarded to an examiner.

Once the flagged marks are examined, the FER is to be released with the aid of automation tools. It is pertinent to note that this process of flagging and examination of the marks is imperative to feed the AI with adequate data since it is aimed at equipping the AI with matters that are against religious sentiments, scandalous or obscene, and other factors through pattern recognition.

If the Applicant furnishes a reply, then steps in Stage I shall be repeated to conduct a formality check and then sent to the examiner. The examiner, upon scrutiny, may either accept the mark or call for show cause hearing. In both cases, automation tools would be utilised to intimate the Applicant.

In the event of a show cause hearing, the examiner is required to provide a reasoned decision. This decision in most cases features a similar framework: *first*, the details of the application and the applicant; *second*, the

good description, date of application, date of examination, details of reply to first examination report (if any), date of show cause hearing, the details of attorney(s) appearing for the applicant, the arguments advanced in the reply and the hearing followed by the decision. AI could be utilised to draft a standard format since it has all the data except the arguments and decisions of the hearing officer, which can be separately inputted.

In case, the examiner requires any changes to the application, then the same needs to be done through the PRAS module. Since the orders are uploaded by the registry, any changes from the end of the applicant merely need to be compared to the order passed by the examiner and if the same is identical, the TM-M shall be processed and accepted.

Stage III

With the conclusion of Stage II, the marks surviving the scrutiny are accepted and advertised in the journal. Stage III opens the mark for external scrutiny; wherein other parties can oppose the registration of the mark. This stage of the prosecution process involves a hefty amount of document processing as well as decision-making. Thus, this stage cannot be wholly automated. We shall be segregating the parts that can be automated and the parts wherein AI could be utilised as an assistance tool.

Elements to which automation can be applied – The Opposition Stage has a hefty amount of documentation, wherein the TM-O/ Notice of Opposition, the CS, Evidence under Rule 45, 46 and 47 are to be processed. These are time-bound documents that are to be filed by the Opposing Party and the Applicant.

A similar automation approach taken in Stage I can be utilised in this stage wherein the automation would take all parameters in Stage I into consideration with an added parameter of the filing date. A leeway of 2-3 days would have to be given since it is a standard practice of the Registry and at times delays might be a result of a technical glitch taking place on the portal.

Herein, wholly automated systems can be utilised since, the only input required for abandonment orders are time-based parameters. The automation shall be tasked with forwarding notices whenever it receives any documentation in this stage irrespective of the content of the documents, since it is up to the opposite party to counter and the Registrar to adjudicate.

In case the parties fail to furnish documents in the stipulated time, the automation shall be tasked with the drafting of abandonment orders. These orders are currently drafted in a standard form and require the name of the parties, the stage of evidence, and the date of filing/notices. However, these are summary orders which though require little to no application of mind, might end up being extremely taxing due to their sheer volume.

If the application or opposition is not abandoned and the same passes through the evidence stage, the automation would need to conduct a search on the database, detect a reasonable slot for hearing, fix the hearing date, and forward the notice of the hearing to the parties. A maximum of two additional dates would be fixed by the automation if the parties do not attend the hearing. In all additional dates, the parties need to satisfy the Registrar on the ground of delay, who may allow or reject

such explanation and update the same on the database. If the same is rejected or the parties do not attend the hearing on the final opportunity, then the opposition/application, as the case maybe, shall be summarily rejected.

In certain cases, extension of time may be granted if an application is made through a TM-M/TM-16.

Elements to which AI can be applied – Once the evidence stage is completed and the documents are in order, no abandonment due to non-appearance or non-submission of documents takes place, the hearing is fixed. AI would not play an autonomous role in this stage, rather it could be used as an assistance tool. Unlike abandonment orders, the orders emanating from an opposition hearing in most cases are lengthy and detailed. However, the same follows a format wherein certain components and the flow of the order remains the same in most cases.

First, the cause title of the opposition case and other relevant details like the opposition number, application number, the addresses of the parties, and the concerned marks, making up the cover page are all available in the database. *Second*, a brief introduction of the applicant and the applied mark along with details of use, distinctiveness (as mentioned by the applicant), associated marks (if any) can be lifted directly from the CS. *Third*, a brief introduction of the opponent and their mark along with grounds of challenge, details of use and other relevant details (as mentioned by the opponent) can be lifted directly from the TM-O. *Fourth*, the details of the attorneys and the arguments advanced in the hearing need to be inputted by the hearing officer. *Fifth*, a template for the reasons

for the decision of the Registrar, per Sections 9, 11, 12, and 18 can be created by the AI. Herein, the AI shall not fill in the details but create a skeletal structure for the assistance of the Registrar. Finally, the concluding paragraph summarising the decision of the Registrar can be drafted by the AI based on the inputs of the Registrar in the template.

It is pertinent to note that AI is not yet capable of making sensitive decisions that might be required in the opposition proceedings, thus its role shall be limited to a digital assistant. The same needs to be scrutinised by the Registrar to ensure the veracity and correctness of the format. The format shall be editable to ensure that all necessary changes can be incorporated.

It is also pertinent to note that the Apex Court of the country is utilising AI for legal research, transcription, legal reasoning, and delivering reasoned decisions. The High Courts of Manipur[52] and Delhi have used AI assistance.[53] Pilot testing of Dragon AI Speech Recognition Software in several courts, especially in Delhi and West Bengal is taking place.[54] The penetration of AI in the Indian judiciary gives ample hope that the use of

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[52] Srinjoy Das, *Manipur High Court Uses Chat-GPT to Conduct Legal Research & Pass Order in Service Law Matter*, LIVE LAW, (July 21, 2025, 12:45 PM), http://livelaw.in/high-court/manipur-high-court/artificial-intelligence-manipur-high-court-uses-chat-gpt-to-conduct-research-on-service-law-matter-pass-order-258742.

[53] Nirbhay Thakur, *Justice at your Fingertips: How AI is helping Delhi's Judges, Lawyers Deal with Caseload*, INDIAN EXPRESS, (July 21, 2025, 12:45 PM), https://indianexpress.com/article/cities/delhi/justice-at-your-fingertips-how-ai-is-helping-delhis-judges-lawyers-deal-with-caseload-10014723/.

[54] Srinjoy Das, Calcutta High Court Distributes 'Dragon Legal Speech Recognition Software' To Judicial Officers of WB & Andaman and Nicobar Islands, LIVE LAW, (July 21, 2025, 12:46 PM), https://www.livelaw.in/high-court/calcutta-high-court/calcutta-high-court-dragon-legal-speech-recognition-software-distribution-judicial-officers-west-bengal-andaman-244641.

AI in quasi-judicial bodies would not be far-fetched but rather an eventual step forward.

Stage IV

In Stage IV or the final stage, yet again there is little to no requirement of human intervention since by this point the database already has data relating to the fate of the application. In the event that the applicant has successfully defended his mark through the examination and opposition stages, the application is fit and completely processed for grant of trademark. As discussed in Stage IV, the trademark registration certificate is drawn through automation, however, the posting and upload of the certificate are done manually by registry officials. However, given that the hardcopies of registration certificates are no longer necessary for evidencing or any other purpose and with the advent of the Information Technology Act, 2000, digital documents have been given legal status as evidence, the requirement of physically posting the certificate only increase the paperwork and load on the registry. An automated system similar to that used for dispatch of notices, as mentioned in the previous sector can be very well utilised for the upload and e-posting of the certificates. Further, there shall be no impediment in this since the required information like e-mail address and contact details are also checked for in Stage I and Stage II.

ii. The Need of Change From the Average Consumer Test to AI Test.

The very premise of trademark law since its inception was to protect the commercial identity and distinctiveness of an entity that is channelised through marks, be it in the form of a word or a label whilst simultaneously protecting the consumer from confusing and deceptive practices.[55] However, to accomplish the same, the standard is humanised which is reflected in the Average Consumer Standard. The Average Consumer is considered to be a hypothetical person representative of the "*quintessential common man*" who is reasonably observant, well informed, and circumspect.[56] While comparing marks from the perspective of the Average Consumer, if the examiner feels for a fleeting second that there is potential for the Average Consumer to be confused, then the registration of the mark shall be refused and/or objected to, depending upon the degree of confusion. Essentially, the test sets a floor for distinctiveness. However, at the time of developing the standard, the consumers were solely human beings and the world was yet to witness the rise of disruptive technologies like AI and ML.

Thus, for the integration of AI in the operation of trademark registries, the standard needs to be altered. However, this creates a fork in the road, wherein a decision would need to be taken whether the standard should be elevated to match the technological advancement and the inevitable rise of machine or AI-assisted shopping or the AI should be

[55] Stephen L. Carter, Comment, *The Trouble With Trademark,* 99 YALE L.J, 759 (1990).
[56] N Dinesh Kumar vs Shweta Khandelwal, (2021) 2 AKR 471 (India).

stunted to meet the standards of an average man. Another workable route could be the implementation of an Imperfect AI Standard, which shall be the transitory standard and a Perfect AI Test which shall be the eventual threshold for the registry and the legal authorities.

The Imperfect AI – This standard shall be applied to replicate the Average Consumer test while conducting AI-assisted examinations. The AI would be instilled with certain human imperfections like

- Average Human Intellect
- Average Awareness and Knowledge
- Circumspect Behaviour
- Imperfect Recollection

It shall be noted that this model would not be using AI to its fullest potential and it does not take machine or AI-assisted shopping into consideration. It is an attempt to replicate human behaviour, i.e., to mimic an "*unwary consumer with average intelligence and imperfect recollection*"[57] for whom differentiating between two similar marks specially attached to identical or similar classes if not impossible would be cumbersome.

In *Starbucks v. Sardarbuksh*, the defendant's mark was deemed to be identical to Starbucks' well-known mark, featuring a similar colour scheme. Pursuant to the same, the Registry directed the defendant to make necessary changes.[58] If the task of differentiating is solely left to an AI with perfect intellect and recollection, then most marks would be rejected since the AI

[57] Corn Products Refining v. Shangrila Food Products Ltd., (1960) 1 SCR 968 (India).
[58] Starbucks Coffee v. Sardarbuksh Coffee, CS (COMM) 1007/2018 (India).

would be capable of differentiating even the most minute details. Thus, the threshold of similarity needs to be fixed. Further, the transition period is required for feeding in data essential for the functioning of the AI, which would incorporate certain unique human traits of brand consciousness and market relevance.[59]

Further, it would enable the AI to have a platform for understanding the average standard for obscene or scandalous matters and religious sentiments, one which was highlighted when a social activist lodged a complaint alleging that the logo of the e-commerce website Myntra was offensive since it resembled the female genitalia, pursuant to which Myntra changed the logo within a month.[60] These inputs would still be required in the Perfect AI Test since these are learnable parameters and not incorporable through only code.

The Perfect AI Test – Once the AI is fed with the learnable data and with the rise of machine or AI-assisted shopping, the Average Consumer Test and the Imperfect AI Standard, as discussed previously to be a transitory standard, shall be revamped in favour of an AI test. This test will eliminate human imperfections whilst transitioning from a subjective to an objective view of trademark law. The test would exude a stricter standard wherein the following shall be the assessing parameters:

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[59] Gholam Soltani, *The Role of Artificial Intelligence in Trademark Law: Challenges and Opportunities*, CRIMSON PUNLISHERS, (July 22, 2024, 7:10 PM), https://crimsonpublishers.com/cojra/fulltext/COJRA.000590.php.

[60] Athira Nair, *As Myntra Turns 10, here are the Major Milestones in its Journey*, YOUR STORY, (Sep. 04, 2024, 08:01 PM), https://yourstory.com/2017/02/myntra-turns-10.

- Perfect Intellect, Awareness, and Knowledge – With the technological advancement in machine and AI-assisted shopping the examiner shall presume that the consumer is equipped with all tools required for distinguishing elements of a mark. These distinguishing characteristics shall include visual, phonetic, and conceptual elements of a mark.
- Perfect Recollection – Since the AI has access to the entire database along with the data collected and behaviour learnt from the transitory period, the examiner shall view the mark from the perspective of an all-knowing machine and not as a person with imperfect recollection. It is to be presumed that the consumer shall exhibit perfect recollection and would be able to retain particulars of a mark, especially the defining characteristics.
- No Circumspect Behaviour Criteria – Since the examination is being conducted while the presumption of machine and AI-assisted consumers, criteria of willingness or the lack thereof to take risks could be completely done away with.

Nevertheless, this test could be disadvantageous due to the socio-economic conditions of India, where a large section of consumers might prefer to transact through traditional/physical markets without the need or intervention of AI. However, raising the standard of distinctiveness shall benefit the consumer with no apparent adverse effects on the players in the market. The market players would need to innovate on their

branding and commercial image rather than basing their image on established market impulses.

III. STAKEHOLDER AND EXPERT INPUT: ANALYSIS

After venturing into the legal implications and interface of AI centred around the trademark registration process as well as complimentary principals of trademark law related to distinctiveness, this paper proceeds to focus on the practical aspects and feasibility of integrating AI assistant tools and automation, by conducting an empirical study with the aid of opened-ended questionnaire method. Data has been collected from 20 respondents who are experts from relevant domains and institutions, namely –

The following part deals with the analysis of the empirical data collected from the above-mentioned respondents-

A. Trademark Registry Officials/ Examiners	The Trademark Registry Officials and Persons working as Examiners were interviewed to gauge the legal and ethical implications of integrating AI and automation in the trademark prosecution process. They were questioned on the desirability of AI and automation in the process, cost and infrastructural limitations and the applicability of the technology in different stages of trademark prosecution.

	It has been observed that Trademark Registry Officials and Examiners are desirous of integrating AI and automation in the functioning of the trademark registry. It has been highlighted that with the inclusion of the technology the standard for distinctiveness would need to be altered which would lead to the conduction of an objective examination, which shall significantly increase the predictability of a potential acceptance or refusal of the application. From a legal standpoint it has been pointed out that since marks are processed on a case-to-case basis, there is a possibility that the process would lead to overly stringent standards. From an ethical point of view, no remarks have been made. It has been indicated that cost and infrastructure shall not be a hindrance even if the same is significant, due to the benefits offered. It is believed that AI could significantly reduce the turnaround time for examination, which is around 10-15 minutes per application. It is believed by an overwhelming majority that the application of AI and automation is most significant in the pre-examination, examination, PARM and registration stages. Further, AI could only be a tool in the opposition and PRAS module.

B. Software Professionals	Software Professionals were interviewed to gauge the capability of AI and automation with respect to trademark prosecution. The questions were framed to ascertain the capability of AI in replicating

	human sentiments and behaviour, the duration required to enable the AI to perform optimally, cost, extent of human intervention and scope of undertaking certain tasks relating to relevant market and consumer base.

It has been observed through the responses of all software professionals that advanced AI with LLM and MML will be able to detect and generate solutions and form opinions on real word problems. However, the accuracy of such a model will depend on the amount of representative data in terms of both quality and quantity that has been fed to the AI. AI would be able to replicate human behaviour and detect obscene and/or marks against public morals/order and/or marks hurting religious sentiments and/or marks that are culturally significant. However, most of the respondents believe that even though advanced AI models do have the capacity of data recognition and extraction some kind of human supervision is necessary, especially in Examination and Opposition stage. Human supervision can be negated in cases where the analysis of data is of an objective nature, like those in the Pre-examination Stage Registration Stage, PARM, PRAS.

The majority of the respondents agree that AI would be able to detect phonetic similarity by performing text-to-speech conversions and vice-versa coupled with RAG (Retrieval Augmented Generation) applications and ML models trained on billions of parameters with data fed from the open internet. Amongst the 5 respondents, only 2 agree that

detection of acquired distinctiveness of a mark and the ability to employ the principle of imperfect recollection can be detected by AI. With respect to the introduction of an AI-assisted model in the registry, there has been a unanimous affirmation. However, the respondents were unable to give a tentative time that would be required to train professionals as well as to populate the AI model and to sanitise the training data, to remove any bias or hallucination.

C. Legal Academics and Legal Professionals	Legal Academics and Legal Professionals were interviewed to gauge the legal and ethical hindrances in the integration of AI and automation in the trademark prosecution process alongside identifying the changes required in the fundamental principles of trademark and associated concepts. Questions were framed to ascertain the applicability in each stage of trademark prosecution.
It has been observed by the responses received from Legal Academicians and Professionals that there are both legal and ethical considerations that need to be taken into account. From a legal standpoint changes are required to the principles of trademark law and associated concepts, e.g. the Average Consumer Test and Distinctive	

Character. From an ethical standpoint transparency, reliability, and removal of bias need to be ensured.

It has been pointed out that AI and automation could be used in clerical or mechanical tasks in most stages of trademark prosecution, most significantly in the Pre-examination Stage Registration Stage, PARM, PRAS. Further, its applicability as a tool in the examination and opposition stage with human intervention has been highlighted by the majority of the respondents.

All respondents have opined that AI and automation will have a beneficial effect on the trademark prosecution process.

Further, it has been opined that AI would be capable of identifying consumer preference, purchasing power, and socio-economic capabilities if fed with adequate data, making the process more efficient.

IV. CONCLUSION AND ROAD AHEAD

After a thorough scrutiny of the trademark prosecution process in India, it can be safely inferred that integrating AI and automation into the registry's operations can provide benefits to the registry, applicants or registrants, and consumers. The registry would be relieved of its burden of pending applications, since the AI could be used as a digital assistant in **Stage I** for image recognition and deconstruction for device marks, in **Stage II** for conducting tedious searches with a higher degree of precision, with a lesser requirement of human resources and time, when provided with adequate training data. In **Stage III**, the potential of the AI can be exploited

at a higher level by utilizing it for creating drafts of reasoned orders based on pre-fed information. On the other hand, simple parameterized automation software could greatly improve the turnaround times in **Stage I** due to its mechanical nature, **Stage III** for document verification, arrangement, and onward transmission, along with service of notices, fixing of hearing dates, and issuance of summary order not requiring the application of the human mind owing to time-based parameters. In **Stage IV**, the automation can undertake mechanical tasks of drafting and forwarding trademark registration certificates. The applicants or registrants would greatly benefit from the reduced turnaround time and the predictability of the duration for arriving at a conclusion, and the nature of such decisions. However, such integration would require a shift in the Average Consumer Test. Nevertheless, it is concluded that a drastic shift in the commonly adopted test would bear adverse consequences; thus, a seamless transition would require a primary shift to an Imperfect AI replicating human imperfection, followed by a shift to a Perfect AI devoid of human limitation, which would be the desired workaround. This would in turn facilitate the market and the buyers to have an objective view of brands and their business identifiers, which would promote the consumer-oriented nature of trademark law.

However, the integration of AI and automation in the legal sphere is always met by scepticism and critical opinions due to the reliability, and transparency of the technology. Nonetheless, amidst such discursions, the United Nations General Assembly's Draft Resolution on "*seizing the opportunities of safe, secure and trustworthy artificial intelligence systems for sustainable*

development"[61] acts as a symbol of reassurance for exploring the potential of AI in intellectual property rights. Domestically, the National Intellectual Property Rights Policy, 2016[62] supplements the view taken in the international instrument by advocating for "*modernization of various IP offices, including improvement of ICT infrastructure*" with an aim to "*fix and adhere to timelines for disposal of IPR applications*", "*augment manpower*", "*taking into account the rapid growth and diversity of IP users and services, higher responsibilities and increased workload*".[63] Indian courts have also been quick to adopt the technology for conducting legal research as evidenced by the bold steps taken by Manipur,[64] Kerala[65] and Delhi High Courts alongside the West Bengal Judiciary. As of recently the Ministry of Law and Justice has also issued a circular dated August 09 2024 to encourage the use of AI and automation in legal research and process.[66] Finally, though a recent public notice by the CGPDTM's Office inviting applications for the post of "*Research Associate and Young Professionals purely on Contract basis*",[67] might

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[61] U.N. GAOR, 78th Sess., 63rd plen. Mtg. at _, U.N. Doc. a/78/l.49 (Mar. 11, 2024).
[62] Ministry of Commerce & Industrial Policy and Promotion, National Intellectual Property Rights Policy, 2016, DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION (May 12, 2016).
[63] *Id.* Objective 4.
[64] Srinjoy Das, *Artificial Intelligence] Manipur High Court Uses Chat-GPT To Conduct Research & Pass Order In Service Law Matter*, LIVE LAW, (July 23, 2025, 11:36 AM), https://www.livelaw.in/high-court/manipur-high-court/artificial-intelligence-manipur-high-court-uses-chat-gpt-to-conduct-research-on-service-law-matter-pass-order-258742.
[65] Harsh Gour, *What is the Kerala HC's New AI policy all about? And what more is needed?*, THE LEAFLET, (July 23, 2025, 11:41AM), https://theleaflet.in/digital-rights/law-and-technology/what-is-the-kerala-hcs-new-ai-policy-all-about-and-what-more-is-needed.
[66] Ministry of Law and Justice, *Artificial Intelligence in Judiciary*, PRESS INFORMATION BUREAU (July 23, 2025), https://www.pib.gov.in/PressReleasePage.aspx?PRID=2113224.
[67] CGPDTM, *Public Notice No CG/Contract Hearing Officers/TMR/2022,* IP INDIA, (Aug. 29, 2024, 11:30 AM),

seem like another cry for help, in reality, it has another facet wherein it envisages the desire of the registry to integrate AI, ML, and Automation in its operations, by also inviting applications for the post of "*Young Professional- (IT- AI, ML) with Essential Qualification – BE/B. Tech (Electronics & Communications/ CS/ IT) with specialized knowledge in Artificial Intelligence/ Quantum Computing/ IoT/ML /any other relevant areas,*" and despite seeming like a small step, it bears the potential of revolutionizing the trademark prosecution landscape in India.

https://ipindia.gov.in/writereaddata/Portal/News/775_1_APPLICATION_FOR__HIRING_HEARING_OFFICER__2022.pdf.

Ritwik Deswal & Himanshi Girdhar, *Reviewing Judicial Amendments in India: Evolving a 'Basic' Structuralist-Pragmatist Approach for Creation and Review of Constitutional Standards and Its Application to the Essential Religious Practice Test,* 11(2) NLUJ L. REV. 110 (2025)

REVIEWING JUDICIAL AMENDMENTS IN INDIA: EVOLVING A 'BASIC' STRUCTURALIST-PRAGMATIST APPROACH FOR CREATION AND REVIEW OF CONSTITUTIONAL STANDARDS AND ITS APPLICATION TO THE ESSENTIAL RELIGIOUS PRACTICE TEST

~Ritwik Deswal & Himanshi Girdhar[*]

Judicial Review has resulted in a plethora of landmark cases on constitutional interpretation since the inception of the Supreme Court. These judgments have both expanded and contracted the meaning of the Constitution's provisions. At times, they have read in restrictions, such as basic structure review for parliamentary amendments under Article 368, absent from the bare text. The evolution of many similar standards and principles to be used in reference to other provisions emanates and are sanctioned by decisions of our constitutional courts. With due course of time, they tend to act as 'functional' amendments to the Constitution. Therefore, this paper argues in favor of an amalgamative approach which merges central tenets of structuralism and pragmatism to create judicial amendments. The approach shall provide a burden to be discharged by the

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Court whilst making functional changes, by ensuring their compliance with the basic structure and pragmatic concerns. Further, to ensure parity with the Parliament, previous judicial amendments may be subject to a basic structure review, with eased procedural requirements. This paper also applies this approach to the Essential Religious Practice Test, a functional amendment to Article(s) 25 and 26, to illustrate its usage.

Keywords: Judicial Amendment, Basic Structure, Pragmatism, Review, Religious Rights

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I.

INTRODUCTION

The mechanism of Judicial Review is mentioned expressly under Article 13[1] and Article 32[2] as well as under other relevant provisions[3] of the Constitution. It empowers the Constitutional Courts in India to invalidate any exercise of power or action of any organ of the State if it infringes upon Part III of the Constitution[4] providing for Fundamental Rights. The courts exercise this power through various modes of judicial review. The concept of Judicial Precedent is one such mode which is favored above the rest by the Supreme Court in India, as well as in other constitutional democracies such as the United States. Indian courts also follow the principle of *'Stare Decisis'* which entails that when a larger bench decides a constitutional issue, it shall prevail unless and until an even larger bench decides the issue differently.

Indian Constitutional Courts, especially the Supreme Court, have been described as 'positive legislators', wherein they not only check administrative overreach through constitutional provisions but legislate through interpretation as well.[5] The Supreme Court evolves tests, principles, standards, and rules which facilitate decisions for future disputes where a similar question of law has arisen. These principles also help in the

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[1] INDIA CONST., 1950, art 13.
[2] *Id.*, art 32.
[3] *Id.*, art(s) 131-136, 143, 226, 227, 245, 246, 251, 254 & 372.
[4] *Id.*, part III.
[5] Surya Deva, *Constitutional Courts as "Positive Legislators": The Indian Experience*, SSRN, (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1620224, quoted in Allan R. Brewer-Carías, *Constitutional Courts as 'Positive Legislators' in Comparative Law,* Cambridge Univ. Press, 2011.

determination of the constitutionality of administrative and legislative actions including statutes. The test of reasonable classification,[6] the test of arbitrariness to determine interpretation of equal treatment under Article 14[7] and the test of proportionality used in determining the scope of the prohibition of deprivation of life and personal liberty under Article 21[8] are some leading examples of judicial standards. Such principles of constitutional interpretation tend to act as what we term through the course of this article to be '*functional amendments*' to the Constitution as they determine how a provision shall be used on a case-by-case basis to decide questions of law and fact.

Judicial precedents as modes of judicial review have been criticized, as erroneous decisions of previous benches are continuously relied upon by courts for long periods of time. Furthermore, such precedents may also be affected by the prevailing conditions at the time and the judicial bias of the Judge or Bench, leading to arbitrariness. In circumstances where the bare text of the provision, the ethos of the Constitution, or the intent of the framers is not duly considered, any defective principle evolved in such precedents may continue to influence the decisions of future cases. Judicial precedents are also the sanctioning authority of 'functional amendments' with the latter continuing to be in force until the former is declared *'per incuriam'*.[9] We argue that the Essential Religious Practice Test ("**ERP**"),

[6] Ram Krishna Dalmia v Justice S.R. Tendolkar AIR 1958 SC 538.
[7] INDIA CONST., 1950, art 14; Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India).
[8] INDIA CONST., 1950, art 21; Justice K.S. Puttaswamy (Retd.) & Anr. v Union of India & Ors. (2017) 10 SCC 1.
[9] John Hanna, *The Role of Precedent in Judicial Decision*, 2 VILL. L. REV. 367 (1957)

used to determine the extent of religious rights under Article(s) 25[10] and 26,[11] is one such leading example of an erroneous judicial amendment. The oft-lambasted principle continues to persist more than 60 years since its conception and has been used in landmark cases such as the *Sabarimala*[12] verdict and recently, in the *Hijab*[13] case by the Karnataka High Court. The principle, yet to be overturned, has diluted the concept of secularism as a part of the Constitution's basic structure and provides an unrivalled theological mantle to the Supreme Court, an organ of the State.

In **Part I** of the article, we provide for a comparative understanding of 'judicial amendments' in the Indian context and define their nature. We also seek to repurpose the Basic Structure Doctrine to control such amendments to the Constitution. Furthermore, we argue for adopting a 'structuralist-pragmatist' approach to be used in judicial review wherein a substantial question of constitutional law is at stake. In **Part II**, we apply our standard on ERP and provide a 'parameters' test which shall be in consonance with the basic structure. Finally, we shall conclude that this approach shall redefine the scope of judicial review and provide a better framework for constitutional interpretation. In the inevitable eventuality that they are not in consonance with the basic structure, the Supreme Court may use the same to dilute such principles.

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[10] INDIA CONST., 1950, art 25.
[11] INDIA CONST., 1950, art 26.
[12] Indian Young Lawyers Association & Ors. V. The State of Kerala & Ors. (2019) 11 SCC 1.
[13] Resham, through Next Friend Mubarak v State of Karnataka, represented by the Principal Secretary Department of Primary and Secondary Education & Ors. 2022 SCC OnLine Kar 315.

II. PART I: JUDICIAL AMENDMENTS IN INDIA: REINING IN THROUGH SELF-REVIEW

A. PROBLEMS IN PRECEDENT: A FALLIBLE SANCTION

Judicial precedents have been held to be very reliable sources of constitutional interpretation. This reliance stems from two main points in favor: (a) their predictability and consistency; and (b) their tendency to prevent mistakes. The argument is simple: if a precedent exists on a substantial question of constitutional law, that question shall remain settled and the precedent shall apply uniformly when and if the same question arises again. Precedent also acts as the sanctioning authority for using any principle or standard evolved from it in future cases with a similar factual situation.

While reliance on precedent may be based on reasonable assumptions of predictability and prevention of judicial mistakes, these assumptions are not infallible. *First*, with regard to predictability and consistency; the Indian Supreme Court does not always adhere strictly to precedents. Through almost its entire existence, the Court has tended to pick and choose between precedents or overrule precedents entirely. *Second*, the manner in which they are overruled does not follow the convention of the, so called 'larger bench reference,' wherein only a court of greater strength may overrule a previous judgment. Further, at times the Court may choose to ignore a precedent entirely whilst pronouncing a judgment overruling it.

i. Inconsistency and Unpredictability

A leading example of such ignorance may be found in the advent of Public Interest Litigation ("**PIL**"), through cases decided against the precedent set by the eleven-judge bench in *R.C. Cooper v. Union of India* ("**Cooper**").[14] The judgment had categorically decided the issue of *locus standi* under Article 32 of the Constitution and reaffirmed that relief against infringement of any right may only be sought by the person whose right has been infringed. The only possible exceptions were carved out for habeas corpus petitions or guarantees of Article(s) 17,[15] 23,[16] and 24.[17] In a stark ignorance of *Cooper*, in *Abdulbhai*[18], the progenitor case of PIL in India, a single-judge bench of Justice Iyer chose to give a liberal expansion to the locus standi rule and inculcated socio-economic considerations of a weaker group into it. This expansion was concretized in *S.P. Gupta*,[19] (a seven-judge bench) and later in *Bandhua Mukti Morcha,*[20] and finally the idea that any 'public spirited person' can approach the court for infringement of others' rights, was incorporated into constitutional jurisprudence via Article 32. In later judgments, it was held that even private cases may be treated as public interest cases[21].

[14] R.C. Cooper v. Union of India AIR 1970 SC 564.
[15] INDIA CONST., 1950, art 17.
[16] *Id.*, art 23.
[17] *Id.*, art 24.
[18] Mumbai Kamgar Sabha v M/s Abdulbhai Faizullabhai & Ors. 1976 (3) SCC 832.
[19] S.P. Gupta v Union of India 1982 AIR 149.
[20] Bandhua Mukti Morcha v Union of India & Ors. (1997) 10 SCC 549.
[21] Shivajirao Nilangekar Patil v Mahesh Madhav Gosavi AIR 1987 SC 294; Indian Banks' Association v D.C. Service AIR 2004 SC 2615.

ii. Prolonging Mistakes

The idea that precedent prevents mistakes by judges has been found to be erroneous on numerous occasions. While precedent can serve as a check on judicial arbitrariness, those based on weak or flawed reasoning may nevertheless persist and be applied for years. In the Indian context, several precedents interpreting the Constitution have done so by incorporating standards or principles which are antithetical to the provision itself or substantially curtail the right it grants. Such standards continue until they are declared *per incuriam* which may either take decades or may never be done. To understand this, let us look at Article 19 ('Fundamental Freedoms'), which *inter alia* provides for freedom of speech and expression. A relevant illustration may be the incorporation of the *Hicklin test*[22] in Article 19(2)[23] to interpret 'decency and morality' as an exception to freedom of speech. The test, in essence, provided a very low bar to restrict freedom of speech, wherein every expression which might have the capability to deprave or corrupt young or feeble minds shall deemed to be impermissible. Although, later overruled and replaced with the *Roth test*,[24] this interpretation still continued for around 50 years. Similarly, 'commercial speech', i.e., advertisements were not held to be a part of Article 19[25] and thus not entitled to any protections envisaged under it.[26] Only after 35 years, in *Tata Press*,[27] was the position rectified and commercial

[22] Ranjit D. Udeshi v State of Maharashtra (1965) 1 S.C.R. 65.
[23] INDIA CONST., 1950, art 19(2).
[24] Aveek Sarkar v State of West Bengal (2014) 4 SCC 257.
[25] INDIA CONST., 1950, art 19.
[26] Hamdard Dawakhana v Union of India AIR 1960 SC 554.
[27] Tata Press Ltd. v Mahanagar Telephone Nigam Ltd. & Ors. AIR 1995 SC 2438.

speech held to be a part of Article 19. Furthermore, another questionable interpretation of Article 19(1)(g),[28] which entails one's freedom to choose one's vocation, continues to exist in the construction of *res extra commercium* (things outside commerce, some commercial activities are not part of private rights.) to exclude activities such as gambling from the purview of trade activities.[29] Lastly, the restriction of 'emergency' read into Article 21, continued till being overruled in *Puttaswamy*,[30] remained a grave 'mistake' sanctioned by precedent.

The aim of this sub-section is not to conduct an empirical study on instances where the Supreme Court rejected larger bench references or established erroneous standards based on shaky reasoning. We only seek to illustrate that precedent at times leads to unpredictability and inconsistency and at others, prolongs mistakes through its sanction. This leads us to the conclusion that precedent, the primary sanctioning authority behind 'judicial amendments' is weak and fallible, prone to erroneous reasoning and yet continues to be in effect, unless and until it is declared *per incuriam*, which is not always the case. An argument can also be made that a precedent is a more undemocratic sanction for constitutional amendment than the established procedure under Article 368[31], which takes into account the will of the people at both the Centre and State levels and is undoubtedly harder to achieve than a judicial decision on a procedural level.

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[28] INDIA CONST., 1950, art 19(1)(g).
[29] State of Bombay v R.M.D. Chamarbaugwala AIR 1957 SC 699.
[30] Justice K.S. Puttaswamy (Retd.) & Anr. v Union of India & Ors. (2017) 10 SCC 1.
[31] INDIA CONST., 1950, art 368.

This leads us into the next question: what does a precedent sanction when it comes to substantial constitutional interpretation.

B. JUDICIAL AMENDMENTS: CHANGING FUNCTIONALITY OF CONSTITUTIONAL PROVISIONS

Judicial amendments to the Constitution are not a novel concept. They have been discussed thoroughly in Western jurisprudence particularly in those of Canada and the United States.[32] A judicial amendment may simply be defined as a decision *"which effectively adds to, removes from or modifies the Constitution"*.[33] Such amendments become necessary when the Constitutional text is sparse and there is a need for interpretation to expand or change its meaning. However, not every constitutional interpretation may be considered a judicial amendment. Professor Emmett MacFarlane provides a very high bar to decide when a constitutional interpretation crosses the threshold of being an amendment.[34] An interpretation may be considered an amendment if: (a) it deviates from constitutional text; (b) deviates from the framer's intent; and (c) is opposed to or ignores the prevalent political conditions at the time. In Berger's reply,[35] she leaves room for challenging this high threshold to other scholars. In the Indian context, we believe that such a high bar to categorize a judicial amendment is not made out.

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[32] Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By, (Basic Books 2012).
[33] Emmett Macfarlane, *Judicial Amendment of the Constitution*, 19 INT'L J. CONST. L., 1894, (2021).
[34] *Id.*
[35] Kate Glover Berger, *Judicial Amendment and Our Constitutional Lives: A Reply to Emmett Macfarlane*, 19 INT'L J. CONST. L., 1925, (2021).

i. Differentiating in Definition

First, with the advent of judicial activism and structuralist reasoning in Indian constitutional jurisprudence, an interpretation may be considered an amendment even if the deviation is consistent with the purpose of the provision. To illustrate, we must consider, the doctrine of reasonable classification read into Article 14 ('Right to Equality').[36] This doctrine postulates that a reasonable classification may be made out based on intelligible differentia and must have a rational nexus to the object sought to be achieved by the statute. If it fulfills this test, such a classification becomes permissible.[37] While, we can observe a clear deviation from the text of Article 14, which merely commands equality before the law, this interpretation of the Constitution can still be considered consistent with the aim of the provision. It seeks to eliminate arbitrariness in the State's action when it comes to preserving equality. The Supreme Court has also held that the doctrine of reasonable classification provides a practical dimension[38] to the concept of equality envisaged in Article 14.

Second, with respect to the genesis of the Indian Constitution, the voluminous Constituent Assembly Debates cannot always accurately predict accurately whether a particular interpretation will be in consonance with the framers' intent. The sheer number of diverse opinions in the assembly can be construed to support or reject any interpretation on this basis. Further, the framers themselves believed that the Indian Constitution

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[36] Ram Krishna Dalmia v Justice S.R. Tendolkar AIR 1958 SC 538.
[37] State of W.B. v. Anwar Ali Sarkar AIR 1952 SC 75; E.P. Royappa v. State of T.N. AIR 1974 SC 555; Ajay Hasia v. Khalid Mujib Sehravardi AIR 1981 SC 487.
[38] L.I.C. of India & Anr. v Consumer Education and Research Centre & Ors. 1995 SCC (5) 482.

is a living document which may need to be altered or changed as and when required by the Indian people.[39] We can illustrate this through Article 21 ('Right to Life'), which has had numerous dimensions added to it *viz.*, right to privacy,[40] right to free legal aid,[41] right to speedy trial,[42] etc. Therefore, this factor will not always be useful in identifying an interpretation as an amendment.

Third, prevalent political conditions and opinions are *prima facie* inapplicable for identifying judicial amendment in India. In discussing the *Quebec Succession* Reference[43], Professor MacFarlane points out that reading an obligation to negotiate in the Canadian Constitution defied everyone's expectations as to what the Constitution contains. While that may be so, this factor is relatively difficult to ascertain with regard to a developing democracy such as India. Professor MacFarlane in discussing *Kesavananda Bharati*,[44] elaborates that the basic structure doctrine being of foreign import defied the expectations of the 'relevant' political community.[45] Further, he states that political actors showed their dissent through attempts to pass amendments to nullify the effect of this doctrine. At this juncture, it

[39] Rishika Singh, *This Quote Means: 'Constitution is not a Mere Lawyers' Document… its Spirit is always the Spirit of Age*, INDIAN EXPRESS, (Nov. 27, 2023), https://indianexpress.com/article/explained/this-quote-means-ambedkar-consitution-day-living-document-9043254/.

[40] M.P. Sharma & Ors. v Satish Chandra, District Magistrate, Delhi & Ors. 1954 SCR 1077; Kharak Singh v State of Uttar Pradesh AIR 1963 SC 1295; Justice K.S. Puttaswamy (Retd.) & Anr. v Union of India & Ors. (2017) 10 SCC 1.

[41] Madhav Hayawadanrao Hoskot v State of Maharashtra AIR 1978 SCC 154.

[42] Hussainara Khatoon & Ors. v Home Secretary, State of Bihar 1979 SCR (3) 532.

[43] Macfarlane, *supra* note 33.

[44] His Holiness Kesavananda Bharati Sripadagalvaru v State of Kerala & Anr. (1973) 4 SCC 225.

[45] Dietrich Conrad, *Implicit Limitations on the Amending Power*, (Lecture delivered at the Faculty of Law, Banaras Hindu Univ., Varanasi, Feb. 1965.

becomes pertinent to point out exactly what 'political community' means in this context. While defining his factors, Professor MacFarlane understands political community to mean both the general public and political representatives empowered to amend the Constitution.

With regard to the general public, it may be contended that at the outset, it is near impossible to identify where their stance lies with regard to a constitutional interpretation and what does and does not form part of the Constitution. But most importantly, it is reasonable to assume that any interpretation which reaffirms their rights and protects them from the State's overreach shall be viewed favorably by the populace. An idea which postulates that the Parliament may not amend the Constitution if such amendment violates easily understood principles such as democracy, rule of law, secularism, separation of powers and supremacy of the Constitution, shall in all probability find support. With regard to political actors, it is pertinent to understand that prevailing conditions of the time may influence their opinions and further it is reasonable to assume that they will view any interpretation which significantly curtails their powers negatively. In relation to *Kesavananda Bharati,* the broader political context was marred by the State continuing to infringe on the rights of the citizens through statutes and amendments which reaffirmed their unfettered right to amend the Constitution and exclusion of judicial review of this process. This eventually culminated in the Emergency in 1975. Therefore, mere opposition by representatives may not be a yardstick to determine the existence of a judicial amendment.

ii. Understanding 'Judicial Amendment' in India

At this stage, we seek to define 'judicial amendment', which adheres to the needs of Indian constitutional jurisprudence and provide a framework for further discussion. In the first place, any amendment can only be referred to as such if it is a binding authority on subsequent constitutional interpretation. Professor Richard Albert refers to this as *"functionally binding quality"* of a judicial pronouncement as opposed to the formally binding authority of an amendment promulgated under Article 368.[46] As discussed above at Section II.A.(ii), this authority flows from precedent declared through the operation of judicial review which lays down this interpretation and continues indefinitely until declared *per incuriam* by the Court itself.

A judicial amendment can further be expressed as the evolution of new principles and standards through decisions of the Apex Court.[47] An oft-cited example of such a principle may be found in the *Oakes* test,[48] a Canadian equivalent of the test of proportionality, which seeks to check whether a government action impinges on rights guaranteed by their Constitution. Professor MacFarlane rejects the effects of the application of this test as a judicial amendment. We find merit in this argument as each and every change which arises from the application from such tests cannot be treated as an amendment. However, we still maintain that a substantial

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[46] Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38(2) DUBL. UNIV. L.J., 387, (2015).
[47]Andree Lajoie & Henry Quillinan, *Emerging Constitutional Norms: Continuous Judicial Amendment of the Constitution-The Proportionality Test as a Moving Target*, 55(1) LAW & CONTEMP. PROBS., 285, (1992).
[48] *R. v Oakes* [*1986*] 1 SCR. 103.

change to the components of the tests or standards will constitute a change in the functionality of the test and therefore of the provision which it seeks to interpret. In the same vein, the test of reasonable classification under Article 14 and the test of reasonableness under Article 19 can also be referred to as judicial amendments. Moreover, judicial amendment may also take the form of adding or subtracting facets from a constitutional provision. Such modifications essentially change how the provision shall be construed and the elements that it constitutes. Article 21, as discussed above at Section II.B.1, is one such provision wherein entire new rights form part of it through judicial decisions and therefore also become justiciable under Article 32.

iii. Finding Meaning in Functionality

From this emerges a core tenet of our definition of judicial amendment-functionality. This tenet flows primarily from two concepts: (a) judicial review; and (b) the American realist school of jurisprudence. *First*, the Court derives its authority to settle questions of constitutional law from judicial review. It evolves standards and principles of constitutional interpretation through this exercise. A Constitution is essentially devoid of any meaning unless the Court exercises its provisions in practice.[49] In choosing between two interpretations[50] or evolving a new interpretation, a Court functionally makes or amends constitutional law. Therefore, judicial review provides an arena wherein constitutional amendment takes place.

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[49] BERNARD SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK, (Macmillan, 2nd ed., 1972).

[50] WILLIAM O. DOUGLAS, FROM MARSHALL TO MUKHERJEA – STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW, (Eastern Law House, 1956); M.P. JAIN, INDIAN CONSTITUTION LAW, (Lexis Nexis, 8th ed., 1962).

Second, this tenet emerges from realist or more adequately functional school of law which propounds that law is what the judges say it is. As defined by Justice Holmes,[51] law essentially means the actions of the Court in deciding legal issues rather than the bare text or orbiting theories analyzing it. Therefore, functionality of a constitutional provision means how the provision is construed or applied by the Courts when they are faced with factual situations invoking the same. In a practical sense, however the Courts apply a provision or a right, relates to its functionality. The elements that the Courts decides to form a part of the right or provision, also forms a part of its function.

Finally, we argue in favor of a broader definition of judicial amendment as it relates to Indian constitutional jurisprudence. A judicial amendment may be described as a change in the functionality of a constitutional provision by addition, subtraction or modification through rules, standards and principles or as otherwise deemed fit by the Court. A judicial amendment derives its authority from the precedent in which it is laid down directly and from the operation of judicial review which led to the said precedent indirectly. Such amendment continues to stay in force unless otherwise overruled, specifically changing the functionality of the said provision or through gradual shifting to another functional perspective.

iv. Identifying the Issues

Agreeing with Professor MacFarlane, we do not seek to provide a normative evaluation of judicial amendments. However, we contend that in a developing democracy such as India, it is important that the judiciary takes

[51] Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV., 457, (1897).

on an active but not an unrestrained role in modifying the Constitution. At this stage, it is pertinent to mention that the main criticism of judicial amendment stems from primarily from two issues: (a) the extent of constitutional change enacted by the Courts; and (b) the inherently undemocratic nature of this change emanating from the Court rather than representatives of the people. Further, an auxiliary criticism stems from the Courts' lack of relevant expertise or information to decide such matters. Scholars have argued for self-restraint when exercising their powers of interpreting the Constitution. Professor Dale Gibson proposed a Constitutional Advisory Commission,[52] which shall conduct research on constitutional questions when there is a possibility of a decision taking the shape of an amendment. After concluding its research, it shall provide the Courts with its recommendations. The recommendations themselves shall not be binding upon the Court, with only 'due consideration' being a prerequisite before it rejects them.

While we find merit in such a Commission, we disagree that it would adequately solve issues (a) and (b); as only increased expertise may be considered as a benefit of it. We believe that an adequate institution within Indian jurisprudence already exists to categorically solve these problems, democratize judicial review and the amendment process and pave way for actual enforcement.

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[52] Dale Gibson, *Founding Fathers-in-law: Judicial Amendment of the Canadian Constitution*, 55(1) LAW & CONTEMP. PROBS., 261, (1992).

C. GIVING A NEW PURPOSE TO THE BASIC STRUCTURE DOCTRINE

The basic structure doctrine has been arguably the most seminal and creative judicial interpretation evolved by the Indian Supreme Court. As laid down in *Kesavananda*, the amending power of the Parliament is subject to a basic structure review by the Court. Simply put, it introduced implied limits on the amending power under Article 368 insofar as any constitutional amendment shall not abrogate the basic structure of the Constitution.[53] Basic structure, by design, was not given a concrete definition but was intended to signify certain overarching principles derived from a structural interpretation of the Constitution by the Court on a case-by-case basis. The underlying principles centered around three considerations: (a) regulating State action from abrogating basic structure through amendment; (b) preserving democracy by ensuring that no two-thirds majority of the Parliament which is not representative of a large national consensus may change the text as to contravene fundamental features; and (c) to provide for a more flexible approach than *Golaknath,*[54] wherein amendment is permissible subject to review based on basic structure. In this sub-section, we argue for repurposing basic structure with respect to considerations (a) and (b).

Professor Sudhir Krishnaswamy[55] hails the doctrine and the consequent review it permits, as a sounder constitutional method to assess amendments and overreach by the State's actions. He broadly supports the

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[53] Smt. Indira Nehru Gandhi v Shri Raj Narain & Anr. 1975 AIR 865; Minerva Mills Ltd. & Ors. v Union of India & Ors. AIR 1980 SC 1789.
[54] I.C. Golaknath & Ors. v State of Punjab & Anr. 1967 AIR 1643.
[55] SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE, (Oxford University Press 2011).

structuralist approach in construing basic structure wherein emphasis is not laid on a single provision or a set of provisions. Rather, the doctrine evolves through principles embodied by the Constitution. This also saves the doctrine from being diluted as reliance on provisions may prompt the Parliament to amend the same to curtail the scope of judicial review. Moreover, such a doctrine differentiates between judicial review of ordinary action of the State and process of constitutional amendment. The basic structure review is not merely a modified version of the review envisaged under Article 13 but a separate and an independent form of review. This establishes a clear purpose for basic structure review: to check constitutional changes through an implied limitation. Professor Krishnaswamy further states that this implied limitation may or may not apply with equal intensity to other modes of constitutional amendment.

v. Double Standards and Abstract Application

At this stage, we seek to make a case that basic structure should function as an implied limitation on judicial amendments. The central thesis behind this assertion stems from the purpose of the creation of basic structure as put forth in (a). The doctrine has, since its conception, checked variety of legislative and executive actions which sought to abrogate the fundamental features through judicial pronouncements. Through this doctrine, the Court checks substantial overreaches by organs of the State. However, the State as defined by the Constitution and as an accepted notion across democracies includes the legislature, the executive and the judiciary itself. As already established in Section II.A.2, the judiciary is as much capable of promulgating change to the Constitution as the

Parliament. In consonance with Professor MacFarlane and other scholars, we also contend that the Judiciary enacts constitutional change more frequently and with less procedural difficulties than the Parliament. To illustrate, Professor Krishnaswamy identifies three ways in which a constitutional amendment may be checked:[56] (a) rights review under Article 13; (b) basic structure review; and (c) review of compliance with the procedure laid down in Article 368. Only if an amendment passes one or all of these reviews, is it validly enacted by the Parliament. While our Constitution is not as hard to amend as the Canadian Constitution, a comparison may be drawn wherein empirically the judiciary has been shown to functionally amend the text significantly more than the Parliament. In sharp contrast, a similar standard is not applicable to judicial amendments as a precedent which changes the Constitution is dependent primarily on the reasoning adopted by particular judges at particular points in time. Furthermore, a constitutional amendment even if it does not fail any of the reviews, may be deleted with a change in Government or through pressure applied by national consensus opposing the same. A judicial amendment, however, stays in operation until the precedent is not declared *per incuriam*.

This points to an inherent disparity which may be solved by uniformly applying the basic structure doctrine to judicial pronouncements as well. Hence, we propose to adopt the doctrine as guiding principles for any decision which has the tendency to functionally change the provisions. We recognize that an abstract concept such as the Basic Structure cannot

[56] *Id.* at 70-130.

be condensed into a definite set of commandments which the Court may refer to while making its decisions. Even if it could, it is a highly futile exercise to be undertaken by the Court to read through the entire Constitution and exhaustively list fundamental features. It also substantially limits their scope of review as a government may claim exclusion from scrutiny if their enactment falls outside of the list. However, to combat this, we find merit in Professor Krishnaswamy's defense of the doctrine's mercurial nature.[57] The case-by-case nature of identifying fundamental features provides more discretion to the Court and enables it to consider a variety of sources such as the bare text, perspectives from a historical, sociological, philosophical or constitutional morality standpoint and framers' intent through Constituent Assembly Debates. They are inherently abstract values much in the same vein as those expressed in the Preamble. Furthermore, landmark judgments of nearly 50 years of basic structure jurisprudence also act as a source of such fundamental values.

vi. For Equal Treatment of Equals

To incorporate these values in judicial decision-making likely to affect the Constitution, we argue that the Court after recognizing the functional effect its pronouncement may have on the text, shall mandatorily subject itself to a self-review, identifying whether the change will be in consonance with the basic structure. This shall take the shape of an additional burden to be discharged by the bench in its reasoning for the change. Only when such a burden is discharged by the Court, will the pronouncement and subsequent functional change take place. At the very

[57] *Id.* at 164-229.

outset, these values shall guide the change which may be in the form of principles, standards or tests devised by the Court. These standards or tests should prima facie be in consonance with the basic structure. Thereafter, once such a conception has been made, it shall be the burden of the majority opinion to show that these standards do not violate the fundamental features. Thus, it provides two dimensions for the application of basic structure, i.e., as an advisory set of rules and as a directive to be fulfilled by the Court in its ratio. This, as shall be shown further, will constitute the 'structuralist' portion of our approach.

In considering the protection of essential democracy and national consensus involved in constitutional amendment, we find merit in Professor Gibson's assertion. In reference to the Canadian Supreme Court, he states that no group of judges however well versed with the law can possibly see the full ramifications of the change enacted by them. Further, he postulates that they do not possess the adequate experience to enact such a change. There exists an argument against the judiciary possessing such a power as opposed to it resting firmly with the constituent authority elected by the people. However, we must make it clear that we are not against the judiciary possessing the power to functionally change the Constitution. Rather, we find that in systems such as Canada and India, where amendment by the Parliament is tough to realize, the judiciary should play an active role in changing the Constitution in accordance with the needs of society. This ideal is representative of the living constitutionalism envisaged by Ambedkar. But it is important to note that such a power should not be unrestrained so as to create a disparity between two institutions essentially doing the same function. On this point, we favor the

'equal treatment of equals' principle propounded by the Court as a part of Article 14. The Court should be subject to the same modicum of limitations as it creates on the Parliament's power to amend. Our approach, as shall be realized towards the end of Part I, fulfills this democratization of amending limitations.

In concluding this sub-section, we understand this to be a 'self-restraint' approach as opposed to another organ reviewing judicial amendment. The aim behind this stems from the belief that India should preserve and nurture the strong form of judicial review it has cultivated through the years. In consonance with Professor Gibson's suggestion of self-restraint, we believe that any other form of review mechanism would compromise the independence of our Judiciary. As Professor Swati Jhaveri explains that a dialogic form of judicial review entails a situation where review takes form of an exchange between the Parliament and the Judiciary with the Parliament having the final word.[58] Applying this weak form of judicial review in the case of judicial amendment, review would lead to a situation wherein the Parliament may have the final say in deciding the *vires* of the amendment. This would ultimately curtail the Court's position as one of active engagement[59] and lead to an unnecessary deference to other organs of the State.

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[58] Swati Jhaveri, *Interrogating Dialogic Theories of Judicial Review*, 17 INT'L. J. CONST. L., 811, (2019).

[59] Sujit Choudry, Madhav Khosla & Pratap Bhanu Mehta, *Locating Indian Constitutionalism*, in *The Oxford Handbook of the Indian Constitution* 3 (Sujit Choudry, Madhav Khosla & Pratap Bhanu Mehta eds., Oxford University Press 2016); Devesh Kapur & Pratap Bhanu Mehta, *Introduction* in *Public Institutions in India: Performance and Design,* (Devesh Kapur and Pratap Bhanu Mehta eds., Oxford University Press 2005).

D. 'STRUCTURALIST-PRAGMATIST': THE OTHER PRONG

At the outset of this sub-section, we would like to clarify that the usage of the terms 'structuralist' and 'pragmatist' is not intended to eclipse judicial precedent as a mode of judicial review or replace it with structuralism or pragmatism. Rather, the usage connotes the adoption of the core tenets of these modes in creating our approach. To illustrate, in the previous section, we defined the 'structuralist' part of our approach. In doing so, we identified central principles of modern structuralism and applied them to check judicial amendment while deciding a case. In his definitive work[60], Professor Akhil Reed Amar understands structuralism as one in which overarching doctrines identified from parsing the text aid in interpretation. As a textualist, he cites *Marbury*[61] to illustrate that the doctrine of judicial review emanated from the US Constitution's history, structure and text. Parallelly, our argument for a basic structure self-review originates in the doctrine being based on history and structure as the *Kesavananda* opinions illustrate, particularly those of Justice Sikri and Justice Khanna. Hence, our approach focuses on using structuralist principles in guiding and sanctioning judicial amendment.

The other element of our approach focuses on adopting central tenets of pragmatism as a mode of judicial review. The auxiliary concern of the Court not possessing requisite experience and resources to adequately change the Constitution in contrast to pragmatic deliberations in the Parliament is undisputed. An amendment under Article 368 is introduced

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[60] Akhil Reed Amar, *The Supreme Court, 1999 Term – Foreword: The Document and the Doctrine*, 114(1) HARV. L. REV., 23, (2000).
[61] Marbury v. Madison 5 U.S. 137, 138 (1803)

in the lower house through a bill to that effect and passed after due debates on the same. Such discussions provide an opportunity to put forth pragmatic concerns that might result from the amendment. A similar procedure is carried out in the upper house and thereafter assent of the President is sought. While an argument may be made that the majority in the Parliament may pass the amendment without addressing these concerns, resources are expended to outline such difficulties. The same cannot be said with regard to judicial amendments as whether a pragmatic approach is adopted in evaluating their decision rests solely with the judges.

i. 'Paneling' Pragmatism

Professor Doori Song defines pragmatism as a mode of constitutional interpretation, rooted in empirical analysis and centered around future considerations which seek to solve cases based on social needs.[62] Pragmatism deviates from rigid procedures established by precedent and offers more flexibility in decision-making.[63] In addition, the mode argues that a sounder decision is attained if the judge is well versed with empirical studies on the subject he or she is deciding. It also allows the Courts to be more activist in nature and resolve growing needs of society. With regards to pragmatism in constitutional interpretation, Professor Song identifies few core strengths which include: (a) allows judges to address factual realities of constitutional interpretation; (b) allows judges to decide on social issues not expressly provided in the text; and (c) provides a more

[62] Dr. Doori Song, *Judicial Pragmatism: Strengths and Weaknesses in Common Law Adjudication, Legislative Interpretation, and Constitutional Interpretation*, 52 U. ILL. CHI. J. MARSHALL L. REV., 369, (2019).
[63] Richard A. Posner, *The Federal Judiciary: Strengths and Weaknesses* (Harvard University Press 2017).

rational basis to balance needs of the State with needs of the individual with a future looking analysis. We identify these as the core tenets in guiding functional change.

To inculcate these values, we need to create a pathway similar to the Commission proposed by Professor Gibson. However, instead of making it a permanent advisory body, we argue it should be a needs-based body taking the shape of expert panels. The panels shall constitute of experts on the specific question or area of law, which is relevant to any functional change to the text. Hypothetically, if the question revolves around adding commercial speech in Article 19, the panel should ideally consist of experts in comparative constitutional and corporate law to evaluate this proposition. Not every case of functional change would require a panel to alleviate pragmatic concerns. If the bench is itself an expert on the central issues, it can be considered an adequate authority to decide on future considerations which might emanate from the change. Therefore, we propose that the appointment of such panels is left to the discretion of the bench. Borrowing from Professor Gibson's suggestion, these panels equipped with adequate resources for research shall submit their findings in the form of a report outlining the concerns identified by them. This report shall ultimately be of an advisory nature. Lastly, such panels will not exist *ad infinitum*; only till the constitutional question is solved.

Our main idea behind proposing such panels is that they are not an unprecedented exercise. The Supreme Court appoints panels regularly to seek expert opinions on factual situations outside of their core competency such as the recently appointed six-member panel headed by former SC

Judge AM Sapre to assess regulatory questions emanating from the Adani crash.[64] Our proposal only seeks to extend this practice to seek specific, concentrated opinions when a functional amendment is a possibility. In conclusion, we believe that such an exercise would be a proper analog to the deliberation exercise undertaken by the Parliament while amending the text.

E. BASIC STRUCTURE REVIEW OF PAST JUDICIAL AMENDMENTS: A LEGITIMATE CASE FOR RELAXING LARGER BENCH REFERENCE

We limit the scope of this sub-section to an argument in favour for relaxing of the Larger Bench Reference ("**LBR**") rule to the specific case of overruling or in other words striking down of judicial amendments. We are not concerned with a broader critique of the LBR[65]. The central thesis is to provide an assertive dimension to our approach and remedy existing judicial amendments in an efficient manner.

Our proposition is thus: when a basic structure challenge to a judicial amendment comes before the Supreme Court, a bench of a defined strength shall hear and decide the matter irrespective of the strength of the amendment's sanctioning precedent. We are inclined to follow procedure set by the U.S. Supreme Court where the bench which decides

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[64] *Meet the Members of SC Appointed Panel on Adani Share Crash*, THE TIMES OF INDIA, March 2, 2023, https://timesofindia.indiatimes.com/india/meet-the-members-of-sc-appointed-panel-on-adani-share-crash/articleshow/98362490.cms.

[65] Shrutanjaya Bhardwaj & Ayush Baheti, *Precedent, Stare Decisis and the Larger Bench Rule: Judicial Indiscipline at the Indian Supreme Court*, 6 INDIAN L. REV., 58, (2022).

constitutional issues has been fixed at nine.[66] The relaxation shall facilitate a situation wherein an impugned precedent facing basic structure review does not continue to subsist for decades. It provides for revocation of a judicial amendment on a similar footing to how an amendment might be struck down or revoked by the Parliament. This would also give a retrospective operation to our approach and enable the Court to reassess its amendments.

At this stage, we do not seek to define the number of judges required to achieve this purpose. It may be set at five as per the provisions of a constitutional bench in Article 145(3)[67] or at nine as per the benches set by U.S. or Canadian Supreme Court. Finally, we feel that the extension of this review to the Court's previous amendments is justified considering its application to ordinary laws,[68] for if it can apply to a lower law, it must be applied to a higher one as well.

F. ADDRESSING POTENTIAL PITFALLS

Before concluding this part and moving on to its application, we feel it is important to address the potential criticisms and drawbacks in our model. The primary criticism may stem from the comparatively low threshold that we have kept in identifying judicial amendments in the Indian context. It may be reasonably inferred that by our standard almost every

[66] Judiciary Act of 1869, ch. 22, 16 Stat. 44 (USA).
[67] INDIA CONST., 1950, art 145(3).
[68] Madras Bar Association v Union of India (2014) 10 SCC 1; Supreme Court Advocates-on-Record Association & Anr. v Union of India (2016) 5 SCC 1.

constitutional interpretation may be considered an amendment. This inference may also have been the reasoning behind the high threshold of the Macfarlane model. While we have explained that the Macfarlane model will run into a host of issues if applied *pari materia*, it may be expected of us to create a similarly high qualification.

However, we feel that in the Indian context, our argument of functionality being the core factor in deciding when a mere interpretative technique becomes an amendment is valid. A constitutional interpretation can only be expected to cross the functional threshold if it becomes the primary way for a provision to be interpreted. If the interpretation is such that it will significantly change how a provision is applied it may be called a judicial amendment. A way to look at this, is to see the frequency of the interpretation's usage either *post facto* or in the Court's ratio. While giving an interpretation, if the Court in its judgment, creates an interpretation which it anticipates may be used frequently by the Court in its review process and will significantly change how the text is interpreted, that may be considered a judicial amendment.

To illustrate, in one dispute, the Supreme Court increases the ambit of right to life to include the right to a healthy environment,[69] while, in another, it evolves a four-pronged test of proportionality to be applied to legislative and executive State action.[70] The former merely makes another dimension of the right to health justiciable, while the latter can be reasonably expected to be used frequently to significantly change how the text in relation to the facts before it is to be interpreted. It is clear that the

[69] *Subhash Kumar v State of Bihar* 1991 SCR (1) 5.
[70] Justice K.S. Puttaswamy (Retd.) & Anr. v Union of India & Ors. (2017) 10 SCC 1.

latter crosses the functionality threshold and therefore becomes an amendment, while the former remains a mere interpretation. The identification of when a judicial interpretation may hit the critical mass necessary to become an amendment, may be left to the Courts which must employ the help of the expert panels in doing so.

As a corollary to this, a question may arise whether each and every judicial standard or test will be considered an amendment to the Constitution. We answer in the negative. The differentiation must be done based on the degree of the functionally binding nature of the test. In simpler terms, a test may be considered an amendment if it is of a definite nature with strict rules regarding its application and which must all be complied with for it to be applied in future decisions. To illustrate, the test of reasonableness under Article 19 postulates that it has to be applied to an impugned law as no abstract standard or general pattern can be laid down.[71] This essentially leaves a lot of room for discretion for the judges and can be merely described as a technique for interpretation. On the other hand, the test of reasonable classification under Article 14 clearly sets out two conditions to be fulfilled by an impugned statute: (a) classification based on intelligible differentia; and (b) rational nexus to the object sought to be achieved. In each and every subsequent case when a law is challenged as violative of the right to equality, this test must be fulfilled by the law. This test eliminates ambiguity regarding its application and usage. Therefore, the former test will not be considered an amendment while the latter will be.

[71] State of Madras v V.G. Row 1952 SCR 597.

Another significant criticism may be, that even with these limitations placed on judicial amendments, it still remains a fairly undemocratic process. At the onset, we accept this criticism at face-value. We cannot argue for fully democratizing this process or place another organ as a check on the Supreme Court, especially in the Indian context. We have partly explained our reasoning in the previous sections. However, we feel that our aim is mainly to make the process of creation and review of judicial amendments analogous to the Parliament's process.

In India, subject to judicial review, a two-thirds majority has the uncontested power to amend the Constitution. Further, because of the delimitation freeze[72] of seat allocation amongst states since 1971, representation to the Parliament is such that not every citizen can claim to have an equal voice. The freeze effectively prioritized representation of less populous but more developed southern states above the over populated less developed northern states. Furthermore, the electoral history of India points towards situations wherein two-thirds majority can easily rest with one bloc for extended periods of time[73]. Therefore, even in the Parliament, we cannot claim a fully democratic amendment process. At best, we can hope to make the result constitutionally sound.

Lastly, a pragmatic concern may be the acceptability of our approach by the Supreme Court. We feel that the approach can be intuitively used by the Court to combat confusion created by the shortcomings of existing precedents and their applicability through the

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[72] INDIA CONST., 1950, art 82.
[73] Dinesh Chandra Srivastava, *Effect of Numerical Strength of Majority Ruling Party on Legislative Output in India*, 74 INDIAN J. POL. SCI., 621, (2013).

years. Furthermore, as per recent trends, it may also help the Court in avoiding disapproval with regard to the seemingly autocratic nature of its constitutional interpretation. For citizens, the Constitution is what the Court says it is far more than what their representatives say it is. The Court does not even need to conform to strict rules of procedure and limitations that the Parliament does. In adopting this approach, the Court will become a more transparent body and create greater trust with the citizens above and beyond constitutional provisions. The aim of any Constitutional Court is to make rights of citizens holistically justiciable through its interpretation. The approach will achieve this and make the process acceptable to the entire populace.

III. PART II: APPLYING APPROACH TO THE ERP TEST: PROVIDING A SOLUTIONS BASED MODEL

G. AMENDING ARTICLE 25 AND 26: A PRECEDENTIAL HISTORY OF ERP

Article 25 and 26 of the Indian Constitution provide for freedoms to practice religion and the management of religious affairs respectively. While the former provides for exceptions on the grounds of public order, health, morality and other provisions of Part III, the latter also exempts on similar grounds but does not subject itself to the other provisions of Part III.[74] These articles do not restrict the State from making any law on any 'secular' activity associated with religion or from seeking social reform in religious institutions and practices. It is on this proviso to these Articles

[74] Dr. Subramanian Swamy v State of Tamil Nadu AIR 2015 SC 460.

that the Indian Supreme Court had to evolve the ERP test to review legislations made by the State and to determine what constitutes religious practice. The test, continuing to this date, became a contentious and controversial functional amendment for these articles.

The amendment derived its sanction from landmark cases on religious rights adjudication of the Court. The first being *Shirur Mutt*,[75] which proposed that the Supreme Court can become a theological authority to determine essentialness of a religious practice by reading the texts and doctrines of that religion. The judgment did provide for an expansive definition of religion and affirmed that religious denominations can decide without any outside interference what is essential to their religion, unless it expressly ran contrary to the exceptions provided.[76] However, this judgment cannot be said to functionally change the provisions as it only highlighted the difference between secular and religious practice. The so-called textual turn,[77] happened in three landmark cases, first among which is *Devaru*[78], in which the Court relied on scriptures and held that it is for the Court to decide what is essential to a religion and not the denomination, an ignorance of the precedent set in *Shirur Mutt.* The elements of this modified test could be seen in *Mohd. Quareshi*,[79] in which the Court used similar standards to uphold the anti-cow slaughter law. The second case was *Durgah*

[75] Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt 1954 SCR 1005.
[76] RONOJOY SEN, LEGALIZING RELIGION: THE INDIAN SUPREME COURT AND SECULARISM, (No. 30, East-West Ctr. Washington, 2007).
[77] RONOJOY SEN, ARTICLES OF FAITH: RELIGION, SECULARISM, AND THE INDIAN SUPREME COURT, (Oxford University Press 2010).
[78] Sri Venkataramana Devaru & Ors. v State of Mysore & Ors. 1958 SCR 895.
[79] Mohd. Hanif Quareshi & Ors. v State of Bihar & Ors. 1959 SCR 629.

Committee,[80] wherein the Court began to apply reason to religious practices and sifted 'superstition' from religion. Further, in *Govindlalji*,[81] Justice Gajendragadkar strongly reaffirmed the Court's adjudicating authority in deciding religious practices, if there were opposing views emanating from the community. The third case was *Syed Saifuddin*,[82] wherein excommunication was held to be a religious practice, yet the dissenting opinion of Chief Justice Sinha elaborated that it shall still be subject to public welfare.

These judgments culminated in a functional change to Articles 25 and 26, providing a three-pronged test for religious rights adjudication not found in either the bare text or framers' intent in Constituent Assembly Debates. A practice shall only be granted constitutional protection against legislative action, if it can be proved religious, essential to faith and finally not contrary to any public interest notions that supersede it. The amendment conferring unprecedented ecclesiastical jurisdiction to the Court has been consistently reaffirmed.[83]

H. AN UNCONSTITUTIONAL AMENDMENT?

The problems with this judicial amendment are numerous. The first and foremost being the apparent assumption of a theological authority by the Constitutional Courts, in contravention to the basic structure principle of 'secularism'. Though the model of ameliorative secularism has been used as a justification by the Courts, the degree of interference cannot be so

[80] Durgah Committee, Ajmer & Anr. v Syed Hussain Ali & Ors. (1962) 1 SCR 383.
[81] Tilkayat Shri Govindlalji ... v The State of Rajasthan & Ors. 1963 AIR 1638.
[82] Sardar Syedna Taher Saifuddin Saheb v State of Bombay AIR 1962 SC 853.
[83] Adi Saiva Sivachariyargal Nala Sangam & Ors. v Govt. of Tamil Nadu AIR 2016 SC 209.

easily juxtaposed with social reform. In assuming this authority, the Courts began to rely on texts and scriptures, which poses a unique problem in India,[84] as multiple texts exist within the same denomination. The Courts' tendency to rely on majority versions, especially in the context of Hinduism, has diluted the 'essentialness' of a practice. Furthermore, the essentialness of a practice creates a novel exception not provided for in the text itself, wherein the only question that emanates from a bare perusal is whether a practice is religious or secular. The general term 'secular activity' being preceded by specific terms such as 'economic, political and financial' in Article 25 lends credence to this.[85] Another issue relates to shifting the burden from the State to the individual or the community, wherein they have to prove to the satisfaction of the Court that their practice is essential and does not contradict public interest and is therefore deserving of protection.

In a pragmatic sense, Courts' adjudication also does not take into account the net social benefit which may or may not be reached by rationalizing a religious practice. *Sabarimala* remains a fit example wherein constitutional morality allowed a few women clandestine entry following the decision at the cost of substantial interference by the Court in the matters of the religious community, which responded with protests. The case and the substantial questions emanating are yet to be decided by a nine-

[84] B.N. KIRPAL ET AL., SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA, (Oxford University Press 2000).

[85] Ashwani Kumar Singh, *India's Troubling Jurisprudence to Control and Regulate Private and Religious Sphere*, IACL- IADC BLOG, (Dec. 6, 2023), https://blog-iacl-aidc.org/2021-posts/2021/9/30/indias-troubling-jurisprudence-to-control-and-regulate-private-and-religious-sphere.

judge bench after multiple review petitions. A similar situation has also arisen with the recent 'Hijab'[86] dispute pending before the Supreme Court. The case also illustrates another problem of subjectivity, wherein, on reading the same passage from the Quran, the Kerala High Court found hijab an essential obligation[87], whereas the Bombay High Court held it to be non-essential[88]. It reflects how difficult it is to determine what constitutes the essentialness of a religion, even from a single supreme text. With reference to Part I, this creates an ironic situation, wherein the Court leaves the determination of the essential features of the Constitution, a supreme text, to be determined on a case-by-case basis, subject to 'living constitutionalism' and impossible to definitively enumerate. Yet, essential features of a religion can be easily identified from even countless scriptures and texts dating back centuries to definitively facilitate rights adjudication.

I. STRIKING DOWN THROUGH SECULARISM: BASIC STRUCTURE REVIEW AND THE 'PARAMETERS' TEST

Secularism has been recognized as a basic feature of the Constitution and enumerated as such in the very first case of *Kesavananda* and in subsequent cases.[89] In *Bommai,* secularism has been defined as the equal treatment of all religions by the State. From the point of view of the state, belief, faith and religion of a person and the acts done in pursuance of their religion are immaterial. All citizens are entitled to equal treatment

[86] Aishat Shifa v The State of Karnataka & Ors. 2022 SCC OnLine SC 1394.
[87] Fathema Hussain Sayed v Bharat Education Society 2002 SCC OnLine Bom 713.
[88] Amnah Bint Basheer & Anr. v Central Board of Secondary Education & Anr. 2016 SCC Online Ker 41117.
[89] S. R. Bommai v Union of India 1994 SCC (3) 1; Dr. M. Ismail Faruqui v Union of India AIR 1995 SC 605 A.

by the State. Professor Jain[90] describes it as a positive model of secularism and the essence of constitutional provisions is to prevent India from becoming a Theocratic State. The Supreme Court has itself gone so far as to say that any Government which pursues unsecular policies and actions contrary to the Constitution should be subject to Article 356:[91] State Emergency.[92]

This conception of secularism and the Court's insistence from preventing the State from assuming theological and unsecular character runs distinctly contrary to the ERP test which allows for an extensive theological mandate. The amendment, while consistently running contrary to the 'golden thread' of secularism woven into the Constitution, also runs into a host of problems as enumerated in the aforementioned sections. The precedential sanction for this amendment has been continuing since *Shirur Mutt* and needless to say has done considerable damage to this basic feature as per extensive evidence analyzed herein and by constitutional scholars at large. Therefore, this judicial amendment of Article(s) 25 and 26 should be struck down as being violative of the basic structure.

We believe our two-pronged approach shall result in a much more efficient test. From a structuralist standpoint emerges, what we dub as the 'parameters' test. To achieve sound religious rights adjudication, firstly the Court must revert to the position before the 'textual turn'. The question shall again become the difference between what is 'essentially religious' and what is not. Furthermore, autonomy to decide essential practices shall again

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[90] Jain, *supra* note 50, at 1384.
[91] India Const., 1950, art 356.
[92] State of Tamil Nadu v Ahobila Matam AIR 1987 SC 245.

be divested to religious denominations. To determine the question of religiosity of a practice, the Court must use certain enumerated, yet not exhaustive parameters. Such parameters can be presumed to include: (a) the duration since the practice has continued; (b) the social/cultural importance of a practice to the individual/community; (c) status of emanation of this belief: either religious or spiritual or any other; or (d) sincerity with which a practice is being followed. The list is not exhaustive and may change from case to case. However, none of the parameters shall allow for a theological mandate to check religiosity and its sincerity through texts or scriptures. In the same vein as the Sincerity of Belief test,[93] the parameters shall only check religiosity on an individual level and not *in rem*. The two-step application of the test shall be: (a) assertion of belief by individual/community; [94]and (b) checking religiosity through secular parameters

From a pragmatic standpoint, while evaluating the social reform as an exception under Article 25(2)(b),[95] we argue for reading in doctrine of proportionality to balance the importance of religious practice against the proposed social reform by the State or Judiciary. If the reform and its effects as contemplated by the Court in its wisdom outweigh the religious practice and any significance it may carry for the individual and community, it shall uphold the legislation or bar the practice as it deems fit. The proportional evaluation shall consider the fundamental rights of religious

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[93] Elizabeth Platt & Kara Loewentheil, *In Defense of the Sincerity Test* in Kevin Vallier & Michael Weber eds., *Religious Exemptions* (Oxford University Press 2018).
[94] Faizan Mustafa and Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, BYU L. REV., 915, (2018).
[95] INDIA CONST., 1950, art 25(2)(b).

freedom from a pragmatic lens and hypothecate any possible consequences that may emanate from their restriction.

Our test leaves the exceptions of public order, health and morality undisturbed. However, in agreeing with Justice Indu Malhotra, we believe that constitutional morality should only be used to eradicate substantial social evils which the Court may decide after considering the societal impact of a practice.

The primary aim of this section was to apply our approach in reading down the ERP test and to create a constitutionally sound judicial amendment. However, we believe that our test is only one of the possible alternatives which emerge from application of our approach.

IV. CONCLUSION

'Judicial Amendments' as a concept has been subject to considerable scrutiny in Western jurisprudence. Perhaps, this was the guiding force behind the high bar provided by Professor MacFarlane wherein only a few judicial interpretations may meet the criterion. While we have found merit in such and similar assessments, we still stand behind functional judicial amendments in developing democracy such as India to foster easier constitutional reform and protect citizens from substantial overreach by the State. The amendments have undeniably emanated through an active and robust system of constitutionally-sanctioned judicial review. This has been evidently shown through *Kesavananda* and beyond, particularly with respect to Fundamental Rights, the most direct relation the Constitution has with citizens.

However, we still understand the need to subject judicial amendments to the same standard that the Judiciary applies on Parliament's power under Article 368. As a democracy, we must not allow for unparalleled power to amend the Constitution to the Supreme Court. Therefore, we must ask for certain checks and balances as well as guiding principles which the Court may use to restrain itself from overreaching its bounds. We believe our approach, a mix of central tenets of structuralism and pragmatism, forms a suitable direction which the Court may take to guide formation of new amendments to strike down previous unconstitutional ones. In doing so, rather than definitively curtailing or expanding judicial review, we sought to redefine it.

Lastly, in our application of our approach to the ERP test, we sought to showcase the effect our model may have on constitutional interpretation and future exercise of judicial review. We firmly believe that it remains an exceptional erroneous judicial change which has perpetuated for almost the entire existence of the Constitution. In applying our model, we evolved a possible alternative amendment which can emerge and be constitutionally sound. Finally, we humbly hope that the nine-judge review bench or the Hijab case reference may become opportunities for the Court to inculcate our model in its constitutional jurisprudence.

Sarthak Ahuja & Khushi Kumar, *Proposals, Practices, and Interpretations: Examining the WTO's Sequencing Dilemma*, 11(2) NLUJ L. REV. 152 (2025)

PROPOSALS, PRACTICES, AND INTERPRETATIONS: EXAMINING THE WTO'S SEQUENCING DILEMMA

~ Sarthak Ahuja & Khushi Kumar*

ABSTRACT

*The Sequencing issue between Articles 21 and 22 of the Dispute Settlement Understanding ("**DSU**") arises from a drafting gap that creates ambiguity regarding the order of compliance and retaliation proceedings. Specifically, the issue pertains to whether compliance with WTO rulings under Article 21.5 must be determined before initiating retaliation measures under Article 22.6 of the DSU.*

The recent commitment to reform the DSU, prompted by the Appellate Body crisis, presents a timely opportunity to address longstanding issues and advance meaningful resolution. While member states have proposed various solutions, no single proposal has resolved the issue comprehensively. To mitigate the uncertainty and rising legal costs of dispute settlement, states have increasingly relied on sequencing agreements, i.e., contractual arrangements between disputing parties to coordinate the processes. A thorough analysis of these proposals offers a comprehensive checklist for tackling the

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problem. However, this approach is a matter of convenience and individual choice, rather than a permanent solution.

This paper thus attempts to address the issue at its fundamental level, analyzing the language of both Articles 21 and 22 using interpretative tools of Public International Law. Ultimately, a framework of authoritative interpretation is suggested to bring clarity, avoiding the need for extensive amendments.

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INTRODUCTION

Following the 8th Uruguay Round of Negotiations, the Marrakesh Agreement was signed on 15th April 1994 to establish the World Trade Organization ("**WTO**"). This agreement replaced the dispute settlement mechanism of the General Agreement on Tariffs and Trade ("**GATT**"), 1947with the Understanding on Rules and Procedures Governing the Settlement of Disputes ("**DSU**"), effectively transitioning GATT to an institutional framework from a mere contractual agreement. Despite this transformation, the WTO has since become the leading international organization for promoting trade liberalization and prosperity through a rules-based system.[1] Similarly, the Dispute Settlement Body ("**DSB**"), established with the flaws of the predecessor in mind, has been tasked with managing one of the most extensive caseloads among the international forums.[2]

The reason for DSB's delivery of such an exponential number of reports and findings, far surpassing those of bodies like the International Court of Justice,[3] can be attributed to two key factors. First, economics is inherently influenced by the power dynamics of the stakeholders involved, necessitating a system to ensure compliance; and, secondly, the complexities of GATT are not fully understood by all member nations.

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[1] WORLD TRADE ORGANIZATION SECRETARIAT, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM (2nd ed., Cambridge University Press, 2017).
[2] Marcelo Varella, *The Effectiveness of the Dispute Settlement Body of the World Trade Organization,* 8(2) J. OF INT'L TRADE LAW AND POLICY 100-101 (2009).
[3] Peter Bossche, *Is there a Future for the WTO Appellate Body and WTO Dispute Settlement?* (World Trade Institute, Working Paper No. 01, 2022).

Thus, the DSB has been approached by multiple states to address a diverse range of issues.

However, despite the DSU's significant success, as evidenced by the volume of cases and the speed of their disposal, it is not without errors. In fact, instead of just being plagued by minor loopholes, the DSU as a whole, has become virtually inoperative due to the blockage of the appointment of Appellate Body members by the United States.[4] The appointment of Appellate Body members requires consensus among WTO members, but the United States consistently objects, citing concerns over judicial overreach and the body's failure to strictly adhere to its mandate, effectively halting the process. This setback to an otherwise efficient dispute mechanism is not an unexpected development; rather the imbalance between the legislative and judicial bodies of the WTO has long been recognized,[5] with reforms consistently being proposed to address it. [6]

To restore the glory of the DSB and to strengthen its functioning, the 12th Ministerial Conference in 2022 made a resolution 'to have a fully and well-functioning dispute settlement body which is accessible to all the members by the end of 2024.'[7]Accessibility to the DSU is a highly contested issue given the significant number of disputes brought before the forum by developing and developed countries. This concentration of cases further

[4] Peter Bossche, *Can the WTO Dispute Settlement System Be Revived?* (World Trade Institute, Working Paper No. 03, 2023).
[5] Laude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization,* 2(2) CHICAGO J. INT'L L. 403, 410 (2001).
[6] Bossche, *Supra* note 4.
[7] World Trade Organization, MC12 Outcome Document, WTO Doc. WT/MIN (22)/24, at 4 (June 17, 2022).

highlights the disparity in the number of cases brought by non-developed countries, raising concerns about unequal access to the system. Additionally, there are ongoing concerns about the overall functioning of the DSU, including its fairness and effectiveness in addressing the needs of all WTO members. It is, therefore, crucial to understand that hindrances to the functioning of DSU are multifaceted and not just limited to the appellate review issue. It encompasses matters like the role of *amicus curiae* the extent to which external parties can submit opinions in disputes, third-party rights ensuring meaningful participation and representation for countries not directly involved in disputes, and the lack of a remand mechanism, which limits the ability to send back to panels for further examination of facts or legal interpretations.

While there is no doubt that the DSU has room for improvement to address such issues, with the first review conducted just four years after its inception.[8] But in practice, irrespective of these issues, the accuracy and finality of the Panel and Appellate Body reports are not questioned. Instead, countries have indicated their intention to comply with the reports of the Panel, as evidenced by the high level of adherence to the outcomes of the adjudicated disputes.[9]

However, the appropriate level of compliance has always been a matter of contention.[10] As an ancillary result of the disagreement, the issue of sequencing has emerged during the compliance stage of the report. This

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[8] *Supra* note 1, at 183.
[9] *Supra* note 1, at 3.
[10] John H. Jackson, *Dispute Settlement and the WTO - Emerging Problems,* 1(3) J. INT'L ECONOMIC L. 329, 340 (1998).

issue is rooted in the ambiguities in the text of the DSU and was highlighted for the first time in the European Communities — Regime for the Importation, Sale and Distribution of Bananas ("***EC—Bananas III***") dispute.[11] It has been more than two decades since the issue was flagged, yet no amendments to the DSU have been made to address it. Instead, independent approaches have been pursued, leaving the issue unresolved and its resolution unpredictable.

Therefore, in the backdrop of ongoing reforms to the DSU, this paper aims to address specifically this lacuna of sequencing in the dispute settlement system. It seeks to mitigate the uncertainty of the dispute mechanism for its member states, particularly affecting non-developed states, whose representation is often limited due to significant financial burdens associated with WTO litigation.

To achieve this, the paper begins by contextualizing the problem in Part II, which outlines the factors contributing to the issue of sequencing and establishes the parameters for assessing the viability of the proposals presented in the subsequent parts. Part III then addresses the comprehensive proposals submitted by WTO member nations to resolve the issue, while Part IV explores how states use contractual agreements to establish a specific order of the DSU provisions. Part V examines scholarly suggestions for interpreting the DSU provisions in light of Public International Law to resolve the sequencing issue without modifying the

[11] Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas,* WTO Doc. WT/DS27/AB/R (1997) (adopted Sept. 25, 1997).

DSU text. Finally, Part VI concludes by suggesting an authoritative interpretation as a viable solution to ensure effective dispute resolution.

A. ISSUE OF SEQUENCING

The sequencing issue in the WTO's DSU arises primarily during the compliance stage of the DSB's recommendations and rulings.[12]

Article 21 of the DSU outlines the process for implementing WTO dispute rulings, requiring the 'party found in violation' of a trade agreement to bring its measures into compliance within a 'reasonable period'.

If there is a disagreement over whether the violating party has complied, Article 21.5 provides a mechanism for the affected party to request the establishment of a compliance panel. This panel examines whether the measures adopted by the violating party align with the DSB's recommendations and rulings. The aim of Article 21.5 is to ensure that rulings are fully implemented and disputes over compliance are resolved.

Meanwhile, Article 22 of the DSU addresses the situation when a member fails to comply with a WTO ruling within the prescribed reasonable period – the prevailing party may seek to impose trade sanctions or compensation.

Under Article 22.6, if the parties cannot agree on compensation or the level of retaliation, the matter can be referred to the DSB for arbitration.

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[12] Vera Grytz & Carolin Mülaler, *Sequencing: Ad Hoc Solutions to a Systemic Problem* in THE WTO DISPUTE SETTLEMENT MECHANISM: A DEVELOPING COUNTRY PERSPECTIVE 195 (Alberto Júnior et al., eds., Springer 2019).

An arbitration determines the permissible level of retaliation, ensuring that the sanctions imposed are proportional to the harm caused by the violation.

The language of Article 21 and 22 of the DSU allows for simultaneous proceedings on compliance and retaliation, therefore, the complexity lies in deciding whether to only initiate a compliance panel under Article 21.5 of the DSU or simultaneously seek retaliation under Article 22 of the DSU, particularly as the expiration of the Reasonable Period of Time ("**RPT**") approaches.

The key issue in such a situation arises from the tight timing constraints.[13] A request under Article 22.2 of the DSU must be made within 20 days of the expiration of the RPT,[14] and authorization for the suspension of concessions and obligations must occur within 30 days of the expiry of the RPT.[15] From the respondent's perspective, arbitration to determine the level of nullification and impairment must be completed within 60 days of the RPT's expiration.[16] Thus, if a party must await a compliance report before considering retaliation, a time conundrum arises as the compliance panel has up to 90 days to circulate its report,[17] potentially longer if

[13] Matilda Brolin, *Procedural Agreements in WTO Disputes: Addressing the Sequencing Problem,* 85(1) NORDIC J. INT'L L.65, 68 (2016).
[14] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.2, April 15, 1994, WTO Agreement, Annex 2, WTO Doc. LT/UR/A-2/DS/U/1 (1994).
[15] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.6, April 15, 1994, WTO Agreement, Annex 2, WTO Doc. LT/UR/A-2/DS/U/1 (1994).
[16] *Id.*
[17] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 21.5, April 15, 1994, WTO Agreement, Annex 2, WTO Doc. LT/UR/A-2/DS/U/1 (1994).

extensions or appeals occur and this would in turn lead to exhaustion of the window period provided for seeking retaliation.[18] As a result, this situation can lead to the possibility of an authorization for suspension being granted before the panel has assessed the compliance of the measures.[19]

This places the disputing parties into a dilemma: either pursue retaliation without a compliance report or risk missing the window for authorization under Article 22.2 and 22.6.

There is also a critical need to avoid an endless cycle of recourse to compliance reviews,[20] where new measures are continuously introduced after old ones are found to violate WTO obligations.[21] This lack of clear sequencing between Articles 21.5 and 22.6 of the DSU can lead to significant delays, and endless loops of litigation,[22] as parties might struggle to reach an agreement on compliance before considering compensation or retaliation. However, bypassing this process by assuming non-compliance and unilaterally seeking authorization of suspension is also precluded.[23]

The *EC—Bananas III* Case,[24] involved a dispute between the European Union and several Latin American countries, along with the United States, over the EU's preferential banana import regime for former

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[18] Gorbylev *et.al*, *Retaliation under the WTO Agreement: The "Sequencing Problem",* 14(2) ESTEY CTR. J. INT'L L. & TRADE POLICY 118, 122 (2013).
[19] Grytz & Müller, *supra* note 12, at 192.
[20] *Supra* note 11, at 6.
[21] Kym Anderson, *Peculiarities of Retaliation in WTO Dispute Settlement,* 1(2) WORLD TRADE REV.123 (2002).
[22] *Id.*
[23] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23.2, April 15, 1994, WTO Agreement, Annex 2, WTO Doc. LT/UR/A-2/DS/U/1 (1994).
[24] *Supra* note 11.

colonies. The WTO ruled that the regime violated trade rules, leading to a series of compliance reviews and ongoing disputes about whether the EU's revised measures met the ruling.

This dispute is an illustrative example of the sequencing issue, wherein two requests for compliance reviews of the reviewed measures at the end of the reasonable period of time ("**RPT**") could have interfered and prevented retaliation by the complaining party if it had waited for the compliance report.[25] This ambiguity not only hinders timely dispute resolution but also complicates the effective navigation of the dispute resolution process by WTO members.

B. SUMMARY OF THE ISSUE

Here, *first* the arbitrator is expected to authorize suspension within a shorter time frame; however, making this decision without a compliance report results in unilateral action. *Second,* conversely awaiting a panel report can trap the complaining party in an endless loop of compliance reviews, or *third,* lead to a lapse of rights under Article 22.2 or Article 22.6 of the DSU due to stringent time frames. This sequencing issue thus presents a significant challenge to the effective and timely resolution of disputes within the WTO framework. As a result, in practice, parties often conduct parallel proceedings under Articles 21.5, 22.2 and 22.6 of the DSU.

[25] Grytz & Müller, *Supra* note 12.

V. STATE PROPOSALS TO THE WTO

Various states have submitted comprehensive proposals to the WTO to address the issue of sequencing. Such proposals deal with the problem in a three-pronged manner;

i) They alleviate concerns about losing the right to retaliate due to the expiry of the reasonable time period.

This has been addressed, firstly, by proposing omission of two prerequisites; a) the requirement to initiate the negotiations under Article 22.2 within the expiry of RPT,[26] and b) the requirement to suspend concessions or other obligations within 30 days of the expiry of RPT.[27] Secondly, in this proposal, the time frame for Article 22.6 arbitration has been adjusted, replacing the 60-day deadline after the RPT's expiry with a reference point based on when the request was made or when the compliance report was circulated. For example, 45/60 days after the request,[28] or 20 days after the compliance panel report has been circulated.[29]

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[26] Dispute Settlement Body Special Session, *Textual Contribution to the Negotiations on Improvements and Clarifications of The Dispute Settlement Understanding*, Non-Paper Presented by Argentina, Brazil, Canada, India, New Zealand & Norway, WTO Doc. JOB (04)/52, at 3 (May 19, 2004).

[27] Dispute Settlement Body Special Session, *Amendment of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, Proposal by Japan, WTO Doc.TN/DS/W/32, at 7 (Ian. 22, 2003); *Supra* note 26, at 4.

[28] *Id.*

[29] Dispute Settlement Body Special Session, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, Proposal by Ecuador, WTO Doc. TN/DS/W/33, at 2 (Jan. 23, 2003).

However, some proposals have missed this detail and have not eliminated these requirements.[30]

ii) They provide a clear pathway for moving forward with Article 22.

This has been addressed, by suggesting that WTO Members may cross-refer the articles by either modifying Article 22 to allow a party to request authorization for suspension only if the compliance panel under Article 21.5 has determined that the member concerned has failed to comply,[31] or they may add Article 22 *bis* which establishes sufficient conditions for moving forward with a request under Article 22.2.[32]

Typically, these conditions would include implicit requirements where the respondent's failure to adhere to procedural obligations indicates non-compliance. However, the last sub-clause mandates a demonstration of non-compliance under Article 21.5 to proceed with retaliation. Moreover, a framework is suggested for parties to request arbitration to determine the level of nullification or impairment before seeking authorization for the suspension of concessions.[33]

iii) They prevent parties from being stuck in a loop of inadequate reforms.

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[30] Dispute Settlement Body Special Session, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, Communication from Australia, WTO Doc. TN/DS/W/49, at 6 (Feb. 17, 2003).
[31] *Id.*
[32] *See* Non-Paper by Argentina and others, *supra* notes 26-27 & 29; Proposal by Japan, *supra* note 27; Proposal by Ecuador, *supra* note 29, at 4.
[33] Dispute Settlement Body Special, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations*, Communication from Kenya, WTO Doc.TN/DS/W/42, at 4 (Jan. 24, 2003).

This has been addressed only in a few proposals. First, the proposal by Japan achieves this by adding a provision after paragraph 1 of Article 22, emphasizing the pursuit of negotiations after a panel under Article 21.5 reports a lack of compliance, unless full compliance is assured.[34]

Second, a proposal by Argentina, Brazil, Canada, India, New Zealand and Norway (the "**Indian block**") addresses this by clarifying that members are not entitled to an additional under the dispute settlement procedures, thus eliminating the scope for new reforms once the time given to the concerned party has lapsed.[35]

In addition to these changes, there have been proposals to sequence and mandate consultations; a) before establishing the compliance panel,[36] or b) before requesting suspension and after the compliance panel has issued its report.[37] The Indian block, on the other hand, explicitly stated that such consultations are not required for the compliance process.[38]

A. VIABILITY OF THE PROPOSALS

In conclusion, while these amendments address the issue of sequencing, no single proposal fully captures intricate details of the required language. The proposals by Japan, the European Union, and the proposal by the Indian block come closest to addressing all the issues. However, the

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[34] *Supra* note 27, at 6.
[35] *Supra* note 26.
[36] Dispute Settlement Body Special Session, *Contribution of the European Communities and its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding*, Communication from the European Communities, WTO Doc. TN/DS/W/38, at 8 (Jan. 23, 2003).
[37] *Supra* note 29, at 4.
[38] *Supra* note 26.

following considerations should further enhance the outcome of the solution:

a) Specifically for the issue of preventing inadequate reforms, the terminology "*full confidence"* proposed is inherently ambiguous. Incorporating language from proposals such as that of the Indian block would be a better option
b) The proposal by Ecuador, which requires the establishment of arbitration to determine the level of nullification before seeking suspension, should ensure that due considering is given to the developing nations.
c) Given the disparity in the number of disputes filed by high-income economies versus low-income economies, the proposal for mandatory consultations should also be given due consideration.

In addition to these amendments to the DSU, Canada has reiterated the role of sequencing agreements in addressing the issue by establishing the pre-requisite of a compliance panel report before moving forward with a request for retaliation.[39]

The use of such sequencing agreements was highlighted in the Australia — Measures Affecting Importation of Salmon ("***Australia—Salmon***") dispute, where the parties agreed to a sequencing framework to

[39] World Trade Organization, *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc. JOB/DSB/1/Add.6 (Aug. 3, 2016).

address the issue of retaliation only after the compliance panel's report was issued.[40]

Since then, there have been significant developments on this issue, and contemporary forms of sequencing agreements may provide valuable insights into contractual language that could help address the existing lacunae between Article 21 and Article 22 of the DSU.

VI. PRACTICE OF SEQUENCING AGREEMENTS

In addressing the issue of sequencing, states often resort to contractually agreeing on a specific order of events within the dispute resolution mechanism. However, the primary limitation of such agreements is that, regardless of the contracting parties, they cannot be relied upon for future disputes, as these agreements are tailored to suit the specific circumstances of the dispute at hand.[41] Consequently, this approach permits varying sequences of proceedings across different disputes. Typically, these agreements address the issue through two primary ways: **[A]** by facilitating the suspension of arbitration proceedings, and **[B]** by enabling a waiver of the Reasonable Time Period argument. Additionally, a third type of sequencing agreement combines these two approaches, offering greater flexibility but less certainty regarding the order of the events.

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[40] Appellate Body Report, *Australia: Measures Affecting Importation of Salmon*, WTO Doc. WT/DS18/AB/R (Oct. 20, 1998) (adopted on Nov. 6, 1998).
[41] Brolin, *supra* note 13, at 70.

A. SUSPENSION OF ARBITRATION

Such agreements do not set new time frames beyond those outlined in the DSU but rely on its provisions. To ensure that a party does not lose the opportunity to retaliate, they incorporate several positive actions.

According to these agreements, a request for authorization of suspension must be made within the prescribed 30-day time frame.[42] Following the authorization for suspension, the responding party submits a request for arbitration to determine the level of nullification.[43] Then, both parties mutually decide to request a halt in proceedings and resumption of work after the compliance panel determine any failure on the part of the respondent.[44] Moreover, specific additional conditions for resumption may be included, tailored to the parties and dispute in question. Conclusively, the parties cooperate to ensure that the arbitration panel delivers and circulates its report within a set time frame after the resumption, usually 60 days.[45]

For the first instance, in the *Australia — Salmon* dispute,[46] the parties agreed as follows: *"Canada and Australia agreed that the arbitration*

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[42] European Communities - Measures Affecting the Approval and Marketing of Biotech Products, Understanding between the European Communities and the United States Regarding Procedures under Articles 21 and 22 of the DSU, WTO Doc. WT/DS291/38, at 3 (Jan. 17, 2008);United States: Subsidies on Upland Cotton, Understanding between Brazil and the United States Regarding Procedures under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, WTO Doc. WT/DS267/22, at 2 (July 8, 2005).
[43] *Id.*
[44] *Id.*
[45] United States - Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea, Understanding between the Republic of Korea and the United States Regarding Procedures Under Articles 21 and 22 of the DSU, WTO Doc. WT/DS488/16, at 2 (Feb. 10, 2020).
[46] *Supra* note 40.

proceedings would be held in abeyance until after the circulation of the panel report under Article 21.5."[47]

This agreement, however, differed in one critical aspect, i.e.it explicitly allowed the arbitration to start regardless of whether either party appealed the compliance panel's report. This could potentially result in simultaneous proceedings under Article 21.5 and arbitration under 22.6, thereby complicating the sequencing process.

Agreements in present day use ensure such possibilities are avoided and instead include additional details for resuming the arbitration panel's proceedings.

For instance, in *EC — Approval and Marketing of Biotech Products,*[48] only the United States was permitted to request the resumption of arbitration. This case involved disagreements over measures imposed by the European Communities on genetically modified products, with sequencing agreements aiming to prevent overlaps between compliance reviews and arbitration by granting specific procedural rights to the complainant. Similarly, in *US — OCTG (Korea),*[49] both parties were allowed to request resumption. This dispute dealt with anti-dumping measures imposed by the United States, and the sequencing agreement emphasized mutual cooperation to avoid procedural conflicts between compliance and retaliation stages. These measures exemplify the tailored nature of modern

[47] Appellate Body Report, Australia - Measures Affecting Importation of Salmon, WTO Doc. WT/DS18/RW, 1.3 (Feb. 18, 2000).
[48] Understanding between the European Communities and the United States, *supra* note 42.
[49] *Supra* note 47.

sequencing agreements to mitigate potential challenges in dispute resolution.

B. ENABLING OF THE 'WAIVER TO ASSERT RPT' ARGUMENT

Such agreements are based on the principle of party autonomy, allowing parties to waive the time period for seeking retaliation. This is ensured through a negative action by the respondent. For this waiver, a compliance panel report is firstly prepared under Article 21.5 a compulsory precursor for a request to be imitated under Article 22.6.[50] Then, the respondent agrees not to assert that the complaining party was precluded from obtaining authorization because the request was made outside the time frame specified under Article 22.6.[51] This waiver is without prejudice to the respondent's right to seek arbitration to address the level of suspension under Article 22.6.[52]

From, the *US —Shrimp,*[53] in 2000, which addressed environmental measures affecting shrimp imports to China — *AD on Stainless Steel (Japan)* dispute,[54] in 2024, involving anti-dumping measures; similar language has

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[50] United States: Import Prohibition of Certain Shrimp and Shrimp Products, Understanding between Malaysia and the United States Regarding Possible Proceedings under Articles 21 and 22 of the DSU, WTO Doc. WT/DS58/16, at 1 (Jan. 12, 2000); Brolin, *supra* note 13, at 71.

[51] China: Certain Measures Affecting Electronic Payment Services, Understanding Between China and the United States Regarding Procedures under Articles 21 and 22 of the DSU, WTO Doc. WT/DS413/10, at 6 (Aug. 21, 2013); Australia: Anti-Dumping Measures on A4 Copy Paper, Understanding between Australia and Indonesia Regarding Procedures under Articles 21 And 22 Of the DSU, WTO Doc. WT/DS529/18, at 7 (Oct. 7, 2020).

[52] *Id.*

[53] Understanding between Malaysia and the United States, *Supra* note 50.

[54] China: Anti-Dumping Measures on Stainless Steel Products from Japan, Understanding Between China and Japan Regarding Procedures under Articles 21 And 22 of the DSU, WTO Doc. WT/DS601/12 (May 29, 2024).

been consistently employed. However, one critical detail often mitted in such agreements is the preservation of the opportunity for negotiations subsequent to the compliance panel report. As the time frame for negotiations remains unaltered, such requests must still be made before the expiry of the RPT, leaving a potential gap in resolving disputes effectively.

C. VIABILITY OF THE SEQUENCING AGREEMENTS

The approach of signing different agreements for different disputes is prone to certain issues. First, since parties devise their own variations of procedures for sequencing, this diversity reduces the system's predictability for resolving disputes.[55]

Second, as a general rule, smaller and weaker members benefit from a more rule-based system rather than bilateral ad hoc arrangements.[56] Procedural agreements require the consent of both parties,[57] not as a one-time consent but as dispute specific agreements. In disputes marked by power imbalances due to differences in the negotiating strength, smaller and less powerful members may feel compelled to accept to terms imposed by larger, more experienced members.[58]

Third, these agreements create another legal lacuna in context of Article 10 of the DSU, which provides for third-party rights. Third party can only raise their interests during the panel process, but Article 22.6

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[55] Cherise Valles &Brendan McGivern, *The Right to Retaliate under the WTO Agreement: The Sequencing Problem*, 34(2) J. WORLD TRADE 63, 84 (2000).
[56] Y Suzuki, *"Sequencing" and Compliance, in* REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM 391 (Dencho Georgiev and Kim Borghteds., 2006).
[57] *Id.* at 382.
[58] *Id.*

relates to arbitral proceedings. If a sequencing agreement allows the arbitrator to decide upon compliance, third parties might challenge the procedural agreement as it modifies their rights without their consent.

Introducing new amendments to the DSU should be considered during the upcoming rounds of reforms for the DSB. However, this is a lengthy process, as evidenced by the fact that the initial proposals addressing the issue were made in the early 2000s and the matters remains unresolved. Moreover, while sequencing agreements, as discussed, provide interim solutions, they have inherent shortcomings. In the meantime, scholars have proposed alternate solutions to the sequencing issue the operate within the ambit of the existing text.

VII. UNDERSTANDING SCHOLARLY PROPOSALS FOR SEQUENCING

Scholars have proposed two primary approaches to address the issue of sequencing: **[A]** An Alternative Interpretation to the Meaning of the Words, and **[B]** Understanding the Principle of Sequencing as Part of Customary International Law.

A. AN ALTERNATIVE INTERPRETATION TO THE MEANING OF THE WORDS

Since the DSU falls under the definition of covered agreements,[59]reliance can be placed on Article 3.2 of the DSU to clarify existing provisions causing the sequencing issue with the help of customary

[59] Understanding on Rules and Procedures Governing the Settlement of Disputes, App. 1, Apr. 15, 1994, WTO Agreement, WTO Doc. LT/UR/A-2/DS/U/1.

rules of interpretation of public international law.[60] As per Article 31(1) of the Vienna Convention on the Law of Treaties, treaty provisions should be interpreted in good faith, according to their ordinary meaning, and in light of the treaty's object and purpose.[61]

Therefore, primarily Article 22.6 which states:

> *"…fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings…"*[62]

should be interpreted as dealing with a situation where a party does absolutely nothing to bring measures into compliance. In such scenarios, the request for retaliation should be made within the RPT.

On the other hand, Article 21.5 which reads as: *"where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings…",*[63] should be interpreted as dealing with cases where the losing party takes some steps toward compliance but there is disagreement as to its adequacy. This creates a new scenario not covered by Article 22, where the time period for retaliation should begin from the day the compliance panel or appellate body determines non-compliance by the respondent.

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[60] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2, Apr. 15, 1994, WTO Agreement, WTO Doc. LT/UR/A-2/DS/U/1.
[61] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.
[62] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22.6, Apr. 15, 1994, WTO Agreement, WTO Doc. LT/UR/A-2/DS/U/1.
[63] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 21.5, Apr. 15, 1994, WTO Agreement, WTO Doc. LT/UR/A-2/DS/U/1.

Additionally, the purpose and objective of dispute settlement which include achieving a *"positive solution to a dispute",*[64] and ensuring a *"satisfactory adjustment of the matter in good faith",*[65] will be better fulfilled by measures aimed at resolving the dispute promptly, rather than prolonging it through unnecessary litigation.[66]

B. VIABILITY OF THE INTERPRETATION

While retaliatory measures remain available regardless of the lapse of reasonable period of time, provided the panel is satisfied with the respondent's reforms, this approach opens the door for the respondent to implement an endless series of inadequate reforms.[67] Therefore, the core issue lies in the potential ability to evade full compliance by making only partial or superficial changes.

Each time the panel deems the reforms inadequate, the respondent can introduce new, still inadequate, measures. This cycle can result in prolonged or even indefinite non-compliance, undermining the effectiveness of the dispute resolution process. Such a loophole allows the respondent to delay genuine compliance indefinitely, thereby frustrating the very purpose of the dispute settlement system, which is to ensure timely and effective resolution of disputes.

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[64] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.7, Apr. 15, 1994, WTO Agreement, WTO Doc. LT/UR/A-2/DS/U/1.
[65] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.10, Apr. 15, 1994, WTO Agreement, WTO Doc. LT/UR/A-2/DS/U/1.
[66] Petros Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place,* 11(4) EUR. J. INT'L L.,795 (2000).
[67] *Supra* note 21.

C. UNDERSTANDING THE PRINCIPLE OF SEQUENCING AS PART OF CUSTOMARY INTERNATIONAL LAW

The principle of sequencing can be considered a part of customary international law,[68] as it fulfills the twin-test of state practice and *Opinio juris*. To satisfy the first requisite, consider the following definition of State Practice: *"state practice is to be general meaning sufficiently widespread and representative."*[69] Furthermore, for a general customary rule, even a majority or substantial minority of interested states can establish new customs.[70] Such as, in the *Continental Shelf* dispute, the position of significant maritime States was recognized as customary international law, even though several eligible coastal states lacked similar state practices.[71] The consistent adoption of the sequencing approach by member states, evidenced by binding agreements they have entered into, demonstrates articulation of claims and responses which in turn represents state practice.[72] This is because the widespread and consistent practice by nations, particularly those controlling a majority of global trade, not only shows general acceptance but also constitutes a widespread and representative practice within the given industry. To fulfill the requirement of *Opinio juris*, States must believe that a course of action is legally binding and perform it with

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[68] Garima Shahani, *The Sequencing Dilemma: Will the European Union Succeed against Indonesia,* 49(3) J. WORLD TRADE 517 (2015).

[69] Draft Conclusions on Identification of Customary International Law, with commentaries, in the Year book of the International Law Commission on the work of its seventieth session, U.N. Doc. A/73/10, Vol. 2(2) (2018).

[70] MALCOLM SHAW, INTERNATIONAL LAW, 87-88 (Cambridge University Press ed., 5th ed., 2003).

[71] Continental Shelf (Lib. v. Mal.), Merits, 1985 I.C.J. 13 (June 3).

[72] Michael Scharf, *Accelerated Formation of Customary International Law,* 20 J. INT'L & COMP. L. 305, 314 (2014).

that understanding. Even a single instance can infer that they have tacitly consented to the rule involved.[73] This must, however, be distinguished from mere usage or habit,[74] where a practice may exist as a matter of convenience or political expediency.[75] Legal obligations can be evidenced through diplomatic correspondence, drafting processes, and diplomatic actions.[76]

Thus, the explicit intent to follow sequencing in agreements and the correspondence submitted to the WTO advocating for sequencing reforms reflect *Opinio juris*. This demonstrates the practice is not merely a social or moral convention but is considered legally binding. Furthermore, sequencing agreements themselves provide positive evidence of the adoption of the rule by the state.

D. VIABILITY OF THE PROPOSALS

While the practice is dispute-specific, certain states exhibit inconsistent behavior, sometimes signing the agreement while sometimes refraining,[77] depending upon factors such as if it is the complaining party or not. But this can be solved by giving weightage to the representative practice as a few uncertainties or contradictions need not undermine the general acceptance of the rule.[78]

An additional concern might also arise of accelerated formulation of customary international law because the time passed for the practice has

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[73] Shaw, *supra* note 70, at 71.
[74] Identification of Customary International law, *supra* note 69, at 138.
[75] Asylum (Col. v. Peru), Judgement, 1950 I.C.J. 266 (Nov 20).
[76] Identification of Customary International Law, *supra* note 69, at 141.
[77] Shahani, *supra* note 68, at 535.
[78] Fisheries (U.K. v. Nor), Merits, 1951 I.C.J. Rep 116 (Dec 18).

not been much and there exists no Grotian moment as such for such practice to come into play. But the duration of time that is taken into consideration can surely be minimized based on over manifestation of the practice as a legal obligation through consistent and widespread adoption.[79]

VIII. WAY FORWARD

Addressing the sequencing issue between Articles 21 and 22 of the DSU reflects a very critical procedural gap that undermines the predictability and efficiency of the WTO dispute settlement system. Ambiguity on the order of compliance and retaliation proceedings has remained in place even after several reform proposals and general use of sequencing agreements as a stopgap measure. Although pragmatic, these are neither universally adopted nor robust enough to resolve the underlying issue.

The most apparent course of action for resolving the sequencing issue is an amendment to the existing DSU under the procedure laid down in the Marrakesh Agreement. The twelfth Ministerial Conference also called for final reforms to the DSU by 2024. However, more pressing issues, such as the state of the Appellate Body, and the requirement for adoption by consensus during the ongoing crisis have delayed modifications to the DSU. These delays resulted in no fruitful conclusion on the negotiations of the reforms during the Thirteenth Ministerial Conference.

With such an obscure position on future reforms on the thematic issues of the DSU, relying on the natural course, as in the EC-Banana

[79] DIONISIO ANZILOTTI, CORSO DI DIRITTOINTERNATIONALE 73-76 (3rd ed., 1928).

dispute where the arbitration and compliance panel were composed of the same people, who then synchronized timelines by merging the deadlines for Article 21.5 and Article 22.6 proceedings, is also not a guarantee for a fix to the sequencing issue. This is because, in the first place, as laid down in US-Wool Shirts and Blouses, "*the panels or appellate bodies are not empowered to make law by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute*."

Second, this approach depends heavily on the availability of the arbitrators, as an Article 22.6 arbitrator might proceed to decide compliance in their absence, potentially prolonging the issue if coordination between arbitrators and panelists fails.

This leaves us the alternative of signing sequencing agreements separately for each dispute. While varied interpretations and considering sequencing as customary international law provide possible fixes, the lack of viability and universal acceptance of these proposals means they cannot be enforced consistently.

An authoritative interpretation by the Ministerial Conference or General Council under the Marrakesh Agreement offers a less cumbersome solution compared to an amendment. This approach requires comparatively fewer votes, only a two-thirds majority for adoption. But it is essential to note that Article IX:2 is limited to interpretation and cannot modify the contents of the DSU.

Therefore, clarification can be given to the extent that Article 21 and Article 22 deals with two distinct scenarios. One scenario would be

where the losing party undertakes measures to comply, but there is disagreement as to its adequacy, and in the other, the party in violation would do nothing to bring measures into compliance.

But in order to resolve every aspect of the issue, following interpretations should be incorporated:

i. **Restriction on Premature Suspension Requests:** Remedies under Article 22 should be allowed only in situations where the party in violation fails bring measures into compliance. Without modifications to the 30-day time period in Article 22.6, suspension requests should only be permitted after the expiry of reasonable period of time. This would ensure that suspension requests are not made before a compliance panel is requested. Furthermore, it would preempt arguments from defending parties claiming while no measures have been taken, implementation is in progress.

ii. **Addressing Gaps in Article 22:** Article 22 does not address situations where there is disagreement about the adequacy of the compliance measures. To fill this gap, if a panel report clarifying the disagreement is circulated after the expiration of the RPT, the purpose and objective of the DSU to ensure positive solutions to disputes should regulate such new scenarios. Relying on Article 3.2 of the DSU, retaliation should be allowed under such circumstances.

iii. **Preventing Endless Cycles of Inadequate Reforms:** Disagreements under Article 21.5 should be considered resolved once a panel report is circulated. Any new measures introduced

after the expiry of the RPT should not be deemed to create a fresh disagreement regarding their adequacy. This would help prevent an endless cycle of inadequate reforms and ensure a more streamlined dispute resolution process.

By implementing these clarifications through an authoritative interpretation, the sequencing issue can be addressed more effectively, without waiting for the lengthy amendment process.

In this regard, procedural imbalance must be bridged in order to ensure the legitimacy and functionality of the WTO dispute settlement mechanism, especially within the context of broader reforms instigated by the Appellate Body crisis. Bridging the gap will require either an authoritative interpretation under Article IX.2 of the Marrakesh Agreement or a more comprehensive amendment to the DSU. Such measures should make it clear that compliance and retaliation proceedings have different purposes and that timelines are clearly established to avoid indefinite delays and strategic misuse.

Ultimately, solving the sequencing problem is not just a matter of legal accuracy but also one of fairness, accessibility, and effectiveness in the resolution of international trade disputes. In embracing a systematic and balanced approach, the WTO can further consolidate its position as a cornerstone of global trade governance.

Archisman Chaterjee & Priya Sharma, *Quant Mutual Fund Fiasco- An exploration of Front Running in India,* 11(2) NLUJ L. REV. 181 (2025)

QUANT MUTUAL FUND FIASCO - AN EXPLORATION OF FRONT RUNNING IN INDIA

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ABSTRACT

*The Quant Mutual Fund scandal has brought the issue of front-running in India's securities market to the forefront. This article examines the regulatory system surrounding front running in India, especially in the wake of the Securities and Exchange Board of India's ("**SEBI**") investigation into the fastest-growing mutual fund in the country. Despite existing regulations under the SEBI Act, the framework for preventing market manipulation like front-running remains inadequate, characterised by vague prohibitions and minimal whistleblower protections. This analysis delves into the intricacies of front running, drawing parallels with the United States' ("**U.S.**") and Singaporean regulations, and highlights the significant gaps in India's current approach. The article also explores recent amendments to the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 (Mutual Fund Regulations) aimed at curbing front running and suggests critical enhancements to ensure more robust enforcement. The proposed changes include clearer definitions of key terms, expanded liability for those*

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involved, and stronger protections for whistleblowers. By adopting these recommendations, SEBI can significantly strengthen the regulatory framework, safeguard market integrity, and enhance investor confidence in India's capital markets.

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I. INTRODUCTION

The issue of front-running has gained significant attention recently, particularly in light of the recent Quant Mutual Fund investigation. This fund, the fastest-growing in the country, was scrutinized by SEBI earlier this year following allegations of front running. In the aftermath, clients have withdrawn thousands of crores from the fund. The question that arises is: What is the regulatory regime for front running in India and is it comprehensive enough to deal with such market manipulation tactics?

While the SEBI Act and related regulations mention front-running, the regulatory coverage is minimal, offering only a vague prohibition without defining its scope. The majority of the current understanding is traced to SEBI's regulatory investigations and penalties.

The legal understanding of front-running can be traced back to the misappropriation theory of insider trading, a form of market manipulation or abuse. Misappropriation theory expands on classical insider trading by holding individuals accountable for trading on material nonpublic information ("**MNPI**") acquired through a breach of fiduciary duty, even if they are unaffiliated with the company involved. For instance, if an attorney at a law firm purchases stock options in a company based on MNPI, obtained through firm discussions, they may be held liable under United States Securities and Exchange Commission Rule 10b-5,[1] despite not owing a direct fiduciary duty to the company itself. The fiduciary duty here pertains to not misusing confidential information that one has no right

[1] 15 U.S.C. § 78j (2006) (U.S).

to use. This activity was likened to embezzlement, which refers to the theft or misappropriation of funds placed with one under trust, by the U.S. Supreme Court in a 1997 case.[2] This theory has since been codified in the U.S. insider trading jurisprudence, expanding the earlier understanding of the insider trading provisions.

Particularly, front-running similarly involves a breach of fiduciary duty—specifically, the duty not to use confidential information that one has no right to use. Asset managers and intermediaries in stock trades are typically implicated in this activity, as opposed to individuals connected to a particular company in any other capacity, which is the case with insider trading. However, both deal with one crucial aspect: the unauthorized usage of confidential and sensitive information.

The current regulatory environment has major gaps, particularly in the scope of coverage and whistleblower protections. Although SEBI has recently amended the Mutual Fund Regulations to strengthen the regulations against front running, we argue that more substantial changes are needed to address these issues effectively. In this article, we conduct an examination of the current regulations and recommend changes. We attempt to firstly, explore the Indian regulations as well as the U.S. and Singaporean regulations related to front-running, secondly, delve into the newly introduced compliance and accountability requirements for mutual funds concerning front running, and thirdly, analyze the definition of the

[2] United States v. O'Hagan, 521 U.S. 642 (1997).

offence, its new patterns and suggest changes to fill the regulatory gaps that we identify from the discussion.

II. REGULATIONS IN INDIA

Front-running is considered a 'fraudulent practice' under the Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market Regulations, 2003 ("**PFUTP regulations**").[3] The PFUTP regulations define fraud to mean such 'act', 'omission', 'expression' undertaken by a party or his agent with his permission, to 'induce' any other individual to trade in securities, which may or may not lead to wrongful profit or prevent wrongful loss.[4]

Regulation 4(1)(q), which specifically deals with front running, states that "*any order in securities placed by a person, while directly or indirectly in possession of information that is not publicly available, regarding a substantial impending transaction in that securities, its underlying securities or its derivative*".[5]

III. REGULATIONS IN SINGAPORE

Regulation 44 of the Securities and Futures (Licensing and Conduct of Business) Regulations regulate the offence of front running in Singapore.[6] The essential ingredients for attracting this offence under this provision are three-fold. At the outset, the person should act "*on his own*

[3] Securities & Exch. Bd. of India (Prohibition of Fraudulent & Unfair Trade Practices Relating to Securities Mkt.) Regulations, 2003 (India).
[4] *Id.* reg. 2(1)(c).
[5] *Id.* reg. 4(2)(q).
[6] Securities and Futures (Licensing and Conduct of Business) Regulations (Cap. 289, RG 10) Reg. 44 (*Sing.*).

account" or on "*behalf*" of another person. Subsequently, while acting in such a capacity, a certain purchase or sale of securities has to be done. Lastly, at the time of such a trade, the person should be acting under instructions from his customer or of the entity he represents to enter into a trade of that same security, and he must have failed to comply with those instructions.

IV. **REGULATIONS IN THE UNITED STATES**

Front-running is defined as a form of market manipulation, which refers to artificially affecting the supply or demand of security by spreading false or misleading information and engaging in transactions to manipulate how the security is traded.[7] It generally refers to "*practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity*".[8] This activity affects fair execution of trades in the securities marketplace and allows parties with sensitive information about upcoming trades to manipulate the market for personal gain, thereby violating their fiduciary duty to their clients.

FINRA Rule 5270 classifies front-running as an illegal act when based on material, non-public market information, concerning an imminent block transaction in a particular security.[9] Information shall be considered publicly available when it has been disseminated via a last sale report system or high-speed communications or by a third-party news wire service. It does not debar transactions that can be demonstrated to be unrelated to material,

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[7] Kohn, Kohn & Colapinto, *what-is-market-manipulation*, KKC (Nov. 2, 2023) https://kkc.com/frequently-asked-questions/what-is-market-manipulation/.
[8] Santa Fe Industries v. Green, 430 U.S. 462 (1977).
[9] FINRA Rule 5270, 77 Fed. Reg. 20452 (Apr. 4, 2012).

non-public market information received in connection with the customer order. It also does not preclude transactions undertaken to fulfil, or facilitate the execution of, the customer block order. US Securities and Exchange Commission's ("**SEC**") Thrivent Code of Ethics deems it illegal and prohibits front running.[10] Commodity Futures Trading Commission deems front-running as an abusive trading practice.[11]

The United States Whistleblower Program is based on a complaint-award model, a reward system, and offers various protections against arbitrary action against whistleblowers under the Dodd-Frank Act.[12] Those with information regarding illegal front-running may file a whistleblower tip or claim to the SEC. SEC offers 10 to 30% of the fines collected to the whistleblower if it exceeds the threshold of $1,000,000, an amount which is paid from the investor protection fund, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

SEC has imposed hefty penalties on individuals found guilty of front running.[13] In one landmark instance, the defendants used confidential information by a company and engaged in front-running. They bought Sterling in advance of a large currency exchange transaction that the company was planning, which caused the price of sterling to spike and

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[10] SEC, THRIVENT CODE OF ETHICS, https://www.sec.gov/Archives/edgar/data/811869/000119312517059407/d328614dex99p1.htm

[11] Final Rules on Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. (2013).

[12] SEC, WHISTLEBLOWER PROGRAM, https://www.sec.gov/enforcement-litigation/whistleblower-program

[13] *SEC Enforces Second-Highest Year for Penalties*, QUEST CE (Nov. 15, 2023) https://www.questce.com/blog-sec-enforces-second-highest-year-for-penalties/.

caused the defendants to profit. Thereafter, false representations were made to the company to hide these activities.[14]

Another relevant concept in the U.S. context is 'flashing'. A flash order refers to the flashing of order information to certain parties prior to the information being made widely available in the marketplace.[15] This, in the era of modern technology, gave access to certain high paying customers to view such information. These practices are likely to facilitate front running and other forms of market manipulation. SEC allowed flashing in 1978. Apart from a few restrictions, flash orders are still legal in the U.S.

V. MUTUAL FUNDS: INCREASED REQUIREMENT FOR ASSET MANAGEMENT COMPANIES

Upon consultation with the industry stakeholders, after the number of front running and insider trading cases went up, SEBI issued amendments to the Mutual Fund Regulations, 1996 (amended regulations)[16] to introduce an institutional mechanism for Asset Management Companies ("**AMCs**"). The primary objective of introducing such a deterrence framework is to ensure that the AMCs implement strict vigil for any unfair market practices and that suspected instances of such activities are reported and flagged faster.[17]

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[14] United States v. Johnson, 945 F.3d 606 (2d Cir. 2019).

[15] *SEC Moving on Flash Trading, High Frequency Trading*, MTLR Blog, https://mttlr.org/2009/11/sec-moving-on-flash-trading-high-frequency-trading/ .

[16] Securities and Exchange Board of India (Mutual Funds) (Second Amendment) Regulations, 2024.

[17] Securities and Exchange Board of India, Institutional mechanism by Asset Management Companies for identification and deterrence of potential market abuse including front-

Earlier, the only requirement incumbent upon the AMCs was the responsibility of its Board of Directors to ensure that any transactions entered by it were in line with the regulations. However, after the amendment, if an AMC fails to put in place the institutional mechanism, then it would lead to the imposition of personal liability upon the Chief Executive Officer or Managing Director of the AMC.[18]

Such a mechanism would undoubtedly allow for an enhanced detection of front running activities and deterrence, subject to the fulfillment of certain criteria. Primarily, the entire framework needs to have specific accountability mandates. As per regulation 25(27) of the new amendment,[19] it appears that accountability only exists till the implementation of such a mechanism. There is a lack of clarity with regard to whether such accountability would continue after the mechanism has started to function. On the other hand, even if it is presumed that liability would continue to exist, its effectiveness is negated as it is only limited to a specific individual and not the board in general.

The need to increase the ambit of liability to the board of AMCs becomes apparent once we look into the nature of the offence of front running. The non-public information regarding the substantial order to be placed by the AMC would only be available to those who are involved in the day-to-day business of the company.[20] This could also be extended to

running and fraudulent transactions in securities, SEBI/HO/IMD/IMD-I POD1/P/CIR/2024/107 (Issued on August 5, 2024).

[18] *Supra* note 16, Reg. 25(28).

[19] *Id.* Reg. 25(27).

[20] SEBI v. Shri Kanaiyalal Baldevbhai Patel, (2017) 15 SCC 1.

mean that the board or certain directors would have such information. Despite the same, if there is a lapse on their part to report suspicious trades as per the manner provided in the institutional mechanism, then they should be personally held liable. This would prevent board members from neglecting the mechanisms and compel them to take action against trading activity that is flagged by surveillance.

In order to further strengthen the institutional mechanism, the role of independent directors could be further expanded by having them oversee the functioning of the institutional mechanism after its implementation. Independent directors are non-executive directors who cannot be held liable,[21] but a reporting system could be put in place wherein they have to make periodical disclosures to the regulator regarding the operations of the mechanism. This would go a long way in boosting accountability.

VI. **DEFINITION: AMBIT EXTENDED TO INCLUDE NON-INTERMEDIARIES**

According to the judgment of the Supreme Court in *SEBI v. Kanaiyalal Patel*,[22] which held that even non-intermediaries can be guilty of front running, SEBI overhauled the entire definition while swapping the phrase 'intermediaries' with 'persons' in its 2019 amendment of the

[21] M. P. Ram Mohan, Urmil Shah, *Tracing Director Liability Framework during Borderline Insolvency & Corporate Failure in India*, IIMA W. P. No. 2021-08-02 (Indian Inst. of Mgmt. Ahmedabad, Aug. 2021) https://www.iima.ac.in/sites/default/files/rnpfiles/812680252021-08-02.pdf .
[22] *Supra* note 20.

regulations.[23] Herein, we evaluate the definition.[24] We discuss three aspects: the term 'person', the nature of 'information' and the criteria for a 'substantial' transaction.

A. AMBIT OF THE TERM 'PERSON'

The term 'person' has not been defined in the PFUTP Regulations or even under the SEBI Act, 1992.[25] Reliance has always been placed upon the judicial pronouncements for the purpose of deciding who comes under the ambit of a 'person'.[26] It is also relevant to peruse the definition of an 'insider' under the SEBI Prohibition of Insider Trading Regulations, 2015 for comparison.[27]

An insider, defined as a connected person (which includes family up to a certain degree) or anyone in possession of 'sensitive information', covers multiple individuals, which allows the regulator to specifically determine whom to prosecute.[28] This was even witnessed in the matter of Front-Running of the Trades of Axis Mutual Fund wherein SEBI barred a fund manager who was operating through entities associated with him for placing front running trades through other accounts.[29] In the instant case, there was indeed no straight jacketed formula to define a person for the

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[23] Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) (Amendment) Regulations, 2018.
[24] *Supra* note 3, Reg. 4(2)(q).
[25] Securities and Exchange Board of India Act, 1992, No. 10, Acts of Parliament 1992 (India).
[26] *Supra* note 20.
[27] Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.
[28] *Id.* Reg. 2(d).
[29] Interim Order-cum-Show Cause Notice in the matter of Front Running of the Trades of Axis Mutual Fund, WTM/SM/ISD/ISD-SEC-3/24180/2022-23.

purposes of front running, as rightly enunciated by the Supreme Court.[30] Despite that, the abrupt shift from narrow to broad by replacing 'intermediary' to 'any person' under the PFUTP regulations may lead to implementation challenges. To illustrate, a third party, X, who already owns shares of an entity decides to place a limit order on them one day before obtaining the information about the large client order and, in turn, makes a greater than usual profit without any malafide intent. Under the amended regulations, he would also be considered a front runner since he falls within the ambit of 'any person'.

In Canada, only a 'participant', as defined under the Universal Market Integrity Rules ("**UMIR**"),[31] can be held liable for front running. Regulation 1.1 defines a participant as two categories:[32] *firstly*, a dealer who has a valid registration from exchange, and *secondly*, persons (defined in Regulation 1.2)[33] which includes 'corporations', and 'incorporated associations' who actively undertake activity in the market. Regulation 4.1,[34] which deals with front-running, explicitly bars three practices: frontrunning by the participant itself, soliciting any third party to partake in the same, and information pertaining to the big client in order to reach any other person. The third part of the provision may explicitly only bar the informational flow but its implied intent is to prevent any other entity from being able to access such information and act upon it.

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[30] *Supra* note 20.
[31] Universal Market Integrity Rules, 2002 (Can.).
[32] *Id.* Reg. 1.1
[33] *Id.* Reg. 1.2.
[34] *Id.* Reg. 4.1.

From our aforementioned discussion, two things become clear. *Firstly*, it is essential to clearly demarcate who would be the subject of the application of a specific law rather than opting for a generic definition. *Secondly*, it is equally crucial to expand the application of law as and when the type of fraudulent conduct shifts. This trend was even reflected in the Supreme Court's verdict where it abstained itself from relying on the pigeon-hole theory for ascertaining conduct to be guilty or not.[35]

B. SUBSTANTIAL TRANSACTION

Another crucial aspect of the statutory definition is that the transaction in the securities as per the client order has to be 'substantial'. Since the regulation does not define this term, its meaning may be expounded through case laws. SEBI in Front Running Trading Activity of Dealers of Reliance Securities took a broad approach by holding that the criteria of determining a substantial order vary for each entity and it depends on factors including the liquidity of that security and major announcements by the company.[36]

Contrarily, SEBI adopted a narrower interpretation in the matter of Front Running by Banhem Securities by outlining more specific criteria on the basis of the volume of the trade to determine what is 'substantial'.[37] It held that if the volume of the client order is equal to or more than 3% of the amount of the same stock traded on that specific day and it is at least

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[35] *Supra* note 20.
[36] Final Order in the matter of Front Running Trading activity of Dealers of Reliance Securities Ltd. and other connected entities, 2023 SCC OnLine SEBI 56.
[37] In the matter of Front Running by Banhem Securities Pvt. Ltd. and Ninja Securities Pvt. Ltd, SCC OnLine SEBI 87.

4000 shares in number, then such an order would be considered substantial. The order was silent on the aspect of the price of the security.

It is submitted that while both volume and price of the security ought to be relevant in ascertaining a 'substantial order', price should be given priority over volume as a criterion. The reason for the same is that any change in price by virtue of the order would showcase how much of a profit the front runner has made. While profit may not be a statutory essential to attract the liability, it is generally the motive behind it.[38] Thus, the change in price dictates how much of an impact a certain order would have. The volume criteria as envisaged by the court in Banhem could be used as a corroborative factor to ensure that the price change was not influenced by any other cause.[39]

C. **INFORMATION**

In the Regulations, SEBI only mentions 'information not publicly available'. It fails to specify the nature of such information as to whether it has to be specific or could it be general in nature. In the case of the latter, it would be possible for SEBI to prosecute a larger pool of entities who may or may not be directly involved in it. For instance, if a market rumour circulates among a few non-intermediaries about an impending order and they act on it, would they be considered equally liable? This question arises in light of the fact that they received such information in the form of a rumour and not through any direct channel.

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[38] Tom C.W. Lin, The New Market Manipulation, 66 EMORY L. J., 1253 (2017).
[39] *Supra* note 37.

Herein, reference could also be drawn from the Canadian framework which requires the knowledge of the order to be specific. It means that anyone acting on such information needs to have acquired it from a direct channel with particular details about the order that would be placed. Further, it categorically bars any trades executed based on information arising out of a market rumour from coming under the ambit of front running.

It is concluded that while the earlier amendment as mentioned above in this discussion is a step in the right direction, amending or altering these terms would further increase the clarity in enforcement of the regulations.

VII. THE EMERGENCE OF A NEW FRONT RUNNING PATTERN – 'BSB'

The practice of front running is divided into three trades out of which two are made by the front-runner and the one which is made before the big order forms the basis for constituting it. Generally, the execution of such trades takes place in a 'Buy Buy Sell' pattern ("**BBS**") or in a 'Sell Sell Buy' pattern ("**SSB**").[40] In the first scenario, the front runner purchases the security prior to its purchase by the large client and then sells it, while in the second, the security is sold before the large order and is then bought at a lower price.

[40] Riya R Alex, *SEBI crackdown on Quant MF: What is front-running? All you need to know*, LIVEMINT (June 24, 2024), https://www.livemint.com/companies/sebi-crackdown-on-quant-mf-what-is-front-running-all-you-need-to-know-11719202556510.html .

In *Kajal Savla*,[41] SEBI had attempted to include different patterns of a front-running apart from the aforementioned ones, especially in light of newer mechanisms that allow the scheduling of trades on the happening of a certain event. To determine whether a trade is a case of front-running or not, the court decided that the relevant factor is whether it was put in place before the purchase or sell order of the client. The second part of the trade allows the front runner to make an unlawful gain, but it does not compulsorily have to be after the client's order due to two reasons. *Firstly*, they may intentionally place it to make it appear as a genuine trade to evade detection, and *secondly*, they may rely on limit order mechanisms to place such orders at a prior date.

Such limit order mechanisms also form the foundation for the new "*'Buy Sell Buy' pattern* ("**BSB**") *by the client*", as discussed by SEBI in its order.[42] In such a trade, the second leg (buy at a minimum X price point or sell at Y price point) is placed in advance of the client order yet executed only before the last tranche of the client order. Thus, while such a leg may appear to be placed before the clients impending trade, in reality, it is executed after the price of the stock has been altered. The reasoning of the order can be extended to another front-running scenario which is the "*'Buy by the client' Buy Sell*" pattern. It would involve placing the first leg of the front running trade after the first tranche of the client. This also indicates that the front runner possesses specific information as to which tranche of the client's order is significant. Thus, even though the first leg of the trade

[41] In the matter of Front Running by Kajal Savla and Others, 2022 SCC OnLine SEBI 1782.
[42] *Id.*

takes place after the client order, the fact that it is placed prior to the substantial or last tranche satisfies the statutory definition.

However, it is stated that the determination of more patterns of this activity depends upon the facts of each conduct and would vary on a case-to-case basis. To further reduce ambiguity, it is suggested that a suitable explanation be added to Regulation 4(2)(q)[43] that the date of execution of the order should be the relevant date for determining the offence. Lastly, the flow of non-public information between such accused individuals needs to be compulsorily established to ensure that no one is falsely punished or genuine trades are penalised as front-run ones.

VIII. INDIA'S WHISTLEBLOWER POLICY

Aside from the Whistle Blowers Protection Act, 2014 ("**WBPA**"),[44] and some provisions in the Companies Act, India lacks a proper whistleblower protection mechanism. Notably, WBPA is only applicable on public servants and public sector undertakings. Section 177 of the Companies Act, 2013, along with Clause 49 of the Listing Agreement, mandates the adoption of a whistleblower policy on listed companies.[45] While private sector companies are increasingly moving towards voluntary adoption of whistleblower policies, it is insufficient unless proper rules are made in this regard. The US, as discussed above, has a proper reward system for whistleblowers, which may act as an incentive for reporting such

[43] *Supra* note 24.
[44] The Whistle Blowers Protection Act, 2014, No. 17, Acts of Parliament, 2014, (India)
[45] The Companies Act, 2013, §177, No. 18, Acts of Parliament, 2013, (India)

activities to the SEC. Moreover, the protection system for whistleblowers is strong. Such mechanisms, if adopted in India, will act as protective measures for whistleblowers.

SEBI, in a Circular titled 'Measures to instill confidence in securities market - Brokers' institutional mechanism for prevention and detection of fraud or market abuse', directed stock brokers to establish and implement whistleblower policy providing for a confidential channel for employees and other stakeholders to raise concerns regarding suspected fraudulent and unfair market practices.[46] Such policies shall also ensure adequate protection for whistleblowers. We observe that this is a step in the right direction. However, proper regulations by SEBI in relation to whistleblowers reporting market abuse instances would go a long way in preventing inconsistencies.

IX. **CONCLUSION**

The issue of front running remains a significant challenge in the Indian securities market. While recent amendments by SEBI, particularly in the Mutual Fund Regulations, have introduced measures aimed at curbing this practice, they fall short of addressing the broader systemic issues. The comparative analysis with U.S. and Singaporean regulations displays the need for a more well-defined approach in India, especially regarding the

[46] SECURITIES AND EXCHANGE BOARD OF INDIA, MEASURES TO INSTIL CONFIDENCE IN SECURITIES MARKET – BROKERS' INSTITUTIONAL MECHANISM FOR PREVENTION AND DETECTION OF FRAUD OR MARKET ABUSE (JULY 4, 2024), <https://www.sebi.gov.in/legal/circulars/jul-2024/measures-to-instil-confidence-in-securities-market-brokers-institutional-mechanism-for-prevention-and-detection-of-fraud-or-market-abuse_84588.html>

scope of liability, the nature of the information involved, and the criteria for substantial transactions. Additionally, the lack of robust whistleblower protections is another problem, deterring potential informants from coming forward with crucial information on market abuses.

Therefore, it is imperative for SEBI to refine the existing regulations by providing clear definitions and expanding the ambit of accountability. Incorporating lessons from international practices, such as the U.S. whistleblower reward system, could also significantly enhance the detection and prevention of front running. Moreover, the introduction of specific accountability mechanisms, particularly for board members and independent directors of AMCs, is essential to ensure that the institutional mechanisms are not merely procedural but lead to tangible deterrents against market manipulation.

The proposed changes to the regulatory framework, including clarifications on the definition of a 'person', the criteria for a 'substantial' transaction, and the nature of the 'information' involved, would enhance the effectiveness of enforcement actions against front running. By addressing these gaps, SEBI can bolster market integrity and protect investors from the detrimental effects of market manipulation.