NIRMA UNIVERSITY LAW JOURNAL
NULJ

Bi-Annual Refereed Journal

ISSN 2249 – 1430

Volume XIII • Issue II • July 2024

FOREWORD

Nirma University Law Journal has a landmark journey of publication exploring and changing dynamics of law at national and global scenarios, with a sense of spirit of inquiry resulting the new knowledge and path-breaking insights of mundane ideas and ways of living.

I am pleased to present to you all the Volume -XIII, Issue – II July 2024 Nirma University Law Journal (NULJ) Peer reviewed and Referred Journal. The Journal aims to encourage writings that are interdisciplinary in nature expanding contemporary issues across disciplines likewise as sociology, Political Science, Public policy, Economics, Science and Technology, and contemporary aspects in the context of law. I am happy to share that the article that has been published in this Journal is indexed to HeinOnline, EBSCO, Manupatra, and SSC Online. The overwhelming response we received from contributors for the publication of Volume XIII, Issue II.

On behalf of Nirma University, I congratulate the authors for maintaining the highest standards of academic honesty and purity of thought, editorial board members, all reviewers including the assistant provided by Tanisha Rai.

We feel pride in being a medium of expression broadcasting novel ideas and being a crucial platform for legal, interdisciplinary, and contemporary legal discourse. I would to the editorial board members for their contribution to the editorial process of the NULJ July 2024 Issue.

Prof. (Dr.) Madhuri Parikh
Chief Executive, Nirma University Law Journal
Director and Dean, I/c
Institute of Law, Nirma University

TABLE OF CONTENTS

Articles

Book Review

THE FUTURE OF CARBON TRADING IN INDIA

Nivedita Chaudhary*
Srishti Chaturvedi**

ABSTRACT

Climate change, driven by increasing greenhouse gas emissions, poses a significant threat globally, impacting both human and non-human systems. This paper explores the concept of carbon trading, introduced by the Kyoto Protocol in 1977 and further strengthened by the Paris Agreement in 2015, as a mechanism to mitigate climate change. Focusing on India's evolving carbon market, it traces key initiatives, including the 2008 National Action Plan on Climate Change and the 2023 Carbon Credit Trading Scheme (CCTS). The paper identifies critical gaps in existing research, particularly the lack of India-specific studies on carbon trading, limited assessment of regulatory frameworks, and inadequate focus on the socio-economic implications for marginalized communities. Additionally, the paper highlights the role of technology in enhancing transparency and efficiency in carbon markets, which is often overlooked. This study contributes to the understanding of India's efforts to fulfil international obligations under the Kyoto Protocol and Paris Agreement while addressing the challenges unique to its socio-economic landscape. Ultimately, the research aims to assess the effectiveness, fairness, and potential value of carbon trading in reducing global warming and advancing climate resilience in India.

** Assistant Professor of Law, Amity Law School, Amity University, Gurgaon.*
Email: niveditachaudhary7@gmail.com
*** Ph.D. Research Scholar, NLIU Bhopal. Email : profsrishti.chaturvedi@gmail.com*

Keywords**:** *Carbon Trading, Climate Change Mitigation, Kyoto Protocol, Paris Agreement, India's Carbon Market.*

I. INTRODUCTION

Climate change is the stark reality of current times, consistently reflecting in headlines for causing crises affecting humans and non-humans. Human activities contribute to the increase in greenhouse gas (*hereinafter* referred as 'GHG') emissions.[1] Visible impacts can be witnessed impacting water and food security, causing displacements and migrations, and leading to erratic wildfires, prolonged droughts, intense heatwaves and devastating floods, etc.[2] Climate change now has permeated in all and every sort of discourses and discussions reflecting the criticality of the same.

To combat climate change various mitigation and adaptations mechanisms have been adopted and implemented with varying effectiveness. Despite progress, adaptation gaps exist, and reports highlight that these gaps will continue to grow at current rates of implementation.[3] Policies and laws addressing mitigation have consistently expanded since IPCC Fifth Assessment Report (AR5). The Nationally Determined Contributions (*hereinafter* referred as 'NDCs') announced by October 2021 indicate that global GHG emissions in 2030 are likely to exceed 1.5°C, making it harder to limit warming below 2°C. It is, therefore, evident that the gaps between policies and NDCs and finance flows are significant across all sectors and regions.[4]

In response to this, the concept of 'carbon trading' or 'carbon market' was introduced by the Kyoto Protocol in 1977 which evolved significantly to mitigate the impacts of climate change. The initial mandate of the Kyoto

---

[1] Hoesung Lee and José Romero, *Climate Change 2023: Synthesis Report (Summary for Policymakers)*, at 6, Intergovernmental Panel on Climate Change (2023).

[2] Mark Poynting and Esme Stallard, *How climate change worsens heatwaves, droughts, wildfires and floods,* BBC News (June 17, 2024), https://www.bbc.com/news/science-environment-58073295

[3] Hoesung Lee, *supra* note 1 at 8.

[4] *Ibid.*

Protocol is to reduce the GHG emissions through regulated and set targets which are met through the national measures by individual countries. Kyoto Protocol further devised a market-based mechanism which has three components, *i.e.,* Clean development mechanism (CDM)[5]; Joint implementation (JI)[6]; and Emissions trading (ET)[7]. These three components together create a 'Carbon Market' where GHG emissions are treated as a commodity which can be bought and sold amongst countries.

Later, in 2015, the Paris Agreement solidified the role of carbon trading in combating climate change, promoting emissions reductions, sustainable practices, and international cooperation. The Paris Agreement envisions an international regulatory framework for cooperation on climate policies, including carbon trading among states and private actors. There are two market-based approaches to international cooperation outlined in Article 6.[8]

India has also taken several significant steps to participate in and benefit from carbon trading mechanisms to mitigate climate change. The 2008 National Action Plan on Climate Change was the first initiative that included "a market-based mechanism for trading in certified energy savings in energy-intensive large industries," which eventually led to the Perform, Achieve, and Trade (PAT) scheme in April 2012.[9] In 2022, India revised its NDCs in line

[5] The clean development mechanism allows governments or private entities in rich countries to set up emission reduction projects in developing countries. They get credit for these reductions as 'certified emission reductions (CER's). The mechanism was established under Article 12 of the Kyoto Protocol adopted by the 3rd COP to the UNFCCC on December 11, 1997.

[6] The Kyoto Protocol, Article 6. Under Joint Implementation, an Annex I Party (with a commitment inscribed in Annex B of the Kyoto Protocol) may implement an emission-reducing project or a project that enhances removals by sinks in the territory of another Annex I Party (with a commitment inscribed in Annex B of the Kyoto Protocol) and count the resulting emission reduction units (ERUs) towards meeting its own Kyoto target.

[7] The Kyoto Protocol, Article 17.

[8] Article 6.2 of Paris Agreement allows countries to transfer emissions reductions or removals to other countries through internationally transferable mitigation outcomes (ITMOs). The article allows countries to trade ITMOs directly through bilateral agreements. Refer, Lea Heinrich, *COP28 and international carbon markets: what to expect?,* FLORENCE SCHOOL OF REGULATION (December 11, 2023), https://fsr.eui.eu/cop28-and-international-carbon-markets-what-to-expect/

[9] Gautam Jain, Kaushik Deb and Ryan Levitt, *Lessons for Structuring India's Carbon Market to Support a Cost-Efficient Energy Transition,* COLUMBIA CGEP (May 13, 2024), https://www.energypolicy.columbia.edu/publications/lessons-for-structuring-indias-carbon-market-to-support-a-cost-efficient-energy-transition/

with the 'panchamrit' goals proposed at COP26.[10] In 2023, the Ministry of Power issued an official notification of a Carbon Credit Trading Scheme (*hereinafter* referred as 'CCTS'). The paper, therefore, intends to analyze India's newly formulated and evolving 'Carbon Market'. The research at hand also contributes to a better understanding of the dynamics of 'carbon trading' in India. Further, it examines as to how India is fulfilling its international obligations mandated under the Kyoto Protocol which was ratified in 2002. Lastly, the article evaluates the potential value of carbon trading in combating climate change, focusing on its fairness and efficiency in reducing global warming.

II. IDENTIFICATION OF RESEARCH PROBLEM

The examination of carbon trading in India reveals several critical deficiencies in the existing literature, legal structures, regulations, and actual implementations. A significant concern is the insufficient thorough study especially targeting India, as the majority of extant material predominantly examines carbon trading in developed nations. This omission creates a significant gap in comprehending how carbon trading might be effectively customised to address India's distinct socio-economic and environmental issues.

Moreover, although several mitigation and adaptation efforts have been executed, many of these projects exhibit insufficient efficacy, resulting in enduring adaption gaps that are poised to expand if present implementation rates remain. Moreover, there is a significant lack of thorough assessment about the efficacy of India's regulatory frameworks for carbon trading, which raises apprehensions about compliance and the integrity of carbon credits. Current research frequently overlooks the role of technology and innovation in promoting efficient carbon markets, especially with the improvement of transparency and efficiency.

---

[10] Dishaa Dand and Krishna Ravishankar, *India's Carbon Credit Policy and the Greenwashing Conundrum,* THE INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS (June 21, 2023), https://www.irccl.in/post/india-s-carbon-credit-policy-and-the-greenwashing-conundrum

Furthermore, the possible socio-economic implications on marginalised areas are barely examined, necessitating a more refined comprehension of the distributive consequences of carbon trading systems. A significant gap is the analysis of India's incorporation into global carbon markets, particularly in the context of the Paris Agreement, which underscores "common but differentiated responsibilities." This prompts enquiries on the equilibrium between revenue generation from carbon credits and the expenses incurred in emission reduction to meet national climate objectives. Addressing these research deficiencies is crucial for establishing a resilient and equitable carbon trading system in India, hence enhancing the nation's overarching climate change mitigation and adaptation plans.

III. RESEARCH METHOD

The research design for exploring the future of carbon trading in India has utilized a mixed-methods approach, combining qualitative and quantitative research tools. A comprehensive literature study has been undertaken to gather and examine current research, policy papers, and case studies pertinent to carbon trading in India and similar contexts. This essential stage has facilitated the identification of prominent themes, trends, and deficiencies in the existing body of knowledge. Furthermore, quantitative research has been used to study current statistics on emissions, carbon credits, and market movements to identify patterns and forecast future scenarios for India's carbon trading environment.

This dual methodology has ensured a thorough analysis that integrates theoretical perspectives and existing facts, facilitating a nuanced comprehension of the intricacies associated with carbon trading. The integration of qualitative and quantitative data has helped us provide viable suggestions designed to improve the effectiveness and fairness of carbon trading systems in India. This study aims to provide significant insights for policymakers, industry stakeholders, and researchers involved in the transition to a low-carbon economy by addressing identified research gaps and employing varied techniques.

IV. CONTEXTUALIZING 'CARBON MARKET/TRADE'

Carbon markets function much like other trading systems by turning carbon dioxide (CO_2) emissions into a commodity with an assigned price. The concept of 'carbon trading' emerged from the 1997 Kyoto Protocol, which established legally binding emission reduction targets for developed countries to mitigate greenhouse gas (*hereinafter* referred as 'GHG') emissions.[11]

Carbon trading gives carbon an economic value, enabling individuals, companies, or nations to trade it in a marketplace similar to securities or commodities. When a nation buys carbon credits, it acquires the rights to emit a certain amount of CO_2, while selling credits means giving up those rights.[12] The carbon value would be determined by a country's ability to store or prevent emissions, and a market would facilitate the buying and selling of GHG rights.[13] These CO_2 emissions fall into one of two categories: Carbon credits or carbon offsets, and they can both be bought and sold in carbon market.

A carbon credit is a generic term for a tradeable certificate or permit representing the right to emit a certain amount of CO_2 (usually 1 metric ton) or an equivalent amount of different GHG in a particular time period (which is usually a year).[14] It is, in a sense, the basic trading unit for carbon markets.[15] Countries can use carbon markets to compensate for their GHG

[11] Six GHG are generally included in carbon markets : carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydro fluorocarbons and perfluorocarbons.

[12] Daya Shankar Tiwari, *Carbon trading: A tool to control global warming,* 6 (S1) INTERNATIONAL JOURNAL OF HEALTH SCIENCES 5713, 5714-5715 (2022).

[13] *Ibid.*

[14] One tradable carbon credit equals one tonne of carbon dioxide or the equivalent amount of a different greenhouse gas reduced, sequestered or avoided. When a credit is used to reduce, sequester, or avoid emissions, it becomes an offset and is no longer tradable.

[15] Zoya Ada Hussain, *How do carbon markets work?,* INDIA DEVELOPMENT REVIEW (February 8, 2024), https://idronline.org/article/climate-emergency/how-do-carbon-markets-work/?gad_source=1&gclid=CjwKCAjwvvmzBhA2EiwAtHVrb1RBNHYkOZOK66ONRC7egBFvcOmz1Sg8qnwWhVmxsu6_XvAi-SG6FRoCxJYQAvD_BwE

emissions by purchasing carbon credits from entities that have reduced GHG emissions.[16] Companies or entities that emit less than their allotted amount can sell their excess credits to others that need to emit more. The strategy aims to make carbon emissions expensive, thereby disincentivizing polluters from exceeding their emission limits.[17]

Let's use an example to illustrate how the system operates. Suppose Company A and Company B each hold 10 carbon credits, allowing them to emit up to 10 metric tons of CO2 or other GHG annually. Company A successfully reduces its emissions to 8 tons, while Company B exceeds its limit and emits 12 tons in the same year. According to the carbon market mechanism, Company A can sell its surplus 2 carbon credits to Company B. This transaction enables both companies to comply with the emission limits established by governmental agencies aimed at reducing carbon and GHG emissions.

On the other hand, carbon offset represents a reduction in GHG emissions to compensate for emissions produced elsewhere. Like carbon credits, one offset also typically equals one metric ton of CO2 or its equivalent. In a broader sense, carbon offsetting refers to voluntary carbon removal, an increasingly popular mechanism for businesses to meet emissions reduction targets.[18] Carbon offset schemes allow individuals and companies to invest in environmental projects around the world in order to balance out their own carbon footprints.[19] For instance, in renewable energy projects, reforestation efforts, methane capture from landfills, and more. However, numerous reports have suggested that many of these offset schemes exaggerate climate benefits and underestimate potential harms.[20] The advent of new mandatory

[16] *What are carbon markets and why are they important?* UNDP NEWS (May 18, 2022), https://climatepromise.undp.org/news-and-stories/what-are-carbon-markets-and-why-are-they-important

[17] Dishaa Dand, *supra* note 10.

[18] EARTHLY, https://earthly.org/the-guide-to-carbon-offsetting (last visited June 15, 2024).

[19] Duncan Clark, *A complete guide to carbon offsetting*, THE GUARDIAN (September 16, 2011), https://www.theguardian.com/environment/2011/sep/16/carbon-offset-projects-carbon-emissions

[20] Nina Lakhani, *Revealed: top carbon offset projects may not cut planet-heating emissions*, THE GUARDIAN (September 19, 2023), https://www.theguardian.com/environment/2023/sep/19/do-carbon-credit-reduce-emissions-greenhouse-gases

emissions trading programs and growing consumer pressure have driven companies to turn to the voluntary market for carbon offsets.[21]

Using the same illustration used above to explain the 'carbon offset' mechanism. In the scenario described, when Company B exceeds its carbon emissions limit, it can purchase carbon offsets from certified projects to compensate. To address its excess emissions, Company B invests in a certified reforestation project that absorbs CO2 from the atmosphere. Specifically, Company B buys 2 carbon offsets from this project, with each offset accounting for one metric ton of CO2 absorbed by the newly planted trees. By purchasing these 2 carbon offsets, Company B effectively compensates for its 2 metric tons of excess emissions.

Carbon credits and carbon offsets are terms often used interchangeably, but they have distinct meanings and roles within carbon markets.[22]

Compliance and Voluntary Carbon Markets

The carbon market can be further disintegrated into two major parts, i.e., Compliance Carbon Markets and Voluntary Carbon Markets. Compliance Carbon Markets are also known as cap-and-trade systems or emissions trading systems (ETS).

Compliance-based trading involves a regulating organisation, typically the government, imposing a restriction on the amount of carbon emissions allowed to release. A corporation must acquire carbon credits to reduce net emissions if it exceeds the emission limit, and can sell excess allowances as carbon credits to other enterprises, providing financial motivation for reducing emissions.[23] Notable examples are the European Union Emissions

[21] CARBON CREDITS, https://carboncredits.com/the-ultimate-guide-to-understanding-carbon-credits/ (last visited June 15, 2024).

[22] Rob Macquarie, *What are carbon offsets?,* LSE GRANTHAM RESEARCH INSTITUTE (July 27, 2022), https://www.lse.ac.uk/granthaminstitute/explainers/what-are-carbon-offsets/

[23] Nirja Bhatt, *India's proposed carbon credit trading scheme: What it is, why it matters and what to expect,* BUSINESS TODAY (April 4, 2024), https://www.businesstoday.in/opinion/columns/story/indias-proposed-carbon-credit-trading-scheme-what-it-is-why-it-matters-and-what-to-expect-424307-2024-04-04

Trading System (EU ETS) and California's cap-and-trade plan for businesses. There exist over 36 emission trading systems globally. There are plans to establish more than 20 additional emission trading markets at both national and sub-national levels.[24] In March 2023, the combined emissions from these markets amounted to 8.91 gigatons of CO2 equivalent (GtCO2e), which represents approximately 17.64 percent of the total world GHG emissions. India now has its own framework for a domestic carbon market.[25]

Voluntary trade allows corporations to limit their carbon emissions without external constraints, or to acquire carbon credits to reduce emissions or achieve net zero emissions.[26] Voluntary carbon markets operate using a baseline and crediting process, which serves as an alternative to the cap-and-trade system, commonly known as the Emissions Trading System (ETS).[27] The baseline serves as the standard against which emissions reductions or removals are assessed, while the crediting mechanism is the procedure *via* which carbon credits are produced and monitored. Voluntary carbon markets, although smaller than compliance markets, provide a flexible and accessible option for firms and individuals to offset their emissions.

Certain carbon markets managed by governments, such as the Australian Emissions Reduction Fund (ERF) or the Thailand Voluntary Emission Reduction Programme, may also allow voluntary participation. There has been a rise in market participation resulting in new difficulties in standardisation and regulation, as the absence of a consistent set of regulations and standards can complicate the verification of the credibility of the carbon offsets being traded.[28] However, reports emphasize that these

[24] Anon, Carbon Pricing Dashboard, World Bank (April 28, 2023), https://carbonpricingdashboard.worldbank.org/map_data
[25] Ministry of Power Notification S.O. 2825(E): Carbon Credit Trading Scheme, June 28, 2023, https://beeindia.gov.in/sites/default/files/CCTS.pdf
[26] Nirja Bhatt, *supra* note 23.
[27] Trishant Dev and Rohini Krishnamurthy, *The Voluntary Carbon Market in India: Do People and Climate Benefit?*, CENTRE FOR SCIENCE AND ENVIRONMENT (October 6, 2023), http://www.cdn.cseindia.org_attachments_0.24802100_1696571001_voluntary-carbon-market-in-india.pdf
[28] *Ibid.*

markets create opportunities for companies and offers a cost-effective pathway for sustainable growth and can be a powerful tool to help advance carbon justice.[29]

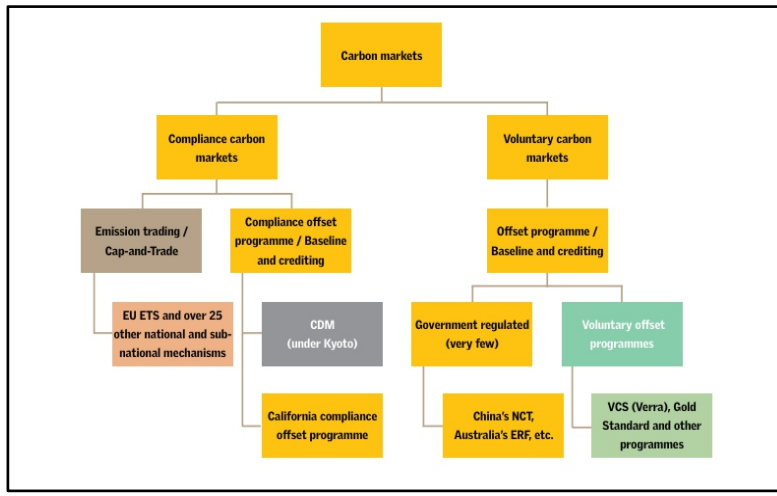

Figure 1: Types of Carbon Markets[30]

V. INDIA'S INTERNATIONAL COMMITMENTS

The approach for global carbon emissions reduction by the United Nations Framework Convention on Climate Change (*hereinafter* referred as 'UNFCCC') has significantly transformed after the 2015 Paris Agreement. The previous implementation of the Kyoto Protocol, which lasted from 2008 to 2020, required only developed countries (referred to as Annex-1 countries) to reduce their emissions according to specific targets. However, the new "global climate order" under the Paris Agreement saw other participating countries also agreeing to reduce emissions, although without globally mandated targets. The Paris Agreement recognised the notion of 'common but differentiated responsibilities', taking into account the

[29] Alexandra Soezer and Stephen Kansuk, *Carbon Justice for All: How Carbon Markets Can Advance Equitable Climate Action Globally,* UNDP BLOG (June 30, 2022), https://www.undp.org/africa/blog/carbon-justice-all-how-carbon-markets-can-advance-equitable-climate-action-globally

[30] Trishant Dev, *supra* note 27.

capabilities and capacities of states to cut their emissions, without specifying obligatory objectives. The process involves a collaborative framework where all nations, both developed and developing, must announce their NDCs every five years starting in 2020, with the option to adjust commitments as needed.

The success of the Paris Agreement depends on moral persuasion and the practice of publicly criticising and "naming and shaming" non-compliant parties.[31] India, similar to other countries that have signed the Paris Agreement, is currently working on developing internal rules and procedures to effectively run a carbon market.[32]

The emergence of the new NDC scenario, in which major developing countries have also committed to emission reduction objectives, presents significant concerns. There may be conflicting interests on the future role of offsetting emissions across borders. This is especially applicable to major emerging economies, like India, that have aggressive NDC targets. Countries finance emissions reduction efforts using public and private resources, but further clarification is needed on voluntary acquisition and transnational retirement of carbon credits within a new global framework.[33] There is a need for a more comprehensive understanding of the connection between international climate finance and the trade of emission reductions across borders.

Articles 6.2 and 6.4 of the Paris Agreement establish new global carbon market mechanisms that aim to reduce GHG emissions and promote

[31] Ajay Tyagi and Nilanjan Ghosh, *Carbon trading in India: Local actions for the global commons,* OBSERVER RESEARCH FOUNDATION (Jan 10, 2024), https://www.orfonline.org/expert-speak/carbon-trading-in-india-local-actions-for-the-global-commons

[32] A draft paper for public comments on the carbon market governance structure was issued by the Ministry of Power on March 28, 2023. Detailed regulations for this governance arrangement were specified later. The same can be accessed at: https://powerline.net.in/wp-content/uploads/2023/03/Mail-dated-27-03-2023-to-Industry-Association-reg-CCTS.pdf

[33] Mohua Mukherjee, *Building the Indian Carbon Market: A Work in Progress*, OXFORD INSTITUTE FOR ENERGY STUDIES (UNIVERSITY OF OXFORD), May 1, 2023, https://www.jstor.org/stable/resrep49373

sustainable development.[34] India prioritises the development of its internal market and carefully determines the specific circumstances in which commerce can occur. An important obstacle that India, along with other developing nations, will face is assessing the balance between the benefits of selling carbon credits and the expenses of decreasing its own emissions in order to achieve its NDC objectives.[35]

The Indian government is confident in its ability to provide incentives within the domestic market, such as government purchases from carbon-neutral businesses, to achieve NDC targets and transition to a domestic carbon market, backed by its 20-year experience in operating compliance markets. This market has been trading Energy Saving Certificates (ESCerts) since 2001.[36] The country has more than ten years of experience with another compliance market for domestically tradeable renewable energy certificates (RECs).[37] A significant aspect of the future Indian carbon market (ICM) is its transformation from the current frameworks to a more comprehensive market-based mechanism. This transition involves converting the current units, which are measured in tonnes of oil equivalent and megawatt-hours, into equivalent tonnes of CO2 emissions.

VI. DEVELOPMENT OF THE INDIAN CARBON MARKET

India's GDP emission intensity has been declining over time,[38] despite its rapid economic expansion. Nevertheless, in order to expedite the shift

[34] Article 6.2 sets robust accounting rules for the bilateral trade of emission reduction units between parties. Article 6.4 provides a more centralized mechanism, with a structured framework for parties willing to engage in international carbon markets , but initially with limited country frameworks.

[35] *Ibid.*

[36] Ministry of Power, *Government of India developed robust mechanism for Online Trading of Energy Saving Certificates,* PIB DELHI (August 19, 2021), https://pib.gov.in/PressReleasePage.aspx?PRID=1747407

[37] S. K. Soonee, V. K. Agrawal, et.al., *Analysis of Indian Renewable Energy Certificate (REC) Market,* https://www.recregistryindia.nic.in/pdf/Others/Analysis_of_Indian_Renewable_Energy_Certificate_(REC)_Market.pdf

[38] Ministry of Environment, *Forest and Climate Change, India stands committed to reduce Emissions Intensity of its GDP by 45 percent by 2030, from 2005 level,* PIB (December 22, 2022), https://pib.gov.in/PressReleasePage.aspx?PRID=1885731. See, emission intensity reductions by India in United Nations, *UN Energy Compacts Annual Progress Report 2022*, https://www.un.org/sites/un2.un.org/files/energy-compacts-annual-progress-report-002.pdf

towards a low-carbon economy, the government's policy draft[39] proposes the implementation of a domestic carbon market as an extra measure for India. More precisely, the administration holds the view that it should give priority to implementing a plan to establish a national carbon market with the aim of fulfilling the country's NDCs. The government believes a carbon market is crucial for a faster reduction in emissions, as it provides complete control and clear knowledge of investments, activities, funds, and progress.[40]

Indian policymakers often express in informal interviews that there is a significant lack of trust remaining after the failure of the CDM in 2012. During this event, millions of Indian certified emission reductions (CERs) suddenly lost their worth because European buyers decided to stop buying from India and other countries without prior discussion. Therefore, Indian government officials are now not inclined to engage in such agreements again in the near future. They would maintain a carve-out only in cases where there is a distinct advantage for India. Currently, activities such as internationally transferred mitigation outcomes (ITMOs) and other activities that require corresponding adjustments will be postponed, except in specific cases such as cutting-edge mitigation, carbon removal technology, or green ammonia production, along with the necessary international finance.[41] Priority will be given to mitigation initiatives supported by NDCs that utilise established technology and are encouraged by the domestic market to attract domestic funding.[42]

---

[39] Bureau of Energy Efficiency, *Policy Paper on Indian Carbon Market*, Government of India (2022), https://cer.iitk.ac.in/odf_assets/upload_files/Comments_Carbon_Market_Policy_DocumentFor_Stakeholder_Consultation.pdf

[40] The government's draft policy document states on page 4 that India was unprepared for the European Union's abrupt unilateral decision in 2012 to purchase certified emission reductions (CERs) only from least developed countries, which caused prices to crash and India's CERs to become worthless: "The CDM market crashed in 2012, when the EU, through a unilateral decision, decided to give preference to CERs from Least Developed Countries (LDC) for the 2013-2020 period. This resulted in the demand for a majority of the CERs falling, and there were no corresponding domestic markets in developing countries, so the prices fell from the highs of US$ 20 per CER to less than US$ 0.5 per CER." There is evidently no wish to repeat such a scenario of dependency on other decision-makers regarding market rules, and India prefers to independently attempt to develop and manage its own domestic carbon market.

[41] Trishant Dev, *supra* note 27.

[42] Mohua Mukherjee, *supra* note 33.

India is well acquainted with the notion of carbon credits, as it was previously the second largest provider of CERs under the Kyoto Protocol. In addition to its previous involvement in the CDM, India has established a well-developed local compliance market for Energy Saving Certificates (ESCert) known as Perform, Achieve and Trade (PAT), as well as another market for Renewable Energy Certificates (REC) called Renewable Purchase Obligation (RPO). The government plans to construct the new ICM by utilising its existing market-driven mechanisms, namely the PAT scheme and the RPO programme, as a basis.[43]

This endeavour will necessitate a shift from the current tradable certificates for energy efficiency and renewable energy output, which are measured in units of oil equivalent and megawatt-hours, respectively, to novel carbon certificates measured in units of CO_2 equivalent. To prepare for launching the ICM, it will be necessary to design a suitable MRV methodology, establish a meta-registry that is compatible with international registries to record adjustments made during future trades, and implement professional accreditation protocols to ensure sufficient human resource capacity in terms of verifiers and validators.

In the future, a domestic compliance market for carbon credits will be established. This market will involve obligated entities, which are entities that have been assigned individual targets for reducing GHG emissions. These companies will function as both buyers and sellers in the market. The purpose of this market is to minimise the costs of reducing emissions at the plant, sector, and national economy levels. Currently, more than 1000 of India's biggest energy users are already considered obligated organisations under the PAT and RPO schemes. The government intends to initiate the process of shifting these consumers to the newly established carbon market for compliance purposes.[44]

---

[43] *Ibid.*

[44] Mannat Jaspal and Manjusha Mukherjee, *Charting Pathways for India's Carbon Market,* OBSERVER RESEARCH FOUNDATION (June 11, 2024), https://www.orfonline.org/research/charting-pathways-for-india-s-carbon-market

India exercises caution in overselling international mitigation outcomes in the context of global carbon markets, as this could potentially affect the NDC targets due to commensurate adjustments. The strategy involves designating specific exceptions for permissible activity. Many commentators have expressed worries regarding the potential impact that such a position may have on market signals.[45] In the future, the designated body in India may announce more exemptions based on past experiences. If this were to happen, it would lead to a gradual increase in the country's involvement in the global carbon market established by Article 6 of the Paris Agreement. This would likely be connected to the country's efforts to attract funding and technology for further steps addressing climate change.

Current Certification Schemes

By 2024, India implemented multiple energy certificate systems, a carbon credit trading mechanism, and a green credit programme. Below is a condensed overview of these schemes[46]:

1. Perform Achieve Trade Scheme (PAT Scheme): The PAT Scheme awards Energy Savings Certificates ("ESCerts") to designated consumers who exceed their allocated energy consumption targets and standards. These certificates are given by the Bureau of Energy Efficiency ("BEE"), an entity under the Ministry of Power ("MoP"). These specified consumers can thereafter exchange the ESCerts on energy exchanges with other specified consumers who fail to meet their targets. ESCerts are granted in accordance with the Energy Conservation Act of 2001.

[45] Indian market players who are directly affected by the international trading ban on credits generated from mature technologies, and other observers, have expressed grave concerns about the implications. Refer, *The Voluntary Carbon Market Contracted in 2023, Driven by Drop-off in Transactions for REDD+ and Renewable Energy,* ECOSYSTEM MARKETPLACE (May 30, 2024), https://www.ecosystemmarketplace.com/articles/a-ban-on-exporting-carbon-credits-and-its-impact-on-thedomestic-carbon-market and Maya Hilmi, *India's Ban On The Export Of Carbon Credits – What Are The Implications?,* VERDANTIX (Sept 30, 2022), https://www.verdantix.com/insights/blogs/india-s-ban-on-the-export-of-carbon-credits-what-are-the-implications

2. Renewable Energy Certificates Scheme (REC Scheme): The REC Scheme is designed to encourage the adoption of renewable energy and assist in meeting the Renewable Purchase Obligations ("RPO") outlined in the Electricity Act, 2003. Obligated entities can compensate for their failure to meet their Renewable Purchase Obligations (RPOs) by purchasing Renewable Energy Certificates (RECs), which are governed by the REC Regulations of the Central Electricity Regulatory Commission. A Renewable Energy Certificate (REC) defines the specific environmental characteristics associated with the generation of 1 megawatt-hour (MWh) of energy from renewable sources. The REC Regulations describe obligated entities as entities that are required to acquire a specific proportion of power from renewable energy sources, based on their total electricity consumption. Eligible entities, on the other hand, are entities that are qualified to receive RECs. RECs can be exchanged on energy markets or through electricity traders and acquired by obligated organisations to fulfil their RPO.

3. Green Credit Rules, 2023: In October 2023, the Ministry of Environment, Forest and Climate Change (MoEFCC) introduced the Green Credit Rules, 2023 ("Rules"). These rules established a Green Credit (GC) programme that aims to encourage environmentally beneficial acts through a market-based system. This system enables the creation and exchange of GCs.[47] Green Certificates (GCs), in contrast to carbon credits, can be obtained through any activity that has a beneficial effect on the environment, such as afforestation, water or waste management, sustainable agriculture or infrastructure, pollution reduction, and forest conservation, among others. According to the Rules, every individual or organisation has the ability to register any activity that has a good impact on the environment with the administrator in order to receive GCs. The Indian Council of Forestry Research and Education has been designated as the administrator

[46] Amoolya Khurana and Chirag Rathi, *Navigating Carbon Credits in India,* SPICE ROUTE LEGAL, https://spiceroutelegal.com/publications/navigating-carbon-credits-in-india/
[47] Green Credit Rules, 2023, https://egazette.gov.in/WriteReadData/2023/249377.pdf

under the Rules. The administrator must validate the environmentally beneficial activity through a certified agency before issuing a GC certificate to the applicant. The administrator is responsible for creating the structure of the trading platform where GCs can be purchased and sold. The Rules also require the creation of a GC Registry to register and distribute each GC. The Rules specify that an activity that produces greenhouse gases (GCs) may also produce carbon credits under the Scheme. The Rules provide the general concept and procedure for generating and trading GCs, but specific recommendations are still being developed.

4. Carbon Credit Trading Scheme, 2023: Despite India's relatively low per capita emissions and historical emissions compared to the global average, it presently ranks as the third greatest contributor of GHGs that cause climate change. India has implemented many measures to reduce its GHG emissions, including the implementation of the perform, achieve, and trade (PAT) plan to enhance industrial energy efficiency and the enforcement of renewable procurement obligations (RPOs).[48] One measure that is being considered is the implementation of carbon markets. In October 2022, the Bureau of Energy Efficiency (BEE) released a preliminary policy document regarding the projected Indian carbon market (ICM). The Energy Conservation Act of 2001 was changed in December 2022 to grant the bureau the authority to establish a carbon credit trading scheme (CCTS) in India, hence enabling the implementation of a compliant carbon market. The scheme was officially announced in June 2023, along with a comprehensive implementation framework.[49] In October 2023, the bureau published preliminary information regarding the compliance system and the requirements and procedures for accrediting carbon verification

[48] Mannat Jaspal, *supra* note 44.

[49] Violet George, *India Announces Its Domestic Carbon Credit Trading Scheme (CCTS)*, CARBON HERALD (December 21, 2023), https://carbonherald.com/india-announces-its-domestic-carbon-credit-trading-scheme-ccts/

agencies. In December 2023, a significant amendment was made to the notified CCTS to enable the inclusion of the offset market.

CCTS is supported by the legislative framework of the Environment (Protection) Act, 1986 (EPA) and the Energy Conservation Act, 2001, which was modified in 2022. The Ministry of Environment, Forest, and Climate Change (MoEFCC) and the Ministry of Power (MoP) will serve as the primary ministries responsible for overseeing the plan, while the Bureau of Energy Efficiency will act as its administrator. A national steering committee (NSC) will be responsible for supervising the operations of the carbon market. The Grid Controller of India will serve as the official repository for the carbon credits that are granted, while the Central Electricity Regulatory Commission (CERC) will oversee and regulate the trading operations. There are three power exchanges that will serve as trading platforms for the carbon credits. The institutional framework overseeing the carbon market has resemblance to that managing the current perform, achieve, and trade scheme, with the possibility of eventually merging into the CCTS.

In June 2023, the CCTS specifically targeted obliged enterprises that will be assigned required emission intensity objectives. This suggests that the Indian carbon market will operate as a compliance market, at least in its early stages. Nevertheless, a notification issued in December 2023 has broadened the reach of the carbon market to include the voluntary offset carbon market. The specific extent and procedures of this expansion are anticipated to be disclosed in the near future. Thus, the interaction between the voluntary and compliance markets remains uncertain.[50]

[50] Trishant Dev, *supra* note 27.

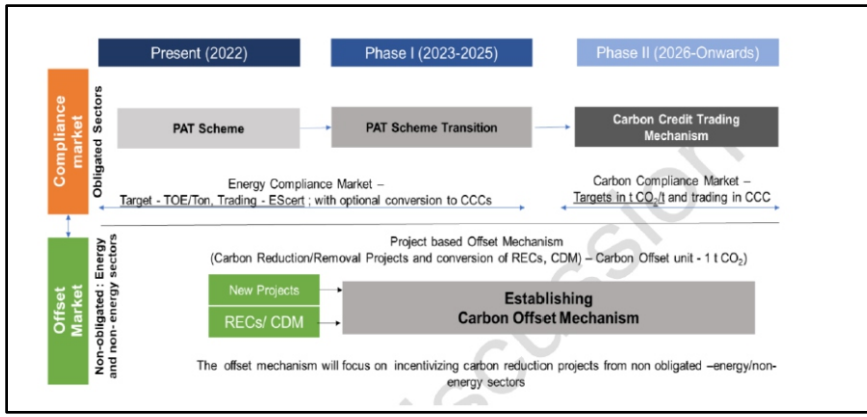

Figure 2: Proposed Development Phases of the Indian Carbon Market[51]

VII. ANALYSIS OF THE SCHEME

Regulation of the Carbon Market

The Bureau of Energy Efficiency will oversee the Carbon Credit Trading System (CCTS) under the direct supervision of the National Steering Committee (NSC) for the carbon market. The NSC will function as an inter-ministerial committee comprising joint secretaries from different line ministries, such as the Ministry of Power, Ministry of Environment, Forests and Climate Change, Ministry of New and Renewable Energy, Ministry of Steel, Ministry of Coal, Ministry of Chemicals and Fertiliser, along with five external experts. The primary responsibilities of the NSC include determining the objectives for the CCTS, which are informed by recommendations from the Bureau, and developing the necessary protocols and guidelines. The NSC has the ability to form working groups that possess specialised technical knowledge. It is necessary to convene a meeting on a quarterly basis. Nevertheless, considering the diverse range of responsibilities assigned to the NSC and its composition of senior officials from different ministries, it is probable that it will primarily function as a ceremonial committee, largely accepting the recommendations put forth by

[51] Bureau of Energy Efficiency, *supra* note 39 at 22.

the Bureau or the working groups. This can impede the NSC's purpose of overseeing the bureau's administrative duties. In addition, the Bureau is situated within the electricity ministry, which has the responsibility for power generation, a significant contributor to emissions, instead of being located within a 'neutral' body.[52]

The Bureau of Energy Efficiency serves as the central agency at the national level for carrying out initiatives related to energy efficiency and conservation. Additionally, it possesses significant expertise in managing the perform, achieve, and trade scheme. Nevertheless, the task of supervising a carbon market has distinct obstacles due to the potential for emissions to originate from various sources and the unique methods required for monitoring, which differ from those used for monitoring energy efficiency.[53] The bureau would need to undergo substantial capacity building in order to effectively fulfil its role as the administrator of the planned CCTS. Considering all these aspects, it may be more appropriate for the environment ministry or an agency within the Prime Minister's Office to oversee the CCTS, considering its broad effects on the economy. This bears resemblance to other nations. As an illustration, the European Union's Emissions Trading System (ETS) is managed by the European Environment Agency, while California's Cap-and-Trade (CaT) programme is managed by the California Air Resources Board.

An additional concern arises from the intricacy of the procedures due to the dual oversight of the plan by two key ministries, namely the Ministry of Environment and the Ministry of Power. The draft compliance mechanism proposed by the Bureau of Energy Efficiency outlines a target setting process that involves several steps. It begins with the technical committee, which provides a recommendation. This recommendation is then passed on to the NSC, which in turn makes its own recommendation. The power ministry receives this recommendation and makes its own recommendation to the

[52] Ashok Sreenivas and Aditya Chunekar, *Carbon Markets in India: Need for a Cautious Approach*, THE INDIA FORUM (June 04, 2024), https://www.theindiaforum.in/climate-change/carbon-markets-india-need-cautious-approach

[53] Gautam Jain, *supra* note 9.

environment ministry. Finally, the environment ministry notifies the targets. This process is not only arduous, but it also lacks clarity regarding the consequences if the recommendations of one agency are not fully accepted by the subsequent agency in the chain. To enhance efficacy and efficiency, it is preferable to streamline and clarify this process, establishing clear roles and responsibilities for all participating entities.

Procedure of Setting Emission Targets

Allocating emissions permits to market players is a crucial element in the construction of an efficient CCTS. The decision of each participant to invest in new technology or acquire credits to achieve the quota would rely on that. If the targets are excessively lenient, meaning that the emissions quota is set too high, it will result in two consequences. One reason is that it will not contribute to the decarbonisation objective as participants will lack adequate incentives to invest in efforts for increased mitigation. Due to the ease with which participants can meet their goals, there will be an excess of carbon credits in the market relative to the requirement to purchase credits. As a result, the price of credits in the market will be suppressed. Conversely, if the targets are excessively strict, meaning that the limits on emissions are too low, the necessary investments to achieve the targets would be greater. This is expected to result in a scarcity of carbon credits in the market relative to the demand for purchasing them, resulting in significantly elevated credit prices. This would result in the Indian industry losing its competitiveness compared to its global counterparts, especially in areas that experience foreign competition, whether in the home or international markets. Consequently, this will lead to an increase in pricing for goods.[54] Hence, it is crucial to establish emissions quotas or targets at the optimal level.

The Bureau of Energy Efficiency implemented the perform, achieve, and trade plan with the objective of enhancing the energy efficiency of companies through the provision of energy intensity targets. The proposed CCTS is primarily based on the perform, achieve, and trade scheme, wherein specific

[54] Trishant Dev, *supra* note 27.

industrial units will be assigned emission intensity targets. The current evidence from the perform, accomplish and trade plan indicates that it has had lenient objectives, leading to an excess supply and undervaluation of energy saving certificates (ESCerts). Furthermore, the existing evidence indicates that even these lenient objectives have not been effectively implemented. In other words, not all individuals or entities who are required to purchase ESCerts have actually done so, which is expected to result in even lower compliance rates in future cycles. Drawing from this experience and incorporating insights from global approaches, certain factors must be taken into account when formulating emission intensity targets for the Indian CCTS[55]:

1. The process of establishing targets should adhere to a transparent and explicit approach, which may differ depending on the industry, in order to determine emission intensity targets. Implementing a systematic approach like this will offer clear and assured guidance to market participants, allowing them to develop their company's strategy accordingly.

2. Having a clear and long-term understanding of target emission intensities will allow companies to actively engage in the system by making well-informed decisions regarding their investment strategies. Within the framework of the perform, accomplish and trade programme, only aims for a three-year period are disclosed, which may be considered insufficient for developing investment strategies. Conversely, the carbon markets in the EU have set annual goals until 2030, which are determined by the most successful organisation in the industry. Therefore, the basic objectives of the Indian CCTS might potentially be established for all years till 2030. The subsequent set of objectives, extending until about 2035, can be made publicly available by either 2026 or 2027. This will provide participants with the foresight to strategize their expansion and financial ventures.

[55] Ashok Sreenivas, *supra* note 49.

3. Sector-wide targets were assigned to each entity or enterprise under the perform, achieve and trade plan, with the aim of reducing energy intensity. The approach became burdensome due to the requirement of establishing the baseline energy intensity for each organisation before setting targets. Furthermore, this strategy allows for the continuation of current inefficiencies without providing motivation for those who have already made efforts to enhance their energy or emission efficiency. Hence, it would be more advantageous to establish emission intensity targets for the entire iron and steel sector, rather than individual targets for each entity within the sector. Many Emissions Trading Systems (ETS), such as the European Union's ETS and the California ETS, adopt this strategy. An effective approach would involve establishing a correlation between the aim and the best achievers in the sector. In the Indian context, if it is deemed necessary to provide special consideration to small and medium companies (SMEs) due to their limited capacity to invest in technology, separate targets could be established for the large industry and SME groups within each sector.[56]

4. Establishing an appropriate emissions intensity target is crucial to achieve successful reduction of carbon emissions and maintain a competitive industry. It is important to note that India already has numerous internal and foreign targets. India's NDC pledge stipulates a reduction of 45% in emissions intensity from 2005 levels.[57] Additionally, there are requirements for all power consumers to fulfil renewable procurement obligations. The current targets should serve as the minimum level when establishing sector-specific target emission intensities, taking into account appropriate adjustments for each sector. India has successfully achieved a 33% decrease in its emission intensity from 2005 to 2019, as indicated by the observed trends.

---

[56] Violet George, *supra* note 49.

[57] Heera Lal and Kaviraj Singh, *Zoomed Out | Carbon Credit Trading Scheme — India's bold step towards net zero,* CNBC TV 18 (August 18, 2023), https://www.cnbctv18.com/views/carbon-credit-trading-scheme-17473261.htm

5. There are additional marketplaces besides the CCTS compliance carbon market that have been suggested for selling carbon credits. Other suggestions encompass a carbon market that operates on a voluntary offset basis, as well as a programme involving "green credits". Presently, there is a lack of understanding on the manner in which these distinct markets would interact. In addition, the value of carbon credits varies significantly across different markets. It is challenging to compare the value of green credits obtained through afforestation with carbon credits obtained through supplying improved cooking stoves or reducing emissions intensity in the petrochemicals sector. Specifically, there could be increased methodological uncertainty and difficulties in evaluating carbon savings in the green credits and voluntary offset markets.

In addition, the Bureau of Energy Efficiency, responsible for overseeing the compliance carbon market, lacks the necessary knowledge to evaluate carbon credits generated through operations like afforestation or the distribution of better cooking stoves. Therefore, it is advisable to maintain a clear separation between the compliance carbon market, which deals with a significant portion of emissions, and other markets. It is important that the carbon credits in the compliance market are not interchangeable with credits in other markets, at least until these markets become more established. Furthermore, similar to other markets, it is worth considering the option of fulfilling a portion of compliance requirements through the offset market.

Target Enforcement

The establishment of suitable targets is a crucial aspect of designing efficient carbon markets. However, the success of the entire system depends on the ability to guarantee that those who fail to meet their targets will buy the necessary amount of carbon credits. This must be accompanied by a credible threat of punitive action to deter non-compliance. Without that, there would be minimal motivation for the industry to comply with the specified targets. The perform, accomplish and trade plan, which serves as a model for the

proposed CCTS, provides compelling evidence. During its initial cycle, the rate of non-compliance, which refers to the failure to fulfil energy intensity requirements or purchase the necessary ESCerts, stood at 8%. This indicates that only 92% of the expected ESCerts were really acquired. Due to the lack of punitive measures taken against non-compliance, the second cycle experienced a significant decrease in compliance, dropping to approximately 50% even after granting many deadline extensions.[58]

There is currently no accessible data regarding any legal consequences being enforced against entities who fail to comply with the perform, accomplish, and trade plan. Undoubtedly, the process of imposing a penalty on organisations who fail to meet their obligations is quite laborious. The Bureau of Energy Efficiency is mandated to notify the state designated agencies (SDAs) about the states in where the violating entities are located. Consequently, the agencies must confirm that the entities in question have failed to achieve their goals, and subsequently submit a formal request to the State Electricity Regulatory Commissions (SERCs) to enforce a penalty on those businesses. The Commission is anticipated to conduct the requisite procedural steps of listening to the different parties, among other things, prior to imposing the penalty. Undoubtedly, the complexity of this process renders its successful implementation unfeasible, especially considering the significant capacity constraints in the majority of state institutions.[59]

Furthermore, there is a lack of clarity regarding the potential consequences in terms of penalties within the proposed carbon market. Due to the scheme's origins being linked to both the EPA and the ECA, it is uncertain which law's provisions dictate the fines to be enforced and the procedure for imposing them. It is imperative to provide legal clarity regarding this matter in order to develop a more streamlined and straightforward procedure for

[58] Zoya Ada Hussain, *How do carbon markets work?,* INDIA DEVELOPMENT REVIEW (February 8, 2024), https://idronline.org/article/climate-emergency/how-do-carbon-markets-work/?gad_source=1&gclid=CjwKCAjwvvmzBhA2EiwAtHVrb1RBNHYkOZOK66ONRC7egBFvcOmz1Sg8qnwWhVmxsu6_XvAi-SG6FRoCxJYQAvD_BwE

[59] Gautam Jain, *supra* note 9.

penalising those who fail to meet their obligations, and to send a strong and trustworthy message about the consequences that can be imposed on entities that default.[60]

The definition of CCTS can clarify that the Bureau of Energy Efficiency has the authority to directly impose penalties on the entity that fails to comply. These penalties are determined by considering the combination of certified emissions reductions achieved (as verified by an accredited carbon verification agency) and the carbon credit certificates purchased and used to meet emissions intensity targets (certified by the registrar of the carbon markets). Without delay, all certificates that have been utilised to fulfil emission intensity goals should be immediately invalidated and prohibited from being traded again. In addition, auditors of the defaulting corporations may identify non-compliance as a failure to meet a legal requirement, thereby alerting shareholders to these failings.[61]

Furthermore, in order to ensure adequate assurance that the market is operating efficiently, the Bureau of Energy Efficiency shall regularly release market monitoring and penalty reports that offer diverse types of information. This can encompass sector-specific information regarding the quantity of entities that successfully met emission intensity targets, the quantity of carbon credit certificates issued, the quantity of entities that failed to meet emission intensity targets, the quantity of carbon credit certificates they were required to purchase, the quantity of carbon credit certificates actually purchased, the fines imposed, the fines collected, and the identities of non-compliant entities (including the fines imposed and collected). In order to provide comprehensive public information about the status of Indian carbon markets, it is important to publish additional details such as the trading volumes of certificates, the offered prices, the discovered

[60] Trishant Dev, *supra* note 27.

[61] Dishaa Dand and Krishna Ravishankar, *India's Carbon Credit Policy and the Greenwashing Conundrum,* THE INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS (June 21, 2023), https://www.irccl.in/post/india-s-carbon-credit-policy-and-the-greenwashing-conundrum

prices, the number of certificates extinguished to meet intensity targets, and the number of outstanding certificates available for further trading.[62]

VIII. CONCLUSION

India is on the verge of implementing a bold carbon market initiative to facilitate the reduction of carbon emissions in its difficult-to-decarbonize industries. This will also elevate the country to the status of nations that own operational carbon markets, and empower Indian companies to engage in international commerce on an equitable basis. Nevertheless, attaining these objectives will necessitate meticulous planning and execution of the CCTS. The institutional framework responsible for supervising the plan would require improvements in order to ensure efficient and effective management. There should be a straightforward and efficient enforcement mechanism in place to ensure that enterprises are motivated to participate in the scheme and achieve their targets.

It is crucial to carefully consider the establishment of emissions intensity targets to ensure that they are neither too lenient nor too strict. These targets should also provide clear guidance on their future trajectory, so that they motivate companies to make informed decisions regarding investments in decarbonisation technologies in order to meet the targets. All of these tasks need meticulous attention to detail and strategic preparation. Without implementing this, there is a potential danger that India will merely have a carbon market in title, but it will not contribute to the efficient reduction of carbon emissions in the Indian economy nor enable it to compete on a global scale as the demands for decarbonisation intensify.

[62] Anil Mehta and Anjal Prakash, *Carbon Credits: India's ethical environmental trading and global climate challenge,* FORBES INDIA (November 1, 2023), https://www.forbesindia.com/article/isbinsight/carbon-credits-indias-ethical-environmental-trading-and-global-climate-challenge/89387/1

CHALLENGES, OPPORTUNITIES, AND FUTURE PROSPECTS OF THE LIQUIFIED NATURAL GAS SECTOR IN INDIA

Kalpesh Vithlani*
Dr. Satya Narayan Singh**

ABSTRACT

India's Liquefied Natural Gas (LNG) sector plays a crucial role in the country's energy landscape by offering a cleaner alternative to coal and oil. Despite significant strides in infrastructure development, including the establishment of major import terminals and an expanding pipeline network, the sector faces challenges, such as insufficient infrastructure, high development costs, and inconsistent policy implementation. The current state of the LNG sector is characterised by a growing dependency on imports to meet rising demand in the industrial, transportation, and residential sectors. The future potential is promising, with projected increases in demand and substantial investments in infrastructure expansion. Key opportunities include economic growth driven by the adoption of LNG, environmental benefits from reduced emissions, and technological advancements in storage and transportation. Strategic initiatives, including policy reforms and international partnerships, are critical to sustainable growth. This study highlights the need for comprehensive policy frameworks, financial incentives, and collaborative efforts to overcome these challenges and leverage opportunities. These

* *Ph.D Scholar, Department of Business and Management, Institute of Advanced Research Gandhinagar*
** *Associate Professor, Department of Business and Management, Institute of Advanced Research Gandhinagar*

findings underscore the importance of LNG in enhancing energy security, reducing emissions, and supporting sustainable development, with significant implications for policymakers and stakeholders.

Keywords: *Liquefied Natural Gas (LNG), Energy Infrastructure, India Energy Policy, Sustainable Development, Natural Gas Demand.*

I. INTRODUCTION

LNG is a natural gas that is cooled to a liquid state at approximately -162 degrees Celsius, transforming it from a gaseous to a liquid state. This process reduces the volume by approximately 600 times, making it more economical to store and transport. The liquefaction process also removes impurities, such as water, carbon dioxide, sulphur compounds, and heavy hydrocarbons, resulting in cleaner-burning fuel.

The significance of LNG lies in its role as a cleaner alternative to other fossil fuels, such as coal and oil. When combusted, LNG emits fewer pollutants and greenhouse gases. Specifically, LNG produces about 50-60% less CO_2 than coal and approximately 30% less than oil, making it a pivotal energy source in efforts to mitigate climate change and improve air quality[1]. Furthermore, LNG's high energy density and ability to be transported over long distances by sea make it a crucial component in the global energy market, enhancing energy security and diversification of energy sources.

I.1.1. Historical Context of LNG Usage in India

The use of LNG in India has evolved significantly over the past few decades. India's journey with LNG began in the early 2000s, with the commissioning of the Dahej LNG terminal by Petronet LNG Limited. This marked the beginning of LNG imports, which were driven by the country's increasing energy demand and declining domestic natural gas production. Over the

[1] Yusuf Bicer & Ibrahim Dincer, *A Comparative Life Cycle Assessment of Alternative Aviation Fuels*, 2 Int'l J. Sustainable Aviation 181, 181-202 (2016), https://doi.org/10.1504/IJSA.2016.080240.

years, India has expanded its LNG infrastructure to include several import terminals, thus enhancing its capacity to import and regasify LNG.

The growth of the LNG sector in India has been spurred by the government's strategic initiatives to reduce dependency on coal and oil and to promote cleaner energy alternatives. India's energy policy framework has increasingly focused on boosting the share of natural gas in its energy mix. The country's first LNG-run bus was launched in 2016, highlighting the practical applications and potential of LNG in the transportation sector. As of 2020, India has become the world's fourth-largest LNG importer, with imports rising steadily to meet the burgeoning energy demand in industries such as power generation, industrial applications, and transportation[2].

I.2. Importance of LNG in India's Energy Mix

India is the world's fourth largest importer of LNG, driven by its burgeoning energy demands and declining domestic natural gas production. The Indian government has set a target to increase the share of natural gas in the country's energy mix from 6% to 15% by 2030 to meet growing energy needs and shift towards cleaner energy sources[3]. The versatility of LNG, which is used in power generation, industrial applications, and as a transportation fuel, highlights its strategic importance. LNG's role in supporting India's urbanisation and industrialisation objectives is critical given the country's aim to balance rapid economic growth with environmental sustainability[4].

The prospects and challenges of the LNG industry in India have been an area of interest in recent years. The Indian pipeline industry has seen significant developments, with a need for infrastructure for the storage and transportation of natural gas to meet projected demand[5]. Additionally, the role of CO2 capture and storage (CCS) has been highlighted as a key factor in mitigating energy security risks and global climate change risks in India[6]. In

[2] Ministry of Petroleum and Natural Gas, *Annual Report 2021-22*, Government of India (2022)
[3] Ministry of Petroleum and Natural Gas, *Annual Report 2020-21*, Government of India (2021).
[4] Manish Vaid, *India's Natural Gas Infrastructure: Reassessing Challenges and Opportunities*, 38 Strategic Analysis 508, 508-527 (2014), https://doi.org/10.1080/09700161.2014.918428.
[5] Hiral Parekh & V. C. Sati, *Pipelines Industry in India: Recent Developments and Future Requirements* (2002).

the context of energy sector development in the BBIN sub-region, including India, challenges related to resource distribution, energy supply, and policies have been reviewed[7].

The potential for alternative fuels, such as compressed natural gas and hydrogen, to decarbonise the road transport sector in India has also been explored[8]. Furthermore, the use of green hydrogen has been identified as a potential solution to lower emissions in difficult-to-abate sectors in India by 2050[9]. While the focus of the literature review has primarily been on energy-related challenges and opportunities in India, there is a need to consider the broader regional context. Integration with regional blocks through intra-industry production networks has been suggested as a way to boost growth prospects in Northeast India[10]. The finite life cycle of recoverable resources in South Asian countries, including India, has implications for natural gas production and policy decisions[11].

The primary objectives of this study were threefold.

1) To explore the current state of the LNG sector in India, including production, import, and consumption trends.

2) Identify challenges and opportunities within the sector.

3) To forecast prospects for LNG in India's energy landscape.

---

[6] Amrit Garg & P. R. Shukla, *Coal and Energy Security for India: Role of Carbon Dioxide (CO2) Capture and Storage (CCS)*, Energy (2009).

[7] Kapil Gyanwali, Ryota Komiyama, Yoshinobu Fujii & T. R. Bajracharya, *A Review of Energy Sector in the BBIN Sub-Region*, Int'l J. Sustainable Energy (2020).

[8] M. R. Nouni, P. Jha, R. Sarkhel, C. Banerjee, A. K. Tripathi & J. Manna, *Alternative Fuels for Decarbonisation of Road Transport Sector in India: Options, Present Status, Opportunities, and Challenges*, Fuel (2021).

[9] Shuhui Song et al., *Deep Decarbonization of the Indian Economy: 2050 Prospects for Wind, Solar, and Green Hydrogen*, iScience (2022).

[10] Amrit Nath, *Integration with Regional Blocks Through Intra-Industry Production Networks: Boosting the Growth Prospects of Northeast India* (2018).

[11] Abhay Darda, Renato Guseo & Cinzia Mortarino, *Nonlinear Production Path and an Alternative Reserves Estimate for South Asian Natural Gas*, Renewable & Sustainable Energy Reviews (2015).

I.3. Current Status of the LNG Sector in India

India's domestic production of natural gas needs to be increased to meet its rising demand, necessitating substantial imports of LNG. In 2020, India's LNG imports stood at approximately 22 million tons per annum (MTPA) and were primarily sourced from countries such as Qatar, the United States, and Australia[12]. The country's LNG infrastructure includes several import terminals with a total capacity of 42.5 MTPA, with plans to expand further to accommodate growing demand[13].

I.4. Consumption Patterns

LNG consumption in India is driven mainly by the power and fertiliser sectors, which together account for more than 55% of total natural gas usage[14]. The City Gas Distribution (CGD) network, which provides piped natural gas (PNG) to households and compressed natural gas (CNG) to vehicles, also represents a significant and growing segment of LNG consumption. The use of LNG in the transportation sector is particularly promising, offering a cleaner alternative to diesel and petrol, and supporting the government's efforts to reduce urban air pollution[15].

I.5. Challenges Facing the LNG Sector

One of the most significant challenges facing India's LNG sector is the lack of adequate infrastructure. The existing pipeline network is insufficient to cover the entire country, particularly the southern and eastern regions, leading to supply constraints and regional imbalances in LNG availability[16]. The

---

[12] Arun Harak & Vijay Kumar, *Pricing Reforms in the Natural Gas Sector in India*, 11 Int'l J. Energy Econ. & Pol'y 187, 187-196 (2021), https://doi.org/10.32479/ijeep.10391.

[13] Ministry of Petroleum and Natural Gas, *Annual Report 2021-22*, Government of India (2022).

[14] Vitomir Vivoda, *LNG Import Diversification and Energy Security in Asia*, 129 Energy Pol'y 967, 967-974 (2019), https://doi.org/10.1016/j.enpol.2019.01.073.

[15] Stefan Pfoser, Oliver Schauer & Yvan Costa, *Acceptance of LNG as an Alternative Fuel: Determinants and Policy Implications*, 120 Energy Pol'y 130, 130-138 (2018), https://doi.org/10.1016/j.enpol.2018.05.046.

[16] Fazal Zakir et al., *LNG Supply Chain: Challenges, Opportunities, and Future Prospects*, 2020 3rd Int'l Conf. on Computing, Mathematics & Engineering Technologies (iCoMET), https://doi.org/10.1109/iCoMET48670.2020.9073830.

development of new pipelines and the expansion of existing pipelines are critical for ensuring the efficient distribution of LNG across India.

I.5.1. Financial and Investment Barriers

The high capital costs associated with the development of LNG infrastructure, including import terminals, regasification units, and pipelines, pose significant financial challenges. Securing public and private investment in these projects is essential, but it often needs to be improved due to economic and regulatory uncertainties[17]. Given the high costs involved, the need for substantial public funding to support pipeline network expansion is particularly pressing[18].

I.5.2. Regulatory and Policy Issues

Regulatory inconsistencies and policy implementation challenges further complicate the LNG sector's growth. Market-based pricing mechanisms necessary for attracting investment and ensuring competitive gas markets are still evolving in India[19]. Additionally, policy measures aimed at promoting LNG must be consistently enforced to build investor confidence and drive sectoral growth[20].

I.6. Opportunities in the LNG Sector

India's robust economic growth and increasing industrialisation are driving a steady increase in energy demand. With its lower emissions and cost-effectiveness, LNG is well-positioned to meet this demand, particularly in sectors such as power generation, transportation, and industry[21]. The

[17] Manish Vaid, *India's Natural Gas Infrastructure: Reassessing Challenges and Opportunities*, 38 Strategic Analysis 508, 508-527 (2014), https://doi.org/10.1080/09700161.2014.918428.
[18] Council on Energy, Environment and Water, *Small-Scale LNG is Used to Expand Natural Gas in India* (2021).
[19] Arun Harak & Vijay Kumar, *Pricing Reforms in the Natural Gas Sector in India*, 11 Int'l J. Energy Econ. & Pol'y 187, 187-196 (2021), https://doi.org/10.32479/ijeep.10391.
[20] Liam Kevin, *Indian LNG Demand & the Global LNG Market*, 12 J. World Energy L. & Bus. 246, 246-259 (2019), https://doi.org/10.1093/jwelb/jwz010.
[21] Vitomir Vivoda, *LNG Import Diversification and Energy Security in Asia*, 129 Energy Pol'y 967, 967-974 (2019), https://doi.org/10.1016/j.enpol.2019.01.073.

transition from more polluting fuels to LNG can help reduce operational costs and environmental impacts, thereby contributing to sustainable economic development.

I.6.1. Environmental Benefits

LNG is a cleaner-burning fuel compared to coal and oil, which aligns with India's commitment to reducing greenhouse gas emissions under the Paris Agreement. The use of LNG can significantly reduce CO2 and NOx emissions, contributing to improved air quality and public health[22]. Additionally, role of LNG in supporting the transition to a low-carbon economy enhances environmental benefits[23].

I.6.2. Technological Advancements

Advancements in LNG technology, such as improved storage solutions and more efficient transportation methods, are creating new opportunities in the sector. For example, innovations in floating LNG (FLNG) technology allow for the exploitation of offshore gas reserves that were previously considered inaccessible[24]. Technologies for utilising LNG cold energy during the regasification process can improve energy efficiency and reduce operational costs[25].

---

[22] Yusuf Bicer & Ibrahim Dincer, *A Comparative Life Cycle Assessment of Alternative Aviation Fuels*, 2 Int'l J. Sustainable Aviation 181, 181-202 (2016), https://doi.org/10.1504/IJSA.2016.080240.

[23] Nandan Das & Joyashree Roy, *Making Indian Power Sector Low Carbon: Opportunities and Policy Challenges*, in *Energy for Sustainable Development* 163-183 (2018), https://doi.org/10.1007/978-981-10-7509-4_10.

[24] Woo Won, Seung Kyu Lee, Kyoung Choi & Young Kwon, *Current Trends for the Floating Liquefied Natural Gas (FLNG) Technologies*, 31 Korean J. Chemical Engineering 732, 732-743 (2014), https://doi.org/10.1007/s11814-014-0047-x.

[25] Ting He, Zhaoyuan Chong, Jianliang Zheng, Yiguang Ju & Praveen Linga, *LNG Cold Energy Utilisation: Prospects and Challenges*, 177 Energy 89, 89-106 (2019), https://doi.org/10.1016/j.energy.2018.12.170.

I.7. Future Prospects

The demand for LNG in India is projected to rise significantly from 25 MTPA in 2020 to 45 MTPA by 2030[26]. The expansion of the LNG infrastructure, including new import terminals and pipeline networks, supports this growth. Continued investment in LNG infrastructure is essential to meet this rising demand and ensure a reliable energy supply[27].

I.7.1. Strategic Initiatives

Strategic initiatives to promote the sustainable growth of the LNG sector include policy recommendations to improve regulatory frameworks and incentivise investment. Promoting the use of LNG in the transportation sector can reduce the dependency on crude oil and lower transportation costs Key recommendations include adopting market-based pricing mechanisms, enhancing infrastructure development, and fostering international partnerships to secure stable LNG supplies[28].

I.7.2. Government Policies and Initiatives to Promote LNG

The Indian government implemented several policies and initiatives to promote the use of LNG as part of its broader strategy to enhance energy security and reduce environmental pollution. Key policies include Hydrocarbon Vision 2025, which outlines the long-term goals for the hydrocarbon sector and emphasises the need to increase the share of natural gas in the energy mix. The government has also introduced policy measures to facilitate the development of the LNG infrastructure. This includes allowing 100% Foreign Direct Investment (FDI) in projects related to the exploration, production, and marketing of natural gas and LNG. Additionally, the government has incentivised the development of LNG terminals and pipelines through various tax benefits and subsidies[29].

---

[26] Liam Kevin, *Indian LNG Demand & the Global LNG Market*, 12 J. World Energy L. & Bus. 246, 246-259 (2019), https://doi.org/10.1093/jwelb/jwz010.
[27] Ministry of Petroleum and Natural Gas, *Annual Report 2021-22*, Government of India (2022).
[28] Anish Kar & Manish Vaid, *Strategic Initiatives for Sustainable Growth of the LNG Sector in India*, 10 Energy Strategy Rev. 48, 48-56 (2016), https://doi.org/10.1016/j.esr.2016.06.004.
[29] Ministry of Petroleum and Natural Gas, *Annual Report 2020-21*, Government of India (2021)

The introduction of the City Gas Distribution (CGD) policy aimed to expand the network of piped natural gas (PNG) for households and compressed natural gas (CNG) for vehicles. This policy significantly boosted the consumption of natural gas in urban areas, further promoting the use of LNG. Moreover, the Indian government's commitment to international agreements such as the Paris Agreement underscores its focus on reducing greenhouse gas emissions and adopting cleaner energy sources, thereby supporting the growth of the LNG sector. Current.

II. STATUS OF THE LNG SECTOR IN INDIA

India's domestic production of natural gas has not kept pace with its growing energy demands. As of 2020, domestic production was approximately 31 billion cubic meters, which is significantly lower than demand. This shortfall has necessitated substantial LNG imports to bridge the gap. In 2020, India imported approximately 22 million tons per annum (MTPA) of LNG, making it one of the top importers globally[30].

The reliance on imported LNG is expected to increase as domestic production continues to decline, and energy demand increases. The expansion of the LNG import infrastructure, including new terminals and storage facilities, is critical for managing this increasing dependency. India's strategy involves not only growing import capacities but also diversifying its LNG supply sources to enhance energy security and reduce the risks associated with supply disruptions[31].

[30] Praveen Kumar, Rohit Sinha & Sanjeev Mishra, *Challenges of Marketing Natural Gas: A Case Study of Sabarkantha Gas Limited*, 45 Vikalpa 1, 1-15 (2020), http://vslir.iima.ac.in:8080/xmlui/handle/11718/19447.

[31] Ministry of Petroleum and Natural Gas, *Annual Report 2021-22*, Government of India (2022)

II.1. Major LNG Import Terminals and Their Capacities

India currently operates several LNG import terminals strategically to optimise its distribution across the country. These terminals include the following.

1. **Dahej LNG Terminal (Petronet LNG Limited):** The largest LNG terminal in India, with a capacity of 17.5 MTPA.
2. **Hazira LNG Terminal (Shell and Total):** Located in Gujarat, this terminal had a capacity of 5.0 MTPA.
3. **Dabhol LNG Terminal (GAIL and NTPC):** Situated in Maharashtra with a capacity of 5.0 MTPA.
4. **Kochi LNG Terminal (Petronet LNG Limited):** Located in Kerala, it has a capacity of 5.0 MTPA.
5. **Ennore LNG Terminal (Indian Oil Corporation):** Situated in Tamil Nadu with a capacity of 5.0 MTPA.
6. **Mundra LNG Terminal (Gujarat State Petroleum Corporation and Adani Group):** Located in Gujarat, with a capacity of 5.0 MTPA.

These terminals collectively contributed to a total import capacity of 42.5 MTPA. There are several under-constructed and proposed terminals that are expected to further enhance India's LNG import capacity in the coming years[32].

II.2. Consumption Patterns and Key Sectors Driving Demand

The power and fertiliser sectors primarily drive LNG consumption in India. The power sector alone accounts for a significant portion of the LNG demand because of the need for cleaner and more efficient energy sources for electricity generation. The fertiliser industry also relies heavily on LNG as a

[32] Ministry of Petroleum and Natural Gas, *Annual Report 2021-22*, Government of India (2022)

feedstock for the production of ammonia and urea, which are essential for agricultural productivity[33].

The transportation sector represents another critical area of LNG consumption, with the government promoting the use of LNG as a clean alternative to diesel and petrol. The introduction of LNG-fuelled buses and trucks, along with the expansion of the CGD network, has facilitated the growth of LNG usage in urban transportation. The City Gas Distribution policy aims to provide piped natural gas (PNG) to households and compressed natural gas (CNG) to vehicles, further boosting LNG demand[34]. The industrial sector, including steel, ceramic, and glass manufacturing, also contributes to LNG consumption because of the need for high-temperature processes and clean burning fuels. LNG's versatility in providing a reliable and efficient energy source across various applications underscores its importance in India's energy landscape[35].

III. CHALLENGES FACING THE LNG SECTOR

One of the major challenges facing the LNG sector in India is the need for more pipeline infrastructure. The country's natural gas grid, which consists of pipeline networks, needs to be more extensive to cover all regions effectively. This infrastructure needs to improve the efficient distribution of LNG, particularly in areas that need to be better connected to the pipeline network. The lack of robust pipeline infrastructure means that many potential consumers, especially in remote and underserved areas, cannot access LNG, thereby limiting its adoption and usage[36]. The uneven distribution of pipelines across different regions exacerbates this issue, creating disparities in LNG availability and consumption.

---

[33] Vitomir Vivoda, *LNG Import Diversification and Energy Security in Asia*, 129 Energy Pol'y 967, 967-974 (2019), https://doi.org/10.1016/j.enpol.2019.01.073.

[34] Stefan Pfoser, Oliver Schauer & Yvan Costa, *Acceptance of LNG as an Alternative Fuel: Determinants and Policy Implications*, 120 Energy Pol'y 130, 130-138 (2018), https://doi.org/10.1016/j.enpol.2018.05.046.

[35] Praveen Kumar, Rohit Sinha & Sanjeev Mishra, *Challenges of Marketing Natural Gas: A Case Study of Sabarkantha Gas Limited*, 45 Vikalpa 1, 1-15 (2020),

[36] Manish Vaid, *India's Natural Gas Infrastructure: Reassessing Challenges and Opportunities*, 38 Strategic Analysis 508, 508-527 (2014), https://doi.org/10.1080/09700161.2014.918428.

Currently, India has a limited number of LNG terminals, which restricts its ability to import and process large quantities of LNG. The existing terminals are concentrated in specific regions, further contributing to regional imbalances in the LNG supply. The major LNG terminals include Dahej, Hazira, Dabhol, Kochi, Ennore, and Mundra, with a combined capacity of 42.5 million tonnes per annum (MTPA)[37]. Although these terminals are significant, more is needed to meet the growing demand for LNG across the country. The limited number of terminals also creates bottlenecks in the supply chain, affecting the overall efficiency of the LNG distribution.

III.1. Financial and Investment Barriers

Developing the infrastructure required for the LNG sector is capital-intensive. These include the construction of LNG terminals, regasification units, and extensive pipeline networks. The high cost of infrastructure development poses a significant financial barrier, particularly in developing economies such as India. Securing adequate funding for these projects is challenging, as it requires substantial investment from both the public and private sectors. The economic feasibility of these projects is often questioned because of their high initial capital outlay and long payback periods[38]. Moreover, fluctuations in global LNG prices and volatility of the energy market add to financial risks, making investors wary.

The development of a comprehensive pipeline network in India requires significant public funding. Given the high costs associated with pipeline construction and maintenance, there are more feasible options than private investments. Public funding is essential to bridge the investment gap and ensure timely completion of pipeline projects. However, the allocation of public funds for such large-scale infrastructure projects competes with other critical sectors such as healthcare, education, and social welfare, making it a

[37] Ministry of Petroleum and Natural Gas, *Annual Report 2021-22*, Government of India (2022)
[38] Fazal Zakir et al., *LNG Supply Chain: Challenges, Opportunities, and Future Prospects*, 2020 3rd Int'l Conf. on Computing, Mathematics & Engineering Technologies (iCoMET), https://doi.org/10.1109/iCoMET48670.2020.9073830.

contentious issue[39]. The need for public funding also highlights the importance of effective government policies and strategic planning to prioritise and facilitate the development of LNG infrastructure.

III.2. Regulatory and Policy Issues

Another major challenge is the inconsistent implementation of policies in the LNG sector. Although the Indian government has introduced several policies to promote the use of LNG, their inconsistent application and enforcement undermine its effectiveness. For instance, policy measures aimed at encouraging the development of LNG infrastructure and market liberalisation often need to be completed on time, leading to uncertainty among investors and stakeholders[40]. This inconsistency creates a lack of confidence in the regulatory framework, thus hindering the growth of the LNG sector.

Implementing market-based pricing mechanisms for LNG is crucial to attracting investment and ensuring competitive gas markets. However, transitioning to market-based pricing models presents several challenges. India's current pricing regime for natural gas is characterised by a mix of regulated prices and market-determined prices, creating a complex and often opaque pricing structure. This complexity deters potential investors and complicates the development of a transparent and efficient LNG market[41]. Furthermore, the lack of a robust market-based pricing framework limits the ability of the LNG sector to respond effectively to market signals, thereby impacting its overall growth and sustainability.

IV. OPPORTUNITIES IN THE LNG SECTOR

India's industrial and transportation sectors present significant opportunities for growth in the LNG sector. The demand for natural gas in

[39] Council on Energy, Environment and Water, Small-Scale LNG is Used to Expand Natural Gas in India (2021).
[40] Liam Kevin, *Indian LNG Demand & the Global LNG Market*, 12 J. World Energy L. & Bus. 246, 246-259 (2019), https://doi.org/10.1093/jwelb/jwz010.
[41] Arun Harak & Vijay Kumar, *Pricing Reforms in the Natural Gas Sector in India*, 11 Int'l J. Energy Econ. & Pol'y 187, 187-196 (2021), https://doi.org/10.32479/ijeep.10391.

these sectors has been steadily increasing, owing to its cost-effectiveness and environmental benefits. In the industrial sector, LNG is used as feedstock for manufacturing processes and as a cleaner alternative to other fossil fuels for energy generation. The transportation sector, particularly heavy-duty and long-haul transportation, is increasingly adopting LNG because of its lower emissions and cost advantages over diesel and petrol[42]. The growing demand in these sectors is expected to drive further investment and expansion of LNG infrastructure in India.

LNG has the potential to significantly reduce the transportation costs in India. As a cleaner and cheaper fuel than diesel and petrol, LNG can lower the operating costs of vehicles, particularly in the logistics and transportation industries. The use of LNG in transportation can also reduce a country's dependence on imported crude oil, thereby improving energy security and reducing the trade deficit[43]. The cost savings associated with LNG can have a positive impact on the overall economy, making it an attractive option for both public and private transportation.

IV.1. Environmental Benefits

One of the most compelling advantages of LNG is its lower emissions compared to those of coal and oil. LNG combustion produces significantly less CO2 and other harmful pollutants such as sulfur oxides (SOx) and nitrogen oxides (NOx), which contribute to air pollution and climate change. The shift from coal and oil to LNG can help reduce the carbon footprint of various sectors, including power generation, industrial manufacturing, and transportation[44]. This environmental benefit aligns with India's commitments to international climate agreements, such as the Paris Agreement, and supports the country's efforts to transition to a low-carbon economy.

---

[42] Vitomir Vivoda, *LNG Import Diversification and Energy Security in Asia*, 129 Energy Pol'y 967, 967-974 (2019), https://doi.org/10.1016/j.enpol.2019.01.073.

[43] Ministry of Petroleum and Natural Gas, *Annual Report 2021-22*, Government of India (2022).

[44] Yusuf Bicer & Ibrahim Dincer, *A Comparative Life Cycle Assessment of Alternative Aviation Fuels*, 2 Int'l J. Sustainable Aviation 181, 181-202 (2016), https://doi.org/10.1504/IJSA.2016.080240.

The adoption of LNG plays a crucial role in achieving India's climate goals. As a cleaner-burning fuel, LNG can help the country meet its targets of reducing greenhouse gas emissions and improving air quality. For instance, the use of LNG in power generation can replace coal-fired power plants, which are major sources of CO2 emissions. Additionally, the deployment of LNG in the transportation sector can reduce emissions from diesel and petrol vehicles, thereby contributing to cleaner air in urban areas[45]. The environmental benefits of LNG make it a key component of India's strategy for combating climate change and promoting sustainable development.

IV.2. Technological Advancements

Technological advancements in LNG storage and transportation have created new opportunities for this sector. Innovations, such as floating LNG (FLNG) facilities, allow for the production, liquefaction, and storage of natural gas offshore, bypassing the need for extensive onshore infrastructure. The FLNG technology enables the exploitation of remote and stranded gas reserves, making it a viable solution for regions with limited access to natural gas pipelines[46]. Additionally, improvements in LNG storage technologies, such as cryogenic tanks and advanced insulation materials, enhance the efficiency and safety of LNG storage and transportation and reduce costs and operational risks.

The utilisation of LNG cold energy presents another significant opportunity for this sector. During regasification, a substantial amount of cold energy is released, which can be harnessed for various applications. This cold energy can be used for power generation, air separation, cryogenic cooling, and other applications. By capturing and utilising LNG cold energy, the overall energy efficiency of the LNG supply chain can be improved, thereby reducing

[45] Nandan Das & Joyashree Roy, *Making Indian Power Sector Low Carbon: Opportunities and Policy Challenges*, in *Energy for Sustainable Development* 163-183 (2018), https://doi.org/10.1007/978-981-10-7509-4_10.

[46] Woo Won, Seung Kyu Lee, Kyoung Choi & Young Kwon, *Current Trends for the Floating Liquefied Natural Gas (FLNG) Technologies*, 31 Korean J. Chemical Engineering 732, 732-743 (2014), https://doi.org/10.1007/s11814-014-0047-x.

waste and operational costs[47]. The development of technologies and systems to effectively utilise LNG cold energy is an area of ongoing research and innovation that offers potential environmental and economic benefits.

V. FUTURE PROSPECTS

The demand for LNG in India is projected to significantly increase over the next decade. According to Kevin[48], India's LNG demand is expected to grow from 25 million tons per annum (MTPA) in 2020 to almost 45 MTPA by 2030. This surge in demand is driven by several factors, including the growing need for cleaner energy sources, the expansion of the industrial and transportation sectors, and the government's commitment to increasing the share of natural gas in the country's energy mix. As domestic natural gas production continues to fall short of meeting rising demand, the dependency on LNG imports is expected to grow, necessitating an increase in import capacity and infrastructure development.

To accommodate this projected increase in demand, significant investments are being made to expand existing LNG infrastructure. The development of new import terminals and expansion of current facilities are critical components of this strategy. The Indian government, along with private sector stakeholders, is investing in new LNG terminals and enhancing the capacity of existing ones. For instance, the attached document outlines plans for new terminals in Jaigarh, Dhamra, and Jafrabad, which are expected to add substantial capacity to India's LNG import infrastructure. These developments are aimed at ensuring that the country can meet its future energy needs efficiently and sustainably.

The growth of LNG infrastructure in India is essential for meeting the projected increase in demand. The country's LNG infrastructure currently

---

[47] Ting He, Zhaoyuan Chong, Jianliang Zheng, Yiguang Ju & Praveen Linga, *LNG Cold Energy Utilisation: Prospects and Challenges*, 177 Energy 89, 89-106 (2019), https://doi.org/10.1016/j.energy.2018.12.170.

[48] Liam Kevin, *Indian LNG Demand & the Global LNG Market*, 12 J. World Energy L. & Bus. 246, 246-259 (2019), https://doi.org/10.1093/jwelb/jwz010.

includes six major import terminals, with a total capacity of 42.5 MTPA. However, to keep pace with growing demand, significant expansions are underway. The construction of new terminals and the enhancement of existing ones are expected to substantially increase the import capacity in the coming years[49].

In addition to import terminals, the development of a comprehensive pipeline network is crucial for the efficient distribution of LNG across the country. Expanding pipeline infrastructure will ensure that LNG can reach consumers in all regions, including those that are currently underserved. This expansion will help address regional imbalances in LNG availability and support the broader adoption of LNG as a primary energy source. The integration of these infrastructural developments with the existing energy networks will enhance the overall efficiency and reliability of India's LNG supply chain.

V.1. Strategic Initiatives

Several policy recommendations have been proposed for the sustainable growth of the LNG sector in India. Kar and Vaid[50] emphasise the need for a comprehensive policy framework that supports the development of LNG infrastructure and promotes market-based pricing mechanisms. Key policy recommendations include the following.

It is imperative to implement clear and consistent regulatory reforms to ensure sustainable growth of India's LNG sector. These reforms should streamline the approval processes for LNG projects and reduce bureaucratic hurdles that can delay project initiation and completion. Simplifying licencing procedures for new terminals and pipelines will make it easier for developers to navigate the regulatory landscape, thereby facilitating faster and more efficient project execution.

---

[49] Ministry of Petroleum and Natural Gas, *Annual Report 2021-22*, Government of India (2022).
[50] Anish Kar & Manish Vaid, *Strategic Initiatives for Sustainable Growth of the LNG Sector in India*, 10 Energy Strategy Rev. 48, 48-56 (2016), https://doi.org/10.1016/j.esr.2016.06.004.

Providing financial incentives is also crucial for encouraging private investments in the LNG infrastructure. Offering tax breaks, subsidies, and low-interest loans can offset the high capital costs associated with LNG projects. These financial incentives make investments in LNG infrastructure more attractive to private investors, ensuring that the necessary funds are available for the sector's development and expansion.

Market liberalisation is another important strategy for fostering a competitive environment that attracts private investment and drives innovation. Transitioning to a market-based pricing model for natural gas and LNG enhances market transparency and efficiency, making it easier for investors to assess market conditions and make informed decisions. A liberalised market encourages competition, which can lead to better services and lower prices for consumers.

Encouraging public-private partnerships (PPPs) is essential to leverage the strengths and resources of both the public and private sectors. PPPs can play a crucial role in financing and developing large-scale LNG projects by combining public funding with private-sector expertise and efficiency. These partnerships can help overcome financial and operational challenges and ensure timely and cost-effective completion of LNG infrastructure projects.

Enforcing strict environmental regulations is necessary to ensure that LNG projects comply with sustainability standards and contribute to reducing a country's carbon footprint. By adhering to stringent environmental guidelines, LNG projects can minimise their impact on the environment and support India's broader goals of environmental protection and sustainability. These regulations will also enhance public trust and acceptance of LNG projects, which are crucial for their long-term success and integration into the national energy framework.

V.2. Importance of International Partnerships

International partnerships are vital to the growth and sustainability of India's LNG sector. Collaboration with global LNG producers and technology

providers can help India secure a stable supply of LNG and access advanced technologies for LNG production, storage, and transportation. It highlights the importance of forming strategic alliances with leading LNG-producing countries such as the United States, Australia, and Qatar. These partnerships can provide India with access to reliable LNG supplies and facilitate knowledge transfer in terms of best practices and technological innovation[51].

Moreover, international partnerships can help India diversify its LNG supply sources, reduce dependency on any single country, and enhance its energy security. Engaging in long-term contracts with multiple LNG suppliers can mitigate the risks associated with geopolitical uncertainty and market fluctuations. Additionally, participation in global LNG forums and organisations can provide India with a platform to influence international LNG policies and standards, aligning them with their national interests.

VI. DISCUSSION, ANALYSIS AND CONCLUSION

An analysis of India's LNG sector reveals significant challenges and opportunities. Key findings indicate that the industry faces notable infrastructure bottlenecks owing to insufficient pipeline networks and a limited number of LNG terminals, which hinder the efficient distribution of LNG across the country. Additionally, the high costs associated with infrastructure development and the necessity for public funding pose substantial financial barriers. Securing adequate investment is critical for expanding LNG infrastructure; however, this is complicated by inconsistent policy implementation and market-based pricing challenges, which complicate the development of a transparent and efficient LNG market.

On the opportunity side, the increasing demand for LNG in the industrial and transportation sectors presents a significant growth potential. LNG's potential for LNG to reduce transportation costs further enhances its attractiveness. Moreover, LNG offers substantial environmental benefits

[51] Anish Kar & Manish Vaid, *Strategic Initiatives for Sustainable Growth of the LNG Sector in India*, 10 Energy Strategy Rev. 48, 48-56 (2016), https://doi.org/10.1016/j.esr.2016.06.004.

compared with coal and oil, contributing to lower emissions and supporting India's climate goals. Technological advancements in LNG storage and transportation, along with the utilisation of LNG cold energy, present new opportunities for enhancing the efficiency and sustainability of the LNG sector.

For policymakers and stakeholders, the findings highlight the need for strategic initiatives to address challenges and leverage opportunities in the LNG sector. Policymakers should focus on implementing comprehensive regulatory reforms and providing financial incentives to attract private investments. Additionally, fostering public-private partnerships and engaging in international collaborations can enhance the development and sustainability of the LNG sector. Stakeholders, including private investors and industry players, should align their strategies with national policies, explore opportunities for innovation, and adopt best practices and advanced technologies to contribute to the growth and competitiveness of India's LNG sector.

Future research should focus on several key areas that support the development of the LNG sector in India. These areas include investigating innovative solutions for expanding the pipeline network and increasing LNG terminal capacity, analysing the impact of market-based pricing mechanisms on the LNG sector, and assessing the environmental benefits of LNG compared to other fossil fuels. Additionally, research should explore advancements in LNG storage, transportation, and cold energy utilisation, as well as examine the potential benefits and challenges of international partnerships in the LNG sector. Future research can provide valuable insights into the development of the LNG sector by identifying best practices for forming and managing strategic alliances with global LNG producers.

India's LNG sector faces several challenges, including infrastructure bottlenecks, financial and investment barriers, and regulatory and policy issues. Addressing these challenges is crucial to the growth and sustainability of the sector. However, there are also significant opportunities in the LNG

sector driven by increasing demand in the industrial and transportation industries, environmental benefits, and technological advancements. The adoption of LNG as a cleaner energy source aligns with India's climate goals and supports its transition to a low-carbon economy. With strategic investments and policy support, the LNG sector can play a pivotal role in India's energy future by enhancing energy security, reducing emissions, and promoting sustainable development. In conclusion, the LNG sector in India holds significant promise in improving energy security, reducing emissions, and supporting economic growth. By addressing these challenges and leveraging opportunities, India can establish a robust and sustainable LNG sector that contributes to its long-term energy and environmental goals.

ETHICS IN ACTION: NATURAL LAW PERSPECTIVES ON ENVIRONMENTAL, SOCIAL, AND GOVERNANCE COMPLIANCE

Kirthana Singh Khurana*

ABSTRACT

The Environmental, Social, and Governance (ESG) movement principally refers to the growing focus on sustainability and social responsibility in global business and investing practices. By incorporating the natural law concepts into ESG decision-making and disclosure procedures, professionals may gain profound insights that allow them to focus on the broader goals of social welfare, human rights, and environmental stewardship. ESG regulations, which are majorly disclosure-based mechanisms, require corporations to articulate commitments that can be measured, and evaluated by external entities such as investors, customers, auditors, and regulators. Adopting ESG standards demonstrates a proactive approach by corporations, regulators, and lawmakers. ESG catalyses integrating corporate activities with ethical concerns, promoting transparency, and guiding organizations toward sustainable and responsible practices.

This paper examines the intersection of natural law theories with the modern domain of ESG regulations and argues that introducing natural

* *PhD Student, Peter A. Allard School of Law, University of British Columbia, Canada; Assistant Professor, Jindal Global Law School, O.P. Jindal Global University, India, email: ksk@student.ubc.ca*

law principles into professional training programs and legal education of ESG professionals can enhance moral awareness.

The paper is divided into five parts, which covers an overview of the themes of ESG regulations globally and how they affect business operations; various criticisms and shortcomings of ESG regulations across the world; discusses the natural law theories of Kant, Aquinas, and Finnis, dissecting their principles in the context of corporations; and concluding remarks.

Keywords: *Business ethics, Corporate disclosures, Corporate sustainability, ESG, natural law.*

I. INTRODUCTION

The Environmental, Social, and Governance (ESG) movement principally refers to the growing focus on sustainability and social responsibility in global business and investing practices. The term ESG has enjoyed global prominence for over two decades, but the principles feeding it are far older.[1] ESG can also be understood as the symbol of an established realisation that responsible investing needs to drive future growth and that corporations, being citizens of a global society, owe a responsibility to help address social and environmental issues that affect humanity.[2] No wonder the common refrain nudging businesses in present times is – Count your footprints; carbon ones!

In the eventful history of human civilization, the onset of the first industrial revolution (1760-1840) was the most significant development since the domestication of animals and plants.[3] Registering its beginning in Britain, it later spread to continental Europe and the United States in the early 19th

[1] Dan Byrne, *What is the history of ESG?* online: Corporate Governance Institute https://www.thecorporategovernanceinstitute.com/insights/lexicon/what-is-the-history-of-esg/.

[2] INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, GLOBAL ENVIRONMENTAL HEALTH IN THE 21ST CENTURY: FROM GOVERNMENTAL REGULATION TO CORPORATE SOCIAL RESPONSIBILITY: WORKSHOP SUMMARY. (2007).

[3] Roderick Floud et al., *The Cambridge Economic History of Modern Britain* (2018).

century. In terms of social structure, the Industrial Revolution witnessed the triumph of a middle class of industrialists and businessmen over the landed class of nobility and gentry.[4] For a few decades, sustained growth in the living standards of the masses turned out to be the natural effect of the industrial revolution.[5] This sparked a spree among the leading nations to seek resources to advance the revolution. Colonialism proved to be a faster route to gain control over the resources to fuel the industrial revolution. Though the resultant gilded eras in industrialised countries gave them global leadership, the aggressive exploitation of the resources, carried on unabatedly for decades, started leading to evil results like environmental degradation, social inequality, and corporate governance scandals. This heralded the emergence of voices against the reckless handling of precious ecological endowments. However, the growth of voices for responsible investing in ethical business practices fluctuated over time depending on what different generations cared about.[6] The primary objective of ESG investing is to optimize financial returns. It employs ESG factors to evaluate risks and opportunities in both the medium and long term. It distinguishes itself from purely commercial investing by considering additional factors beyond the evaluation of short-term financial performance and commercial hazards associated with that performance.[7]

Socially responsible investing practices began to take shape in the 1960s and 1970s. The first notable example was the action of the activists in nudging academic institutions and companies to divest their stock holdings in organizations that did business in South Africa to protest against the apartheid system and its regressive influence, then in place there.[8] The

---

[4] Walter L. Arnstein, *The Myth of the Triumphant Victorian Middle Class*, 37 THE HISTORIAN 205 (1975).

[5] Floud et al., *supra* note 3.

[6] Dan Byrne, *supra* note 1.

[7] OECD PUBLISHING, *The Role of Institutional Investors in Promoting Good Corporate Governance*, https://www.oecd.org/daf/ca/49081553.pdf (last visited Apr 23, 2023).

[8] Laura E Deeks, "Discourse and Duty: University Endowments, Fiduciary Law, and the Cultural Politics of Fossil Fuel Divestment" (2017) 47:2 Environmental Law 335–427. See generally Edwin Amenta & Francesca Polletta, *The Cultural Impacts of Social Movements*, 45 ANNU. REV. SOCIOL. 279 (2019).

evolution of the ESG movement is peppered with a series of earlier versions of a similar thought. As far back as the 1980s, organizations in the United States started considering how to check environmental degradation and use regulations to manage or reduce pollution resulting from the pursuit of economic growth across sectors.[9] Christened Environment, Health, and Safety (EHS) was an early sign of the awakening regarding the imperative of preserving the environment for future generations. By the 1990s, EHS had made way for another movement, Corporate Sustainability, which ushered the highly encouraging spectacle of many US companies voluntarily offering to reduce their firm's environmental impacts beyond the reductions that had been legally mandated. The advent of the early 2000s saw the corporate sustainability movement beginning to integrate ideas around the social obligations of companies and how they should respond to social issues. It was also a phase when a consensus was developing that sustainability was no longer about doing less harm. It was about doing better. This phase also saw the emergence of what was to be called Corporate Social Responsibility (CSR), another name for corporate philanthropy. Aside from various positives of the CSR movement, employee volunteerism turned out to be its true hallmark.[10]

Ultimately, it was left to the 2004 report from the United Nations, titled 'Who Cares Wins,'[11] which carried what is widely considered the first mainstream mention of ESG in the modern context. This forceful report strongly encouraged all business stakeholders to embrace ESG ideals in the long term. Yet, it was not until the late 2010s and into the 2020s that ESG underwent a massive transformation and assumed the shape of a much more proactive, instead of reactive, movement. The last two decades after the

[9] Isaac Gwyneira et al., *Native American Perspectives on Health and Traditional Ecological Knowledge*, 126 ENVIRONMENTAL HEALTH PERSPECTIVES 125002.

[10] Archie B. Carroll, *Carroll's Pyramid of CSR: Taking Another Look*, 1 INTERNATIONAL JOURNAL OF CORPORATE SOCIAL RESPONSIBILITY 3 (2016); Mauricio Andrés Latapí Agudelo, Lára Jóhannsdóttir & Brynhildur Davídsdóttir, *A Literature Review of the History and Evolution of Corporate Social Responsibility*, 4 INTERNATIONAL JOURNAL OF CORPORATE SOCIAL RESPONSIBILITY 1 (2019).

[11] UN GLOBAL COMPACT, *Who Cares Wins: Conencting Financial Markets to a Changing World*, (2004).

publication of Who Cares Wins have witnessed governments worldwide update their laws to embrace ESG. As a result, the ESG movement now boasts a comprehensive framework covering critical environmental and social impact elements and how governance structures can refashion themselves to enhance stakeholder well-being.[12]

The ESG approach combines three interrelated pillars. The first is the environmental dimension, which pertains to the impact of corporations on the environment. It entails assessing how an organization oversees resource utilization, pollution and emission management, climate change risk mitigation, sustainable practices promotion, and similar themes. The social aspect focuses on the influence of the corporation on its stakeholders. It encompasses philanthropy, customer satisfaction, community involvement, labour practices, and human rights. Governance encompasses the frameworks and procedures through which the corporation is governed and supervised. This facet evaluates elements including but not limited to executive compensation, shareholder rights, board diversity, transparency, and ethical business practices.[13]

What was seen as a market-driven, investor-led phenomenon has now attracted the attention of regulatory authorities worldwide. Global corporate and securities regulators have started regulating and controlling the emphasis on ESG via legal and regulatory measures, notably concerning ESG reporting. In its evolved form, ESG is now a robust framework mandated to assess an organization's business culture, practices, and performance based on various sustainability and ethical criteria. It also provides a way to gauge a company's preparedness to negotiate business risks and opportunities in those areas.

The concept of ESG intertwines seamlessly with ethics. At its heart, ethics is the study of what is moral, focusing on duties, rights, justice, fairness, and

[12] Dan Byrne, *supra* note 1.

[13] Deloitte, *What Is ESG?*, https://www2.deloitte.com/hu/en/pages/energy-and-resources/articles/esg-explained-1-what-is-esg.html (last visited Dec 7, 2023).

community benefit. This moral imperative applies equally to individuals, groups, and organizations. When businesses follow ESG principles, they show that they are aware of how their actions affect the environment, society, and other stakeholders. They also express a dedicated commitment to being a positive force within their communities.

ESG regulations, which are majorly disclosure-based mechanisms, require corporations to articulate commitments that can not only be measured but can also be evaluated by external entities such as investors, customers, auditors, and regulators. Adopting ESG standards demonstrates a proactive approach by corporations, regulators, and lawmakers. This stance acknowledges that corporations significantly impact society and, in turn, are equally impacted by it. Additionally, it propels corporations to embrace ethical decision-making methods when creating company policies and developing their products. This is achieved by prioritizing data, involving stakeholders in determining the corporate purpose, and adopting a longer-term and sustainable approach to managing change. ESG catalyses integrating corporate activities with ethical concerns, promoting transparency, and guiding organizations toward sustainable and responsible practices.

Natural law theories serve as invaluable guideposts for business managers and lawyers, providing a solid structure to understand and traverse the ethical considerations necessary for successful ESG compliance. By incorporating the natural law concepts into ESG decision-making and disclosure procedures, professionals may gain profound insights that allow them to focus on the broader goals of social welfare and environmental stewardship.

This paper examines the intersection of natural law theories, namely those propounded by Kant, Aquinas, and Finnis, with the modern domain of ESG regulations. The study examines how natural law can influence the training and development of ESG professionals and corporate lawyers, focusing on the ethical aspects of corporate behaviour and decision-making. I argue that

introducing natural law principles into professional training programs and legal education of ESG professionals can enhance moral awareness and responsibility by implementing the philosophies of Kant, Aquinas, and Finnis. These three scholars have been selected for their significant contributions to natural law philosophy and their impact on ethical issues, particularly in the area of business ethics. This review aims to strengthen the ESG movement's efficacy by supporting a sincere dedication to ethical behaviour, promoting transparency, and stakeholder primacy.

Part 2 of the paper provides an overview of the themes of ESG regulations globally and how they affect business operations. Part 3 highlights various criticisms and shortcomings of the ESG regulations. Part 4 discusses the natural law theories of Kant, Aquinas, and Finnis, dissecting their principles in the context of corporations. This section explains how these philosophical foundations can enhance corporate performance in the ESG domain, ultimately bolstering the effectiveness of the regulations and achievement of the broader sustainability development goals. Part 5 concludes the study.

II. ESG REGULATIONS – GLOBAL THEMES AND IMPACT ON BUSINESS

The three principal pillars of the ESG regime are sustainability, responsibility, and ethical business practices. Acknowledging the interconnectedness of the rising business operations across geographies and their capacious impact on the world, the ESG approach seeks a shift towards more sustainable and responsible business practices. Sustainability is more than good intentions, and sustainability considerations are becoming essential across businesses of all sizes.[14] Companies just cannot ignore the ever-rising number of sustainability reporting laws and regulations that are incessantly popping up across the world.[15] This ascendance is only expected

[14] PricewaterhouseCoopers, *Climate and sustainability*, pwc.com/gx/en/issues/esg.html.

[15] Archie Burkinshaw, *ESG Regulation in 2024: Everything You Need to Know*, SUSTAINABLE FUTURE NEWS (2023), https://sustainablefuturenews.com/policy-and-regulation/2024-guide-to-esg-regulation/ (last visited Dec 5, 2023).

to continue as markets look for more robust and transparent ways to direct capital to sustainable businesses and outcomes.

The emergence and wide acceptance of the ESG regime have led to the legal adoption of these principles. Research from data management firm ESG Book shows that ESG regulation has increased by 155% over the past decade, reflecting the rapid growth of sustainability-based policy interventions.[16] However, the ESG laws and regulations, which are ever-evolving, vary significantly from one jurisdiction to another.

Additionally, the landscape of ESG laws is dynamic, with changes and updates occurring regularly. According to a recent United Nations Conference on Trade and Development report, 316 policy measures on sustainable finance existed across 35 jurisdictions, with a majority comprising disclosure-based mechanisms.[17] The Global Reporting Initiative (GRI), the Sustainability Accounting Standards Board (SASB), the United Nations Global Compact, the Task Force on Climate-related Financial Disclosures (TCFD), and the International Financial Reporting Standards Foundation are some of the leading international organizations developing ESG reporting frameworks for corporations.

The global theme of the ESG laws is essentially focused on responsible and sustainable business practices and has the following key components:

1. **Transparency and Disclosure**: Most countries and regions have laid great emphasis on transparency and disclosure while legislating ESG laws. While some have made these disclosures mandatory[18], some allow

[16] Ingrid Riehl, *ESG Book: Global ESG Regulation Increases by 155% Over the Past Decade*, BUSINESS INFORMATION INDUSTRY ASSOCIATION (2023), https://www.biia.com/esg-book-global-esg-regulation-increases-by-155-over-the-past-decade/ (last visited Dec 5, 2023).

[17] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *World Investment Report 2022*, (2022), https://unctad.org/system/files/official-document/wir2022_en.pdf (last visited Dec 7, 2023).

[18] For example, UK has two mandatory ESG disclosure laws: The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022 and the Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022. The Corporate Sustainability Reporting Directive extends to the top EU companies. In India, ESG disclosures were made mandatory through the Business Responsibility and Sustainability Report framework.

corporations to follow the frameworks established by institutions like GRI, SASB, and TCFD and disclose information voluntarily.[19]

2. **Climate Change and Environmental Stewardship**: A significant part of the ESG legislation globally caters to climate change and environmental sustainability.[20]

3. **Social Responsibility and Human Rights**: Worldwide ESG laws include provisions related to social responsibility, labour practices, human rights, and diversity and inclusion.[21]

4. **Corporate Governance and Ethics:** Board structures, executive compensation, anti-corruption measures, and overall ethical business conduct enjoy salient positions in most ESG regulations.[22]

5. **Stakeholder Engagement**: Most ESG laws increasingly encourage companies to engage with a broader set of stakeholders beyond traditional shareholders, including employees, customers, communities, and other parties.[23]

6. **Sustainable Finance and Investing**: ESG laws are also increasingly integrating ESG considerations into corporate investment decisions.[24]

---

[19] For example, there are no mandatory ESG disclosure requirements on the federal level in the US. The US Securities and Exchange Commission has proposed the necessary amendments which are pending at the time of writing this paper. The Canadian federal government has also proposed mandatory climate-related reporting requirements. China came up with a set of voluntary guidelines for Chinese companies to report on ESG metrics.

[20] David A. Cifrino, *The Rise of International ESG Disclosure Standards*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2023), https://corpgov.law.harvard.edu/2023/06/29/the-rise-of-international-esg-disclosure-standards/ (last visited Dec 5, 2023).

[21] Environmental, Social and Governance (ESG) Trends: Why it's important and what you need to know, BLG, CANADA (2023), https://www.blg.com/en/insights/2023/06/esg-trends-why-its-important-and-what-you-need-to-know (last visited Dec 7, 2023).

[22] R. BOFFO & R. PATALANO, *ESG Investing: Practices, Progress and Challenges*, (2020), http://www.oecd.org/finance/ESG-Investing-Practices-Progress-and-Challenges.pdf (last visited Dec 6, 2023).

[23] Leah Malone & Emily B. Holland, *ESG: Trends to Watch in 2023*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2023), https://corpgov.law.harvard.edu/2023/03/04/esg-trends-to-watch-in-2023/ (last visited Dec 8, 2023).

[24] BLG, *supra* Environmental, Social and Governance (ESG) Trends: Why it's important and what you need to know, *supra* note 21.

7. **Standardization and Reporting Frameworks**: Most ESG laws have tried to standardize ESG reporting to facilitate comparability among companies.[25] This enhances the consistency and reliability of ESG disclosures.[26]

The subsequent critical inquiry is whether adhering to ESG regulations translates into any tangible benefits for companies. To summarize a few high points, consumers now expect companies to meet higher sustainability and job quality standards. ESG is more important to regulators and policymakers because they need the corporate sector to help them solve social problems like pollution, environmental degradation, and diversity in the workplace.[27]

Many studies show a positive correlation between ESG orientation and the financial results of corporations[28], and there are many drivers of intrinsic company worth that account for these observations. The first factor is the rise of revenue or sales at the highest level. Corporations selling consumer goods having a robust sustainability strategy are more included to garner client loyalty and attract new customer groups.[29] Studies suggest that businesses with a greater focus on sustainability have accelerated growth as compared to firms with a less robust sustainability strategy.[30]

---

[25] Deloitte, *supra* note 13.

[26] André Höck et al., *The Effect of Environmental Sustainability on Credit Risk*, 21 JOURNAL OF ASSET MANAGEMENT 85 (2020).

[27] Sara Bernow, *Why ESG Is Here to Stay*, MCKINSEY & COMPANY (2020), https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/why-esg-is-here-to-stay (last visited Dec 5, 2023).

[28] TENSIE WHELAN ET AL., *ESG and Financial Performance: Uncovering the Relationship by Aggregating Evidence from 1,000 Plus Studies Published between 2015-2020*, (2021), www.stern.nyu.edu/sites/default/files/assets/documents/NYU-RAM_ESG-Paper_2021%20Rev_0.pdf (last visited Dec 8, 2023).

[29] Unilever, *Brands with Purpose Grow - and Here's the Proof*, (2019), https://www.unilever.com/news/news-search/2019/brands-with-purpose-grow-and-here-is-the-proof/ (last visited Dec 5, 2023).

The second factor to consider is the cost. By being more resource-efficient and water-efficient and using eco-friendly packaging, corporations will often have a lower cost per unit.[31] The third factor is regulatory interventions. Corporations that are more responsible for reducing the environmental impact of their assets have a lesser likelihood of facing strict regulatory consequences, creating possible regulatory benefits.[32]

Another relevant driver is attracting the right talent. In contemporary times, recent hires and individuals, especially millennials, want to be associated with businesses whose purpose is to make a difference in the world and be sustainable. As an employer, if you are sustainability conscious, there are better chances of attracting and retaining human talent[33]and, thus, experiencing an increase in workplace productivity.

III. ESG REPORTING CHALLENGES

The ESG movement, which was initially launched with the best intentions, has been criticized for its lacklustre performance in creating meaningful environmental change and has highlighted a persistent abuse of flawed methodologies. Some claim sustainable investing to be a "dangerous placebo that harms the public interest," "like selling wheatgrass to a cancer patient."[34] Certain right-wing politicians have attacked ESG investing for supporting

---

[30] TENSIE WHELAN ET AL., *supra* note 28; Talal Rafi, *Why Corporate Strategies Should Be Focused On Sustainability*, FORBES BUSINESS COUNCIL (2021), https://www.forbes.com/sites/forbesbusinesscouncil/2021/02/10/why-corporate-strategies-should-be-focused-on-sustainability/?sh=3359d88a7e9f (last visited Dec 8, 2023).

[31] Green Business Bureau, *Financial Benefits of an Eco-Friendly Business*, (2019), https://greenbusinessbureau.com/blog/financial-benefits-of-an-eco-friendly-business/ (last visited Dec 8, 2023).

[32] Höck et al., *supra* note 26.

[33] David Beck, *Why Sustainability Improves Recruitment, Retention*, TECHTARGET (2023), https://www.techtarget.com/searchhrsoftware/tip/Why-sustainability-improves-recruitment-retention (last visited Dec 8, 2023). May Lee & Emma Webb, *Employee Experience: Put People at the Heart of Sustainability*, MERCER (2023), https://www.mercer.com/en-nz/insights/talent-and-transformation/attracting-and-retaining-talent/put-people-at-the-heart-of-sustainability/ (last visited Dec 8, 2023).

[34] Tariq Fancy, *The Secret Diary of a 'Sustainable Investor' — Part* 1, MEDIUM (20 August 2021), https://medium.com/@sosofancy/the-secret-diary-of-a-sustainable-investor-part-1-70b6987fa139.

what they perceive to be a "woke" agenda[35], and many regulators are taking action against fund managers that engage in "ESG-washing."[36]

A recent Brown University report finds that energy companies have spent nearly $3.6 billion on corporate reputation-building "green" advertisements. Moreover, corporations have been able to shift the editorial stance of media companies in favour of their positions on energy issues.[37] Another study conducted at Harvard reveals that a majority of the social media posts of oil and gas companies incorporate deceptive greenwashing tactics.[38] As a result, investors in oil and gas companies – some of the most significant contributors to greenhouse gases and global warming – are misled about the environmental effects of doing so. The International Federation of Accountants and the Association of International Certified Professional Accountants have indicated that there are still considerable obstacles to overcome in order to provide investors and lenders with information that is consistent, comparable, and of high-quality regarding sustainability.[39]

---

[35] Max Zahn, *What is ESG investing and why are some Republicans criticizing it?*, ABC NEWS (15 February 2023), https://abcnews.go.com/Business/esg-investing-republicans-criticizing/story?id=97035891#:~:text=Prominent%20Republican%20politicians%2C%20such%20as,turn%20hindering%20the%20wider%20economy.. Jeff Green and Saijel Kishan, *America's Political Right Has a New Enemy No. 1: ESG Investors*, BLOOMBERG (20 May 2022), https://www.bloomberg.com/news/articles/2022-05-20/why-esg-investing-is-under-republican-attack?leadSource=uverify%20wall.

[36] Justine Sacarello, *ESG: Addressing Greenwashing in Financial Services*, KPMG, https://kpmg.com/xx/en/home/insights/2022/04/esg-addressing-greenwashing-in-financial-services.html#:~:text=Firms%20should%20be%20proactive%20in,impacts%20arising%20from%20reputational%20risk. (last visited Dec 3, 2023).

[37] Robert J. Brulle, Melissa Aronczyk & Jason Carmichael, *Corporate Promotion and Climate Change: An Analysis of Key Variables Affecting Advertising Spending by Major Oil Corporations, 1986–2015*, 159 CLIMATIC CHANGE 87 (2020).

[38] GEOFFREY SUPRAN AND CAMERON HICKEY, *Three Shades of Green(Washing): Content Analysis of Social Media Discourse by European Oil, Car, and Airline Companies*, (2022), https://ati.io/three-shades-of-greenwashing/ (last visited Dec 4, 2023).

[39] IFAC, AICPA & CIMA, *Momentum Builds for Corporate ESG Disclosure and Assurance, Yet Reporting Inconsistencies Linger, Study Finds*, INTERNATIONAL FEDERATION OF ACCOUNTANTS (2023), https://www.ifac.org/news-events/2023-02/momentum-builds-corporate-esg-disclosure-and-assurance-yet-reporting-inconsistencies-linger-study (last visited Dec 3, 2023).

There are a few ESG reporting challenges:

1. **Greenwashing:** Many greenwashing techniques have been explored in the literature. The first kind involves manipulating the disclosure of information in order to increase the firm value artificially. Corporations exaggerate their actual environmental performance.[40] They attempt to conceal their inadequate environmental performance by providing extensive amounts of environmental data in order to deceive the stakeholders.[41] Another type of greenwashing involves selectively disclosing information to deceive investors.[42] Corporations disclose favourable environmental information while concealing unfavourable information, thereby deceiving the public by creating a misleading image of their actual environmental performance.[43]

2. **No universal standard:** The lack of a common ESG reporting standard has led to the development of a multitude of sustainability reporting frameworks, surveys, and programs to involve shareholders and data suppliers. Each of these frameworks and projects has its own distinct methodology and set of criteria.[44] Consequently, companies frequently must decide which parts of sustainability to focus on, what information to share, and which metrics to employ. For instance, what are the key criteria for a strong commitment to net zero carbon

[40] Thomas P Lyon & John W Maxwell, "Greenwash: Corporate Environmental Disclosure under Threat of Audit" (2011) 20:1 Journal of Economics & Management Strategy 3–41 [Lyon & Maxwell]; Thomas P Lyon & A Wren Montgomery, "The Means and End of Greenwash" (2015) 28:2 Organization & Environment 223–249 [Lyon & Montgomery]; Christopher Marquis, Michael W Toffel & Yanhua Zhou, "Scrutiny, Norms, and Selective Disclosure: A Global Study of Greenwashing" (2016) 27:2 Organization Science 483–504 [Marquis, Toffel & Zhou].

[41] Ellen Pei-yi Yu, Bac Van Luu & Catherine Huirong Chen, *Greenwashing in Environmental, Social and Governance Disclosures*, 52 RESEARCH IN INTERNATIONAL BUSINESS AND FINANCE 101192 (2020).

[42] Lyon and Maxwell, *supra* note 40; Lyon and Montgomery, *supra* note 40; Marquis, Toffel, and Zhou, *supra* note 40.

[43] Marcus P. Kirk & James D. Vincent, *Professional Investor Relations within the Firm*, 89 THE ACCOUNTING REVIEW 1421 (2014).

[44] For example the Global Reporting Initiative and the Sustainability Accounting Standards Board measure the same phenomenon in a different manner. For evaluating employee training, the former considers the amounts invested in training, whereas the latter measures the same by training hours.

emissions? Moreover, who has the authority to determine it? Currently, carbon offsets are the predominant topic of discussion regarding greenwashing.[45] The absence of standardized ESG reporting indicators is a significant barrier, making it more difficult for companies and investors to compare performance and make decisions. [46]

3. **Data fragmentation:** The process of manually gathering relevant data on sustainability from various sources inside the corporation proves to be a challenging endeavour, mainly when the data is dispersed across several different departments and functions. What exacerbates this problem is the absence of efficient communication channels between different departments; these departments frequently function independently and do not share a common language that is simple enough for people to comprehend. Data banks are often siloed; thus, corporations struggle to integrate the relevant data smoothly.[47] For the simple reason that corporate sustainability is fundamentally a cross-functional endeavour, almost every department tends to oversee some component of it.[48] It may also be challenging to obtain pertinent ESG data as it may be confidential, proprietary, or difficult to access.

   Further, most information that is factored into ESG analysis is provided voluntarily by corporations.[49] Voluntary reporting enables extensive customization of the style, structure, and substance of disclosures, allowing firms significant flexibility to influence the disclosure process.[50] These disclosures are not subject to external verification to a large

[45] Ralph Cuervo-Lorens et al., *Green or Grey: Regulators Target Greenwashing, Misleading Environmental, Social and Governance (ESG) Claims*, MCMILLAN (2022), https://mcmillan.ca/insights/green-or-grey-regulators-target-greenwashing-misleading-environmental-social-and-governance-esg-claims/ (last visited Dec 3, 2023).
[46] Novisto, *4 Challenges of ESG Reporting and Strategies for Overcoming Them*, (2023), https://novisto.com/challenges-of-esg-reporting-and-strategies/ (last visited Dec 3, 2023).
[47] IFAC, AICPA & CIMA, *supra* note 39.
[48] Novisto, *supra* note 46; R. BOFFO AND R. PATALANO, *supra* note 22.
[49] TIMOTHY M. DOYLE, *Ratings That Don't Rate*, (2018), http://accfcorpgov.org/wp-content/uploads/2018/07/ACCF_RatingsESGReport.pdf (last visited Dec 4, 2023).
[50] R. BOFFO AND R. PATALANO, *supra* note 22.

extent, which motivates corporations to manipulate their data in order to align with rating methodology and consistently portray the company as ESG compliant.[51]

4. **Varying levels of knowledge:** Different stakeholders (investors, shareholders, creditors, and communities, among others) possess diverse degrees of knowledge and comprehension about ESG concerns, reporting structures, and terminology, which may vary in complexity. Effectively conveying intricate ESG subjects, together with substantial amounts of data, in a manner that is comprehensible and significant to a wide range of individuals is not always immediately evident.[52]

5. **Issues with transparency:** Concerned stakeholders are increasingly requesting greater openness and certainty when it comes to evaluating ESG performance. However, guaranteeing the precision, dependability, and uniformity of presented data might pose difficulties, resulting in concerns regarding greenwashing, green advertising, and communicating deceptive information. An absence of comprehensive data management, rigorous data verification procedures, and efficient communication hinders the establishment of confidence.[53]

IV. NATURAL LAW AND ESG PRINCIPLES

The foundation of natural law theory is in the intellectual contemplation of the nature, conditions, and experiences of human existence within a world inhabited by other individuals.[54] A corporation, though considered an artificial person in the eyes of the law, is, in fact, run and governed by individuals. Not only is it the brainchild of individuals, but it also transacts with individuals irrespective of the kind of business it is involved in. Thus,

---

[51] TIMOTHY M. DOYLE, *supra* note 49; Javier El-Hage, *Fixing ESG: Are Mandatory ESG Disclosures the Solution to Misleading Ratings?*, 26 FORDHAM JOURNAL OF CORPORATE & FINANCIAL LAW 359 (2021).

[52] Novisto, *supra* note 46.

[53] R. BOFFO AND R. PATALANO, *supra* note 22.

[54] Richard W Wright, *Principles of Justice*, 75 NOTRE DAME LAW REVIEW 1859.

the social responsibility of a corporation is to respect the natural rights of all the individuals it interacts with, namely, directors, officers, managers, employees, labour, consumers, shareholders, and other stakeholders.

When businesses are tasked with 'doing the right thing,' the individuals in charge of decision-making must balance personal convictions, philosophy, and the pursuit of optimum profitability. Their actions have consequences for various entities that share this social world; thus, corporations have no valid reason to be exempted from the network of reciprocal obligations and responsibilities (as well as privileges or rights) that bind all moral agents.[55]

Applying natural law theory can help determine whether the regulation of prominent and influential public corporations aligns with the principles of commutative and distributive justice[56], particularly concerning corporate activities that have negative consequences on the environment and involve fraudulent behaviour. The issues include self-dealing and other forms of authority abuse by corporate agents, a lack of employee diversity at all levels, excessive executive compensation not tied to performance, limited corporate income taxation, and corporate political contributions' influence on the democratic process.[57]

In the pursuit of understanding how natural law theories can catalyze the effectiveness of ESG regulations, we shall now analyze the theories propounded by Kant, Aquinas, and Finnis. These philosophical frameworks provide distinct perspectives on the moral foundations that have the potential to influence and improve the ethical structure of corporate conduct in the greater scheme of societal accountability.

[55] Robert C. Solomon & Peter Singer, *Business Ethics*, *in* A COMPANION TO ETHICS (2000).
[56] See Sean Coyle, *Justice*, *in* NATURAL LAW AND MODERN SOCIETY 0 (Sean Coyle ed., 2023), https://doi.org/10.1093/oso/9780192886996.003.0004 (last visited Aug 13, 2023).
[57] Michael Ambrosio, *A Natural Law Perspective of Corporate Governance*, 16 INTERNATIONAL IN-HOUSE COUNSEL JOURNAL 1.

Immanuel Kant

Scholars in the field of business ethics have demonstrated how Kantian ethics can direct companies toward practices that prioritize stakeholders' interests over profit maximization.[58] Kant argued that the highest good was a good will, and to act from a good will is to act from duty.[59] An action may be considered moral if it is morally motivated. What can be inferred from this is that it is the intention behind an action rather than the result of the action that makes that action suitable. Kantian principles justify why a corporation should deal in good faith with its suppliers and customers, have fair employment policies, and contribute to the benefit of society.[60]

Kant emphasized two categories of duties. Sometimes, we do an action in order to achieve something else. For example, we engage in regular exercise in order to remain healthy. If we want to acquire knowledge about a particular topic, we ought to read books and articles. This was termed as a "hypothetical" imperative.[61] The duty to exercise daily is dependent on my desire to remain healthy.

The other kind of duty is required per se, with no conditions attached. These duties were termed as "categorical" imperative.[62] According to Kant, these duties are categorical, and categorical imperatives are the fundamental principles of ethics. In his view, the categorical imperative is justified by reason, so the categorical imperatives of morality are requirements of reason. Most commentators focus on three formulations of categorical

---

[58] WILLIAM M. EVAN & R. EDWARD FREEMAN, A STAKEHOLDER THEORY OF THE MODERN CORPORATION/ : KANTIAN CAPITALISM (1988). See Bruce Langtry, *Stakeholders and the Moral Responsibilities of Business*, 4 BUSINESS ETHICS QUARTERLY 431 (1994). But see Matthew C. Altman, *The Decomposition of the Corporate Body: What Kant Cannot Contribute to Business Ethics*, 74 JOURNAL OF BUSINESS ETHICS 253 (2007).

[59] IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS/WHAT IS ENLIGHTENMENT? (Robert Pail Wolff ed., Lewis White Beck tran., 1990).

[60] Norman Bowie, *A Kantian Theory of Leadership*, 21 LEADERSHIP & ORGANIZATION DEVELOPMENT JOURNAL 185 (2000).Denis G. Arnold & Norman E. Bowie, *Sweatshops and Respect for Persons*, 13 BUSINESS ETHICS QUARTERLY 221 (2003).

[61] IMMANUEL KANT, CRITIQUE OF PURE REASON (Paul Guyer & Allen W. Wood eds., 1998), https://www.cambridge.org/core/product/259C2355B74458963EC285F53337AAF0.

[62] *Id.*

imperatives:

(1) "*Act only on maxims which you can will to be universal laws of nature.*

(2) Always treat the humanity in a person as an end and never as a means merely.

(3) So act as if you were a member of an ideal kingdom of ends in which you were both subject and sovereign at the same time."[63]

It is possible to view Kant's ethics as an ethics of duty rather than an ethics of consequences. People who act ethically act with the right intentions. The fact that we have free will allows us to act this way. Taking these principles into account, we will now apply them to ESG regulations.

IV.1. First Formulation of Categorical Imperative: Honesty and Transparency in business dealings

"*Act only on that maxim by which you can at the same time will that is should become a universal law.*"[64] Through this maxim, Kant provides a method to determine whether a proposed action (including business actions) is moral.[65] This maxim makes us question what would happen if our action became a universal law. Will we be able to imagine a world where everyone acted on that principle?

An ESG professional in a corporation who understands Kantian principles would ask himself if, for his decision, does the principle on which the decision is based would fulfil the requirements of the first formulation of the categorical imperative, that is, can it be universally applied without any contradiction? If the answer is in the affirmative, the decision may be

[63] Norman E. Bowie, *A Kantian Approach to Business Ethics*, *in* A COMPANION TO BUSINESS ETHICS 3 (1st ed. 1999); IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Karl Ameriks & Desmond M. Clarke eds., Mary Gregor tran., 2006). See Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., Fall 2022 ed. 2022), https://plato.stanford.edu/archives/fall2022/entries/kant-moral/.

[64] IMMANUEL KANT, *supra* note 63.

[65] Norman E. Bowie, *supra* note 63.

considered morally acceptable, or else, the action will be considered to be morally forbidden.[66] The categorical imperative test turns into a fair play concept. Not making an exception for oneself is a fundamental component of fair play.

Consider the example of a small town, which is home to many local industries, grappling with rampant environmental pollution. Despite many requests, the industrialists failed to address these issues, resulting in severe air and water pollution in the city and causing many hardships for the community. Amid this crisis, two new-age eco-friendly corporations set up their businesses in the town and consciously prioritized sustainability and transparency. These visionary companies consistently adhere to environment-friendly practices and involve the local communities in their sustainability endeavours. In their annual reports, they mention This positive image, which, in turn, leads them to achieve a state government grant that supports businesses committed to sustainable practices. Over time, these corporations' success and ethical choices became a catalyst for change, inspiring other local industries to follow in their footsteps and gain similar advantages and perks for their own businesses.

When applying ESG principles, corporations must assess whether engaging in greenwashing, misleading advertisements or misrepresentations in company documents aligns with moral standards. What if all businesses end up doing it? Can it be universally applied without any contradiction? This test invariably yields a resounding negative answer. On the contrary, embracing both environmental consciousness and transparent communication upholds ethical integrity and may even lead to attracting more investors, creditors, and customers for the business.[67]

---

[66] *Id.*

[67] See Juan C. Mejia-Escobar, Juan D. González-Ruiz & Eduardo Duque-Grisales, *Sustainable Financial Products in the Latin America Banking Industry: Current Status and Insights*, 12 SUSTAINABILITY (2020).

IV. Second Formulation of Categorical Imperative: Importance of Stakeholders

"Always treat the humanity in a person as an end and never as a means merely."[68]

The fundamental idea behind Kant's second formulation of the categorical imperative is that no human being can use another in order to further their own interests. This also involves an analysis of Kant's concept of freedom. Negative freedom is "freedom from coercion and deception," whereas positive freedom is the freedom to enhance and cultivate one's human capacities and strengths.[69] Thus, the second formulation in business transactions requires individuals in a corporate setting not to be exploited, i.e., they should not be coerced or deceived. Further, it implies that corporate structures and operations ought to be set up to promote rather than obstruct the growth of human capacities.[70]

To illustrate this with an example, consider the very contentious corporate governance issue of executive compensation. This issue often includes analysing whether excessive compensation packages awarded to the top management (CEO, CFO, etc.) are moral and justifiable, given the corporation's poor financial position. From a naïve Kantian standpoint, this excessive executive compensation might be seen as immoral because it puts the top management on a higher pedestal and seemingly treats the lower management and shareholders as a means to maximize top executive wealth. However, if we were to apply the Kantian principles properly, we would be required to examine the fairness and transparency in the process of determining executive compensation. The factors would include aligning executive pay with annual company performance, disclosure of the members

[68] IMMANUEL KANT, *supra* note 63.
[69] CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS (1996), https://www.cambridge.org/core/product/8C5CA1EFA210C42260A94D02494FD498.
[70] Robert C. Hughes, *Paying People to Risk Life or Limb*, 29 BUSINESS ETHICS QUARTERLY (2019); Wim Dubbink & Jeffery Smith, *Understanding the Role of Moral Principles in Business Ethics: A Kantian Perspective*, 21 BUSINESS ETHICS QUARTERLY 205 (2011).

of the compensation committee and their discussions, equitable compensation structures, and the absence of deceptive practices in disclosing compensation details, which would be crucial.

Thus, one can adopt a Kantian approach to corporate governance by framing the issue of whether coercion and/or deception are present in determining and disclosing executive compensation. This approach would enable a nuanced evaluation of corporate practices through the lens of fairness, transparency, and treatment of individuals as ends in themselves rather than means to an end.

Another essential business conundrum in which the Kantian principles can be applied is to address the problem of information asymmetry. By virtue of being cognizant about their day-to-day affairs, the insiders of corporations have access to much more corporate information than outsiders. There is also a gap in the amount of information the top management has vis-à-vis the lower management. The temptation to abuse authority and use deceit will always exist for those with greater access to information. This is especially relevant in the case of ESG disclosures, where the top management, who generally controls the ESG disclosure process, may be tempted to manipulate the readers or selectively present information to portray the company in a more favourable light. Following a Kantian approach, one can always look for ways to reduce this information asymmetry. A few examples have been provided below:

(a) Kant's principles would require companies to provide accurate ESG disclosures not solely as a means to meet regulatory requirements or present a positive or green image but as a genuine commitment to transparency. Corporations should recognize the inherent value of stakeholders by offering accurate and comprehensive ESG information.[71]

[71] This has also been the focus of the Global Reporting Initiative and the Sustainability Accounting Standards Board. See GLOBAL REPORTING INITIATIVE & SUSTAINABILITY ACCOUNTING STANDARDS BOARD, *A Practical Guide to Sustainability Reporting Using GRI and SASB Standards*, (2021).

(b) Kant's ethical framework would suggest that in the context of ESG disclosures, all individuals involved in the reporting process, ranging from the top and middle to the lower management, have a duty to ensure the comprehensiveness and accuracy of the information provided. By cultivating conscientious stewardship of the relevant ESG data, individuals reduce the probability of mishandling or engaging in unethical practices. This, in turn, can enhance the integrity and moral compass of corporate strategies pertaining to ESG factors.

(c) Corporations should also establish internal checks and balances in their ESG disclosure processes. This may include independent verification of ESG data, whistle-blower mechanisms, and the involvement of representatives from multiple teams to ensure a more accurate and unbiased representation of the corporation's ESG performance.

C. Third Categorical Imperative: Corporate Community

According to Kant's third formulation of categorical imperative, you should behave as if you were a part of a perfect kingdom of ends where you are simultaneously sovereign and subject.[72] Since people run businesses, organizational structures must treat people with dignity and respect. Further, all members of the organization must be able to support the rules that govern them. Kantian views organizations as moral communities where all members are morally obligated to each other. Organizations are formed as a means of achieving mutually beneficial goals.[73]

A Kantian framework of "social" and "governance" aspects of the ESG movement would endorse the following:

1. The corporation shall ensure fair treatment, equal opportunities, and a safe working environment for its employees. Internal corporate policies should uphold human rights and promote well-being.

[72] IMMANUEL KANT, *supra* note 63.
[73] Norman E. Bowie, *supra* note 63.

2. Integrate ESG considerations into the corporate purpose, core values and operations of the business. This involves aligning business strategies that positively impact the environment, society, and corporate governance. Adopt a long-term perspective that considers the impact of critical business decisions on future generations. This aligns with the idea of "creating an ideal kingdom of ends," which goes beyond short-term gains.

3. Establish feedback mechanisms to allow stakeholders to express their concerns and ideas on corporate practices and use these suggestions to refine and enhance policies.

By incorporating Kantian ethics into ESG, organizations may promote ethical integrity, transparency, and stakeholder-centric decision-making. As businesses navigate the complexities of the ESG regulations, Kant's ethical principles offer a timeless framework for promoting ethical behaviour, accountability, and the establishment of a harmonious kingdom of ends.

Thomas Aquinas

In his work *Summa Theologiae*, Aquinas argues that just as there are self-evident normative principles that govern theoretical reasoning, there are also self-evident normative principles that govern practical reasoning, specifically in determining what one ought to do. Aquinas claimed that "good ought to be pursued by action and evil avoided."[74] This principle forms the foundation of natural law as well as fundamental moral law. According to Aquinas, it is morally licit for one to destroy another's life in the course of defending oneself since, in essence, an action preserves one basic good while destroying another basic good.[75] There is no problem with destroying one good as long as the person intends only to preserve the other good and as long as the destruction is proportionate to preserving the other good. Applying this theory to business transactions, Aquinas argues that "sins against

[74] THOMAS AQUINAS, SUMMA THEOLOGIAE (1916).
[75] *Ibid*, Pt. II-II, Q.64, a.7.

commutative justice can occur… by pursuing profit as an end which "has no limit" instead of as a means for duly supporting oneself, one's family, or one's society." [76] While arguing that the principles of natural law are universally applicable, Aquinas also advances the universality of ethics in another fundamental way: "Virtue as the pursuit of the good is based upon an adequate rational conception of morality."[77] No human being is ever completely devoid of potential virtue and an innate awareness of good since the latter is always accessible to people and because "the natural law, in abstract, can nowise be blotted out from men's hearts."[78] Therefore, even those human beings who commit heinous sins cannot lose their capacity for reason or for turning their lives around for the better.[79]

According to Aquinas, fairness serves as a universal virtue that unites the economic realm with the welfare of all people. As a relational value, justice ties the behaviours of people, businesses, and society together to express a communal orientation of the human being. Additionally, Aquinas' theory shows how moral behaviour encourages personal fulfilment.

As a means of pursuing the virtue of honesty, Aquinas demonstrates that disclosing information is an essential act for maintaining human health and eternal salvation. These signs should be seen as components of a much larger, virtue-based framework rather than via a consequentialist lens. Aquinas specifically mentions knowledge sharing as a necessary act to preserve social trust, which is essential for the proper functioning of society. He makes it clear that everyone has a moral obligation to "declare the truth," emphasizing that doing so is essential to the survival of human civilization.[80] Aquinas mentions:

---

[76] *Ibid*, Pt. II-II, Q.77, a.4; Manuel Velasquez & F. Neil Brady, *Natural Law and Business Ethics*, 7 BUSINESS ETHICS QUARTERLY 83 (1997).
[77] *Ibid,* Pt. I-II 94, 6.
[78] *Ibid.*
[79] Ibid, Pt. I-II 85, 2.
[80] João César das Neves & Antonino Vaccaro, *Corporate Transparency: A Perspective from Thomas Aquinas' Summa Theologiae*, 113 JOURNAL OF BUSINESS ETHICS (2013).

Since man is a social animal, one man naturally owes another whatever is necessary for the preservation of human society. Now, it would be impossible for men to live together, unless they believed one another, as declaring the truth one to another. Hence the virtue of truth does, in a manner, regard something as being due.[81]

This is of extreme importance in understanding the moral foundations of corporate transparency and ESG-related disclosures. Since trust is a prerequisite for coexistence and cooperation, accurate information disclosure – exercising the virtue of truthfulness – is essential to maintaining the proper function of civil society.[82] Aquinas also offers the following suggestion about publishing misleading information: "It is always morally wrong, even when the false information might be used for good purpose."[83] *Ex sua inordinatione*, or false information, is linked to "inordinateness," which is never proper, not even for moral purposes.[84]

Aquinas's ethical principles can provide valuable insights to enhance the effectiveness of ESG regulations in the following manner:

1. Aquinas' theory also suggests that adhering to moral values enhances *personal* fulfilment. As organizations consist of individuals, supporting virtuous and fair actions enhances the employees' human potential and thus improves firm performance.[85] Unselfish behaviour towards achieving a common good lie in the self-interest of business.

2. Businesses should be encouraged to regard profit as a means for supporting not only the financial interests but also the well-being of individuals, families, and society as a whole within the context of ESG regulations. Corporations should apply Aquinas' ideas of pursuing good

[81] Summa Theologiae, *supra* note 51, Pt. II–II 109, 3, 1 (Emphasis added).
[82] das Neves and Vaccaro, *supra* note 80.
[83] *Ibid*, Pt. II-II 110, 3, 4
[84] *Ibid*.
[85] Surendra Arjoon, *Virtue Theory as a Dynamic Theory of Business*, 28 JOURNAL OF BUSINESS ETHICS 159 (2000).

through action as a guide to ethically balance commercial goals with more significant societal duties.

3. Aquinas's virtue-based approach underscores the importance of honesty in information disclosure. Corporations should be encouraged to publish accurate and comprehensive information about their ESG practices to fulfil the requirements of ESG laws, which should establish a *virtue-based* framework for transparency. This aligns with Aquinas' assertion that truthful knowledge-sharing is essential for the preservation of human society.

4. Since Aquinas places a strong emphasis on the virtue of honesty, it is clear that *trust* is an essential component of human connections. ESG regulations should underscore the role of accurate information disclosure in building and maintaining trust with corporate stakeholders.

5. Aquinas' stance on misleading information suggests that it remains morally wrong even if false information might be used for a seemingly good purpose. The objective of ESG regulations should be to prohibit the dissemination of deceptive information, thus reinforcing the notion that ethical behaviour is non-negotiable and that inordinate actions, even for purportedly good purposes, are intrinsically improper. Thus, there should be strict penalties in place for corporations undertaking greenwashing or providing misleading or incomplete ESG disclosures.

Aquinas' conception of moral good is simultaneously more practical and more compelling compared to Kant's ethics, which are centred around duty. While Kant's deontological obligations are fundamental to professional business behaviour, such as those of auditors, accountants, and board members, the intricacies of business need to go beyond rigid rules and standards. To excel as a top-tier lawyer, recognized CEO, acknowledged lecturer, or desired spiritual director, one must go beyond mere fulfilment of their job. When examining one's profession from a Kantian perspective, one

observes the presence of obligations, entitlements, and obligations. When seen from Aquinas' perspective, one might perceive a sense of vocation, a defined objective, and a means of achieving personal satisfaction.

John Finnis

Finnis' work is a detailed explanation and implementation of Aquinas' perspectives, especially in relation to ethical inquiries. However, it places particular emphasis on addressing the challenges of social theory as a whole and analytical jurisprudence in particular.[86]

Finnis' natural law approach to morality and law is based on the Aristotelian concept that the good is the ultimate goal of all things.[87] The benefits are derived from the outcomes of human endeavours. The ultimate objectives of human endeavours are states and actions that possess inherent value; our engagement in these states and activities leads to our own development and improvement. Finnis classifies them as seven states and activities: life, knowledge, practical reasonableness, play, aesthetic experience, sociability or friendship, and religion.[88] Collectively, these elements constitute what Finnis defines as integral human fulfilment.

Given the absence of a hierarchy or priority among several fundamental goods, it becomes necessary to establish guidelines for selecting among diverse options that promote these goods. Morality provides a foundation for rejecting specific available options while there may still be several valid alternatives remaining. Finnis' natural law theory places great importance on the recognition of absolute values, which must be upheld in all actions.[89] Therefore, choices that directly undermine a fundamental value are never justified. On the other hand, the only valid justification for any choice is that

[86] Brian H Bix, *Jurisprudence Theory and Context*, 7th ed (Durham, North Carolina: Carolina Academic Press, 2015) at 77. Leora Batnitzky, *A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law*, 15 OXFORD JOURNAL OF LEGAL STUDIES 153 (1995).
[87] John Finnis, *Natural Law and Natural Rights*, 2nd ed (New York: Oxford University Press, 2011) at 36.
[88] *Ibid*. Chapters 3 and 4 (59-99) describe the basic goods.
[89] JOHN FINNIS, *supra* note 87.

it somehow promotes one or more of the basic values or goods. Finnis outlines five criteria for distributive justice, ranked in order of importance: need, function, capacity, merit, and whether a risk of harm was created or accepted.[90] According to him, the primary responsibility for distributive justice lies with individuals, with the government having a secondary role.[91]

The transition from fundamental necessities to ethical decisions takes place by following a sequence of direct rules, which Finnis refers to as "the basic requirements of practical reasonableness."[92] These include: (i) Harmony of purpose/a coherent plan of life; (ii) No arbitrary preferences amongst values; (iii) No arbitrary preferences amongst persons; (iv) Detachment from particular realizations of good (avoiding fanaticism); (v) Fidelity to commitments (avoiding apathy and/or fickleness); (vi) Efficacy (within limits); (vii) Respect for every basic value; (viii) Respect for community and the common good; (ix) Following conscience and being authentic.[93]

Finnis also offers valuable insights into the functioning of communities and group dynamics. Finnis says that the true nature of a human group or community is determined by the combined activities of the group as a whole and the individual acts and attitudes of its members. The group's success or failure depends on the individual actions and attitudes of the members. It is also evident by the members' active engagement and emotional investment in the group's activities, which are motivated by common objectives or benefits. The existence of a group is fundamentally a result of individual actions, influenced and maintained by each person's decisions, tendencies, and reactions.[94]

Expanding on Finnis' ideas, it can be argued that moral development within a corporation is also a common good and assumes the ability to make personal choices and reasonable judgments. This is consistent with Aquinas'

[90] *Id.*
[91] BRIAN H. BIX, *supra* note 86.
[92] *Ibid.*
[93] *Id.* Chapter 5 (100-127) describes the principles of reasonableness.
[94] *Ibid* at 313.

teaching on the common good, as he believed that the well-being of the whole leads to the well-being of each individual portion. Consequently, the welfare of the community upholds the welfare of every individual.[95] This corresponds perfectly with the social aspect of the ESG. Therefore, a business can be considered successful when it not only promotes the moral development of its members but also enables workers to actively contribute to the organization's collective well-being through work. During this occurrence, moral growth occurs when the workers integrate the virtuous practice of prudence into their productive activity.[96]

John Finnis' natural law theory provides an extensive ethical framework that can aid in the successful incorporation of ESG norms by directing companies to take into account essential goods, immutable values, and fair distribution of resources in their decision-making processes.

1. **Promoting the basic good of "friendship"**: It is important to remember that a corporation is a cooperative reality of a business objective driven by teamwork and specific functions.[97] Its purpose goes beyond just following laws or ESG regulations; it also focuses on getting people the things they need for a sustainable life and helping them grow, especially those closely affected by it. '*Good work*' in a corporate context encompasses not only meeting regulatory requirements but also actively promoting the correct virtues, particularly among the workforce, as much as their capacities allow.

2. **Corporate purpose**: ESG regulations should encourage corporations to adopt integrated management systems across various departments and functions that align with ESG objectives, thereby promoting a harmonious and comprehensive ESG plan. Lawmakers on a macro level

[95] J. I. Pinto, *The Firm and Its Common Good: Cooperation, Virtuous Work, and Friendship*, *in* HANDBOOK OF VIRTUE ETHICS IN BUSINESS AND MANAGEMENT 249 (Alejo José G. Sison, Gregory R. Beabout, & Ignacio Ferrero eds., 2017), https://doi.org/10.1007/978-94-007-6510-8_84.
[96] *Ibid* at 254.
[97] *Ibid* at 253.

and top management on a micro level should create incentives to encourage companies to embrace comprehensive sustainability practices beyond mere reporting. For example, tax incentives or similar rebates could be implemented for firms that showcase the incorporation of ESG principles into their fundamental business operations, including supply chain management, product development, and employee relations. This can lead to a more integrated approach to sustainable practices. Similarly, on a corporate level, employees making special efforts towards sustainability and ESG-centric business decisions should also be duly recognized and rewarded for their efforts.

3. **No arbitrary preferences amongst values**: ESG ratings should assess the company's overall performance across all metrics over a longer period of time. To encourage corporations to continue to work on ESG-related issues, rating agencies should not only consider their current performance but also assess their progress over a period of time. This, in turn, will encourage corporations to continue prioritizing ESG values to foster a culture of sustainable development.

4. **Promoting efficacy**: Legal ministries and regulators should organize skills-enhancing workshops for managers and lawyers, sensitizing them to the moral responsibilities of individual employees and the corporation. These programs can provide tailored education, resources, and advisory support to help corporations develop and implement effective ESG strategies that may suit their specific industry.

5. **Respect for every basic value**: ESG teams in corporations should include members with varied backgrounds, like environmentalists, human rights advocates, corporate governance specialists, and ethicists. This shall ensure that all relevant values are appropriately represented and addressed.

V. CONCLUSION

In the ever evolving and intricate realm of corporate practices and laws, natural law theories are the beacon lights for the future crop of corporate lawyers and executives. These theories, particularly those developed by Kant, Aquinas, and Finnis, have a strong bearing on the working of ESG regulations worldwide, and these theories act as the touchstones to measure their efficacy.

The future ESG experts, both managers and lawyers, will possess a great advantage in having a strong edifice built on fundamental principles of morality and natural law to address the concerns about morally repugnant corporate decisions. This paper attempts to assess how various theorists' ethical approaches help comprehend and appraise corporate behaviours, strategic decision-making, and disclosures. These theories have a dual purpose in identifying actions that fail the morality test and repurposing modern corporations' functions and goals in view of the broader societal context.

The influence of the natural law principles can be seen infused across the domain of the legal profession, extending the wherewithal to the lawyers, judges, and lawmakers to evaluate corporate law from the standpoint of ethics and morality. This also makes way for an unabated fine-tuning of corporate regulations meeting the demands of the principles of morality. Conversely, a lack of ability in managers and lawyers to discern the moral questions in their actions could jeopardize public interests and the demands of justice. The time is ripe for corporate managers and lawyers to assume the role of independent moral agents to keep the flag of natural law principles flying high.

From the standpoint of natural law, the ability and willingness to incorporate ethical and moral concepts into ESG strategies and disclosures and corporate governance, on the whole, are what will distinguish competent and successful corporations in the future. We must have a radical change in

mindset and decision-making to meet the Sustainable Development Goals and set the world on a more sustainable and equitable course.

REVEALING THE ACTUAL IMPACT OF CRUEL ANIMAL FACTORY FARMING ON CLIMATE CHANGE

Monika Gautam*

"When people think of the significant causes of climate change, they often think about burning fossil fuels for industrial purposes, energy and transport. But there's a hidden climate culprit, and one that could be on your plate – factory farmed animal."

Jacqueline Mills

ABSTRACT

Globally, around 80 billion farmed animals are slaughtered each year for human consumption, much higher than the number of animals that the earth can naturally support. The second leading cause of large-scale CO_2 emissions is animal agriculture, which is setting the planet on fire, and the extreme utilisation of cheap meat is fuel to the flames. Industrial structures have seen an upsurge six times the rate of traditional mixed farming methods. Policymakers are now expecting that production of meat will be twofold by 2050, hypothetically expanding the number of animals used to 120 billion a year. According to the "One Welfare" approach the animal welfare; human health and environment are deeply interrelated. Factory farming is destroying the earth through greenhouse gas (GHG) emissions; capable of breeding the next pandemic; and GHG emissions might increase

* *Ph.D. Scholar at Himachal Pradesh National Law University,*
Email: monikaphd1901@hpnlu.ac.in

to 39% by 2050it extents to more than all-inclusive transport segments combined. Moreover, waste control and dumping is a major concern, as it is a the threat for polluting adjoining water bodies; also, one of the principal contributors in damaging biodiversity, acid deposition, and coral reef destruction. Animal advocates, conservationists, and health officials throughout the world are all challenging the factory farming practices. The paper argues that factory farming business on no account can reasonably refute the enormous toll it inflicts on animals, our planet and climate.

Keywords: *Animal agriculture, animal cruelty, climate change, environment, factory farming.*

I. INTRODUCTION

It can be articulated that the year 2023 has been a period of climate extremes wherein temperature records stumbled across the globe. The climate is changing and it is the human activities that are influencing this change and the effects are far more severe than were formerly anticipated. Calamities like famines, floods, heat waves, storms and wildfires are the consequences of human induced actions. Our climate crisis is intensifying and universal disparity and hunger is rising at an alarming rate. Urbanization, population growth and mounting demand for meat is becoming the major reasons for escalation of factory farming throughout the world and this growth comes with substantial price to our climate, environment, health and animals.[1] The factory farming industry attempts to maximize production and at the same time minimizing costs at the expense of animals. The gigantic companies running most of the factory farms are making maximum money by squeezing animals into small spaces, which lead to large amount of animals dying due to various diseases.[2] When climate change is discussed, most people think of fossil energy being mined and burnt and other transport requirements. One

[1] *How Factory Farming Emissions Are Worsening Climate Disasters In The Global South*, WORLD ANIMAL PROTECTION (January 23, 2024, 3 PM) http://www.worldanimalprotection.org.

[2] *Factory Farming: Misery For Animals,* PEOPLE FOR ETHICAL TREATMENT OF ANIMALS (January 2, 2024, 11: 10 AM) http://www.peta.org.

of the silent perpetrators we are failing to address is factory farming despite the clear indication of climate effect due to billions of meat chickens, pigs, and cows that are farmed each year. Farmed animals are major contributors for producing the three major GHGs: carbon dioxide, Methane and nitrous oxide and as the number of these animals grow on farms so does these emissions. This issue is predicted to grow enormously throughout the globe in the forthcoming years with large-scale demand for meat estimated to have an upsurge by as much as 30% in Africa, 18% in Asia Pacific, 12% in Latin America and 9% in North America by the year 2030. Worldwide, industrial structures are producing over half of all pork and around two-thirds of eggs and poultry meat. In countries like China, India and Brazil intensive factory farming is being favoured by producers over welfare friendly practices. The Food and Agriculture Organization of the United Nations (FAO) in 2006 issued its ground breaking report "Livestock's Long Shadow: Environmental Issues and Options," that evaluated the effects of animal agriculture. It established that the livestock sector emerges as one of the top two or three substantial contributors to the extreme grave environmental harms, at every point from local to international". The major production of meat and dairy that leads to considerable emissions of injurious greenhouse gas methane if cut down in the next five years will support an instantaneous lessening of greenhouse gas in the atmosphere. The future of safe climate is unreachable without addressing the constant growth in meat consumption around the world. The excessive demand for resources and its extreme impact, factory farming is the wrong standard for feeding the world in 2050.[3]

II. RESEARCH OBJECTIVE

1. To analyze the impact of animal factory farming on climate change.

2. To analyze the cruelty that is inflicted on animals through factory farming.

[3] *Beyond Factory Farming: Sustainable Solutions For Animals, People And The Planet*, COMPASSION IN WORLD FARMING (February 2, 2024, 10 AM) http://www.ciwf.org.

III. RESEARCH METHODOLOGY

The research methodology for this study is purely doctrinal and secondary data has been used, focusing on the analysis of existing literature like books, reports, statues, articles and material available through various NGOs working on the rights of animals and climate change.

IV. FACTORY FARMING THE FUEL TO CLIMATE CHANGE

"Factory farming" denotes to the raising of animals for meat, milk or eggs involving practices that are geared towards greatest output per animal. The British author and animal advocate Ruth Harrison coined the term factory farming in the year 1964 to suggest that animals were treated more as machines than as living beings by the industrial farmhouses. Animals under the industrialized production began to be retained in close places and were absolutely fed factory-made fodder. There were two developments that led to this revolution. First, animal nutrition science in mid-20th period revealed how to manufacture feed that not only met nutritional requirements but also allowed quicker weight gain than grazing. Second, antibiotics were developed during the World War II for militaries kept in close confinement in order to prevent disease transmission, which later began to be used for the similar purpose on confined animals. Subsequently, progress in genetic science and farm mechanization like automatic milking techniques additionally added to the productivity of animals.[4] Chickens raised for the purpose of meat are reserved in places comprising thousands of birds that are kept in spaces with approximately 30cm or less. Fast growing chickens frequently undergo agonizing crippling leg disorders since their legs are unable to keep pace with their fast body growth. Sows i.e. female pigs during gestating period are placed in metal crates in such a position that they can lie down only in one position and are unable to turn around or interact with their piglets. Piglets are taken from her as early as 21 days old, their teeth and tails cut and males being neutered. Calves that are not useful to the dairy industry are sent for

[4] JULIE URBANIK AND CONNIE L. JOHNSTON (eds.), HUMANS AND ANIMALS, A GEOGRAPHY OF COEXISTENCE 143 (ABC-CLIO, LLC USA, 2017).

the veal production. These calves are instantly retained into crates in which they are unable to move or interact with others until further transported for slaughter. Any kind of regulation alarms factory farms since their practices unquestionably violates any definition of cruelty to animals. To treat animals humanely is impossible since it is a business that rejects to consider the interests of animals. According to Mark Bittman, 'factory farms are the industries that 'grow' meat because it is difficult to use the word 'raise' when applied to animals in factory farms'.[5] The meat manufacture according to the Food and Agriculture Organization of the United Nations is far more responsible for greenhouse gases than transportation or other industries. For instance, making a hamburger contributes as greatly or far more greenhouse gases to the atmosphere as driving an average car to work. When large amount of animals are concentrated together, waste control and dumping becomes an issue with the large amount of gases being released by way of urine and feces that decreases the air quality and increases the risk of contaminating neighbouring water bodies.[6] For instance, 45% of Brazil's pig population in the year 1992 occupied only 5% of the country's land but by the year 2001 the amount of pigs housed in the same area arose to 56%. Over the next decade it is important for the world to touch net zero emissions in order to control global temperature rises to 1.5° C. In order to achieve this goal the food and farming sectors will need to play a vital role since the emissions coming from the animal agriculture is travelling in the wrong direction. The aim of the Paris agreement is to control global warming below 2°C and for this all sectors is required to reduce their emissions. Nonetheless, research shows that there will be a substantial increase of emissions through food and agriculture and that will make it very difficult to accomplish the Paris targets. According to the studies, reduction in the global meat consumption would produce manifold benefits: reduction in the use of resources as well as lessening environmental degradation. In precise, reduction in consuming meat and dairy would result in cutting down of arable land, water, pesticides,

[5] Kyle H. Landis Marinello: *The Environmental Effects Of Cruelty To Agricultural Animals*, 106 Michigan Law Review First Impressions, 148 (2008).

[6] *Id* at 144-145

energy, nitrogen, deforestation and soil erosion. Not only this but reduction in meat consumption would also help in feeding the ever growing population as huge amount of crops would be used directly for human consumption which is far more resource efficient. In addition to this it will also benefit in allowing cultivation of cropland less intensively and that will not only lead to the restoration of environment and birds, but insects and pollinators will also start thriving once again. It will also help in reducing burden on wildlife as habitat destruction could be reversed.[7]

V. CLIMATE CHANGE: RELEASE OF METHANE, NITROUS DIOXIDE AND CARBON DIOXIDE THROUGH FERTILIZERS, FEED PRODUCTION, ENERGY USE, TRANSPORTATION AND PROCESSING AND CHANGING OF LANDSCAPE

The absolute greenhouse gas emissions embodied in food value are frequently hard to identify. They are scattered through sectors and therefore under reported in most evaluations of agriculture and food.[8] The system of factory farming is cruel, with animals being confined in cages, injured and crushed together and forced with antibiotics to stay alive. It takes extensive destruction of forests to cultivate crops in order to feed farmed animals that leads to habitat loss and suffering of the wild animals that exist there. The animal feed is drenched with fertilizers and pesticides that lead to water and soil pollution and grave human health complications. This animal fodder is then treated and conveyed to various farms around the world thereby using substantial fossil fuel energy. Additional energy like heating, lighting and ventilation is required on factory farms and enormous volumes of animal compost are produced and spread on fields. This is polluted with supergerms since antibiotics are overused to counterweigh for traumatic and sadistic practices on farms. The storage of animal dung also produces methane gas

[7] *Breaking The Taboo, Why Diets Must Change To Tackle Climate Emergency,* COMPASSION IN WORLD FARMING (January 25, 2024, 7 PM) http://www.ciwf.com.

[8] *Shifting The Menu: Reducing The Carbon Footprint Of Fast Food Consumption By Switching To Plant Based Options,* WORLD ANIMAL PROTECTION (February 16, 2024, 7 PM) http://www.worldprotection.org.

that is discharged to the atmosphere with harmful effects. The factory farming business globally is very strong and dominant. Factory farming alone contributes a huge amount of a yearly CO_2 and this is not directly through animals themselves rather it comes from the inputs and land use changes that are essential to maintain and feed them.

In contrast to animals that are raised and can graze on pastures – animals raised in captivity are limited to grain based feed for their entire lives. The chief input in current farm animal manufacture is artificial nitrogenous fertilizer, huge volume of which is used in the cultivation of farm animal feed. It is mainly used for corn, soybeans, barley and sorghum globally, out of which more than 97% of soymeal and over 60% of barley and corn is used for feeding farm animals. A projected 41 million tones of CO_2 is released every year from fertilizer production absolutely for feed crops. The highest amount of CO_2 in the world is emitted by China releasing closely 14.3 million tonnes yearly followed by United States with 12 million tons, while Canada, France and the UK each emits 2.2 -3.3 million tonnes of CO_2 each year because of the production of fertilizer for feed crops.[9]

To maintain animal production facilities and cultivate the associated animal feed almost emits 90 million tonnes of CO_2 annually due to necessities like electricity and diesel fuel. As factory farming has become increasingly globalized, live animals, meat, eggs, veal, milk products are being transported afar than ever before. About 45 million cattle, pigs and sheep are traded each year around the globe and million others are conveyed within the country's own borders over long distances. The live animal transport uses huge amounts of fossil fuels further contributing to climate change. Transportation of feed and animal products emits several millions of tonnes of CO_2 each year. According to the report of FAO transporting feed and animal products to the places where they will be consumed releases about 0.8 million tonnes of CO_2 annually. The yearly trade of meat between nations results in 500,000 – 850,000 tonnes of CO_2.

[9] *An HIS Report: The Impact Of Animal Agriculture On Global Warming And Climate Change,* HUMANE SOCIETY INTERNATIONAL (February 7, 2024, 5 PM) http://www.hsi.org.

Animal farming around the world is one of the major causes of the frequently changing land uses. Farmed animals, egg, meat and other dairy manufacturing facilities cover one-third of the world's overall surface area and more than two-third of its agricultural land. With the increase of farm animals the impact on forests, soils and ecosystem worsens. Deforestation, converting forested areas into grazing ground and cropland for producing fodder are all results of expanding farm animal production. Tropical woods act as carbon sinks, capturing carbon thereby preventing its release into the atmosphere. According to the FAO, deforestation caused by animal agriculture emits 2.4 billion of tonnes of CO_2 into the atmosphere annually. With the increase of consumption of animal products, grounds used for grazing, monoculture of soybean, industrial area for feeding animals and factory farms has resulted into encroachment of forests. The FAO in 2005 discovered that one of the principal causes of deforestation in Latin America was cattle ranching. It anticipated that by 2010, the Central America would lose 1.2 million hectares of forest whereas in South America 18 million hectares of forest will completely disappear due to clearing of land for the purpose of grazing cattle. The Center for International Forestry Research (CIFOR) in 2004 stated that Brazilian beef export has increased the destruction of Amazon rainforest manifold. According to the 2000 report, 58.7 million hectares of forestland was lost as compared to 41.5 million hectares that was lost in 1990. Within ten years itself area twice the size of Portugal was lost to grazing cattle. Brazil is now the fourth leading green house gas emitter due to agricultural burning in the Amazon with 70% of the country's emissions. The State Mato Grasso lost almost 36,000 km of forest to intensive industrialized agriculture between the years 2001 and 2004. In 2007, within five months Brazil lost 3,200 km of forest in the Amazon due to illegal farming and ranching.[10]

Total 1,100 to 1,600 billion tonnes of carbon is presently estimated to be stored in soils, which is being considerably depleting due to major human interventions. Altering forests into grazing lands does not only lead to

[10] *Id.* at 7

increased levels of CO_2 but also significantly decreases the methane corrosion by soil micro-organisms such that the methane is discharged into the atmosphere rather than being utilized. Universally, farm animals are one of the major causes for 35–40% of release of methane gas. Cattle like sheep and goats release methane during the process digestion and an adult cow releases 80-110 kg of methane in a year. Methane emissions in the year 2004 was 21.17 million tonnes in Central and South America, approximately 12 million tonnes in India and closely to 9 million tonnes in China. Over 8 millions tonnes was emitted by the rest of Asia. Manure is also one of the contributors of methane and according to FAO pig production has one of the greatest share in emitting methane through manure. Methane discharged from animal manure calculates approximately to 18 million tonnes each year globally. Methane and nitrous oxide emitted from factory farms are up to 300 times more destructive as greenhouse gases than carbon dioxide.[11] It is important to note that methane has significantly a briefer lifespan in the atmosphere than CO_2, thereby living fast and dying fast. Since meat is the largest source of methane, its reduction can reduce global warming considerably faster.

VI. THE IMPACT OF FACTORY FARMING ON WATER, AIR, AND CLIMATE

A major risk is posed by factory farms to the most vital natural resource of all i.e., water. Factory farms are funding to this water crisis in various ways. Huge amounts of corn, soy, and other crops are fed to the livestock in the factory farms that takes massive amounts of water to grow. Factory farms also have negative effects on water quality. Animals in conventional farming spread their waste as they move which is beneficial to the land. With industrialized setups thousands of animals are placed together in sheds, which not only causes frustration, anxiety and painful diseases but also leads to enormous build-ups of compost. It is projected that every minute about 2 million pounds of manure is produced by animals on Concentrated Animal

[11] *Ibid.*

Feeding Operations (CAFOs) in U.S alone. Pigs produce four times more waste as compared to human beings and one facility with huge number of pigs can certainly match a small city in terms of waste production.[12] The animal excrement is not treated like human waste and usually gets flushed into underground pits or waters and is accumulated there until used as fertilizer on fields. However, the amount of compost produced on factory farms cannot be easily absorbed leading in over-application and overflow of the chemicals, toxins and bacteria contained in compost into local waterways. This also leads serious effects on marine health because of the extreme amount of nutrient concentrations from compost such as nitrogen or phosphorus thereby making water uninhabitable. The massive water requirement in factory farms has distressing ecological impacts. Universally, an agriculture use more amount of fresh water than any other human activity and it is to be noted that one-third of that water is used for the production of livestock alone.[13] Also the increase in meat consumption has been recognised as one of the chief causes of the deteriorating water scarcity in China.

Animals being raised in jam-packed settings bounded by their own waste affect the air quality inside the facilities that results in abnormal concentration of ammonia, hydrogen sulphide, carbon dioxide and other harmful matter. These dangerous gases impact animals' welfare triggering concerns like respiratory diseases in cattle and ammonia induced eyes and skin problems in chickens. The airborne pollutants from compost and filth also result in polluting the air in surrounding communities.

Throughout the four hot spots i.e. Brazil, China, USA and Netherlands the yearly consumption of chicken alone generates the same impact on climate change as keeping 29 million cars on the road for a year. GHG emissions in 2050 needs to be under 85% to those of 2000 in order to have a reasonable

[13] *Factory Farming: A Recipe For Disaster For Animals And Our Planet*, ASPCA (February 5, 2024, 12:10 PM), http://www.aspca.org.

[12] *The Environmental, Public Health And Social Impacts Of Pig Factory Farming Humane Society International*, HUMANE SOCIETY INTERNATIONAL (February 16, 2024, 9AM) http://www.hsi.org.

chance of reducing temperature upsurge to around 2° C. Factory farming sharing a large proportion of total global greenhouse gas emissions needs to make a significant decrease within a small timeframe.

VII. ANIMAL CRUELTY IN FACTORY FARMING

Animals on factory farms are exposed to regular mutilations, intense captivity and are manipulated to yield profit for human consumers. A lifetime confinement is not only unnatural but is also taken to extremes. Cows are crammed forcefully together for a portion of their momentary lives predestined to become beef. The tail docking in cows and pigs is done regularly without any anaesthetic. In countless abattoirs non-human animals experience far more cruelty than they are doomed to, by being inappropriately stunned before finally being killed. They are directed into a compartment, heads fastened into a vice and then shot in the head in order to make them insensitive before they are lynched upside down by their legs and have their throats slit. Pigs too are shot in the head with an electrical gun and also killed in chambers with CO_2 gas. Removed from mothers at three weeks they are subjected to agonizing mutilations, tails cut, ears notched, castration, teeth clipped with zero pain reliefs or anesthesia. Also, Enzootic Pneumonia is reported to be found amongst 80% of the factory-farmed pigs. Chickens again are slaughtered with the live shackle method, which frequently results in broken bones. They are then plunged into electric water before slitting their throats and finally bodies thrown into boiling water. Most of the chickens end up drowning in the boiling water or end their lives from blood loss because they are not effectually stunned.[14] At every juncture of their brief lives they are restricted to an area size of an iPad and are treated as devices in a machine.

[14] *How Are Factory Farms Cruel To Animals*, THE HUMANE LEAGUE (February 15, 2024, 2 PM), https://thehumaneleague.org.

VIII. CHANGE IN FOOD CONSUMPTION PATTERNS CAN HELP MEET CLIMATE TARGETS

Our food selections at home and away from home can together have a massive impact on lessening GHG emissions. We still have a choice to either continue on the route of excessive meat consumption and increasingly intensified factory farming or select a food production structure that is more environmentally friendly for the sake of people, animals and climate. According to research, if changes in food consumption patterns are made it can lead to significant decrease in GHG emissions and will also help meet the Paris Agreement. Like already discussed this is because animal products usually generate significant greater emissions per unit of nutrition produced than plant based foods. There is no doubt that modern production of meat, eggs and dairy products have taken a massive toll on animals and the environment. Not only these industries are exposing animals to massive suffering and jeopardizing our health but are also using overwhelming amount of our limited resources thereby producing climate warming gases. Nevertheless, people through out the world are consuming record amounts of animal products. This is purely not sustainable, practicable or environmentally favorable to take billions of animals presently captured in factory farms and transport them to pasture. Approximately, all of the principal ingredients in plant-based foods consume considerably less land and water and also emit to a great extent reduced greenhouse gases. The Climate Change Committee (CCC) established by legislation in United Kingdom in its "priority recommendation" have called upon a 20% shift away from all meat by 2030 that will rise up to 35% by 2050 and a 20% shift from dairy products by 2030. The FAO report of 2020 associates dietary patterns with four healthy substitutes each comprising less meat consumption: flexitarian, pescatarian, vegetarian and vegan. One can increase plants in one's diet meaning thereby, substituting some new products intended to impersonate meat, eggs and dairy or it may also mean to increase beans, pulses, mushrooms and other nutrient rich plant foods. It further added that by 2030, any of the four alternative healthy diet patterns

globally would help lessen estimated diet-related GHG emissions by 41 – 74%. In 2019 a letter signed by 60 scientists stated that climate crisis cannot be efficiently tackled without addressing the enormous impact that factory farmed meat production and consumption has on our globe.

Some researchers and studies have indicated that beef production adds the maximum greenhouse gases and encourage consumers to eat smaller by having more poultry and fish. However, although poultry and some pork might have lower production related emissions, merely substituting from beef to chicken will not be climate friendly choice and it will result into more damage to more animals. Disturbingly, it takes 134 chickens to get the equal amount of meat as one cow, so even if consumers switch beef for chicken, billions of more animals would suffer on factory farms.

Consuming crops is simply more beneficial than consuming an animal who has eaten crops. The United Nations IPCC Report on Climate Change recognized that changing diets from animal to plant based products has the power to help us battle climate change by significantly reducing our greenhouse gas emissions. Throughout the world, above 800 companies and brands either mainly focuses on plant based products or have business unit line focused on such products. The world is on an unsustainable course, it is anticipated that consumption of factory-farmed meat will see an escalation in most parts of the world; comprising areas where meat based foods are not yet the norm. Significant decline in meat consumption would assist lessen the profit margin of factory farms, which would make them highly unmaintainable and eventually a less tempting prospect for the companies financing them. But what is worth noting is that extreme level of meat consumption will not collapse instantaneously rather factory farms will continue to exist for some time. Factory farmed animals deserve to be saved from brutal treatment and to have lives worth living and only greater welfare standards offer that protection. Consumers can play a crucial part but eventually it is also up to the governments to hold this dominant factory farming industry to account. The best approach to protect animals and our

climate is to bring an end to factory farming beginning with a total prohibition on new factory farms.[15]

IX. ALLEVAIATION, TRANSFORMATION, LOSS AND DAMAGE

The accountability for loss and damage is an issue right at the core of discussions surrounding the connections between climate change and climate stimulated weather calamities. Apart from other industries sharing liability, factory farming as a noteworthy contributor of greenhouse gas emissions likewise needs to share this liability. Loss and damage are already happening at a huge scale and will only deteriorate as global heating upsurges. Huge scale GHG emissions through factory farming needs to be considered in climate alleviation and transformation policies in order to limit global temperature below 1.5 degrees Celsius. The climate induced weather incidents will continue to take place thereby causing major monetary, animal and human health costs unless imperative actions are taken in order to alleviate GHG emissions and encourage countries to transform the impacts of climate change. Leaders around the world must convey a strong pledge that promotes climate drive and acknowledges that factory farming emissions must be lessened while helping the countries that are greatly impacted by climate change. Governments around the world are required to put an end to the highest polluting industries whether they are fossil fuel industries or cruel factory farmed industries. The profits that various worlds' major meat processors in the global north earn come at the price of lives and livelihoods in the global south. The small-scale farmers are on the front lines of climate change. They are the most affected groups amongst those that are suffering due to drought and successive crop failure and damage to livestock.[16]

---

[15] *Climate Change And Reality*, WORLD ANIMAL PROTECTION (February 15, 2024, 10:05 AM) http://www.worldanimalprotection.org.

[16] *How Factory Farming Emissions Are Worsening Climate Disasters In The Global South,* WORLD ANIMAL PROTECTION (February 16, 2024, 11 AM), http://www.worldanimalprotection.org.

If higher animal welfare standards are enforced it would support in ending the vilest cruelty in factory farming. It would help get mother pigs out of the cages, giving piglets more time with their mothers and bringing an end to painful mutilations. Chickens would be spared of the crowded rooms, getting a chance to spread their wings that will make lives worth living. The researchers around the globe are of the view that there is no justification in postponing the advancement of animal welfare standards on climate grounds since the production and processing of animal feed crops remains the chief contributor to climate change. Climate welfare needs to be improved without negotiating animal welfare.

X. CONCLUSION

Factory farming is the outcome of practices for keeping animals alive and producing animal products at the smallest expenses conceivable like using smaller cages and intense incarceration. Despondently, it only means that animals along with our environment end up paying the price. There is substantial impact on the lives of animals because of animal farms. Since these animals are legally regarded as the property of the establishments, they are handled more alike machines than the sensitive and intelligent creatures they are. They are incapable of engaging in their natural activities, injured, operated without anesthesia, and by force impregnated only to take away their offspring from them. The impact of Animal factory farming is one of the principal drivers of anthropogenic climate change and environmental damage that cannot be ignored. The impact of animal agriculture sector towards deforestation, contamination of all manners and habitat loss considerably worsens climate change. An Arduous challenge to the ongoing well being of earth and its countless inhabitants will continue to persist unless there is substantial decrease in the factory farms. The food consumed by the factory-farmed cattle of the world alone is much more than the caloric requirements of all-inclusive human population on earth. In order to save the climate we will have to cut our meat intake and finally end factory farming. We talk a lot about sustainable sources of energy and transport with

regard to climate friendly behavior but what is important to note is that a very efficient approach to lessen your personal carbon footprint is through your diet. The intake of animal based diet funds the flawed factory farming industry that in turn becomes the reason for immeasurable animal suffering and is a chief contributor to climate change. The three R's principle: Reduce the amount of animal products that are consumed to the greatest extent, Refine the choice of animal products to the most justifiable and cruelty free option and Replace to a large extent animal based products with cruelty free and climate friendly substitutes as mentioned in Climate and Animal Welfare by FOUR PAWS International should be worked upon. The truth is that there will not be an overnight collapse in the extreme growing rates of meat consumption and factory farms will continue to subsist for sometime. Factory farmed animals have a right to be spared the horrific treatment and experience lives worth living. Though consumers play a crucial part but it is up to the governments of the various countries across the world to hold the prevailing factory farming industry accountable. This industry in no circumstances can reasonably decline the enormous toll it inflicts on animals, our planet and climate. Considerable decrease in animal based production and consumption can harm factory farming monetarily and unravel the humane and sustainable future we need. Practices like enhanced manure management and production improvements can help lessen emissions but special care must be taken in order to ensure that any practice used does not injure animal welfare standards. Also in 2019, over 11,000 scientists that suggested six critical steps in order to reduce the worst effects of climate change signed a declaration named "World Scientists Warning of a Climate Emergency". One of these steps suggests that eating mainly plant-based foods while lessening the global consumption of animal commodities can improve human health and considerably lower green house gas emissions. Laws criminalizing animal cruelty should operate to the agricultural industry as well. Factory farming and its disturbing effects on environment would not be possible if governments throughout the world criminalize cruelty to agricultural animals. This multi billion industry uses

various resources urging legislatures and various agencies to leave their practices unfettered. If the government intervenes and calls upon factory farms to treat animals properly, these farms will not be able to raise animals in such huge numbers. Production of these animals will therefore reduce which will further mitigate the damage done to environment by factory farms. When the agricultural industry is exempted from these laws it results in abnormally high levels of factory farms. The UN Secretary General has lately stated 'the age of climate boiling has arrived. Climate change is here. It is frightening. And it is just the beginning'. He has cautioned that the effects are as clear as they are heart-breaking: children being swept away by monsoon rains, workers getting collapsed in scorching heat and families running from the flames. The present-day exploitation of animals in factory farms is representative of the manner humans interact with much of the natural world – viz. Looking at everything as a source for human use. In order to move in the right direction and help benefit our environment it becomes utterly important that we move beyond the notion that animals are nothing but resources for human consumption.

PROTECTING THE RIGHTS OF SURROGATE MOTHERS: ADDRESSING GAPS IN THE SURROGACY (REGULATION) ACT 2021 IN THE CONTEXT OF NON-TRADITIONAL RELATIONSHIPS LIKE LIVE-IN RELATIONSHIPS

Ayesha Gupta*

ABSTRACT:

The Surrogacy (Regulation) Act, 2021, while aiming to protect surrogate mothers, presents significant shortcomings in its maintenance provisions. The Act permits only altruistic surrogacy, restricting financial compensation to medical expenses and insurance, which can impose undue financial hardships on surrogate mothers who may face loss of income and other economic challenges during and post pregnancy. The absence of any specific provision for the surrogate mother under The Maternity Benefit (Amendment) Act, 2017, which only talks about "commissioning mother" (means a biological mother who uses her egg to create an embryo implanted in any other woman)[1] is a blatant negligence on part of legislature as it is unclear as to the extent of such leaves post-partum, which needs to be taken into consideration. Furthermore, to ensure surrogate mothers' holistic protection from potential abuse during or after surrogacy process, it is proposed that their rights be fortified under The Protection of Women from Domestic Violence Act, 2005. By recognizing the surrogate mother within the scope of "domestic relationship", the Act can provide a robust legal framework to shield her from any form of abuse, coercion, or

* *Ayesha Gupta, PhD Scholar, Faculty of Law, University of Delhi, gupta.ayesha09@gmail.com*

[1] The Code on Social Security, § 2(13), No. 36, Acts of Parliament, 2020 (India).

exploitation, thereby addressing both economic and personal security comprehensively.

The paper argues that absence of any maternity leaves and benefits to the surrogate mother under the law in force warrants a comprehensive analysis; the rights of surrogate mother under Article 14, 19 and 21 of the Constitution of India should be discussed by policy makers. Integrating these protective measures is crucial for safeguarding the dignity, autonomy, and well-being of surrogate mothers in India.

Keywords: *Surrogacy (Regulation) Act 2021, Altruistic Surrogacy, Surrogate Mothers' Rights, Domestic Violence Act 2005, Non-Traditional Relationships, Maternity Benefits for Surrogate Mothers*

I. INTRODUCTION

Those who ordained our Constitution must not have intended to let a man enjoy *de facto* marriage and yet disown duties and obligations arising there from at the cost of aggrieved woman.

The legislators in their wisdom have been making various attempts by introduction of special statutes in the Parliament on the law of surrogacy and after multiple failures, has enacted *The Surrogacy (Regulation) Act*, 2021. Our Constitution guarantees some rights to every citizen of India, and some of them as their fundamental rights; and all persons have recognized to possess Human rights as well, as such rights are inherent in every being to make a human. Though the statute fails to provide protection of rights of "surrogate mothers", the legislative intent is clear with respect to extension of protection made available to "women even in cases beyond marriage", that is, "relationship in the nature of marriage". Due emphasis in this regard may be made to the expression "relationship in the nature of marriage" and "adoption" as used under section 2(*f*) of the Act[2] whereby an aggrieved surrogate mother may be allowed to argue to derive benefit of protection

[2] The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).

given to surrogate mother under the Protection of Women from *Domestic Violence Act*, 2005 (hereinafter called "the Act" which defines "Domestic relationship" as:

> *"(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."*

Till this date, as per the knowledge of the present researcher, not a single dictum is found to have been pronounced by any court of record, be it High Courts or the Supreme Court. Thus, this beneficial provision that gives benefits to aggrieved woman who may not technically pass the test of being a validly married wife of the respondent, may still be extended to the benefit of such woman, if the circumstances of the case may so warrant on the anvil of Article 14 of the constitution that guarantees protection of fundamental rights and speaks loudly against human rights' violation. By virtue of this paper, the present researcher shall try to find out as to whether the plight of aggrieved surrogate mother can be addressed under the Act in the absence of any special statute to their favor.

This paper adopts a doctrinal legal research methodology to critically analyse the *Surrogacy (Regulation) Act*, 2021, focusing on its limitations in protecting the rights of surrogate mothers, especially those in non-traditional relationships like live-in partnerships. The analysis draws on statutory provisions from the Surrogacy Act and the Maternity Benefit (Amendment) Act 2017, highlighting gaps in legal protections for surrogate mothers. A review of relevant case law, including *Baby Manji Yamada v. Union of India* and *Jan Balaz v. Anand Municipality*, is conducted to illustrate judicial interpretations and calls for legislative reforms. A constitutional analysis is also employed, with particular emphasis on Articles 14, 19, and 21 of the Indian Constitution, to argue for the need to align surrogacy laws with fundamental rights. Finally, the paper proposes

legislative reforms, including expanding the scope of the Protection of Women from *Domestic Violence Act*, 2005 to include surrogate mothers and amending the Surrogacy Act and Maternity Benefit Act to ensure comprehensive protections.

II. IDENTIFICATION OF STATEMENT OF PROBLEMS

The review of the *Surrogacy (Regulation) Act*, 2021, alongside the *Maternity Benefit (Amendment) Act*, 2017, and the Protection of Women from *Domestic Violence Act*, 2005, reveals critical gaps in the legal protection and welfare of surrogate mothers. First, the *Surrogacy Act* limits compensation to medical expenses and insurance, neglecting the financial hardships surrogate mothers face during pregnancy, including loss of income. This calls for a more comprehensive financial framework to ensure adequate economic support. Additionally, the *Maternity Benefit Act* fails to extend post-partum leave benefits to surrogate mothers, focusing solely on commissioning mothers, thereby leaving surrogate mothers without necessary maternity protections. Another issue is the absence of judicial precedents that include surrogate mothers within the scope of the *Domestic Violence Act*, limiting legal recourse against abuse, coercion, or exploitation. The lack of legislative clarity and consistency leaves surrogate mothers outside the protective ambit of laws designed for women in traditional marriages. Furthermore, the failure to ensure their protection under Articles 14, 19, and 21 of the Indian Constitution highlights a broader gap in safeguarding their fundamental rights. This research seeks to address these gaps by exploring how legal and constitutional protections can be extended to guarantee surrogate mothers' economic, personal, and legal security.

III. RESEARCH METHODOLOGY

This paper adopts a doctrinal legal research methodology to critically analyse the Surrogacy (Regulation) Act 2021, focusing on its limitations in protecting the rights of surrogate mothers, especially those in non-traditional relationships like live-in partnerships. The analysis draws on statutory

provisions from the *Surrogacy Act* and the *Maternity Benefit (Amendment) Act* 2017, highlighting gaps in legal protections for surrogate mothers. A review of relevant case law, including *Baby Manji Yamada v. Union of India* and *Jan Balaz v. Anand Municipality*, is conducted to illustrate judicial interpretations and calls for legislative reforms. A constitutional analysis is also employed, with particular emphasis on Articles 14, 19, and 21 of the Indian Constitution, to argue for the need to align surrogacy laws with fundamental rights. Finally, the paper proposes legislative reforms, including expanding the scope of the Protection of Women from Domestic Violence Act 2005 to include surrogate mothers and amending the Surrogacy Act and Maternity Benefit Act to ensure comprehensive protections.

IV. ANALYSIS OF RIGHTS OF SURROGATE MOTHER

a) Surrogate Mother

The term "surrogate mother" is an amalgamation of two terms: "surrogate" and "mother". To understand the meaning of surrogate mother we need to look into the generic meaning of the term surrogate which as per Shorter Oxford English Dictionary authored by William Little, though the longest known dictionary in the world, is as follows: "A person appointed by authority to act in place of another; a person or a that acts for takes place of another; a substitute".[3]

Webster's Comprehensive Dictionary also defines surrogate as: "one who or that which is substituted for another; a substitute; to put in place of another; to substitute; subrogate"[4] Black's Law Dictionary, which doesn't mention surrogate as a generic term, defines surrogate as: "The name given in some of the states to the judge or judicial officer who has jurisdiction over the administration of probate matters, guardianships etc". [5] The word surrogate as per the famous Law Lexicon Encyclopaedic Dictionary, which doesn't

[3] William Little, *The Shorter Oxford English Dictionary* (Geoffrey Cumberlege ed., 3rd ed. 1944).
[4] *The New International Webster's Dictionary of the English Language* (1999).
[5] Bryan A. Garner, *Black's Law Dictionary* (6th ed. 1990).

define the word in the context of the usage here, it means, rest other definitions provided therein being irrelevant to the topic, "the one that is substituted or appointed in the room for another".[6] Taking up the term further, its crucial to evaluate who is a mother. As per The Shorter Oxford English Dictionary by William Little mother is defined as: "a woman who has given birth to a child; a female parent; applied to things regarded as giving birth, or standing in relation of a mother, e.g. a condition that gives rise to another, the Church, Nature, one's native country; a woman who exercises control like that of a mother, or who is looked up to as a mother. A ropy mucilaginous substance produced in vinegar during acetous fermentation by a mould- fungus called *mycoderma aceti*. ; to become mothery."[7] As per the Webster's Comprehensive Dictionary of the English Language, mother is defined as: "a female parent; that which has produced or given birth to anything; an abbess or other nun of rank or dignity; an elderly woman or a matron; to care for as a mother; to bring forth as a mother; produce; to admit or claim parentage, authorship, etc.; holding a maternal relation."[8] Mother as defined in Black's Law Dictionary is: "a woman who has borne a child; a female parent; the term includes maternity during prebirth period." As defined in P Ramanatha Aiyyar's The Law Lexicon. Now the meaning of the term "surrogate mother" as per Merriam Webster is: "a woman who becomes pregnant by artificial insemination or by implantation of a fertilized egg created by in vitro fertilization for the purpose of carrying the foetus to term for another person or persons; a female animal that is impregnated (as by embryo transfer or artificial insemination) in order to bear young in place of another animal; one who acts or serves as a substitute mother". Another noteworthy definition of the term would be of the term "surrogacy":

"Surrogacy is a well known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be, as a

[6] P. Ramanatha Aiyar, *The Law Lexicon: The Encyclopaedic Law Dictionary* (1997).
[7] William, *Supra* note 4, at 4.
[8] *Supra* note 5, at 4.

gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases**,** surrogacy is the only available option for parents who wish to have a child that is biologically related to them."[9]

The Surrogacy (Regulation) Act 2021[10] defines "surrogacy" and "surrogate mother" as; "surrogacy" means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth" "surrogate mother" means a woman who agrees to bear a child (who is genetically related to the intending couple or intending woman) through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of Section 4;

A perusal of the above cited definitions it is abundantly clear that a surrogate mother is substantially any woman who bears a child in her womb but is not the intended mother. The child essentially is biologically of the intended mother whose egg is used and the intended father whose sperm is used, or the sperm or egg may be used from a donor as well depending on the circumstances.

b) Evolution and Recognition of Surrogacy

In ancient times it was not unknown that the institution of marriage was primarily meant for procreation of children. Therefore, it was a common practice since ancient times where a woman bore child for a married couple who was incapable to procreate children. One of the major reasons pinned down to this practice was identified as the continuation of lineage and carrying forward the family. Babylonian law and custom allowed this practice, and a woman unable to give birth could use the practice to avoid a divorce, "which would otherwise be inevitable"[11]

---

[9] Baby Manji Yamada v. Union of India., (2008) 13 SCC 518.

[10] The Surrogacy (Regulation) Act, 2021, § 2(zc), No. 47, Acts of Parliament, 2021 (India).

[11] *Carrying a Child for Someone Else Should be Celebrated and Paid*. THE ECONOMIST (Jun. 20, 2024, 8.30 PM, https://www.economist.com/leaders/2017/05/13/carrying-a-child-for-someone-else-should-be-celebrated-and-paid.

The concept of surrogacy is not new even in Indian context and can be traced back to Hindu mythology. In Bhagavata Purana, Vishnu heard Vasudev's prayers beseeching Kansa not to kill all sons being born. Vishnu heard these prayers and had an embryo from Devaki's womb transferred to the womb of Rohini, another wife of Vasudev. Rohini gave birth to the baby Balaram, brother of Krishna, and secretly raised the child while Vasudev and Devki told Kansa that the child was born dead[12].

Drawing inspiration and taking cue from the above Hindu religious classical epics, in the last two decades the advancement in science and technology has not only enabled the mankind to restrict and control birth rate by the use of contraceptives but has also enabled once again childless couples to become parents through the device in the nature of artificial insemination, *i.e.*, transmission of male seeds into female body artificially through a syringe.[13]

Artificial insemination (AI) is one amongst many recognised "Assisted Reproductive Technologies". When a scientific method of medical intervention is done in order to 'enhance fertility' or 'treat infertility' outside the traditional means of procreation, it may be called Assisted Reproductive Technology (ART). ART has become a largely chosen option for all the infertile married couples — single males who want a child and for gay and lesbian couples as well. The catchiest example is of Karan Johar (Karan Johar is a director and producer of Hindi movies made in Mumbai and is a well celebrated figure in public domain) who is now a single father of twins born by ART.

c) Surrogacy in the Modern Age

Surrogacy is type of pregnancy where a married couple (may be unmarried couple also, which by itself is a subject matter for further advance research), incapable of bearing child, comes into an arrangement with a woman who

[12] Jasdeep Kaur, *Surrogacy: A Paradox Regarding Motherhood Rights with Special Reference to India*, 2 LEGAL ANALYST 113, 114 (2012).
[13] Andre P. Rose, *Reproductive Misconception: Why Only Cloning Is Not Just Another Assisted Reproductive Technology*, 48 DUKE L.J. 1133, 1133-56 (1999).

would give birth to a child for them by letting out her womb. It's usually governed by an agreement between the intended parents and the birth giving woman. The birth giving woman, be the donor or the lessee of the womb, is termed as the "surrogate mother", legality or morality or commerciality of such transactions apart!

There are two options available in surrogacy, *viz.,* "traditional" or "gestational". In case of "traditional surrogacy", the woman donates or subscribed for consideration, if the law or morality may so permit, her egg and also carries the pregnancy, the same is known as a "traditional surrogate". The egg, in such case, belongs to the surrogate who is genetically related to the prospective child, and the egg is fertilized by artificial insemination with the sperm of the intended father, and thereby giving quality and genetics of such surrogate mother and also of the biological father (It is not uncommon in the market of surrogacy to see and evaluate the biology of surrogate mother, that is, her height and complexion etc. as that of a commodity and some even go further to evaluate the fertility of mind of such woman to find out the intelligent quotient of such women as she is likely to pass such traits to the prospective child.)

Insofar as the case of "gestational surrogacy" is concerned, the surrogate becomes pregnant by the process IVF (IVF stands for "invitro fertilization" and ART, where the embryo of intended parents created by their own egg and sperm are implanted into her womb and she carries it till the birth of the child and therefore the gestational surrogate mother is genetically unrelated to the child. This is usually opted by fertile parents whose pregnancy may have some medical, biological or even physiological associated risks.

d) Types of Surrogacy Arrangements

There are two types of surrogacy arrangements, namely, "commercial" and "altruistic". As the name suggests in case of commercial surrogacy the surrogate mother receives compensation whereas in altruistic surrogacy no

such compensation is involved although the expenses and insurance related to the pregnancy is covered in both the cases by the intended parents.

e) Commercialization of Surrogacy in India

According to some newspaper reports, India is a hub of commercial surrogacy or "wombs for rent". Surrogacy has basically made a natural and biological process into a mere commercial and transactional one. From advertising to marketing, everything is rampant, open and a baby has become more like an organ and this may partake the character akin to organ transplant. Surprisingly, commercial hiring of wombs has not been made explicitly illegal in India despite the ban on sale of human organs, loaning organs and commercialization of trade of human organs under the Transplantation of Human Organs Act, 1994. And just like in the cases of organ transplant, there is but obvious a black market, and may be an extreme of a criminal market, for surrogacy as this may involve human trafficking of females, commercialization of the process when it is legislatively barred and so on. India has numerous breeding farms, which turn impoverished women into baby producers. A 2013 study conducted by the non-profit center for social research found that 88 percent of surrogate mothers interviewed in Delhi and 76 per cent in Mumbai did not know the terms of the contract; and 92 percent of those in Delhi did not even have a copy of such agreement of surrogacy.[14] Commercial surrogacy attracts many foreigners in India due to cheap availability of the method. A dark line, which is of serious concern to the present researcher, is regarding "forced surrogacy" which is another facet of human trafficking that carries criminality of utmost degree with it!

Everyone is talking about the rights of surrogate child and protection of the surrogate child, but our focus has never come upon the protection and rights of the surrogate mother. Poor women find this as a very lucrative option to earn money and as a means of survival *in presenti* without, however, taking

[14] Prem Chowdhry, *Surrogate Victims of Abuse, Exploitation*, THE TRIBUNE (Jun. 27, 2024, 9:29 PM), https://www.tribuneindia.com/news/archive/comment/surrogates-victims-of-abuse-exploitation-712289.

care of her future. Currently the market for surrogate child in India involves $445 billion. Ours is the only country which has not formally and explicitly illegalized commercial surrogacy so far which is of serious concern.

Commercial surrogacy degrades the dignity of the entire community of woman and they are treated as mere commodities, – a baby producing factory. Right to live with dignity as envisaged in our constitution under Article 21 is even otherwise inherent in nature. It's a basic human right which unfortunately is ignored when it comes to surrogate mother. Not only is commercial surrogacy associated with degradation and devaluation of dignity of a woman in general and motherhood but is also associated with major health-related risks of such women. Mostly, pitiable illiterate women driven by poverty agree to let out their womb for apparent commercial reasons, or may be under the guise of relations, because they are unaware of the risks involved and no other means being available to them for their animal survival. In many cases, they are not even paid, or some amount is forfeited in cases such as that of a miscarriage, thereby doubly victimizing the woman. In case of eruption of some medical complications, it is incredibly difficult to establish the liability particularly at a time when the need is most.

Surrogacy is even compared to prostitution by various critics as in both the cases physical services are offered only for material compensation.[15]

f) Legal Status of Surrogacy in India

Currently, there is no law governing surrogacy in India and only after much debates it is regulated via National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India in 2005 which is non-binding. The contract between the parties however is governed by the ordinary civil law. Surrogacy (Regulation) Act, 2021 to bans commercial surrogacy. The major highlights of the Act are[16] :

[15] S.S. Das & Priyanka Maut, *Commercialization of Surrogacy in India: A Critical Analysis*, JCC LAW REV. 14-29 (2014).
[16] The Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 2021 (India).

- Only legally married couples who have been married for at least five years can opt for altruistic surrogacy.
- The Act seeks to "allow ethical altruistic surrogacy to the intending infertile Indian married couple between the age of 23-50 years and 26-55 years for female and male, respectively."
- The surrogate mother shall be related to the married couple and such surrogate should also be married and had a child of her own, and should be between the age 25-35 years.
- The Act clearly defines various terms such as altruistic surrogacy, commercial surrogacy, surrogate mother, intending couple etc.

The Act is divided into VIII Chapters with 51 sections, and it primarily focuses on regulation and registration of surrogacy clinics and their procedure. Section 37 and 38 of the Act deals with punishment for initiation of commercial surrogacy and penalty for contravention of provisions of the Act for which no punishment in the form of sentence of imprisonment is provided.

A careful analysis of the Act clearly reveals that the problem of commercialisation is taken due care of, however, the protection of the surrogate mother from mental, physical and emotion violence has not been sufficiently addressed as it has not been expressly provided for and dealt with under the Act. The Act, in the considered opinion of the present researcher, lacks in various innumerable aspects. The question that arises here for consideration is that what would happen to the surrogate mother who is related to the couple and yet faces inhuman treatment at their hands! And necessary corollary would be another issue as to under which law will she take resort; particularly when there is no such specific law in existence, what about the women who are totally unaware of their rights, forced by her circumstances to give birth without even knowledge of the terms of agreement between them which even if banned by the Act is a humongous

task to enforce. All they have become are just chickens and baby producing factories that too now without any consideration for the process. In the considered opinion of the author, altogether banning commercial surrogacy has literally zero incentive for a woman to consider helping a couple in turmoil and she can seek only medical expenses and insurance but is then left at her own whims.

g) Rights of Surrogate Mother under The Surrogacy (Regulation) Act, 2021

Surrogacy (Regulation) Act, 2021 intends that surrogate mother should not be abandoned after delivery and be given some protection in the form of maintenance etc. even after execution and conclusion of the agreement for a specified period as stated in the Act. Special reference in this connection may be made to sec.4(iii)(a) Explanation III of the said Act[17] which reads as follows:

> *"(III) an insurance coverage of such amount and in such manner as may be prescribed in favour of the surrogate mother for a period of thirty-six months covering postpartum delivery complications from an insurance company or an agent recognised by the Insurance Regulatory and Development Authority established under the Insurance Regulatory and Development Authority Act, 1999."*

In the opinion of the present author the above stated provision is impractical to implement in a complex system like that of our country. Even if an attempt is made to apply the same, it would be done in phases with certainty of loopholes thus defeating the very intent and purpose of the legislation. The author is of the opinion that such a system to maintain and cover basic health of the surrogate mother should be culled so as to give protection to the surrogate through the intended parents thus creating a more accountable system where the party failing to carry out such an obligation can be legally challenged and directly held accountable.

[17] The Surrogacy (Regulation) Act, 2021, § 4(iii)(a), No. 47, Acts of Parliament, 2021 (India).

It is no more *res integra* and is well settled by virtue of catena of judicial pronouncements that right to life, the forerunner of our constitution, can be claimed by an aggrieved person not only against the State but against private parties also. In this view of the matter therefore, it becomes unequivocally clear that fundamental right in the nature of right to life as ordained under Article 21 of The Constitution of India 1950 can be exhausted and claimed by an aggrieved person in the matters involving personal relationship between private parties, vis, father and daughter, brother and sister, husband and wife and live in partners etc. to say the least, in the matters involving personal relationship between the parties, in the absence of explicit provision of law providing remedy to the aggrieved, Article 21 of the constitution of India is bound to come in for rescue to the favour of such aggrieved person. The said provision of constitution does not give but recognizes the existing right to life which is inherently available to all living being under any system of governance; and therefore, the said provision of the constitution is not a simple residuary provision of law but partakes the character of basic structure of constitution. Irrespective of whether the given legislature recognizes such a right, the same is inherently available to every person it would therefore, become necessary that such right must be made available and enforced with due force to the favour of aggrieved surrogate mother against the opposite party.

In nutshell it leaves no manner of doubt that notwithstanding any legislation or precedent in this regard, which to the knowledge of present researcher, none is there except the above referred Act, right to subsistence and sustenance to a bare minimal of an aggrieved surrogate mother is implicit being directly flowing from Article 21 of Constitution which by itself is a part of basic structure of constitution that cannot be abrogated or taken away neither by all judges of the Supreme Court sitting together nor by even a unanimous decision of the legislature, which is rarely seen though no such decision has been ever made by all judges sitting together of the SC nor there has been a bigger bench than 13 judges bench in *re Keshavnanda Bharti case*[18].

[18] Keshavnanda Bharati v. State of Kerala., AIR 1973 SC 1461.

h) Surrogate mother living under the same roof

Insofar as place of aboard of surrogate mother during the currency of surrogacy agreement and her pregnancy, two situations can be envisaged: namely, firstly, the surrogate mother maybe living during such period or may have lived at any time under the same roof along with the opposite party who can be either or both of the intended parents; and secondly, when such aggrieved person lived separately. Under the current heading we shall be discussing with respect to the first situation mention above.

It would not be inappropriate here to refer to the term "in the nature of marriage" within The Protection of Women from Domestic Violence Act, 2005 whereby benefit has been recognized and extended for the first time to the favour of aggrieved woman who is not married to the opposite party *stricto sensu*. In other words, the legislature in its attempt has recognised the rights of an aggrieved woman not only when she fails to prove the factum of solemnisation of marriage with the opposite party for some technical reason or otherwise but also in the cases where such aggrieved woman is claiming relief against the opposite party on the basis of her live relations. It would be apt to quote *inextenso* the provision of section 2(f) and 2(s) of *The Protection of Woman from Domestic Violence Act* 2005:

Sec. 2(f): "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as joint family.

Sec. 2(s): "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and included such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right.

The above definitions make it amply clear that the intention of the law makers was to give a wide definition so as include women living within the shared household and since there is no explicit mention of the surrogate mother in The Surrogacy (Regulation) Act, 2021 or even the The Maternity Benefit (Amendment) Act, 2017 so the hapless and destitute should be able to avail maintenance for the altruistic surrogacy beyond medical expenses to say the least and be given all protection at par with any other pregnant woman within the territories of India.

In opinion of the researcher, the above-mentioned issue may be resolved by keeping the surrogate mother within the protective sweep of Protection of Women from Domestic Violence Act, 2005. Section 3 of *Protection of Women from Domestic Violence Act*, 2005 defines 'Domestic Violence' and the definition is inclusive in its character. Also, section 2 (f) of the Act deals with the definition of 'Domestic Relationship' which includes "relationship in the nature of marriage" or "adoption". The inexhaustive nature of the definition discussed above may also be used to include within its ambit the surrogate mother so as to provide her with requisite protection in the nature of maintenance, medical treatment, residence facilities and so on as ordained for the entire community of woman under the *Protection of Women from Domestic Violence Act*, 2005. By umpteen number of judicial pronouncements, it has now been unequivocally held that 'live-in relations' are also covered under the Act and, therefore, there is no room of doubt that such woman who begets child for a man would also not be disallowed to avail the benefits of this socially beneficial legislation, this being a human rights issue. Similarly, insofar as the protection of the child is concerned, the same can be said to mean in the nature of "adoption" so as to redress his grievances. Since the prevailing law falls short as discussed in the paper, either *The Surrogacy (Regulation) Act*, 2021 along with *The Maternity Benefit (Amendment) Act*, 2017 should be amended or as suggested by the present researcher, given protection under *The Protection of Women from Domestic Violence Act*, 2005.

i) Landmark Cases on Surrogacy in India

Even though surrogacy has not been amply taken up by the judiciary through cases on all possible legal issues and fallacies in the law, there are plenty noteworthy judgements to monitor the judicial trend for treating surrogacy. The dire need of having clear regulations was foremost pointed out in the landmark case of *Baby Manji Yamada* v. *Union of India*[19] where the key issues involved that who would take the child after separation of intended couple. Here, the father desired to take custody of the child as against the mother who had disowned the child raising complications due to unclear laws on the subject at the time. The Supreme Court allowed the Japanese father to take custody of the child while highlighting the clear need to regulate surrogacy in India. Amongst many other issues, one was of the nationality of the child born out a surrogacy arrangement brought forth in case of *Jan Balaz* v. *Anand Municipality and Others*[20] wherein the commissioning German couple were blessed with twin children out of the arrangement. Gujrat High Court granted citizenship to the children indicating the laws to be set straight to address issues of citizenship of the children born through surrogacy.

Yet another noteworthy judgement is of *Suchita Srivastava* v. *Chandigarh Administration (2009)*[21] where the Supreme Court had upheld the right of a woman to make decisions regarding her reproductive health thereby when same is applied in context with rights of surrogate mother on autonomy over body.

The case of *Devika Biswas* v. *Union of India (2016)*[22] The Supreme Court emphasized the state's responsibility to ensure safe and ethical reproductive health services. The case highlighted the importance of regulating surrogacy to protect the rights and health of surrogate mothers.

---

[19] Baby Manji Yamada v. Union of India., (2008) 13 SCC 518.
[20] Jan Balaz v. Anand Municipality., AIR 2010 Guj 21.
[21] Suchita Srivastava v. Chandigarh Administration., (2009) 9 SCC 1.
[22] Devika Biswas v. Union of India., (2016) 10 SCC 726.

In *Pinki Virani* v. *Union of India* (2015)[23] a Public Interest Litigation (PIL) filed by author Pinki Virani, raising concerns about the exploitation of surrogate mothers and seeking a ban on commercial surrogacy. The Supreme Court of India issued notices and subsequently, the government imposed a ban on commercial surrogacy in 2015, leading to the drafting of the Surrogacy (Regulation) Bill, 2016. The case emphasized the need for a regulatory framework to protect surrogate mothers from exploitation and ensure their welfare, indirectly addressing maintenance issues. Coming to the case behind the enactment of *The Surrogacy (Regulation) Act*, 2021, Union *of India* v. *Jayashree Wad* (2018)[24]wherein the challenges to the Surrogacy (Regulation) Bill, 2016, highlighting concerns about the rights and welfare of surrogate mothers. The Supreme Court's discussion in this case contributed to the ongoing legislative process, eventually leading to *The Surrogacy (Regulation) Act*, 2021, which includes provisions for the protection of surrogate mothers.

The ministry of Personnel, Public Grievances & Pensions released a notice dated 2nd December 2015 to address the maternity benefits available to surrogate mother on case to case basis, making this to be an absolutely bizarre approach as now each time the surrogate who went to help the intending parents would have to undergo this unnecessary obligation for something which is a matter of Human Right![25]

Another noteworthy latest observation by the Supreme court by a bench comprising of Justices BV Nagarathna and N Kotiswar Singh was that there is a need for a proper "system" so that no woman is exploited which was made in respect of exploitation of the surrogate and Justice Nagarathna quoted "*You don't have to pay directly to the lady, the Department pays. You will have to deposit",* the crux of the observation being that the surrogate needs to be paid suggestively by some regulated system as that of a

[23] Pinki Virani v. Union of India., Writ Petition (Civil) No. 95 of 2015.
[24] Union of India v. Jayashree Wad., (2018) 2 SCC 423.
[25] Press Information Bureau, *Maternity Benefits to Surrogate Mothers*, PIB (May 30, 2024), https://pib.gov.in.

"surrogate bank".[26] This observation strongly strengthens the authors hypothesis that the in the guise of altruism, the surrogate tends to be exploited, if not compensated adequately. It doesn't have to be a commercial transaction as there is sufficient evidence that this type of arrangement may lead to abuse and exploitation of surrogates, rather there should be explicit provisions and rules within *The Surrogacy (Regulation) Act*, 2021 to compensate the mother. In the opinion of the present researcher, the suggestion of a surrogate bank would lead to an unnecessary bureaucratic hurdle, increasing scope of corruption and instead of that there should be specific provisions in the Act to assess the same.

V. CONCLUSION AND RECOMMENDATIONS

The Surrogacy (Regulation) Act, 2021 addresses several critical aspects of surrogacy, including the requirement for medical expenses and insurance coverage for surrogate mothers, the restriction to altruistic surrogacy, and the protection against exploitation. However, despite these advancements, significant gaps remain, particularly regarding financial and emotional support for surrogate mothers.

The research highlights the following areas where enhancements are urgently needed:

1) **Amendment to the *Maternity Benefit Act*, 1961:** Incorporate explicit provisions for surrogate mothers to ensure they receive maternity leave, wage compensation, and job protection.

2) **Comprehensive Insurance Coverage:** Expand insurance to cover a wider range of postnatal care, including long-term health and psychological support.

3) **Financial Support:** Establish a fixed financial stipend to assist surrogate mothers during pregnancy and the postpartum period, acknowledging their physical and emotional contributions.

[26] Arun Muthuvel v. Union of India., W.P. (C) No. 756 of 2022 (India).

4) **Nutritional and Health Support:** Mandate nutritional supplements and regular health check-ups as part of the surrogate's care package to ensure overall well-being.

The existing legislative framework, including *The Surrogacy (Regulation) Act*, 2021, fails to address the full spectrum of needs and rights of surrogate mothers comprehensively. The Act's current focus on medical expenses and insurance is insufficient given the physical, emotional, and financial sacrifices involved in surrogacy. The lack of specific provisions in *The Maternity Benefit (Amendment) Act*, 2017, and the vague guidance provided by the Ministry of Personnel, Public Grievances & Pensions further exacerbate this issue, leaving surrogate mothers in a precarious position.

To bridge these gaps, it is recommended that either *The Surrogacy (Regulation) Act*, 2021 be amended to include explicit and comprehensive provisions for surrogate mothers or, alternatively, that protections under *The Protection of Women from Domestic Violence Act*, 2005 be extended to encompass surrogates. Given the broad and inclusive nature of the definitions within *The Protection of Women from Domestic Violence Act*, it could offer a more robust framework for the protection and support of surrogate mothers, aligning with human rights considerations and ensuring equitable treatment.

This research underscores the need for a more nuanced and humane legislative approach that not only addresses the immediate medical needs but also considers the broader social, emotional, and financial well-being of surrogate mothers. As the legislative landscape evolves, it is crucial that these considerations are incorporated to safeguard the rights and welfare of all parties involved in surrogacy arrangement.

THE DOCTRINE OF 'MANIFEST ARBITRARINESS': FORESTALLING ITS ARBITRARY USE IN THE INDIAN JUDICIAL LANDSCAPE

Yash Sharan*
Anenya**
Akanksha Sharan***

ABSTRACT

To align the interests of the citizens with a doctrine prevalent in the current times remains a task called for. One such doctrine is the Doctrine of 'Manifest Arbitrariness' invoked by the Courts in myriad cases in the recent times. What is crucial to realize is that even after years of its application since the landmark case of Shayara Bano[1], the criteria of its application are ever-expanding and vague and the superfluity of its usage has become one of the up-and-coming constitutional issues in recent time. There lies no concrete test to make use of the doctrine and this acts as a corollary to the arbitrary usage of this doctrine. Article 14 of the Indian Constitution and the Doctrine of 'Manifest Arbitrariness' are two peas in a pod. They are closely connected through the golden string of reasonableness. Although various jurists and justices stand divided when it comes to the proper and palpable application of this doctrine, there is not as much discussion as is necessary to 'pet' this elephant in the room. This article aims to explore the advent, the evolution, the efficiency of this doctrine through a comparative

* *Hidayatullah National Law University; yash.2820@hnlu.ac.in*
** *Hidayatullah National Law University; anenya.232823@hnlu.ac.in*
*** *Hidayatullah National Law University; akanksha.232857@hnlu.ac.in*
[1] Shayara Bano v. Union Of India, AIR 2018 SC (CIVIL) 1169

analysis with other countries, the underlying challenges and provides recommendations as to how these challenges can be bypassed. Eventually, the article puts forth a concrete and reasonable test which will depend upon formulating an objective legal strategy which may thwart the arbitrary overuse of this doctrine.

Keywords: *Arbitrary Usage, Article 14, Capricious, Irrational, Manifest Arbitrariness, Objective Legal Strategy, Reasonableness.*

1. INTRODUCTION

Arbitrariness refers to the acts solely built upon the edifice of a person's will. It does not consider any line of reasoning or judgement. It disregards all the actions based on 'reasonable grounds.'[2] Where either the decision-making process or its product is not substantiated with relevant facts and sound reasons, it is arbitrary in nature.[3] The Doctrine of 'Manifest Arbitrariness' is the ground on which the legislations which are 'irrationally and capriciously'[4] drafted are struck down as being violative of Article 14 of the Indian Constitution.[5] The status quo stands as the test to ascertain 'manifest arbitrariness' is to determine 'whether the enactment is drastically unreasonable and/or capricious, irrational or without adequate determining principle.'[6] There is a pressing need for a stern and uniform test for ascertaining the 'manifest arbitrariness' in legislations due to its widespread usage in a multitude of cases in India. The talks on arbitrariness have held the centre stage since the landmark ruling of *E. P. Royappa*[7], where the Indian Supreme Court enlarged the ambit of Article 14 and propounded a doctrine following which any action of the State, if violative of Article 14,

---

[2] S. Joy v. The Chancellor, (2022) WP(C) No. 33664
[3] Asha Sharma v. Chandigarh Administration & Ors, (2011) 10 SCC 86
[4] Ashok Kini, *Justice Nariman's Revival Of Doctrine Of "Manifest Arbitrariness" To Strike Down Legislation*, LIVE LAW (Nov. 30, 2019, 6:12 P.M.), https://www.livelaw.in/know-the-law/justice-narimans-revival-of-doctrine-of-manifest-arbitrariness-to-strike-down-legislation-150312.
[5] INDIA CONST. art. 14.
[6] Dr. K. Helen Nirmala v. Union Of India, (2022) W.P.No.1215
[7] E.P. Royappa v. State Of Tamil Nadu & Anr, AIR 1974 SCR (2) 348

could be struck down. Justice Bhagwati put forth the renowned saying "equality is antithetic to arbitrariness" and how they are 'sworn enemies.'[8] When challenged on the yardstick of Article 14, its three aspects, namely arbitrariness, unfairness and unjustness function as separate anvils on which the contested State activities were to be evaluated.[9] An arbitrary legislation rests on the whims and fancies of the legislature, it is illogical taking into account the law of the land as well as mere political logic. The narrative established in the *E.P. Royappa* case is regarded as the traditional narrative[10] which has now been projected to a contemporary, accelerating development that has released Article 14 from the shackles of its previous 'doctrinaire confinement'. The revival of the doctrine in the *Shayara Bano* case has led to an uproar among various jurists, yet the discussions do not suffice for their purpose. Since there is a chasm of delineated principles based on which the doctrine would be applicable, the doctrine should be delved deeper into. Furthermore, this doctrine hands over wide discretion to the judges exercising judicial review, thereby undermining the sagacity of the Parliament. The scope and application of this doctrine have been altered time and again through various judgements. This can be concluded from the fact that studying the 'heart' of the legislation with an aim to check its validity is no longer permitted.[11] In the present work, the authors have evaluated the Doctrine of 'Manifest Arbitrariness' in five parts. The first part deals with the status quo, explaining the historical evolution and contemporary applicability of the doctrine. Part two proffers a test for ascertaining a stringent application of the Doctrine of 'Manifest Arbitrariness'. Part three examines the Constitutional implications of the doctrine. The fourth part deals with the hurdles that are needed to be bypassed. The authors provide their own suggestions, recommendations and modifications for establishing an efficient mechanism in India for the

[8] *Id.*
[9] Eklavya Dwivedi, *The Doctrine Of "Manifest Arbitrariness" – A Critique*, India Law Journal (2024)
[10] Farrah Ahmed and Tarunabh Khaitan, *Constitutional Avoidance in Social Rights Litigation*, 35 Oxford Journal of Legal Studies 607 (2015)
[11] Justice K.S.Puttaswamy (Retd) v. Union Of India, AIR 2018 SC (SUPP) 1841

smooth applicability of the doctrine in the fifth part of this article. The paper closes with the way forward for the jurists and legislators and through the conclusion, the authors intend to sum up the entire analysis of this conundrum.

II. STATUS QUO

II. 1. Womb of the doctrine: The theory of contractarianism[12] propounded by the renowned English philosophers Thomas Hobbes and John Locke underscores the paramount importance of consent as the exclusive and legitimate underpinning for the exercise of the state's coercive authority. This theory laid the groundwork for a governmental structure focused on shielding individuals from arbitrary state interference. This framework found pronounced manifestation within Professor Richard Stewart's innovative paradigm of governance, known as the transmission belt model.[13] This model highlights that governance was majorly concerned with implementing legislative measures to restrict administrative decision-making within defined parameters. Since then, the recognition and elimination of arbitrary factors such as personal bias or discretion, lack of clear regulations etc. have become a crucial undertaking, contributing significantly to the development of concrete laws aimed at safeguarding individual liberty against arbitrary exercises of authority by the administration. Article 14 of the Indian Constitution[14] secures all individuals within the nation's territories from arbitrary laws and their arbitrary application. This principle was deeply ingrained in our Constitution by our forefathers, also evident in the Preamble's commitment to 'equality of status and opportunity', reflecting the essence of Article 14. Moreover, The Supreme Court has also underscored the importance of this principle through various landmark judgments, such as in the *E.P. Royappa* case,

[12] Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N. Y. UNIV. LAW REV.
[13] Richard B Stewart, *Administrative Law in the Twenty-First Century*, 78 N. Y. UNIV. LAW REV.
[14] INDIA CONST., *supra* note 5.

where it expanded the scope of Article 14, emphasizing that 'equality is a dynamic concept and arbitrary state actions can violate it'. However, the aforementioned case is not merely a defining moment in the historical evolution of the concept of arbitrariness, it is the genesis of the Doctrine of 'Manifest Arbitrariness.'

II. 2. Milestones on ascertaining arbitrariness

The principle of arbitrariness was not new, as seen in previous cases like *SG Jaisinghani*[15] where the absence of arbitrary power was deemed essential to the rule of law which is an underlying principle of Article 14, *E.P. Royappa*[16] stands out as a seminal judgment shaping the understanding of non-arbitrariness in legal discourse, finally culminating into the doctrine of 'Manifest Arbitrariness'. The concept of 'Manifest Arbitrariness' has been subject to diverse opinions, including critiques and praises, over time.

The *State of Mysore vs. Sr. Jayaram*[17] case marked the potential beginning of this doctrine. Justice Bachawat examined the validity of the latter part of Rule 9(2) of the *Mysore Recruitment of Gazetted Probationers Rules*, 1959[18] formulated by the Governor of Mysore. It was found to grant arbitrary powers to the government regarding appointments. Consequently, the court deemed such powers as arbitrary and contrary to the principle of employment equality. This ruling bolstered the stance taken in the previously mentioned case of SG Jaisinghani, further shaping the concept of arbitrariness.

Making a direct reference to *A.V. Dicey's Rule of Law*[19], the Supreme Court in *Indira Gandhi vs. Raj Narain*[20] upheld the principle of separation of

[15] Jaisinghani (S.G.) v. Union Of India And Ors, (1967) ILLJ234P&H
[16] *Id.* at 7.
[17] The State of Mysore v. Sr. Jayaram, AIR 1968 SUPREME COURT 346
[18] Mysore Recruitment of Gazetted Probationers Rules, 1959, Rule 9, No. 20, Acts of Karnataka State Legislature, 1959 (India).
[19] Mark D. Walters, *The Spirit of Legality: A. V. Dicey and the Rule of Law153*, https://www.cambridge.org/core/books/cambridge-companion-to-the-rule-of-law/spirit-of-legality-a-v-dicey-and-the-rule-of-law/DE60FB0039BC12B1A8095C2D28E67A32 (last visited May 21, 2024).
[20] Indira Nehru Gandhi v. Shri Raj Narain & Anr, AIR 1975 SUPREME COURT 2299

powers[21] and emphasized that laws must be founded on intelligible distinctions and should not result in arbitrary government actions. Such rulings influenced the decision in Royappa's case, as the court leaned towards a more concrete adherence to the spirit of the law. Justice Bhagwati emphasized that equality stands in opposition to arbitrariness, thereby reinforcing the connection between arbitrariness and unreasonableness as outlined in Article 14. He further clarified that this dynamic concept cannot be 'cribbed, cabined and confined', thus establishing a tool for assessing the constitutionality of any state action based on arbitrariness. Arbitrariness was defined as the 'whim and caprice of an absolute monarchy', bringing to light the dynamic aspect of equality that had previously remained 'latent and submerged in the few simple but pregnant words of Article 14'. In the subsequent *Maneka Gandhi*[22] case, the precedent set by the *Royappa* ruling assisted the court in recognizing the arbitrariness involved in the government's act of seizing passports without providing any evident justification. By prioritizing the broader interests of the general public, the court deemed such executive action to be a breach of equality, aligning with the assertion made in *E.P. Royappa's* case. This established a straightforward application of arbitrariness as a principle, delineating the role of substantive due process as part of Article 21 in conjunction with Article 14.

In the cases of *A.L. Kalara*[23] and *D.S. Nakara*[24], the Supreme Court noted that arbitrariness does not always necessitate a comparison to identify discriminatory treatment, as illustrated by the test of 'reasonableness' under Article 14.[25] However, the issue that persisted was how to define such arbitrariness without a concrete test, as the lack of one would render the application of this doctrine vague and arbitrary. Subsequently, a significant development occurred with the ruling in *Ajay Hasia*[26], which consolidated

[21] INDIA CONST. art. 50.
[22] Maneka Gandhi v. Union of India, (1978) SCR (2) 621
[23] A.L. Kalara v. The Project & Equipment of India Limited, AIR 1984 SUPREME COURT 1361
[24] D.S. Nakara & Others vs Union of India, AIR 1983 SUPREME COURT 130
[25] INDIA CONST., *supra* note 5.
[26] Ajay Hasia Etc v. Khalid Mujib Sehravardi & Ors. Etc, AIR 1981 SUPREME COURT 487

the evolving law by determining that not only bodies created by an Act, but also those established under a law, such as societies registered under the Societies Registration Act[27], could be considered 'other authorities.' Thus, the legislature, executive, or any authority deemed a 'State' under Article 12 of the Indian Constitution[28] could be held accountable for arbitrariness, with Article 14 being used to nullify such actions. This ruling set a precedent that courts have since used to adjudicate cases involving arbitrariness, marking one of the earliest efforts to apply an equality test to the principle of non-arbitrariness. Furthermore, judgments such as *Mithu vs. State of Punjab*[29] leaned on Hasia to invalidate statutes that fell under the purview of arbitrariness as defined at the time. Consequently, they paved the way for this principle to be harmonized with other statutes sharing similar objectives, facilitating a more robust examination of unwarranted and detrimental elements.

In *McDowell*[30], Justice Rohinton Nariman, representing the losing counsel, played a significant role in shaping one of the most debated perspectives on this principle, as articulated by Justice Reddy. The notion of arbitrariness as a basis for striking down laws was outrightly rejected. The verdict asserted that only lack of legislative competence and violation of fundamental rights could justify striking down a law. Surely, such belief stems from our forefathers or constitution makers who put their utmost faith in the legislature and considered due process to be of more value than the procedure established by law. The bench concluded that procedural unreasonableness and substantive due process were essentially American doctrines fraught with controversy in their application. As Abhinav Chandrachud also notes, such decisions highlight the doctrinal looseness[31] of

[27] Societies Registration Act, 1860, Acts of Parliament, 1860 (India).
[28] INDIA CONST. art. 12.
[29] Mithu, Etc., Etc v. State of Punjab Etc. Etc, AIR 1983 SUPREME COURT 473
[30] Mc Dowell & Company Limited vs The Commercial Tax Officer, AIR 1986 SUPREME COURT 64
[31] Abhinav Chandrachud, *Arbitrariness, "Doctrinal Looseness", and Other Things...*, LAW AND OTHER THINGS (Jun. 5, 2013), https://lawandotherthings.com/arbitrariness-doctrinal-looseness-and/ (last visited May 21, 2024).

the arbitrariness test. However, this judgment conspicuously overlooked consideration of earlier judgments on similar grounds, rendering it *per incuriam* and flawed in its comprehension of the doctrine.

A notable case that clearly explains the doctrine of manifest arbitrariness is Khoday Distilleries.[32] In this case, the court emphasized that Article 14 guarantees protection against arbitrary action, and any rule must pass the test of Article 14.[33] However, unlike the application of arbitrariness to executive actions as seen in *Royappa* and *Maneka Gandhi* cases, this principle was not applied to delegated legislation. Instead, the court held that for delegated legislation to be invalidated, it must be manifestly arbitrary—meaning it must be a law that could not reasonably be expected from an authority vested with law-making power. This case offered a new perspective on understanding the doctrine.

II. 3. Resurrection of the doctrine-contemporary relevance

The antiquity of the cases in question should not confine our dialogue solely to bygone eras. The doctrine retains its relevance in contemporary times, notwithstanding the presence of both vocal detractors and staunch advocates. Nearly 20 years later, Nariman J reaffirmed his stance in the *Shayara Bano* case, where he, along with Justice U.U. Lalit, declared 'talaq-e-biddat', commonly known as 'Triple Talaq', unconstitutional. By referencing a range of judgments both before and after the McDowell decision, he reinforced his belief in using the Doctrine of 'Manifest Arbitrariness' to invalidate legislation, labelling McDowell a 'discordant note' in the evolution of this doctrine. The judgment stated that the *Shariat Act*[34], being pre-constitutional legislation, falls under the term 'laws in force' as defined in Article 13(3)(b) of the Indian Constitution[35]. Consequently, as guided by the Doctrine of 'Manifest Arbitrariness', this legislation was deemed arbitrary. Justice Nariman expounded the doctrine by providing a

[32] Khoday Distilleries Ltd v. State Of Karnataka, (1995) SCC (1) 574
[33] INDIA CONST., *supra* note 5.
[34] The Muslim Personal Law (Shariat) Application Act, 1937, No. 26, Acts of Parliament, 1937 (India).

clear definition and outlining its application as 'irrational, capricious, or without an adequate determining principle.' Despite this advancement, the court still failed to establish a framework or a clear test for examining the application of the doctrine of 'Manifest Arbitrariness.'

Justice Chandrachud, in the *K.S. Puttaswamy* case, highlighted the constitutional significance of the fundamental right to privacy[36]. Addressing the protection of human rights, the nine-judge bench delved into the basic principles of the Constitution and reaffirmed the use of substantive due process. However, Justice Chandrachud's reference to substantive due process differed from that in *Shayara Bano* case. He explained that while arbitrariness is a ground for striking down a law, the threshold for striking down plenary legislation should be higher than for subordinate legislation. Acknowledging the absence of due process in the Constitution and the framers' belief, such as B.R. Ambedkar's, in the legislature's wisdom over judicial review[37], Justice Chandrachud asserted that judicial review should not second-guess the legislature but rather focus on the consequences of its actions and whether those actions suffer from manifest arbitrariness. *Puttaswamy* case established a threefold test requiring any state action to meet the criteria of 'legality,' 'need,' and 'proportionality.' This set a precedent that it is no longer permissible to examine the validity of plenary legislation unless it shocks the court's conscience or is patently illegal. However, this constraint disregards the scope and breadth of the principle of 'non-arbitrariness.' The test provided is merely an interpretation of the test under Article 14 and does not fundamentally affect the underlying doctrine of manifest arbitrariness.

Drawing on the *Shayara Bano* judgment, the bench in *Navtej Singh Johar* declared Section 377 of the Indian Penal Code[38] unconstitutional for violating Article 14, as it discriminated against gender identity. Similarly, in Joseph

[35] INDIA CONST. art. 13, § 3, cl. 2.
[36] INDIA CONST. art. 21.
[37] INDIA CONST. art. 142.
[38] The Indian Penal Code, 1860, § 377, No. 45, Acts of Parliament, 1860 (India)

Shine, the court deemed the provision criminalizing adultery arbitrary and discriminatory by directly invoking the doctrine.

The principle of non-arbitrariness, foundational to ancient governance systems, is reinforced through judicial decisions reasoning is evident in the case of Techno Electric vs. State of Jharkhand[39], where it was asserted that passing the test of non-arbitrariness is essential for the validity of any state action. Considering arbitrariness as detrimental to state action was deemed the most effective way to uphold the rule of law as promised by the constitution. It was determined that, in applying this doctrine, the state and private individuals are not comparable, as highlighted in Ajay Hasia. Such a comparison might be invoked by the state even in contractual matters. Thus, the same standards of rationality and reasonableness were reaffirmed without a direct or explicit explanation of the doctrine itself.

However, in the case of *Serum Institute vs. UOI*[40], the court stated that judicial precedents have set an extremely limited scope for interference, emphasizing that the judiciary should defer to legislative judgment on social and economic policies and not interfere unless the legislative judgment is blatantly arbitrary. Therefore, courts must recognize that laws should not be assessed by abstract symmetry. The most recent interpretation of this doctrine can be seen in one of the most widely discussed judgments: the *Electoral Bonds* case.[41] Here, a five-judge bench of the Supreme Court struck down the electoral bond scheme as violative of Article 14 by employing the doctrine of manifest arbitrariness. This decision reaffirmed the judiciary's commitment to the crucial principle of non-arbitrariness. The court bolstered the previously shaky grounds of the doctrine by stating that it is an important tool for invalidating laws, provided that:

- The legislation fails to make a classification by recognizing the degrees of harm.

[39] M/S Techno Electric & Engg. Co. Ltd v. The State Of Jharkhand & Others, (2023) W.P No.219
[40] Serum Institute Of India v. Union Of India Through Secretary, (2023) W.P. No. 3735
[41] State Bank Of India v. Association For Democratics Reforms, AIR 2024 SC 195

- The purpose is not in consonance with constitutional values.

The court heavily relied on the judgment in *Shayara Bano* to validate the use of this doctrine and put forward the above-mentioned criteria. It found no rational distinction between plenary and subordinate legislation when challenged for being manifestly arbitrary, thus resolving judicial confusion in applying the doctrine to different types of state action. The court stated that both types of legislation are subject to scrutiny under Article 14 and extended the test laid out in Indian Express Newspapers to plenary legislation as well. Any legislation that is excessive and disproportionate can also be held as manifestly arbitrary. The court elaborated on the various facets of this doctrine, thereby clarifying some ambiguities in its application.

II. 4. Call for Action

From the epoch of *E.P. Royappa* to the enigma of the *Electoral Bonds* case, the doctrine of manifest arbitrariness has not just evolved but has been repeatedly reinvented in various judgments. It has been dissected, broken into smaller components, and reassembled in entirely new ways. Despite frequent judicial use of this doctrine, courts still exhibit significant hesitation. One major reason, identified through extensive research, is the lack of a clear test or framework. Each judgment either reconstructs or reiterates similar tests, as seen in the Electoral Bonds case, often without explaining why these tests are effective or whether they themselves are arbitrary. Justice R. Banumathi, in the *Young Lawyers Association case*[42], described the doctrine of manifest arbitrariness as a tool to ensure that laws not only have a legitimate aim but are also reasonable and non-discriminatory in their implementation. However, doubts about the applicability of current frameworks and tests arise from the absence of a universal and verifiable standard. This gap can lead to disharmony between the legislature and the judiciary. To address these concerns, the authors advocate for a clear, objective test to eliminate ambiguity and vagueness in the effective use of the doctrine of manifest arbitrariness.

[42] Indian Young Lawyers Association v. The State Of Kerala, AIR 2018 SC 243

III. COMPARATIVE ANALYSIS

Welfare administration has maintained its role in state social policy formation for ages. The gap between administrative commitments and actions is tied to the inclusion of social welfare in policy design, which has historically helped governments worldwide maintain their credibility. Effective welfare administration hinges on regulating arbitrary governmental actions by adhering to constitutional principles. The concept of non-arbitrariness, which the authors have discussed extensively, remains significant and timeless in its application. Historically, this concept is rooted in salient documents like the *Magna Carta*[43], which form the foundation of modern legal systems. The Magna Carta includes provisions that prohibit the arbitrary taking of property, and the arbitrary exercise of power, and guarantee the doctrine of proportionality. As such, it is considered one of the earliest documents to establish the principle of non-arbitrariness, valued by scholars and courts alike.

The idea of preventing governmental arbitrariness from the Magna Carta permeates contemporary constitutional doctrines. The phrase 'per legem terrae' from the original Latin text has been interpreted by courts to mean 'due process of law'. Notably, the Magna Carta was created to curb arbitrary actions by King John in 1215. Similarly, the Bill of Rights[44](cite), signed by King William and Queen Mary, also aimed to ensure equal protection of rights and administer justice by eliminating state arbitrariness

III.1. Curbing the arbitrary-global reach of the doctrine

In addition to shaping policies in the United Kingdom (UK), the Magna Carta has also influenced other countries to include the non-arbitrariness clause in their constitutions. In the landmark United States (US) case of *Bank of Columbia v. Okely*[45], the courts affirmed that the Magna Carta was intended to protect individuals from arbitrary government actions.

[43] The Magna Carta of Edward 1 (1297)
[44] The Bill of Rights (1688 or 1689), 1 Will. & Mary, sess.2, c.2.
[45] Bank of Columbia v. Okely, 17 U.S. 4 Wheat. 235 235 (1819)

Consequently, the United States has also recognized the importance of this concept in its constitutional governance. Subsequent amendments to the American Constitution, such as the Sixth[46] and Eighth[47] Amendments were directly influenced by the Magna Carta's rejection of arbitrary acts. American courts have used various doctrinal tests to prevent arbitrary state actions. A significant example is the doctrine of 'substantive due process', derived from the due process clauses of the Fifth[48] and Fourteenth[49] Amendments. This doctrine mandates a rational relationship between the government's ends and means, guiding numerous judgments in the United States.

Many fundamental court judgments have emphasized the pivotal role of the principle of non- arbitrariness. For instance, in the *Adair vs US case*[50], it was explicitly stated that Congress's power is constrained, and any provision exceeding those limitations violates personal liberty and is unenforceable under the due process clause. Similarly, in *Nebbia vs New York*[51], it was affirmed that due process, as recognized in the American constitution, requires governmental regulatory powers to align with constitutional provisions, ensuring the use of reasonable means and preventing arbitrary or capricious actions, thereby maintaining substantial relation to the intended objective. This comprehension extends beyond the UK and the US; various other countries have also recognized the significance of incorporating the principle of non-arbitrariness into their constitutions. For instance, Article 9 of the Swiss Federal Constitution[52] mandates the protection of individual liberty against arbitrariness and guarantees equal treatment by the state in good faith.

In another significant ruling within the *Golberg vs. Kelly case*[53], the court reaffirmed its constitutional dedication to due process, emphasizing the

[46] U.S. CONST. amend. VI
[47] U.S. CONST. amend. VIII
[48] U.S. CONST. amend. V
[49] U.S. CONST. amend. XIV
[50] Adair v. United States, 208 U.S. 161 (1908)
[51] Nebbia v. New York, 291 U.S. 502 (1934)
[52] Art. 9 BV
[53] Goldberg v. Kelly, 397 U.S. 254 (1970)

limitation on arbitrary agency actions subject to judicial review. Hence, the court expanded the application of the non-arbitrariness principle within the due process clause, particularly evident in the First Amendment[54] to the American Constitution.

However, the swift evolution of governance strategies resulted in a decentralized approach to welfare administration, where state discretion became increasingly arbitrary. Consequently, the necessity for a broader application of this principle became apparent, prompting many developing countries to adopt the concept, particularly through global treaties binding nations toward similar objectives. Such agreements not only facilitated countries new to this concept but also enabled them to learn from the experiences of foreign administrations that had already achieved success in terms of human rights by implementing the principle of non-arbitrariness. A deeper insight into this can be gained by examining a pivotal judgment in the *Glamis Gold vs. US* case[55].

By citing the commitments of the US, Glamis Gold, a Canadian mining company, accused the US government of implementing new measures that unreasonably restricted the company's project in California, thereby violating NAFTA's[56] provisions for the minimum international standards of treatment of foreign investors. The tribunal, prompted by a notice of arbitration, clarified that the standards of treatment mentioned by the claimant encompass protection against arbitrariness and discrimination, and only an egregious action by the government could breach such obligations. However, the tribunal determined that the USA had not exercised its discretion arbitrarily, as the measures implemented were aimed at protecting the interests of natives, thus serving the public interest. Consequently, the tribunal ruled in favour of the respondent, the United States.

---

[54] U.S. CONST. amend. I
[55] Glamis Gold Ltd v. United States, Award, IIC 380 (2009)
[56] NAFTA, the North American Free Trade Agreement : a guide to customs procedures. (1994). Washington, DC :Department of the Treasury, U.S. Customs Service.

The investor protection clause[57] in the NAFTA agreement has led to the acknowledgment of arbitrariness on a global scale, extending its application from state administration to a country's commitment to fair and reasonable treatment of foreign entities. The notable case of *Eli Lilly vs. Canada*[58] exemplifies this trend. Eli Lilly, an American pharmaceutical company, contended that it held certain Canadian patents for various pharmaceutical compounds and alleged that the Canadian Patents Act, as well as its interpretation by Canadian courts, breached Canada's NAFTA obligations, once again invoking claims of arbitrary and discriminatory treatment. However, upon scrutiny, the tribunal found Eli Lilly's claims of denial of justice under Canadian laws to be unfounded, unanimously dismissing them, mirroring the outcome of the Glamis Gold case. Such rulings underscore the importance of reviewability by appropriate authorities, such as arbitration tribunals, in addressing disputes over arbitrary practices between different countries, thereby emphasizing the significance of the non-arbitrariness principle pervading all relevant laws and ensuring justice. According to the criteria established in the Eli Lilly case, another instance is the Aktau petrol case[59]. The Aktau tribunal examined Kazakh court proceedings to identify arbitrariness and unfairness before ultimately ruling in favour of the claimant based on executive expropriation. Additionally, in the case of *Delcourt vs Belgium*[60], the importance of the right to a fair administration of justice in a democratic society was emphasized, indicating that a narrow interpretation of laws could impede such a process.

Hence, in a landscape teeming with diverse interpretations, the principle of non-arbitrariness permeates global governance across various domains. This presence has facilitated numerous pivotal rulings aimed at curbing arbitrary practices by authorities, whether stemming from a lapse in fundamental procedural fairness or an exercise of power lacking reasonable justification.

---

[57] NAFTA, the North American Free Trade Agreement : a guide to customs procedures. (1994). Washington, DC :Department of the Treasury, U.S. Customs Service, Art. 1105.
[58] Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2
[59] Aktau Petrol Ticaret A.S. v. Republic of Kazakhstan (ICSID Case No. ARB/15/8)
[60] Case of Delcourt v Belgium, Application no. 2689/65 (1970)

Furthermore, to prevent misuse, courts have clarified that government actions must be so oppressive that they 'shock the conscience' of the court to qualify as arbitrary, as seen in the 1951 case of *Rodin vs. California*[61]. Indian courts have adopted similar interpretations, as evidenced in the *K.S. Puttaswamy*[62] case where Justice Chandrachud discussed the "shocks the conscience" test to understand arbitrariness in a constitutional context. Additionally, the Young Lawyers Association case [63]emphasized the importance of ensuring both reasonable means and fair ends. However, the precise extent of protection against arbitrary actions provided by the doctrine of manifest arbitrariness remains a subject of considerable debate. Hence, the introduction of a concrete arbitrariness test is necessary to enhance its effectiveness in India's governance.

IV. TEST-AMELIORATING THE EFFICIENCY OF THE DOCTRINE

The legal maxim *'Salus Populi Suprema Lex'*[64] meaning 'let the welfare of the people be the supreme law'[65] emphasizes the motto of the legal field, where warriors of justice strive for justice to prevail. This is ensured firstly through the right intention and will[66] of these champions and secondly through a proper mechanism to dispense all kinds of justice to the people. In relation to the Doctrine of 'Manifest Arbitrariness', this 'proper mechanism' would be established by formulating a concrete test to ascertain, determine and delineate the boundaries of arbitrariness in legislation.

Presently, there is a fissure in the concept of arbitrariness. There is no explicit and clear criterion to demarcate the contours of legislative arbitrariness. In this regard, the former minister of Law and Justice, Mr.

---

[61] Rochin v. California, 342 U.S. 165 (1952)
[62] *Id.*
[63] *Id.*
[64] CICERO, DE LEGIBUS 466 (London, Heinemann 1928)
[65] MERRIAM WEBSTER'S DICTIONARY, https://www.merriam webster.com/dictionary/salus%20populi%20suprema%20lex%20esto (last visited May 12, 2024).
[66] UNITED NATIONS, https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers (last visited May 12, 2024).

Ravi Shankar Prasad underscored the necessity of 'defining' them.[67] He opined that the lawmakers should be aware of the 'judicially manageable standards' of an act being arbitrary. In the Indian scenario, the concept of arbitrariness comes well within the impediments of Article 14.[68] This was concretized in the case of *Natural Resources Allocation, In re*[69], where it was assured that Article 14 would interdict any constitutional infirmity arising out of legislations through the Doctrine of 'Manifest Arbitrariness'. The Doctrine of Proportionality[70] and disproportion of the imposition[71] have been held as the grounds of striking down a piece of legislation as arbitrary. The concepts of irrationality, capriciousness, unreasonableness, undue hardship, and excessiveness stand as the pillars of ascertaining arbitrariness within a statute. The premise of 'Presumption of Constitutionality' is also used by the judges[72] in various cases. In our opinion, it is merely a presumption which is often rebutted. In cases of violation of fundamental rights, interpretation of legislative actions, and ascertaining the reasonableness of curtailments, an indispensable and inevitable element is subjectivity. Keeping into consideration the discussion in the preceding part of this article, there are numerous tests propounded by several jurists and judges alike. The souls of these tests carry with them vagueness and the absence of defined contours of arbitrariness. Since most of these tests emanate from or relate to Article 14, such a momentous article becomes an empty vessel, and therefore, not only the judges but also the legislators find it puzzling to point out the arbitrariness in a statute. Myriad cases in Indian jurisprudence, such as Mithu, Shayara Bano and Joseph Shine clearly lay down the idea that by strictly following a vague test, the cases would start having erroneous outcomes. The concept of arbitrariness has not given a practical basis to the principles of legislative review. The legislations should undergo a legitimate

[67] Apurva Vishwanath, *Judges must define contours of manifest arbitrariness: Ravi Shankar Prasad*, THE INDIAN EXPRESS, (Mar. 03, 2020, 07:42 AM), https://indianexpress.com/article/india/judges-must-define-contours-of-manifest-arbitrariness-ravi-shankar-prasad-6296293/
[68] *Id.*
[69] Natural Resources Allocation, In re, (2012)10 SCC 1
[70] Dr. K. Helen Nirmala v. Union Of India, (2022) W.P.No.1215
[71] State of Madras v. V.G. Row, (1952) 1 SCC 410
[72] SUKARM, *supra* note 45.

check of 'manifest arbitrariness', thereby, increasing the significance and utility of this doctrine. Bills and acts should not be immune to this principle just because they are spruced up as statutes. A piece of legislation should be tested on the touchstone of a concrete, cogent and well-grounded test. Thus, there lies a compelling need to propound plausible principles because the instinct and need to test and affirm new found principles against the proven path reigns supreme.

In light of all these arguments, the authors would like to suggest a specific and concrete test of their own to trace any form of arbitrariness. The test includes the setting up of a committee by the judges adjudicating the cases relating to legislative review. The test comprises essentially of three steps, which would act as spider webs to capture the arbitrariness in a statute.

IV.1. Steps: ladder of non-arbitrariness

The steps of the test are as follows:

1. Whenever a case of legislative review would come to any court, the judges would constitute a committee of professionally and intellectually competent people who would be qualified and skilled in the field to which that legislation pertains.

2. The members of the committee would tread across the length and breadth of the statute to examine any form of arbitrariness, taking into account, the principles discussed above, such as irrationality, unreasonableness etc. as well as its impact on the general public. They would also take into consideration any other effect which they may deem concerning.

3. After observing the first two steps, the committee would submit a duly prepared report to the judges adjudicating the matter and thus, based on that report and using one's own judicial wisdom, the judges would give the verdict.

In addition to the above-mentioned steps, the neutrality of these members must be ensured, that is, they should not be a part of any of the three organs of the government, sewing up an unbiased and neutral decision.

This three-fold test would serve numerous purposes. First, it would grant certainty to the process of determining arbitrariness in a statute and second, the burden on the judges would also decrease as it would include skilled professionals to work for the betterment of society. Additionally, the efficiency of demarcating contours of arbitrariness would also increase considering that scholars in that particular field would underscore the instances of arbitrariness by scrutinizing the statute. This would, in turn, provide detailed and specified set of ideas to the lawmakers, which would cause a surge in their law-making competence, making the process less tedious altogether.

Thus, the procedure of ascertaining arbitrariness can be made less strenuous by following this test and the need to follow such a test arises because India cannot afford this kind of prolonged anonymity and ambiguity in constitutionally important matters.

V. CONSTITUTIONAL IMPLICATIONS OF THE DOCTRINE

Equality before the law is a fundamental tenet of the Indian Constitution, and the idea of Manifest arbitrariness serves as a vital defence against its infringement. It is especially important when those acts lack a fair procedure or are discriminatory. Ensuring the proper and equitable application of laws serves to uphold the principle of equality before the law. This philosophy shields people from capricious government choices that don't have a solid foundation or solid evidence. Judges have the authority to overturn presidential decrees and laws that are seen to be unreasonable, biased, or arbitrary within the judicial review framework thanks to the idea of manifest arbitrariness.

The case of *Ashoka Kumar Thakur*[73] investigated the topic of reservations in educational institutions. Social justice and the upholding of meritocratic values in Indian educational institutions are closely related. Thakur argued that the OBC quotas were unconstitutional because they violated equal rights provisions found in Articles 14[74], 15(1)[75], and 16(1)[76] of the Indian Constitution. The Supreme Court recognized that reservations had helped to end historical disadvantages faced by lower groups and developed the concept of the 'creamy layer' to balance competing interests. This case serves as a microcosm of the current debate and emphasizes the need for a comprehensive approach that considers both individual merit and class stratification. The court skilfully employed visible arbitrariness in sensitive social spheres by carefully balancing the promises of equality made by the constitution with the objectives of social justice.

Possible arbitrary procedures regarding financial donations to political parties were brought up in the Association for Democratic Reforms case, colloquially referred to as the Electoral Bond Case[77]. Bond donations made anonymously were permitted under the Electoral Bond Scheme. The petitioners claimed that since voters have a right to know the sources of money, this violates their Right to Information[78]. In February 2024, the Supreme Court declared the anonymity clause to be arbitrary and invalidated the plan. They underlined how crucial informed voters are to a robust democracy. This case served as an example of the importance of transparency in political finance as well as the defence against improper influence in the political system offered by obvious arbitrariness.

The scope of manifest arbitrariness extends beyond individual liberties and societal rights. The function it plays in economic regulation is best illustrated by the *Swiss Ribbons Pvt Ltd. case*[79]. Here, opponents of the *Insolvency and*

[73] Ashoka Kumar Thakur v. Union of India, (2008) W.P. (civil) No. 265.
[74] INDIA CONST., *supra* note 5.
[75] INDIA CONST. art. 15(1)
[76] INDIA CONST. art. 16(1)
[77] *Id.*
[78] INDIA CONST. art. 19(1)(a)
[79] Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) W.P. (civil) No. 37

Bankruptcy Code[80] (IBC) claimed that some of its provisions were blatantly arbitrary. The court used economic reasons in its approach even as it acknowledged the need of judicial review. Ultimately, it recognized the government's justifiable goal of creating a strong insolvency law and affirmed the majority of the IBC's provisions. This instance shows how obvious arbitrariness and the government's requirement for policy flexibility in particular situations can coexist.

The idea of manifest arbitrariness has developed from a separate notion to an essential part of Article 14[81]. The promise of equality before the law is transformed from a theoretical ideal into a useful defence against arbitrary governmental actions by it, and it is the essential enforcement mechanism for this fundamental value. Manifest arbitrariness keeps citizens safe from arbitrary government and guarantees that Article 14[82] is consistently applied by enabling the judiciary to serve as a watchful defender. Adopting the broad readings advocated by legal luminaries such as Justice Mathew and Justice Bhagwati is crucial for future progress. Their expanded definition of the 'State' guarantees that no power-wielding body is immune from the scrutiny of blatant arbitrariness. The Indian judiciary fortifies the fundamental basis of equality by continuously improving this philosophy. This clears the path for all Indian citizens to benefit from a more just and equitable legal system.

The Indian Supreme Court invalidated a piece of legislation that gave the government the erroneous authority to exempt companies from excise tax in McDowell[83]. The court determined that because the discretion was not founded on any observable policy or concept, it was arbitrary and violated Article 14[84]. The McDowell ruling has received recognition for its contribution to the suppression of capricious and prejudiced government actions as well as for giving minorities and individuals a strong weapon for defending their rights. It has, however, also come under fire for judicial

[80] The Insolvency and Bankruptcy Code, 2016, § 87, No. 31, Acts of Parliament, 2016 (India)
[81] INDIA CONST., *supra* note 5.
[82] *Id.*
[83] *Id.*
[84] *Id.*

overreach, with some observers contending that the court ought to respect the policy decisions made by democratically elected legislators and only overturn laws that are manifestly and severely irrational. The notion of manifest arbitrariness, which safeguards the rights of marginalized populations and guarantees that the government behaves reasonably and without discrimination, is nevertheless an important weapon in Indian constitutional law, notwithstanding these concerns.

V.1. Post the application of the propounded test

There is great potential to strengthen Article 14[85] of the Indian Constitution with the proposed three-pronged approach for recognizing apparent arbitrariness, which involves subject matter experts in the process. A strong synergy between the legislative and the court is presented by this novel technique. Judges' legal skills would be complemented with vital insights from expert committees with extensive domain knowledge. This cooperative approach would highlight instances of arbitrary law that have gone unnoticed in the past, resulting in more accurate and nuanced rulings. Moreover, comprehensive reports from these committees would provide legislators with understandable and practical advice on how to draft laws that uphold the rationality and fairness criteria. Consequently, this would enhance the general standard of legislation and fortify the legal structure. In the end, this test's implementation would strengthen Article 14[86] by guaranteeing that the right to equality before the law is protected by laws that are clearly devoid of arbitrariness.

VI. THORNS STREWN AND TRANSFORMATIVE SUGGESTIONS

After thoroughly examining various facets of the doctrine and its practical implications, the research has identified several obstacles hindering the effective implementation of the doctrine of 'Manifest Arbitrariness'. While acknowledging future challenges, the paper underscores the doctrine's

[85] *Id.*
[86] *Id.*

importance, suggesting that its benefits outweigh the anticipated difficulties. To surmount these challenges and ensure the doctrine's successful application, the authors propose specific recommendations aimed at enhancing its effectiveness and mitigating the following identified hurdles.

VI.1. Harmonious existence with other prevalent doctrines

An essential component of the Indian legal system that safeguards fundamental rights and prohibits legislative overreach is the theory of Manifest arbitrariness. However, because the legal system is a complicated patchwork of many well-established doctrines, each with its own set of guiding principles; its application is not a stand-alone procedure. The doctrine of proportionality, which stresses a measured approach between a law's objective and its impact on individual rights, and the eroding of long-standing doctrines, like deference, which calls for courts to take the wisdom of the legislature into account when evaluating laws, can give rise to conflicting principles.

Undoubtedly, the doctrine's essence aligns with Article 14[87], representing a fusion of constitutional commitments to both equality and rationality. Given the myriad principles and doctrines stemming from similar ideas, the potential for conflicting or confirming applications exists. However, the specific parameters of the test pre-empt any such clashes. Despite initial resistance stemming from ambiguity, the doctrine's reviewability, coupled with judicial wisdom, is poised to dispel uncertainties.

VI.2. Vagueness of its usage

The inherent vagueness in the definition of the term 'arbitrary' conduct makes it less effective because judges might interpret it in their own ways, which can result in inconsistent rulings from the judiciary. Judges are free to interpret the law subjectively in the absence of precise, objective guidelines, which could result in inconsistent decisions and unpredictable outcomes.

[87] *Id.*

Both those contesting laws that are purportedly arbitrary and the administration enacting them are left in doubt by this discrepancy.

Previously, judges relied solely on myriad interpretations from different case laws to apply this doctrine. However, the proposed test offers a novel and effective approach, making the application more deliberate, well-defined and impactful. With clear guidelines in place, the doctrine's authority is reinforced, securing its distinct place within the constitution.

VI.3. Arbitrary nature of judicial decisions

Another difficulty is that judges are frequently the ones who decide whether an action is arbitrary. Decisions made by the judiciary that are inconsistent may make it difficult for them to assess arbitrariness in other branches of government with objectivity. In order to reinforce public trust in the judiciary's position as a watchdog against capricious governance, judges must endeavour to provide clear, thorough reasoning in their rulings.

Refinement and the creation of tangible standards for judging 'Manifest Arbitrariness' would fortify the theory, increase legal outcome predictability, and advance a fair and uniform legal system. The theory may also be at odds with other accepted legal precepts since it necessitates a careful balancing act between safeguarding the authority of the legislator and defending fundamental rights. In order to ensure peaceful coexistence, the judiciary must use a nuanced approach, emphasizing precise rationales when adopting evident arbitrariness in conjunction with or in opposition to other doctrines.

Furthermore, the presence of the proposed test, as advocated by the authors, prevents arbitrary judicial interpretations and reduces the judiciary's burden, as the committee's report facilitates judges in interpreting, inferring, and understanding, thereby providing a comprehensive insight into the implementation and objectives of the government policy or statute in question.

VI.4. Undermines the wisdom of the Parliament

The doctrine also adds a potential source of conflict between the legislative and the judiciary. This conflict emerges when the courts apply the doctrine to overturn laws that they believe to be unduly arbitrary. Such acts may be interpreted as a challenge to the wisdom of the legislature and the authority of its legislative procedures. As a result, a disagreement arises as to which branch is better at defining what makes a just and reasonable law. A subtle strategy is necessary to effectively negotiate this possible issue. The strategy should promote reverence for the legislative branch's legislative power.

Implementing a two-step verification process through the establishment of a committee reinforces the notion of honoring legislative wisdom while ensuring a balance and the presence of both legislative and judicial perspectives, thereby promoting a more effective application in the interest of public welfare.

Additionally, recognizing the universal applicability of this principle, as discussed in the comparative analysis, this doctrine could potentially shape the future of out-of-court settlements, as evidenced by various treaty-related disputes where tribunals utilized this principle to ensure fair awards. Particularly in arbitration, this doctrine may emerge as the linchpin for swift and effective resolutions.

VII. CONCLUSION-LIGHTING A PATH TO PROGRESS

The article has pondered over the history, evolution, milestones of the doctrine. It has also put forth a comparative analysis among numerous countries. Furthermore, it has proffered a test to rejuvenate and revitalize the doctrine. Through the section of constitutional implications, the article has established the constitutional importance and relevance of the doctrine. Ensuing from these discussions, the article has dealt with the challenges in the application of the doctrine and the test, consequently, providing its solutions, recommendations and suggestions.

The test postulated will not only demarcate and maintain the contours of arbitrariness but will also preserve the sanctity and integrity of the organs of the government as it will conserve the principle of separation of powers. It will forestall the arbitrary use of the doctrine, prevent the undermining of any organ of the government and set up an expeditious decision-making process.

The Doctrine of 'Manifest Arbitrariness' has seen a vicissitude of seasons. Overall, the path ahead seems favourable for its application, keeping in mind the standpoints of prominent jurists. History has been evidence that almost every novel principle and concept has faced some kind of resistance, but resilient principles have always found a way to flourish and persist. This can be proven by the fact that concepts of Natural Justice and Basic Structure faced severe disapproval in their nascent stages. The same is the case with this doctrine, thus, the government must look into the plausible solutions to make efficient use of this doctrine for the advancement and growth of the people.

The Doctrine of Manifest Arbitrariness serves as a critical constitutional tool in safeguarding against arbitrary state actions, particularly those infringing Article 14 of the Indian Constitution. The doctrine addresses the capricious and irrational use of legislative or executive powers, ensuring laws adhere to principles of reasonableness and fairness. Over time, it has evolved through landmark cases, where courts struck down actions that were irrational, unprincipled, or unjust.

Despite its significance, the doctrine's application has been inconsistent due to the absence of a concrete legal test. This paper proposes an objective legal strategy that seeks to establish clear criteria for determining arbitrary usage. The suggested three-step test, involving a neutral committee of experts, would not only delineate the contours of arbitrariness but also prevent the judiciary from overstepping its boundaries, thus preserving the separation of powers.

Furthermore, this strategy ensures that judicial review is balanced, curbing the excessive discretionary use of the doctrine while respecting legislative intent. The doctrine's focus on curbing manifestly arbitrary actions safeguards the constitutional promise of equality. By proposing a more defined mechanism, the paper fosters a more structured and equitable approach to the doctrine's application. Ultimately, the Doctrine of Manifest Arbitrariness, with the suggested refinements, remains a robust tool for promoting constitutional integrity and advancing the rights of citizens, while ensuring accountability in governance.

THE COLONIAL CONSTITUTION: AN ORIGIN STORY

(India, Juggernaut Books, 2023) [PP. 296, P-ISBN: 9789353451929; E-ISBN: 9789353451790 (Paperback)]

Raj Krishna*

The Colonial Constitution by Arghya Sengupta[1] offers a brief historical-legal history of the inception of the Indian Constitution. The author accomplishes the same by highlighting the colonial origins of the Constitution and outlining the reasoning for its creation during the meetings held in the Constituent Assembly. Furthermore, it is interesting to note that Sengupta in his book contends that colonialism still persists and must be addressed, even in light of the freedoms provided by the Constitution. He draws attention to the shortcomings of the current constitutional order and how it has impacted society at large. Additionally, he has highlighted the different options that the members of the Constituent Assembly may have chosen to follow in the process of drafting our Constitution. With the aforementioned information in mind, the researcher has evaluated the book and pointed out its advantages as well as disadvantages.

The Indian Constitution is a dynamic document since it is evolving with the changes required in the contemporary time. As a result, the people who had previously been colonial subjects of an alien authority were now free citizens of an independent republic. India was thus liberated from the shackles of the British Raj. However, unlike the nation states of the West, it is pertinent to keep in mind that power in India had never been completely wielded by the

* *Lawyer; Email ID- rajkrishnasahay1997@gmail.com*

[1] ARGHYA SENGUPTA, THE COLONIAL CONSTITUTION (India, Juggernaut Books, 2023) [PP. 296, P-ISBN: 9789353451929; E-ISBN: 9789353451790 (Paperback)]

State itself. In a multicultural and heterogenous Indian society, there were many other institutions that wielded power and authority along with the state like the dominant caste groupings and specific gender groups. Consequently, the framers of the Indian Constitution had two tasks in hand. First was to alter the political status of Indians and second was to alter the prevailing social structures within the Indian society.[2]

This socio-political revolution was expected to revolve around the fundamental rights chapter. Equality of representation for people of different ancestries was the cornerstone of the Indian Constitution. It is important to note that the Indian Constitution ensures that each and every citizen of our country is adequately represented in governmental decision-making. Furthermore, a person cannot be marginalized only because of past discrimination against them. Thus, every member of society must have a voice in political decision-making, and this is the responsibility of every government institution to ensure the same. As a result, India's Constitution is frequently labelled as a holy text.[3] Due to this any effort to document its progress carries the risk of becoming a hagiographic narrative. However, criticizing the same also poses a high risk of being viewed as an attempt to undermine the Constitution for the sake of a broader political agenda.

Interestingly The Colonial Constitution by Arghya Sengupta challenges the hagiographic interpretations of the founding narrative by asserting in a seemingly controversial way that the Constitution is, in fact, a colonial document. According to Sengupta (2023), the Indian Constitution is inspired by the colonial legislations and draws multiple similarity from its predecessor. Apart from that the extremely prescriptive nature of the Constitution suggests that the framers of our Constitution were not willing to trust the people to rule themselves, much like they did under the previous colonial government. Secondly, the Constitution envisions a state of law and

[2] GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION (Harper Collins, Noida, 1st edition, 2019).
[3] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (Oxford India Press, New Delhi, 34th edition, 2019).

order that dominates its people. While citizens enjoy certain fundamental rights, their rights are essentially limited by certain restrictions. The author goes on to argue that while the Indian Constitution was drafted with the idea that the government would protect individual liberties while having broad authority, that hasn't turned out to be the case.[4]

The book is structured with a prologue and an epilogue, and two sections with three chapters each. Sengupta outlines the Constituent Assembly's constitution-making process in the first three chapters. He also discusses the contrasting ideologies of the day, the roles that different people played, and the rationale behind the decisions reached. He then emphasizes upon the fact that how other concepts—like Gandhian village democracy, which was centered on individual responsibilities, or aspects of direct democracy by MN Roy were not thoroughly investigated at the time because they were considered to be very radical. The author further notes that instead of investigating and developing indigenous institutions that might have been better suited for running the Indian administration, the framers of the Constitution chose to accept existing international constitutional conventions and institutions. This book has thus wonderfully illustrated the history of the Indian Constitution by exploring the constitutional writings of political figures like Gandhi, Ambedkar, Savarkar and the discussions that took place both inside and outside the Constituent Assembly.

Furthermore, it is pertinent to note that Sengupta does not downplay the Constitution's transformative qualities wherein it has made a positive impact. However, Sengupta still contends that Indian Constitution is a colonial constitution even though it was not a mere blind perpetuation of the past. The author in his book has described two recent occurrences in an effort to illustrate how the contemporary government, like the colonial one, looms over the populace. The author draws the conclusion that this is a result of the Constitution's failure to give up its colonial characteristics,

[4] Dr. Moiz Tundawala, Book Review | Why Not to Call the Constitution Colonial, NATIONAL LAW SCHOOL OF INDIA UNIVERSITY (June 30, 2024, 6:00 AM), https://www.nls.ac.in/blog/why-not-to-call-the-constitution-colonial/

citing the struggles filmmaker Deepa Mehta encountered while filming her movie Water and the cruel treatment migrant laborers endured during the COVID-19 pandemic.[5] Furthermore, he also points out that the Indian judiciary has upheld the constitutional validity of numerous statutes that has empowered the police to conduct investigations, make arrests, and place people under preventive custody throughout the country's post-independent legislative history, despite the claim that these laws are violative of the Constitution. In this aspect, Sengupta is therefore correct when he claims that the Constitution falls short of fully defending people' rights from the state's arbitrary police power.[6] However, here's also where the author seems to go too far and disregard Ambedkar's words that no matter how wonderful a constitution is, it will be useless if the people putting it into practice are awful. No matter how awful a constitution is, it will work well if the people enforcing it are good.[7]

Now, the question arises is that whether the author is suggesting that the Colonial Constitution is repealed and replaced with a new text? The answer to this is no. The author has offered an alternative that the creators of contemporary India ought to have paid attention to Gandhi's plea to choose a domestic constitution that would have allowed India to function as a confederation of independent villages. However, to this one may contend that such aspirations are utterly unrealistic, considering the inherent necessity for significant industrialization and the developmental demands of a sizable country whose population aspired to the same standard of living as people around the world.[8]

---

[5] Shishir Tripathy, Book Review- Beyond hagiography, Arghya Sengupta takes critical look at Indian Constitution, FIRSTPOST (June 28, 2024, 11:30 PM), https://www.firstpost.com/opinion/book-review-beyond-hagiography-arghya-sengupta-takes-critical-look-at-indian-constitution-13193712.html

[6] Harish B Narasappa, An open-&-shut case, DECCAN HERALD (June 29, 2024, 9:00 PM), https://www.deccanherald.com/features/books/an-open-shut-case-2725310

[7] Shishir Tripathy, Book Review- Beyond hagiography, Arghya Sengupta takes critical look at Indian Constitution, FIRSTPOST (June 28, 2024, 11:30 PM), https://www.firstpost.com/opinion/book-review-beyond-hagiography-arghya-sengupta-takes-critical-look-at-indian-constitution-13193712.html

[8] Dr. Venkat Iyer, Book Review: Unsealed Covers by Gautam Bhatia and The Colonial Constitution by Arghya Sengupta, BAR AND BENCH (June 29, 2024, 8:30 p.m.), https://www.barandbench.com/columns/book-review-unsealed-covers-by-gautam-bhatia-the-colonial-constitution-by-arghya-sengupta

This also leads us to the most basic argumentation error in the book. India does not possess a colonial Constitution. Our Constitution is truly a revolutionary document, penned by men and women who were trying to deal with a turbulent situation of widespread violence, enormous migration, and poverty while also trying to change India's destiny. Ultimately, it succeeded in changing the dynamics between the state and the individual by transforming former colonial subjects into citizens of a democratic republic. This was made possible by a variety of traditional civil and political rights that limited the power of the state and other traditional institutions, such as right to equality, personal liberty, freedom of speech etc.[9]

It is acceptable to abolish a constitutional system that, in the author's opinion, is isolated from local ethos and morality and is a clone of a previous colonial rule that likewise fell short of the expectations of millions of people, but to what degree and for what purpose? Is it possible to eliminate the fundamental framework of the Indian Constitution as well? What if the thoughts and opinions of the majority are the only ones that the current times allow? The many regions of India exhibit cultural and socioeconomic dichotomies in addition to population differences. What standards and bounds ought to be set for creating new constitutional values, and who gets to have the final say? There is undoubtedly space for debate on that subject. Whatever the merits of some or many of those amendments, it is relevant to note that the Indian Constitution has been amended 106 times since it came into force in 1950. This indicates that constitutional reappraisal is a viable process in independent India, as evidenced by the commission that was set up in 2000 to conduct a comprehensive review of the Constitution's operation.[10]

---

[9] Subhajit Bhattacharjee, Book Review- The Colonial Constitution, 15(1) IJLJ (2024), https://ijlj.nbu.ac.in/doc/v15_no1.pdf

[10] Shishir Tripathy, Book Review- Beyond hagiography, Arghya Sengupta takes critical look at Indian Constitution, FIRSTPOST (June 28, 2024, 11:30 PM), https://www.firstpost.com/opinion/book-review-beyond-hagiography-arghya-sengupta-takes-critical-look-at-indian-constitution-13193712.html .

The Indian Constitution is arguably the most significant document of the 20th century, and the book provides unique insights into its creation. In conclusion, the author poses a relevant issue for the readers: Does the nation need to renew its own constitutional course, eschewing the constraints of a colonial constitution? Unfortunately, the book avoids addressing a crucial question: can a meaningful discussion about new constitutional values take place in the wake of majoritarianism, when India is witnessing the country's constitutional institutions becoming ineffective and feckless? However, despite its criticisms, the author in this book has posed some difficult concerns that haven't been addressed before. Due to this, Dr. Sengupta's work is an essential reading for everyone with an interest in law, politics, or history, not just those in the legal community.