# VIDHI INSIGHT JOURNAL

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## ABOUT THE JOURNAL

*Vidhi Insight is a biannual journal on law and public policy reviewed by budding lawyers with proven expertise and skills having served in the genre for a long time. The journal is a solemn effort to promote erudite discernment and academic scholarship over the contradictions of the vexed questions that revolve around the debate of relationship of law and public policy.*

*It seeks to create a platform where there is an exchange and dissemination of ideas and thoughts regarding issues mutually related to law and public policy.*

*We believe in advocating the importance of freedom of speech and expression and understand the need for transmission of ideas across platforms and disciplines.*

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# Message

I congratulate the entire team of Vidhi Parivartan for coming up with the third issue of the Vidhi Insight Journal. It is indeed a pleasure for me to go through the varied contents ranging from legal news updates to miniatures compelling the reader to pause and absorb the essence of the contents and furthermore, putting it in an easy-to-comprehend manner.

**From: Nancy Garg, Founder**

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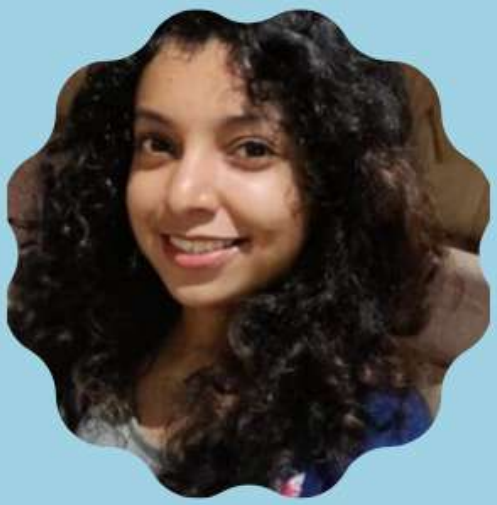

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# A STUDY ON GROWTH OF VENTURE CAPITAL FINANCING IN INDIA

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## ABSTRACT

The ascent of investment has been one of the biggest substantial improvements in entrepreneurship over the previous decade. It has had a huge impact on the global economy in terms of employment generation, inventive products and services, competitive vigour, and the enhancement of entrepreneurial spirit. It has sparked and sustained economic progress and rejuvenation through communicating and producing fundamental principles. In particular, investors help their investee organizations in giving an organization, selecting key administration and building a group, creating monetary frameworks, exhorting on organization regulation and other lawful issues, assisting co-venture and orchestrating working capital offices from financiers, giving showcasing connections and contacts, sharing the business viewpoint, offering help and certainty during terrible times, helping in long haul key reasoning and arranging, assisting with establishing a pioneering environment and conceiving motivation frameworks to advance long period with teaming work. India's growth has never been perceived as promising or stable due to a lack of support for innovative initiatives. It is past time for venture capital's catalytic function to be fully recognised in order to completely benefit from economic changes and strengthen the Indian economy.

## INTRODUCTION

Subsidizing is supporting that monetary benefactors provide for new organizations and private endeavours that are acknowledged to have significant stretch advancement potential. For new organizations without permission to capital business areas, subsidizing is a central wellspring of money. Risk is customarily high for monetary sponsor, but the disadvantage for the beginning up is that these financial backers generally get a say in association decisions. Investment is long haul risk cash-flow to back high innovation projects which imply risk and yet has solid potential for development. Financial speculator pools their assets including administrative capacities to help new business people in the early long stretches of the undertaking. When the undertaking the phase of productivity, they sell their value holding at a high premium. Accordingly, funding giving organization is type of supporting foundation

which joins as business person as a co-advertiser in an undertaking and offer the gamble and compensations of the endeavour.

Investment is a kind of private worth a sort of supporting that is given by firms or resources for little, starting stage, emerging firms that are considered to have high advancement potential, or which have shown high turn of events. Venture companies or resources put assets into these starting stage associations as a trade-off for esteem an ownership stake-in the associations they put assets into. Shareholders confront a risk of investing risky entrepreneurial ventures inside this hope that such a part of the organisations their support will bear fruit. Emerging enterprises are often created on a creative invention or planning process, because they are typically from advancement endeavours, such as data frameworks, internet recreation, or nanotechnology.

"Financing is the strategy of risk bearing capital, routinely as an investment in regard, to relationship with high progression potential. Additionally, the financing affiliation offers some benefit consolidated the kind of the board heading and commitment to generally technique. The bearably high dangers for the monetary patrons are repaid by the chance of magnificent yield, overall through enormous capital extensions in the medium term".

**VENTURE CAPITAL'S ORIGIN**

During the 1920s and 1930s, affluent families and private investors donated seed money for enterprises that would go on to grow famous. Very well ventures they backed were Eastern Airlines and Xerox. The Rockefeller's Family launched a unique fund named VENROCK in 1950 to support innovative technological firms, and it was one of the first VC funds to be established. General Doriot, a University Professor, established the American Research and Development Corporation (ARD) at MIT in 1946, the first business, rather than a private individual, to fund the commercial marketing of sophisticated technology generated in US institutions. In that it employed solely equity, financed for the coming decades, and was willing to live with losses, ARD's strategy was typical VC. ARD's 1957 investment in DEC represented a watershed moment in venture capital fundraising. While venture capital was first associated with increased innovation, the concept has developed over time and today pertains to joint funding in undisclosed enterprises.

## VENTURE CAPITAL IN INDIA

The action of funding is finished by formative monetary establishment like: IDBI, ICICI and state monetary partnership. These agencies advanced components in the private sector using commitment as a tool of assistance. For an extended amount of time, government savings being utilised as either a source of Investment Capital. The resource, in any event, was based on a remarkable arrangement of market notions.

Moreover, with both the basic fixed capital demands being raised for posting on securities exchange, it became difficult for further modest enterprises with appropriate workouts to enable the business from either the community. The need for VC was recognised in India inside this 7th long term strategy and comprehensive stretch finance framework of the GOI. In 1973, a committee on Development of SME's emphasised any need to accelerate VC as a funding mechanism for new corporate innovators and progress. VC finance actually originated in Early in 1988 with both the TDICI defensive strategy, which was later advanced by ICICI and UTI. The crucial commercial VC fund, Financial Strategic Investment Funds, was supported by CFC and advanced by BOI, ADB Bank, and the Commonwealth Development Corporation. Meanwhile, Gujarat Venture Finance Ltd. and APIDC Venture Capital Ltd. were founded by government financial institutions. The financial connected institutions, political structures financial clients or perpetual assets, and highly completed assets persons have been the origins among those assets.

## REGULATORY FRAMEWORK OF VENTURE CAPITAL INDUSTRY IN INDIA

Without a coordinated funding industry, individual financial backers and improvement monetary establishments play until now filled the role of investors in India. Business people have to a great extent relied on private positions, public contributions and loaning by the monetary establishments. In 1973, a leading body of legal administrators on Development of SME’s included the need to energize speculation as a wellspring of supporting new business visionaries and advancement. From there on some open area reserves were set-up, yet the action of investment didn't build up speed as the push was on high innovation projects subsidized on a simply monetary as opposed to a comprehensive premise.

Following that, the World Bank undertook a study to investigate the possibilities of making interest in the private sector, as a result of which the GOI adopted a systematic push and published guidelines for speculation savings (VCFs) in 1988. Regardless, these criteria, in a

sense, limit the establishment of Reliably by banks and monetary institutions. Universally, the pattern inclined toward funding being set up by experts, effective business people and modern financial backers ready to face high challenge in the assumption for exceptional yields, a pattern that has proceeded to these ten years. Starting there, Government of India gave rules in September 1995 for abroad financing interest within the country. While, for charge exemption purposes, rules have been given by the CBDT, the endeavours and stream of new cash into and out of India are addressed by the RBI. Moreover, as part of its structure to regulate and promote the Indian insurance industry, SEBI created the SEBI Guidelines, 1996 as per Section 12 of the SEBI Act of 1992.

As a result, there had been three proposals of Regulatory requirements supervising purely speculative growth, for example, SEBI Legislation 1996, Standards and requirements for Internationally VCF given by Department of Finance in the Ministry of Finance in 1995, and CBDT Regulations for VC Companies given in 1995, which were thus changed in 1999. As a result, there was a need to combine all of them into a single set of regulations in order to maintain consistency, provide hassle-free single-window flexibility, and provide universal standards. Beginning with the suggestions of the K.B. Chandrasekhar Committee, which has been established by SEBI in 1999-2000, the Recommendations for Internationally VCF in India had been completely eradicated by the Government in September 2000, and SEBI was designated as that of the nodal control board for VCFs to provide a standardised, trouble-free, primary regulatory prototype. SEBI also disclosed guidelines for new monetary contributors. In the same way as appropriate institutional financial clients (FIIs) were to be registered with SEBI, FVCIs were to be registered as well.

**VENTURE CAPITAL FINANCING STAGES**

Private supporters (Angel Investors) are most typical people (companions, relations or business visionaries) who need to assist different business visionaries with getting their organizations going - and acquire an exceptional yield on their speculation. The name "angel" stems from the tradition of affluent businessmen financing in Broadway musicals in the 1900s. Typically, they serve as a bridge between a company's self-funded stage and the point at which it requires actual venture capital. The typical range of angel finance is $150,000 to $1.5 million. In addition to these benefits, they usually provide skills, knowledge, plus connections.

1. ***Seed Finance:***

It is the primary phase of investment supporting. Seed-stage financings are frequently similarly humble measures of capital gave to creators or business visionaries to fund the early improvement of another item or administration. These early financings might be coordinated toward item improvement, statistical surveying, fabricating a supervisory crew and fostering a field-tested strategy.

A true seed-stage firm has not yet developed commercial operations; thus, a capital injection is required to sustain ongoing research and product development. These early-stage businesses are notoriously difficult to fund, as they frequently require funds for pre-start-up R&D, product programming and implementation, or the design of specific equipment. A competent VC company's seed capital funding round generally runs from $250,000 to $1 million.

Subsequent funding stages with certain other capital participants would often include seed-stage VC capital to pay company expansion expenditures such as sales and distribution, components and stock, recruiting, mentoring, and branding. The financial perceived severity is quite substantial at this level, and the financing might be realised in 7 to 10 years.

2. ***Early Stage:***

For associations that can begin errands yet are not yet at the period of business gathering and arrangements, starting stage financing maintains a push ahead in limits. Currently, start ups can spend large sums of money, whereas VC companies with a large number of emerging stage organisations in its holdings may see expenditures rapidly rise.

3. ***Start-Up:***

New products and early-stage branding are aided. Start-up help offers firms with funds for research and development and start-up branding. Such kind of financing is frequently granted to freshly created businesses or those that have been in existence for a small period but just haven't marketed their merchandise. In general, such organisations has aggressively accumulated crucial info, devised a practice area plan, plus conducted data analysis. At about this point, the company is earning its first profits, but it does not appear to be profitable. This really is frequently when the venture's initial "foreign" financial partners are acquired.

4. ***First Stage:***

Financing is provided to begin enterprise assembly and transactions. Start-ups companies has often become in existence with less than 3 years and just have a services or products in research or trial manufacturing. This object may be economically feasible during moments.

5. ***Later Stage:***

Before industrial production and sales, well before any IPO, investment is supplied. The good or service is now in operation and is purchasable. The firm has had considerable market growth, but it may not have been profitable.

i. ***Expansion Finance:***

Angel investors see little risk in businesses that require funding for development, such as a larger plant, a larger warehousing, additional industries, or a new industry, and also for the acquisition of an already established company. The average investment period lasts 1 to 3 years. It is the final year with funding before the scheduled withdrawal.

ii. ***Second Stage Financing:***

Funding is done when the firm has the item or the help yet it still can't seem to foster the advertising foundation to arrive at the buyer. During this period, extra money is required in light of the fact that the undertaking faces rivalry and the association's own benefits are ordinarily pitiful to assist it with entering the market.

The business visionary has contributed his own assets yet further imbuement of assets by the funding firm is important. The funding firms give bigger assets at this stage than at other beginning phase supporting, on the grounds that the time scale for the speculation is clearly more limited than in the beginning up case and the subsequent round supporting is part of the way as obligation instrument which will turn out revenue to the investment firm.



iii. ***Third-Stage or Mezzanine Financing:***

Projects are funded for a large growth of a firm whose market share is expanding and is productive or good yielding. Funds are utilised for expansion of the business, commercialization, cash flow, new designated geographical entry, or enhanced project management, among other things. At this point, venture capital has a medium risk and can be realised in one to three years. Several investment firms are using it as a substantial component of their business.

***iv. Bridge Finance:***

Bridge investing/funding might be given when an organization is hoping to go to the public right away or some other endorsed monetary help from the business banks, monetary foundations and such. At the point when the money remains undisbursed because of a few administrative reasons, funding firms approach to back the undertakings of the endeavours under such basic crossroads. This is the last round of supporting prior to opening up to the world, henceforth it implies okay and the venture might be acknowledged in one to three years. Frequently span supporting is organized so it can be reimbursed from the returns of a first sale of stock.

**VENTURE CAPITAL INVESTMENT PROCESS**

1. **Deal origination:**

Plans may be insinuated the VCs through their parent affiliations, trade accessories, industry affiliations, sidekicks, etc. The subsidizing business in India has become exceptionally proactive in its method for managing delivering the game plan stream by enabling individuals to consider their attractive procedures. To generate fresh and unique ideas, consulting companies such as Mckinsey and Arthur Anderson have organised strategic planning competitions across India, using the mainstream media along with direct connection with major universities and institutions. Professionals with relevant experience contribute the required skills to the ideas that have been evaluated.

2. **Screening:**

VCFs do starting screening of all ventures based on a few expansive measures. By instance, the selection approach may restrict activities to areas where the venture capitalist is constant in order to achieve sustainable development, item, or market presence. The magnitude of the concept, geographical area, and time frame of finance might also be employed as wide building information models.

3. **Monitoring and evaluation:**

When a proposal has passed the preliminary analysis, it is offered to an unambiguous assessment or a standard amount of processing stage. Most undertakings are new and the business visionaries could require working experience. Thusly a refined, formal appraisal is

neither possible nor appealing. The VCs in like manner rely upon a theoretical anyway broad, appraisal. VCFs survey the idea of the money manager before assessing the characteristics of the thing, market or development. Many funders want a mechanism to analyse the potential bet and projected ROI.

4. **Deal structuring:**

At the point when the undertaking has been surveyed as pragmatic, the monetary examiner and the endeavor association orchestrate the arrangements of the course of action, i.e., the aggregate, design and cost of the endeavor. This communication is named as game plan arranging. The course of action also joins the guarded arrangements and secure out blueprints. Arrangements incorporate the financial investigator's authority to manage the investment organisation and start changing its organisation, if necessary, buy back schematics, ownership, discovering starting responsibilities (IPOs, and so on, procure out strategies decide the finance manager's worth offer and the objectives to be achieved. Overall, financial supporters organise paths of steps to prevent the safeguarding of respective interests. They want a set of actions to follow in order to comply:

- A return that is appropriate and adequate..
- Gain control of the company by joining the board of directors.
- Restricting appraisals.
- Ensuring adventure liquidity.

The choice to override the board assuming there ought to emerge an event of consistent. Poor authoritative execution. The investee associations would like the game plan to be coordinated with the goal that their benefits are gotten. They should receive a respectable profit, minimize expenses, have enough money to operate their firm, and continue in a good position.



5. **Post investment activities and exit:**

At the point when the course of action has been coordinated and understanding finished up, the financial backer all around acknowledges the occupation of an accessory and partner. He moreover takes part in framing of the course of the undertaking. This may be done through a regular depiction of the directorate, or easygoing effect in chipping away at the idea of promoting, finance and other regulatory limits. The level of the monetary theorists incorporation depends upon his procedure. It may not, in any case, be appealing for a

monetary theorist to take part in the ordinary movement of the undertaking. If a financial or management crisis emerges, the monetary examiner may interfere and sometimes even call another administrative gathering.

**TAKE OF THE JUDICIARY**

With evolving legal options, Indian judiciary are likely to place more faith in financial sponsors, enabling a good theory atmosphere. In another judgement, the High Court of Delhi upheld an entire arbitration differentiation for a modern funding backer but also against the sponsors of an Indian organization for concealing details concerning methods made towards it by the US Food & Drug Administration when offering their pieces. The judge's decision was notified of the arbitral decision in favour of Docomo in another case, NTT Docomo v. TATA Sons Limited. The judge's decision clearly demonstrated the relevance of building out a favourable environment for new hypotheses by predicting that Indian groups should take a feeling of control with their legitimately limiting obligations and preventing it from invoking the Foreign Currency Laws as a defence.

**RBI AND VCF CRITERIA**

A new financial beneficiary wanting to advance with speculative projects in India might register with SEBI, required to meet the competence norms and different conditions stated in the SEBI International Venture Capital Investment Guidelines. The SEBI International Venture Capital Investor Guidelines underpin the notion rules, which might effect social supportive plans of future subsidising savings.

a) The new monetary sponsor should declare its theory system and growth stage to SEBI, and it shall meet the venture criteria before the conclusion of its service life.

b) An minimum 66.67% of led to increased demand should be allocated to unregistered valuation offerings or worth-related securities.

c) An maximum of 33.33 % of led to increased demand could well be provided via way of:

· Involvement in the IPO of a subsidized by the government venture, the proposals of which are suggested to also be documented.

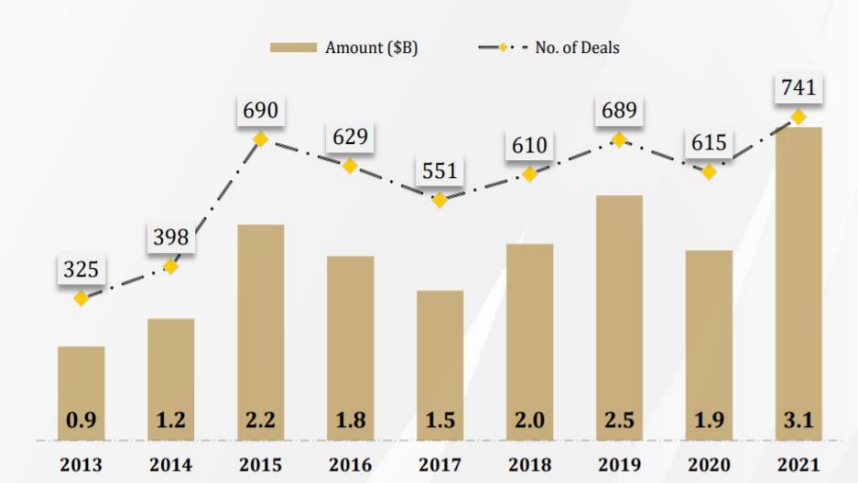
· Commitment or commitment instrument of a subsidizing undertaking in which the new speculation monetary supporter has recently made an endeavour, through esteem.

· Particular distribution on major valuable portions of a documented relationship, according to a yet another lock on timetable.

· The value offerings or value-related equipment of a financially disadvantaged or weaker present-day association (as sorted out in the SEBI FVCI Regulations) whose offers are recorded.

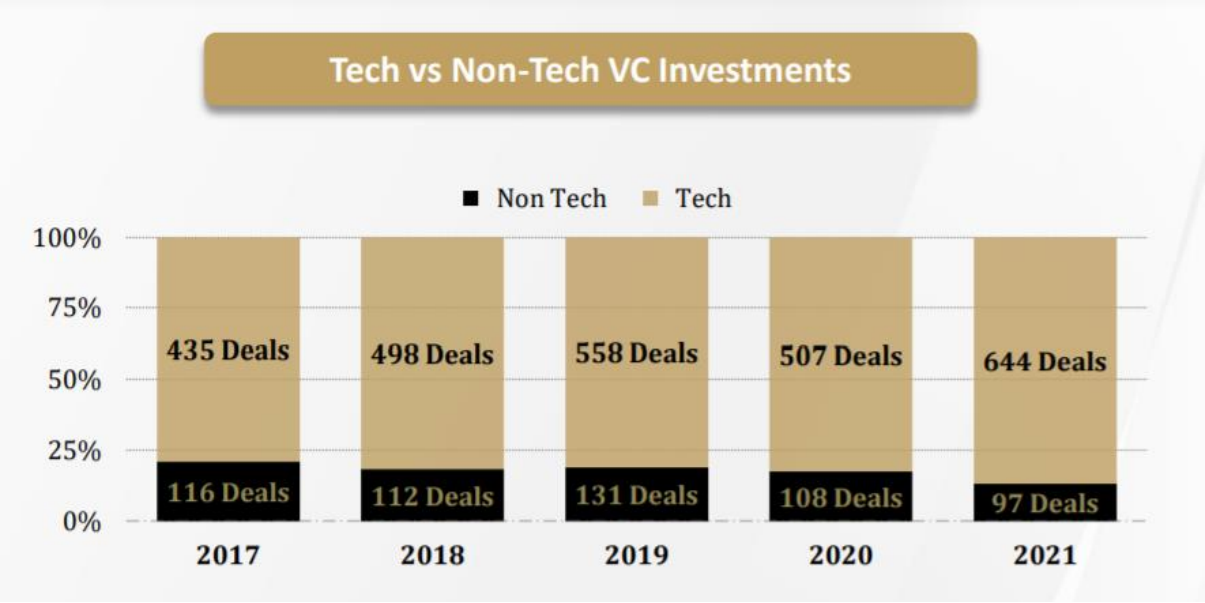
**VENTURE CAPITAL TRENDS IN INDIA**

Figure 1: VC Investment in India During 2021



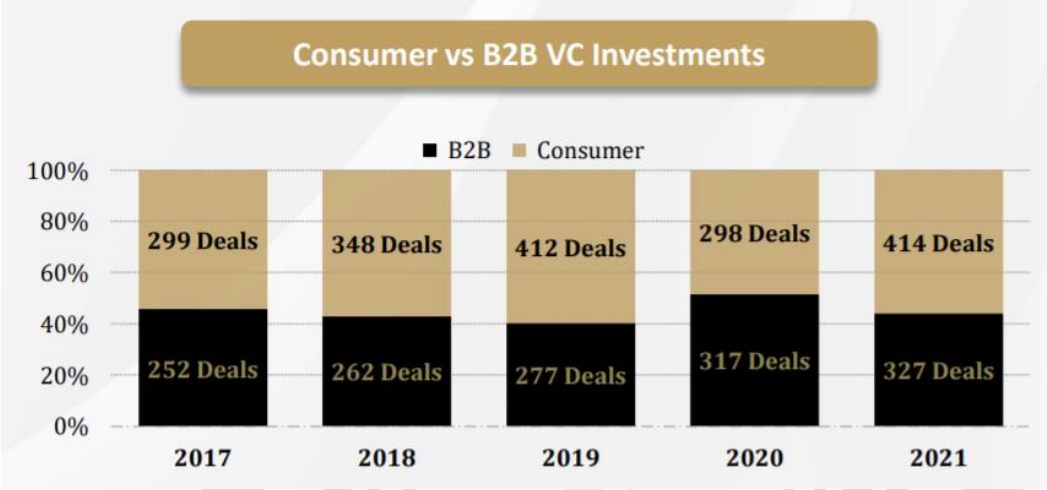

(Source: India Venture Capital Report 2021)

Figure 2: Tech vs Non-Tech Investments in 2021



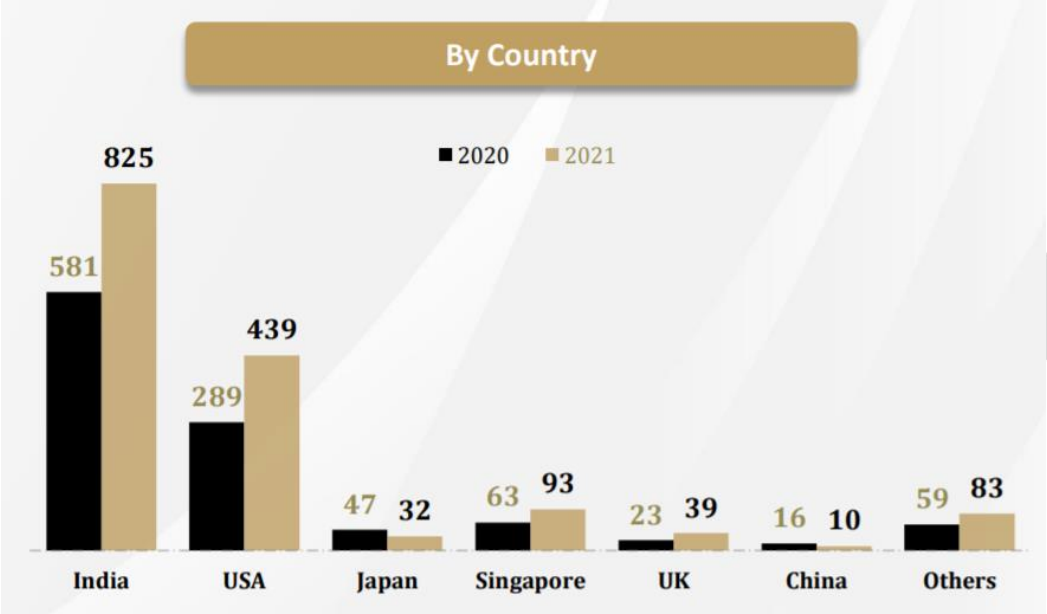

(Source: India Venture Capital Report 2021)

Figure 3: Consumer vs B2B Investments




(Source: India Venture Capital Report 2021)

Figure 4: Total Number of Investors (Country-wise) Who Invested in Indian Start-ups in 2021




(Source: India Venture Capital Report 2021)



**CHALLENGES IN VENTURE CAPITAL FINANCING**

The PEVC business is at a basic point today and confronting huge difficulties on numerous fronts. While extraordinary ventures have occurred throughout the course of recent years, beating these difficulties will be essential to the manageability of this industry. A portion of the common difficulties are:

1. **Exits:**

   Understanding the worth of speculations has been hampered by overdependence on IPOs for exits, exceptionally short IPO windows, and immature M&A leave instruments which need dynamic collaboration of business visionaries and company advertisers.

2. **Valuation:**

   In other similar business sectors, for example, China, there is an exchange in valuations between private business sectors and public business sectors. In India private valuations are on par or higher than their public companions. The essential explanation is the scarcity of good quality privately owned businesses of investible size. A greater part of the 6,000 or so recorded organizations in India have the qualities of privately owned businesses, are capital starved and accessible at lower valuations than their private companions. Sadly, they can't be tapped by PEVC reserves in view of administrative limitations.

3. **Scalability:**

   Indian organizations are finding it difficult to scale past a specific basic size by virtue of foundation bottlenecks, administrative postponements and developing formality.

4. **Illiquidity:**

   SMEs recorded on the public business sectors are profoundly illiquid - organizations with market cap under 1,000 crores ($225 million) represent 11% of the absolute normal day to day exchanged esteem public business sectors, while organizations with market cap under 500 crores ($113 million) represent 4%. PEVC financial backers who own critical stakes for example over 10%) in portfolio organizations experience difficulty leaving these organizations by virtue of illiquidity in their scrips. Albeit the possibility of a different securities exchange for SMEs has been being talked about for quite a while, no huge headway has been made.



5. **Returns:**

   For different reasons, Indian PEVC has not had the option to create returns or leave products comparable to contending markets, such as China. In the event that this proceeds, the assignment of new capital by financial backers (or restricted accomplices, LPs) to India will retreat.

**SUGGESTIONS**

- Public and private ltd. Investor organizations ought to zero in on the new innovation.
- Government ought to give financial motivating forces to the business person as well as investor in type of tax breaks.
- Special endeavours, adventure fairs, adventure clubs and adventure organizations ought to be shaped for the development.
- To set up the administrator able and prepared, they ought to be giving preparation with utilizing new innovation.
- College's ought to be connected with colleges so new helpful thoughts can be changed into reasonable shape.
- Business person ought to be persuaded so they could become for the daring individual and Indian economy could prosper.

**CONCLUSION**

New businesses organizations assume key part in country's flourishing and monetary prosperity. Funding is exceptionally significant for any startup to develop. It guarantees the appropriate accessibility of value for the new businesses. Other than being a central participant in new businesses development and extension there are additionally a few sick impacts funding venture which now and again can be unfavorable to the strength of new companies. Investor offers a colossal help to the youthful imaginative high possible organizations as value speculation and the board support. Their drawn out objective is to make the startup ready to give great turnover so that toward the end they could pull out grasping benefits. Having this viewpoint investors thusly look for certain stakes in the new business proportionate to their venture. This therefore may some of the time drives new businesses to have almost no say in their own organization.



One thing is prominently realized that nothing can hundred percent great or insidiousness. Same applies to investment too. In spite of the fact that, there are a few blemishes in funding speculation, it is enthusiastically prescribed to have funding ventures to guarantee financial strength of the country. Furthermore, in this manner to appeal more VC ventures areas are facilitating administrative consistence. India is no special case for this Start up India has sent off in 2015 from that point forward it is noticed that till February 2018, 6,981 new businesses have been enrolled by the DIPP and consequently drawing in huge sum investment store.

# BEYOND WORDS AND DESIGNS: THE EMERGENCE OF NON-CONVENTIONAL TRADEMARKS

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## INTRODUCTION

Imagine you have a small home bakery, called "Sugar Rush Bakery" that sells a variety of baked goods, including cookies called "Sugar Rush Cookies."You have spent years building the reputation of Sugar Rush Cookies, and the cookies have become well-known and highly sought-after in your city. One day, a national bakery chain called "Sweet Treats Bakery" begins selling its own line of cookies called "Sugar Rush Cookies." The cookies from Sweet Treats Bakery are similar in appearance and flavour to those from Sugar Rush Bakery, and are being sold in the same stores as your Sugar Rush Cookies are sold. You, as an owner of Sugar Rush Bakery are concerned that consumers may become confused and think that the Sweet Treats Bakery cookies are actually Sugar Rush Cookies. This could lead to a loss of sales and damage to the reputation and value of Sugar Rush Cookies. A brand that you have built over the years is now vulnerable to attempts of infringement by a bigger chain. What remedy is available to you, as the original owner of Sugar Rush Cookies?

This is where 'trademark' comes in. According to WIPO (World Intellectual Property Organization), "*trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises.*"[1]Trademarks are protected by intellectual property laws and can include elements such as taglines, phrases, logos, symbols, and more. Trademarks serve several important functions, including advertising and promoting a product, helping consumers identify and distinguish a product from others, and ensuring the quality of a product. In today's competitive market, it is essential for businesses to have strong intellectual property protections, including trademarks. As a result, the scope of trademark protection has expanded to include unconventional elements and innovative approaches to safeguard a company's products and brand.



[1]Trademarks, World Intellectual Property Organisation, *available at*: https://www.wipo.int/trademarks/en/ (last visited on December 29, 2022).

The essence of trademark protection lies in the distinct elements that are used to identify a particular product. Trademark protection is centered around the unique elements that are used to identify a particular product. These elements can include sensory characteristics such as smells, tastes, textures, shapes, colours, and sounds, which are known as 'non-conventional trademarks'. Non-conventional trademarks are rare and can be challenging to register due to a number of issues that exist in the international and Indian scenario. Some well-known examples of non-conventional trademarks include the well-known "Barbie Pink" colour trademarked by Mattel, or the distinctive smell of "Play-Doh" which has been trademarked by the toy manufacturer Hasbro. It is important for businesses and creators to be aware of the challenges and issues that may arise in the protection and enforcement of non-conventional trademarks, as well as the legal definitions and requirements for these types of marks. To ensure that non-conventional trademarks receive the same level of protection and respect as traditional trademarks, it may be necessary to consider the remedies and solutions that can be implemented to overcome these challenges and issues. This includes understanding the strategies and approaches that can be used to protect and enforce rights in non-conventional trademarks.

**NON-CONVENTIONAL TRADEMARKS: MEANING AND SIGNIFICANCE**

According to The TRIPS agreement, a trademark is defined in the following manner:

"*Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible*."[2] Upon studying the definition carefully, we see that the TRIPS Agreement stresses upon the visual aspect of the trademark. However, non-conventional trademarks, although some of them may be non-visual, do fall under the scope of this definition as they are capable of distinguishing a product from another. Careful perusal of the definition of trademarks in TRIPS tells us that it is not mandatory for a trademark to be



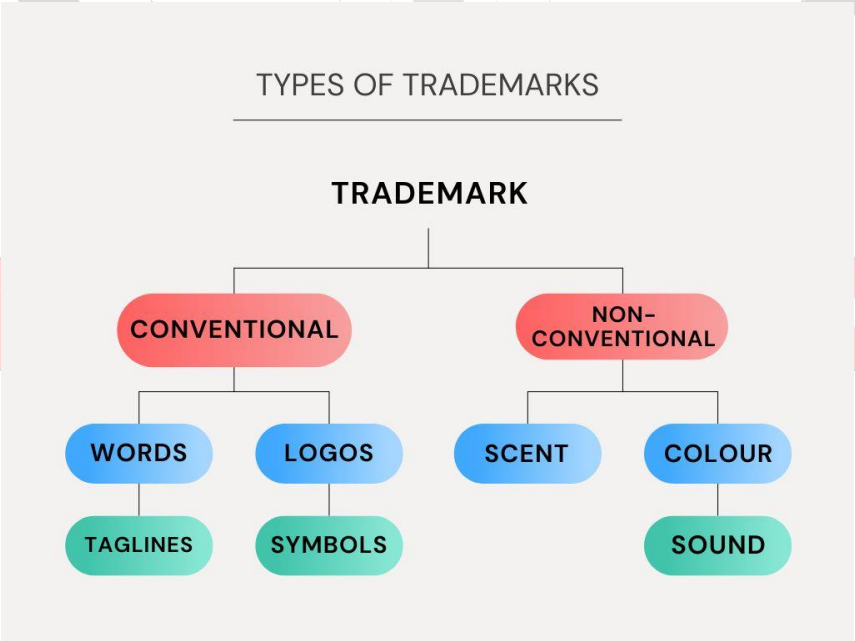
[2]Trade Related Aspects of Intellectual Property (TRIPS), *available at*: https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art15_jur.pdf (last visited on December 29, 2022).

visually or graphically represented to be eligible for registration and protection. Therefore, there has been an emergence of granting non-conventional trademarks in various countries like The USA, UK, as well as in countries in Europe.

Non-conventional trademarks can be defined as the distinctive elements that are used to identify and distinguish a particular product or brand, where the distinctive elements are based on olfactory, auditory, visual or any other sensory attributes. The peculiarity of non-conventional trademarks is that they are 'out of the ordinary' – they do not fit into the outline of traditional trademarks which applies to words, phrases, logo, etc. With consumer demands mounting, new products and services are available in the market. In recent years, the increased competition in the market has made it more important than ever to protect the identity of a business in order to stand out and succeed. Traditional trademarks like words or symbols may get overused, and new avenues are explored by the creator to advertise their product. Thus, using non-conventional elements and getting them protected legally helps businesses as well as creators retain their unique brand identity.

**NON-CONVENTIONAL TRADEMARKS: TYPES**

Non-conventional trademarks are a subcategory of trademarks that differ from the more traditional, commonly recognized types of trademarks that are typically encountered.Non-conventional trademarks can be further classified into 2 categories, viz. Visual and Non-Visual.



***Visual trademarks:***

Simply put, these are the types of trademarks which can be represented graphically and perceived through the eyes. Visual trademarks are also further categorised based on the elements involved. Colour or colour combinations are the most popular non-conventional elements which are trademarked.

*1. Colour trademarks*: A colour trade mark is sought for protecting a certain colour or colour combination used to identify a certain brand. For example, the distinct 'eggshell blue' colour, which is exclusively trademarked by the famous jewellery brand "Tiffany and Co.". The brand Tiffany has become so closely associated with the distinctive shade of blue that it uses in its packaging and branding that people often think of that colour when they think of the brand. Other examples include the registered pink colour by the American insulation company Owens Corning, or even the trademarked Magenta colour used by the telecom giant T-Mobile.

*2. Multimedia mark*: A red-coloured 'N' appears on a black screen, with the famous 'tudum' sound and you instantly know it is Netflix – this is what a multimedia mark is. Multimedia marks are a very new category and comprise of a combination of visual and animated elements. They differ from logos in the sense that they are in motion, and not stationery. A multimedia trademark protects the typography and other design elements which may be used by the brand in its marketing and branding efforts, such as trailers, posters, and other promotional materials. Netflix was recently granted a multimedia mark protection for its unique animated logo, in Turkey.[3]

*3. Trade dress*: Trade dress refers to the overall appearance of the products, which may include any graphics, packaging, shape or other visual elements. Although it sounds very similar to design, there lies a thin line of separation between both. Design is more focused on aesthetic elements, and trade dress is the visual outline of a product. Although both require that elements should not be functional, ornamentation is emphasised upon more in design. On the other hand, trade dress is stressing upon the distinct visual appearance of the product as a

[3]Merve Macit, "Netflix animated ident logo becomes the first multimedia mark to be registered in Turkey", *World Trademark Review*, July 07, 2022, *available at*: https://www.worldtrademarkreview.com/article/netflix-animated-ident-logo-becomes-the-first-multimedia-mark-be-registered-in-turkey (last visited on December 29, 2022).

whole, which will communicate the source of the product to the consumer. Design protection has its own legal framework, while trade dress is protected under trademark law.

Some famous examples of trade dress include the signature scarlet-coloured base of heels made by Christian Louboutin or the shape of the Coca-Cola bottle.

***Non-visual trademarks:***

Apart from visual trademarks, an interesting variety of unique elements are eligible for trademark protection. Various attributes such as scent, texture, sounds, etc. which cater to different senses are capable of trademark protection if they are distinct in nature.

1. *Scent trademark*: Scent marks are a type of trademark protection granted to products having a distinctive smell. The registration of smell marks is one of the most difficult amongst all other trademarks and it is only on rare instances that such protection has been granted. To get protection for a scent, typically a sample has to be submitted along with a description of the scent. Proving the distinctiveness has turned out to be an insurmountable task for many brands. A perfume or a distinct fragrance can be capable of protection under scent marks. The most famous example of a scent mark is Play-Doh, which was granted a trademark for the smell of its clay.The scent was described by their parent company, Hasbro, as "*a combination of a sweet, slightly musky, vanilla-like fragrance, with slight overtones of cherry, and the natural smell of a salted, wheat-based dough*"[4]and they received exclusive protection for their scent in 2018 by the United States Patent and Trademark Office[5].

2. *Sound trademark*: When we listen to a specific 'jingle' or a 'tune', for example the Nokia tune, we immediately associate that tune with a brand. This is the essence of a sound trademark. A sound trademark caters to the auditory senses and can be registered by submitting a recording of the sound for examination. There have been many instances wherein brands have received the green-light for protection of their advertisement jingles or specific sounds. Some popular examples include the Nokia tune, the theme sound of Looney Tunes, the four notes of bellsringing by Britannia, etc. A very interesting fact to note here is



[4]"Hasbro Trademarks a Favorite Smell from Childhood: The PLAY-DOH Scent", May 18, 2018, *available at*: https://newsroom.hasbro.com/news-releases/news-release-details/hasbro-trademarks-favorite-smell-childhood-play-doh-scent (last visited on December 29, 2022).

[5]*Supra* note 4.

that the bike manufacturer Harley Davidson had tried to get a sound trademark for the roaring of the engine in 1994![6]

3. *Tactile Trademarks*: Another rare and intriguing category of non-visual unconventional trademarks is tactile trademark. These are also called 'touch trademarks' or 'texture trademarks' and is granted protection for a distinctive 'feel' or texture of a product. Awareness with respect to this type of trademark is comparatively less and there have been a select few companies who have been bestowed with such protection. A sample of the product has to be provided here as well, for examination of distinctiveness. The first ever trademark granted under this type was for a Whiskey company called Diageo. The company received protection for their 'crackle-glass texture' of their bottle[7].

Other categories of non-conventional trademarks include:

*Taste trademark*: A taste trademark is granted for products like food, beverages, or even medications, for a distinct taste.

*Shape trademark*: A distinct shape comes under the purview of shape trademark protection.

*Hologram trademark*: A 3D holographic image which is applied to the product for verification of the quality or origin of the product is eligible for protection under this type of trademark.

While some unique categories of trademarks, such as non-conventional trademarks, have gained recognition internationally, there is relatively little awareness of these types of trademarks within the domestic market. However, as more multinational companies and international brands establish a presence in India, the number of brands operating in the country is increasing. In this highly competitive environment, it is important for Indian companies to consider adopting innovative measures, such as the use of non-conventional trademarks, to help their own brands stand out and not get lost among the numerous other brands in the market.



[6]Sathurshan, "Did You Know Harley-Davidson Tried To Trademark Their Exhaust Sound?", iMotorbike, *available at*:https://imotorbike.my/news/en/2020/01/harley-davidson-sound-trademark/ (last visited on December 29, 2022).

[7]Non-Conventional Trademarks, *available at*: https://www.theipmatters.com/post/non-conventional-trademarks (last visited on December 29, 2022).

## NON-CONVENTIONAL TRADEMARKS: THE INDIAN SCENARIO

The primary legislation that governs the registration and protection in India, The Trade Marks Act, 1999[8]does not particularly emphasize upon recognition of non-conventional trademarks. The Act does not mention or address registration of non-conventional trademarks.

However, the definition of trade mark enshrined in section 2 (*zb*) of The Act makes it clear that any graphically representable trade mark, which is capable of distinguishing goods and services from others can be eligible for protection under The Act[9]. Due to no specific mention to non-conventional trademarks, it is uncommon for business to apply for such protection. However, non-conventional trademarks can be included in the scope of this definition if they can meet the requirements for trademark registration, i.e., if it can be depicted in a visual manner, and it helps the consumer differentiate the product from other products.

Although registration of non-conventional trademarks has not become main-stream in India yet, there have been occasions where such trademark protection has been granted to certain conglomerates. Following are certain real-life examples of non-conventional trademarks granted in India:

*Yahoo Tune*: The Yahoo 'yodel' is a very famous tune which is immediately recognised by consumers. Yahoo's three note sound was the first-ever sound trademark to be granted protection in India. A graphical representation of the notes of the tune was submitted by Yahoo! as a sample to the apex trademark protection granting body of the country, The Indian Trade Marks Registry. While Yahoo!'s sound was already granted protection from the US Patent office, the company sought to protect its unique tune in India in 2008. The well-known firm, Anand & Anand had legally represented the company during the whole registration process. When the exclusive rights to use the tune was conferred, it marked a watershed moment in the IPR segment of India.The acquisition of a sound trademark by Yahoo! demonstrated the value of non-conventional trademarks as a tool for protecting and promoting a brand in the highly competitive Indian market[10].



Other sound marks in India include ICICI Bank jingle, the theme song of the National Stock Exchange and the tune of Nokia.

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[8] The Trade Marks Act, 1999 (Act 47 of 1999).

[9] *Supra* note 8, s.2 (zb).

[10] P. Manoj, "Yahoo awarded India's first sound mark, Nokia in queue", *Livemint*, August 22, 2008, *available at*: https://www.livemint.com/Home-Page/5z2B1NQUy3YyPkpRDp789M/Yahoo-awarded-India8217s-first-sound-mark-Nokia-in-queue.html (last visited on December 29, 2022).

## LIMITATIONS IN THE LEGAL FRAMEWORK FOR NON-CONVENTIONAL TRADEMARKS IN INDIA

No non-traditional trademarks have been registered in India except for sound trademarks. The reasons why we see only a handful of non-conventional trademarks being registered domestically is due to certain ambiguities and issues afflicting the legal structure of laws relating to the same. Following are the issues which are becoming hurdles to recognition of 'sensory' trademarks in India:

*Lack of legislations*: The Trade Marks Act of 1999 has no provisions related to non-conventional trademark. Thus, in a way, there is no official recognition of non-conventional trademarks as far as Indian Intellectual Property law is concerned. Thus, there is a dire need for clear protocol to be established related to non-conventional trademarks

*'Graphically Representable' as an obstacle*: As mentioned in the article above, one of the restrictions to eligibility of registration of a trademark is that it must be graphically represented. While sound marks can be graphically represented by writing the notations of the tune, in other cases it is not possible to do so. This is a restraint for business who want to protect their distinguishing factors such as smells, textures or tastes.

*Lack of Awareness*: While non-conventional trademarks have started becoming the new normal in foreign countries, India is still taking baby steps with respect to non-conventional trademarks. It is thus important to make substantial efforts to 'spread the word' about non-conventional trademarks in India.

## CONCLUSION

There is a saying that goes 'Necessity is the mother of invention'. In terms of non-conventional trademarks as well this phrase is true. The world is teeming with various businesses, new brands and novel ideas. To protect these ideas and maintain the position in the market, one needs to have a unique identity to survive. And for this purpose, non-conventional trademarks have begun to gain importance. Albeit non-conventional trademarks, such as scent, sound, touch, and taste trademarks, presents certain challenges in terms of obtaining and enforcing protection, their usage is becoming more widespread as businesses and creators aim to safeguard and enhance their brand in a fiercely competitive global market. It is expected that the recognition and protection of non-conventional

trademarks will continue to increase in the future as more companies leverage this innovative method of brand promotion and protection.

# LEGAL IMPLICATIONS OF CBDC ISSUED BY RBI

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***Government Law College, Thrissur***

## ABSTRACT

Transaction of money drives the society. Changing forms of money has effects not only on financial state but also social-economic-political stability of nation. The implementation of regulated virtual currency (e.g. CBDC) is faster than the transition from fiat currency to unregulated virtual currency (e.g. cryptocurrency). This rapidity cajoles the process to be more vigilant. The concept of Central bank digital currency and its legal implications in India are analysed in this paper to understand the efficiency of this new form of currency and thus to bring insights on necessary changes.

## INTRODUCTION

Money is a part of human life since BC 3000[1]. But a currency which is now an synonym to money in common parlance has not much history. The world's first known minting mill is located at Henan in China which minted coins around BC 640. The first coins were minted in BC 770 and currencies were printed in BC 700. First official currency was printed by Lydia's king Alayttes in BC 600 named Lydian stater, before which bartering was the mode of transaction of values[2], like, giving three unit of wheat for half one unit of salt. During CE 1260 China moved to paper currency[3]. These changes reflected all over in Asia. But till 16th century Europeans continued use of coins as their sole form of money. Gradually bank notes were issued by banks and private institutions for deposits and borrowings, which were interchangeable to gold or silver coins. It was the beginning of modern currency[4]. The tangible money was used to be interchanged with intangible money in past centuries. But in 21st century new forms of money was introduced and are also intangible. Mobile payments which rendering money for goods or services through mobile phones or tablet devices (example google pay, apple pay...) and virtual currencies ( example Bitcoin) which have not



[1]Glyn Davies, "A History of Money," 2 University of Wales Press Cardiff (2016).
[2]A. Mitchell Innes, "Credit and State Theories of Money,"2Edward Elgar Publishing Limited, (2004).
[3]Hans Ulrich Vogel, "Marco Polo Was in China: New Evidence from Currencies, Salts and Revenues," BRILL, 24 (2012).
[4]Charlemagne and the Carolingian coinages,*available at*: https://www.britannica.com/topic/coin/Charlemagne-and-the-Carolingian-coinages (last visited on December 29, 2022).

physical coinage are new forms of money. Bitcoin was introduced in 2009. Virtual currencies are more users friendly. But most of them (unregulated virtual currencies) have no backing as currencies issued by central banks. So Bahamas has introduced regulated virtual currency namely, Central bank digital currency in 2020 and many other countries including India is stepping to develop own Central Bank Digital Currency (CBDC). India has launched pilot experiments on CBDC. The major difference between Bitcoin like virtual currency and CBDC is the legality. How much CBDC provides legal protection to consumers is imperative, as of now.

**RESEARCH OBJECTIVE**

- To understand the legal implications Central Bank Digital Currency recently launched by Reserve Bank of India
- To suggest effective measures to the way forward of Central Bank Digital Currency.

**CENTRAL BANK DIGITAL CURRENCY**

**Concept of Money and Legal Tender**

Money is not defined by statutes. The Supreme court of Canada defines money as "any medium, which, by practice, fulfils the function of money which everyone will accept in payment of a debt is money in the ordinary sense of the words, even though it may not be legal tender". Money is described in *Moss V. Hancock* as "that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodity, being accepted equally without reference to the character or credit of the person who offers it and without the intention of the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodity". Thus money has three major functions; medium of exchange store of value standard for payments Money may or may not be a legal tender. Commonly money is considered as legal tender, but during wars grains or any other movable or immovable commodities were also counted as money[5]. But in modern economy legal tender refers to "money that a creditor is not privileged to reject if it is tendered by a debtor to repay its debt,

[5]Nussbaum, *Money in the Law National and International: A Comparative Study in the Borderline of Law and Economics*, 45, *available at:* https://archive.org/details/money9000nussbaumenlawofmoneynationalandinternationalred/mode/1up (last visited on December 29, 2022).

whereby this obligation on the creditor can be created only by law"[6]. It is evident that tangible currency or coin is here referred as money.

## Concept of CBDC

The physical cash and central bank reserve/settlement account are the two form of money in a country. Central Bank Digital Currency or CBDC is a new variant of money[7]. CBDC refers to different concepts of Digital currency issue by Central Banks[8]. The design and concept of CBDCs are changing according to the developments in technology. Now different countries have their own CBDC the core concept of those are same but their understandings are different. According to the Bank of England, CBDC is money issued by the central bank in digital or electronic form (not in traditional banknotes and coins) stored on a computer or similar device[9]. The United States Federal Reserve defines CBDC as digital form of central bank money that is widely available to the public, bearing digital liability to central banks[10]. People's Bank of China (PBOC) defines its digital fiat currency or e-CNY as a digital version of fiat currency circulated by PBOC that is operated by authorized stakeholders[11]. E-CNY covers a value-based, quasi account based and account-based hybrid payment instrument with the status as legal tender and loosely-coupled account linkage[12]. CBDC is a liability of central bank, not that of commercial banks. It is medium of exchange and store of value. According to Reserve Bank of India CBDC is "the legal tender issued by a central bank in a digital form. It is the same as a sovereign currency and is exchangeable one-to-one at par (1:1) with the fiat currency"[13].



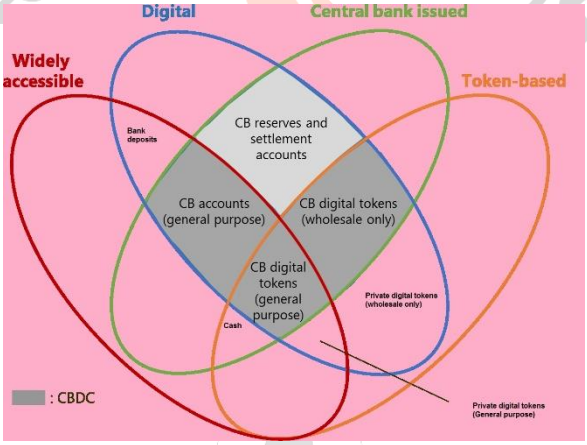
[6] *Ibid.*
[7] Concept Note on Central Bank Digital Currency *available at:* https://m.rbi.org.in//Scripts/PublicationReportDetails.aspx?UrlPage=&ID=1218#:~:text=The%20report%20by%20the%20CPMI,and%20a%20store%20of%20value (last visited on December 29, 2022).
[8] Bank for International Settlements Central Bank Digital Currencies *available at:* https://www.bis.org/cpmi/publ/d174.pdf.(last visited on December 29, 2022).
[9] UK central bank digital currency *available at:* https://www.bankofengland.co.uk/research/digital-currencies (last visited on December 29, 2022).
[10] Board of the Governors of the Federal Reserve System *available at:* https://www.federalreserve.gov/ (last visited on December 29, 2022).
[11] Fransiska Ari Indrawati"Central Bank Digital Currency Under The State Theory Of Money: A Preliminary Legal Analysis" 1 *Journal of Central Banking Law and Institutions* 375 (2022).
[12] *Ibid.*
[13] *Supra* note 7.

**Design of CBDC**

'Money Flower' is one of the design concept accepted by different scholars and also included in the concept not of Reserve Bank of India. It was introduced by Bech and Garratt in 2017[14]. While combining the taxonomies of virtual currency of central banks and cryptocurrency CBDC has four fundamental elements.

Fundamental elements of CBDC are;

1. Universal accessibility
2. Electronic format
3. Central bank of country is the issuer
4. Exchange mechanism on peer-to-peer




[15]

The core principles given by Kumhof and Noone clarify the design of CBDC[16]. The core principles are; the interest rate is adjustable, CBDC cannot be converted to reserve money and reserve money cannot be converted to CBDC, bank deposits may be converted to CBDC( not guaranteed), and CBDC issues against eligible securities.

CBDC are of two types based on purpose;

1. ***Wholesale CBDC:***

W-CBDCs are accessible to particular entities only. It is limited to financial institutions and markets.



[14] Bech and Garratt- Central Bank Cryptocurrencies *available at:* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041906 (last visited on December 29, 2022).

[15] *Supra* note 7.

[16] Michael Kumhof and Clare Noone - Central Bank Digital Currencies – Design Principles and Balance Sheet Implications,Bank of England – Staff Working Paper, no. 725,*available at:* https://www. Bankofengland.co.uk/-/media/boe/files/worki ng-paper/2018/central-bank-digitalcurrenciesdesignprinciples-and-balance-sheet implications (last visited on December 29, 2022).

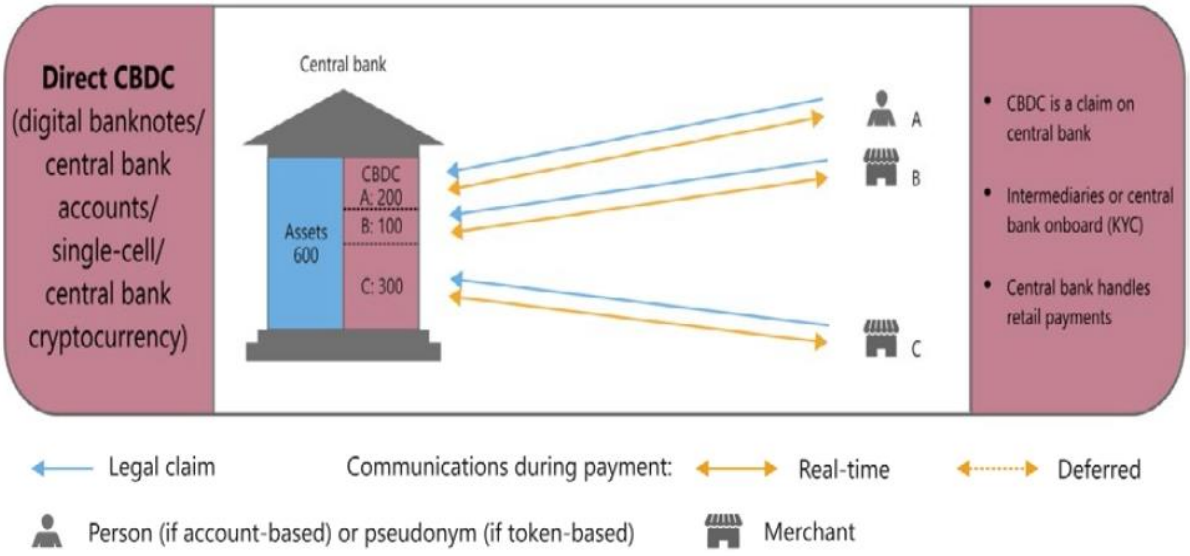
2. ***Retail CBDC:***

r-CBDCs are accessible to everyone. They are of two designs; digital currency tokens and deposit accounts with central bank.

Although different technologies are used by different countries, block chain technology is more accepted. But whole features of block chain technology are not applicable in CBDC. Issuance and management of CBDC across the world can be classified into three models, namely,

A. ***Single Tier Model or Direct CBDC model:***

Central bank is the issuer of and liable for money. Central bank operates retail ledger. The system is very resilient because all information are available to central bank and thus verification is readily possible. But private sector involvements are marginalized.[17]




B. ***Two Tier Model or Intermediate model:***

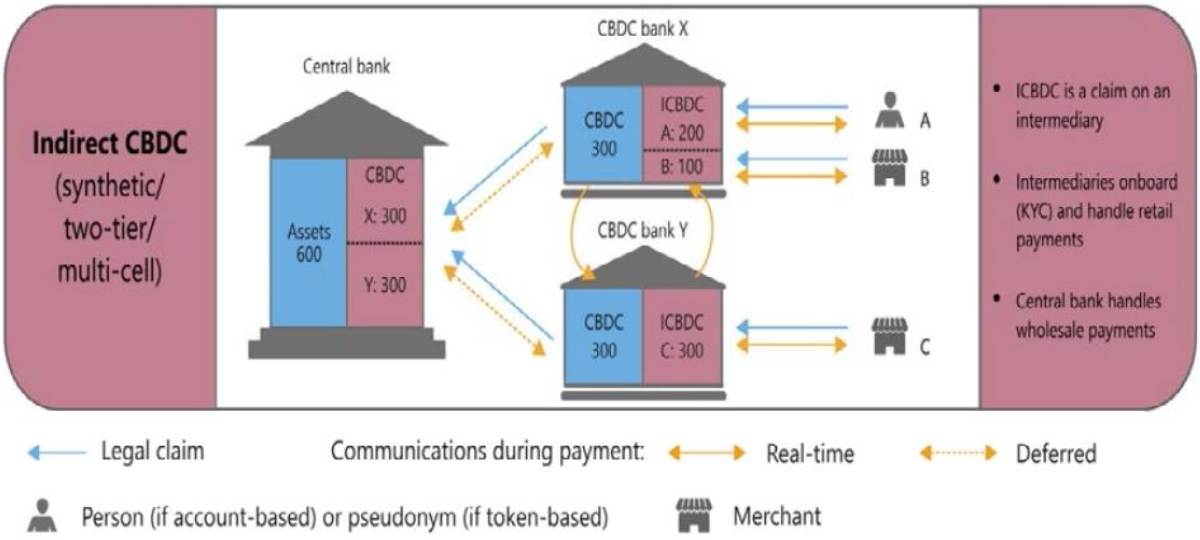
Central bank as well as other service providers plays significant roles in intermediate model.

a) <u>Indirect model:</u>



[17] *Supra* note 7.

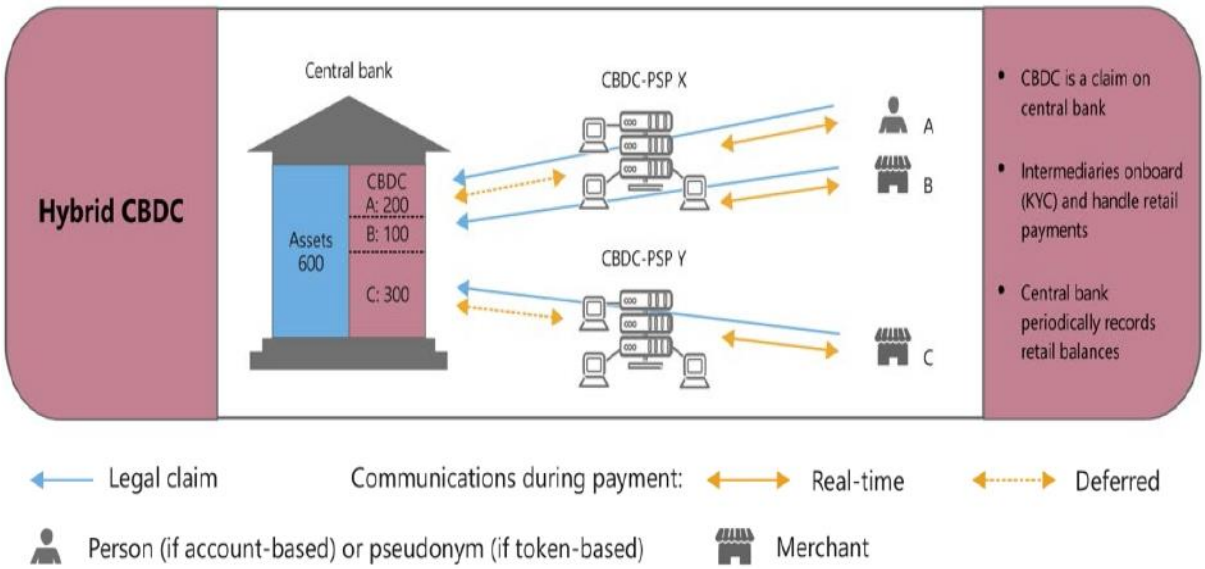
CBDC of consumers are kept with account or wallet of bank or any other service providers. Central bank issues w-CBDC and intermediaries distributes r-CBDC. Intermediaries holds




ledger.[18]

b) <u>Hybrid model:</u>

CBDC of consumers are kept with account or wallet of bank or any other service providers. Central bank issues w-CBDC and intermediaries distributes r-CBDC. Intermediaries as well as central bank hold ledger.[19]




[18]*Supra* note 7.
[19]*Supra* note 7.

**Current Status**

Majority of the central banks, about 86% across the world are researching on CBDC. Out of which 60% of Central banks are experimenting[20].The countries including Nigeria, Bahamas and Jamaica has launched CBDC with e-Naira, sand dollar or digital Bahamas dollar and Jam-Dex respectively[21].

Reserve Bank of India has launched Central Bank Digital Currency pilot project on December 1st, 2022.[22]Account based w-CBDC and token based r-CBDC is exploring by India and follows two-tier indirect model.

## LEGAL IMPLICATIONS OF CBDC

**Change in Central Bank Law**

As of now CBDC of India lacks legal certainty. this legal uncertainty will certainly lead to risks in finance and reputation of whole banking system. Though the acts which regulating money are enacted pre-digital era it is necessary to make changes in legal frame work according to the needs of digital world. The foremost legal implication required by RBI on CBDC is the power to issue digital form of fiat currency. This power depends on technological design of CBDC as well as operational design features. Account based CBDC and token based CBDC have different legal implications. Account based CBDC are not consider as new form of money. they resemble account form of money already exist. They are digital form of book money and are credit balance on account. But token based CBDC is considered as new form of money. The token incorporate the liability of central bank. Central bank of a country has power to issue money. Some central banks have narrow remit to issue money in the form of banknotes and coins only, whereas some central banks have wider power to issue money not only in banknotes and coins but also in the form of book money and bills. This general power is required to issue digital money or CBDC based on tokens. If the central bank can issue money only in bank notes and coins, they are not even empowered to issue token based CBDC. To issue account based CBDC some amendments on acts which regulate issuance of money are required. Generally accounts in Central bank can be held by



[20]*Supra* note11.

[21] Sand Dollar, *available at:* https://www.sanddollar.bs/
eNaira, *available at:* https://www.enaira.gov. Ng/, and Bank of Jamaica, "Jamaica's Central Bank Digital Currency (CBDC) – JAM DEX,*available at:* https://boj.org.jm/corefunctions/currency/cbdc /(last visited on December 29, 2022).

[22] Central Bank Digital Currency (CBDC) pilot launched by RBI in retail segment has components based on blockchain technology, *available at:* https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1882883#:~:text=The%20Minister%20stated%20in%20response,the%20paper%20currency%20and%20coins.(last visited on December 29, 2022).

some certain entities only. Account based CBDC is possible only with opening of accounts by public in Central bank.

In India, Reserve Bank of India is the authority of issue of money. It is regulated by Reserve Bank of India Act of 1934. Various provisions of the act such as section 24 about denomination, section 25 about form of banknote and section 26(1) about legal tender status are providing statutory powers to Reserve bank of India. The power to issue CBDC is provided by the Finance act of 2022 through which Reserve Bank of India act of 1934 was amended. This amendment added digital form of bank note also to the meaning of 'bank note'. So Section 22 of Reserve Bank of India act, 1934 makes the RBI the authority to issue digital bank note. And Section 22 A is inserted to make some provisions applicable for physical bank note but not applicable to digital bank note. As the amendments of Reserve bank of India act shall replicate in legislation, separate amendment to criminal law protection from counterfeits, legal tender status such monetary law are not necessary.

**Consumer Protection and Grievance Handling**

CBDC is a digital currency. This digital nature provides positive results such as more access to and availability of choices of services and products with much speed and convenience at low cost. At the same time digital nature of CBDC may also increase chances of digital fraud, data breaches, lack of privacy and digital security risk incidents. The consumers of CBDC are at higher risk. So, the consumer protection is very much alarming. Major risks of CBDC consumers are; privacy risk: CBDC can provide pricy only to an extent. Digital nature of CBDC makes anonymity imperative. Security and technology risks: Security risks of consumers are depends on the using technology audits implementation. CBDC has more complex technology and it may be beyond the knowledge of common consumers. As the technology can indirectly affect consumer risk it is necessary to neutralize with appropriate standards of audit and technology. Accountability Risk: In case of losses in CBDC transactions that are accountable to consumer is primary question as of now. Increase in rate of digital literacy of consumer can resist cyber attacks and maintain security. Deficiency in intermediary services and disruption in technical support are the main expecting problems.



**SUGGESTIONS**

1. As CBDC is a tool for cross-border payment, balanced standard for interoperability, data protection, localisation, dispute resolution and settlement finality are to be considered.

2. Subjectivity of CBDC to Foreign Exchange Management Act of 1999 might be considered. "Banks and any other service providers" will be participated in CBDC according to RBI concept notes. But 'service Providers' are not defined. It is imperative whether the entities which are already regulated by Reserve bank of India or new entities or both are service providers. As per the answer CBDC may be subjected to Banking Regulation Act of 1949 and Payment and Settlement Systems Act of 2007.
3. To technical services or any other services new players should be entertained only with clear legal framework. For example, in Nigeria merchants should provide e-Naira as one of the options of transitions in businesses in the country.
4. CBDC intermediaries should be regulated with adequate legal framework focuses on eligibility, licensing, cost, fee, norms, specifications of wallet, privacy and security, dispute resolution, governance of data and risk management policies.
5. As the intermediaries are accessed to information of consumers to great extent feasibilities of IT Act, 2000 & the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 should be considered.
6. Applicability of Prevention of Money Laundering Act of 2002 and Know-Your-Customer (KYC) framework are immense.
7. RBI should be empowered to take actions against intermediaries to ensure security of CBDC[23].

**CONCLUSION**

21st century shows unprecedented changes regarding forms of money. As the unregulated digital currencies like Bitcoins and Ethereum attracts the world because they are beyond the authority of state and utmost privacy is provided to customers. But CBDCs were introduced with the backing of central bank to provide legal protection in addition to cost-effective transaction. India's CBDC pilot launch is a result of research on successful CBDCs of many other countries. But there are gaps among the designs of different CBDC. So it is important to understand the legal implications of the same according to design of CBDC in our country. Consideration of above mentioned suggestions shall make the legal framework regarding CBDC of India more effective and efficient to the financial stability of country as well as consumer security.



[23]Examining the Policy and Legal Consideration of a Digital Rupee, *available at:* https://vidhilegalpolicy.in/blog/examining-the-policy-and-legal-consideration-of-a-digital-rupee/(last visited on December 29, 2022).

# MECHANISM OF ELECTRONIC FUND TRANSFERS: AN ANALYSIS OF LEGAL FRAMEWORK & CHALLENGES

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**ABSTRACT**

The purpose of this project is to conduct a thorough examination of electronic fund transfers in India and their significance in the country's banking industry. This paper will chart the emergence of electronic fund transfers, provide a brief historical context, and discuss the various kinds of electronic banking and electronic payment systems available in India. The focus of this project will be on India's legal framework for electronic funds transfers (EFTs) and the difficulties surrounding them. Finally, this paper will shed light on the future road map for EFTs' touchstone, as well as offer improvements that may be made, particularly in terms of the security and privacy of EFT systems.

**INTRODUCTION**

The Indian banking system has seen significant transformations as a result of technological adoption, particularly in the post-reform period.[1] By overcoming geographical obstacles of branch banking and alleviating time, resource, and volume constraints, technology has aided banking organisations in reaching clients' doorsteps. In the 1980s, the expansion and development of information technology, as well as advancements in computer networking, aided banks in automating transactions.[2] As a result of the advent of the internet and the following introduction of e-commerce, m-commerce, and Automated Teller Machines, the sector has undergone structural and functional changes (ATMs).



In addition to scaling boundaries, technology has aided banks in modifying strategic behaviour, increasing efficiency, and lowering transaction costs. In Indian banking, technology began as an enabler, but it has now developed into a business driver and is soon becoming an inseparable part of the process. Banks should embrace progressive

[1]Economic Reforms which took place in 1991, i.e. Liberalization, Privatization and Globalisation (LPG), also known as the New Economic Policy.

[2]R. K. Mittal and Sanjay Dhingra, "Technology in Banking Sector: Issues and Challenges" Vinimaya, Vol. 27,14 (2006-07).

computerization and correspondence advancements to give a very much planned, vigorous, and straightforward monetary foundation moored by proficient instalment and repayment frameworks.

**HISTORY AND BACKGROUND**

In the mid-1960s, the first automated teller machine (ATM) was installed, giving rise to the electronic fund transfer (EFT) system. The ATM had the option to perform account moves, get stores, and circulate cash utilizing a standard attractive stripe card and an individual's 4 digit code/PIN.[3] The RBI pushed for electronic banking in India, based on various recommendations from various committees established from time to time to enhance information technology infrastructure. In 1984, banks began implementing sophisticated technology in their internal systems to boost branch office collaboration and communication.[4]

The key proposals were using Magnetic Ink Character Recognition (MICR) technology in four major cities, establishing universal clearing house procedures, and introducing credit cards and ATMs. The major goal of the Rangarajan Committee Reports on Bank Computerization in 1994 was to provide recommendations on technical concerns related to payment systems. The Committee offered several suggestions, including the implementation of an EFT system, the implementation of MICR clearing in over 100 banks, and the promotion of a card culture. Legislation on EFT and other electronic payment mechanisms was suggested the same year. The RBI proposed a set of EFT Regulations under the RBI, 1934, and a change to the Bankers' Books Evidence Act, 1891.

Furthermore, the Narsimha Committee Report (1998) addressed issues such as financial system strengthening, technical advancement, and human resource development. The Committee emphasised the need of addressing a number of EFT authentication problems. Another committee, led by Dr. A. Vasudevan, advocated that the banking industry's technology be improved, including the legal framework for electronic banking, bank technology planning, technology outsourcing, and government computerization.



[3]Stan Sienkiewicz, "The Evolution of EFT Networks from ATMs to New On-Line Debit Payment Products" Discussion Paper, Federal Reserve Bank of Philla Payment Cards Center (April 2002).

[4] "India and the World: The Changing Paradigms in the Banking Sector due to Technological Advancements" Prajnan, Vol. 39, 130(2010-11).

The Integrated Payment and Settlement System's (IPSS) communication backbone is the Indian Financial Network (INFINET), which was developed in 1999. To examine various aspects of the technology, the RBI organised an Internet Banking 'Working Group.' The focal point of the gathering was on three significant parts of banking: innovation and security, lawful troubles, and administrative and administrative issues.[5]

The GOI (Government of India) adopted the IT Act, 2000 to offer legal recognition to electronic transactions, taking into account and acknowledging the relevance of the aforesaid challenges. The RBI Act was also amended, giving the Reserve Bank the authority to oversee electronic cash transfers between banks and financial institutions. Further legal difficulties and advancements relating to EFTs will be discussed in the third and fourth chapters, but before that, this paper has to be brightened up, therefore it is necessary to examine the various forms of electronic banking and payment systems in India.

**FORMS OF ELECTRONIC BANKING AND ELECTRONIC PAYMENT SYSTEMS IN INDIA**

- **Forms of Electronic Banking:-**

1. *Internet Banking:*

Customers must physically visit the bank branch to conduct activities such as cash deposits or withdrawals, fund transfers, or account statements in conventional banking, however with internet banking, similar transactions may be accomplished using computers without having to visit the bank office. Both the consumer and the bank benefit from this arrangement.

The consumer is free of the negative effects of travel, and the time saved may be put to better use in other ways. The most significant benefit of internet banking is that it allows customers to do basic financial activities from anywhere in the globe using a PC or laptop. Customers use the internet to visit the bank's website to check and view their account information as well as complete basic banking operations.

2. *Mobile Banking:*

[5]Working Group on Internet Banking, 2001 under the Chairmanship of S.R.Mittal.

You can bank from anyplace from anywhere, at any time, and regardless of the weather with mobile banking. The requirement of a computer or laptop with an internet connection is the most important disadvantage of internet banking. In the United States and Europe, this is certifiably not a significant hindrance, however in China and India, it is. Portable financial addresses this basic imperative of online banking by diminishing the client's need to just a wireless. Smartphone banking is a sort of banking and financial service that allows customers to access their accounts from their smartphones in real time. The use of a mobile phone for financial transactions is known as mobile banking. Mobile banking is a supplement to internet banking.

3. *Telephone Banking:*

Telephone banking entails dialling a phone number and listening to a recorded message before hitting the phone's corresponding buttons to access an account, transfer cash, seek statements, or request a cheque book.[6] It allows consumers to check their accounts at their leisure and do simple tasks without having to visit the bank. An automated voice response system is used in the telephone banking service. Its goal is to provide all consumers with a 24-hour service that is quick, convenient, and secure.

Accordingly, phone banking can be characterized as a protected, fast, and advantageous method for acquiring an assortment of administrations via telephone as opposed to visiting a branch, for example, account data, exchange execution, announcing a lost ATM card, requesting a really take a look at book, etc. Banking is feasible even while a person is on the go.

4. *Automated Teller Machine (ATM):*

Clients/Customers can set aside instalments, withdrawals, and other monetary exercises utilizing an ATM, which is a self-administration electronic machine. It's a positive step toward better customer service. At any time of day or night, customers can use the ATM. ATMs have given banks and other financial institutions a competitive advantage in conducting business. An ATM card, a plastic card with a magnetic strip that holds the client's

[6] Seema Kapoor and Deepak Dhingra, "Application of Information Technology in Banking" published in *E-banking in India- Challenges and Opportunities,* 106 (New Century Publications, New Delhi, 1st edition, 2007).

name, card number, bank information, validity period, and signature panel, is issued to the consumer.

Each card bearer is granted a private personal identification number (PIN). When a consumer wishes to use the card, he must insert it into the slot on the machine. The consumer enters his PIN once the card has been recognised. After confirming the clients' authentication, he must input the amount to be withdrawn. The output slot of the ATM spits out the amount of cash input for withdrawal by the customer after processing the transaction.

- **Forms of Electronic Payment System:-**

  Using an electronic payment system is a convenient way to make a purchase or pay for a service without having to carry cash or go through the process of writing out a check. The E-Banking service relies heavily on the electronic payment mechanism. Electronic payments claim to be the most advantageous method of completing cash-based transactions since they are the most convenient.

  The following are some of the payment mechanisms used in the electronic payment environment:

1. *Digital Cheque:*

   Digital cheques are electronic payment devices that leverage networking services to allow e-customers to issue digital cheques to e-merchant establishments to cover transactions conducted over the internet. Paper checks issued in a physical banking setting are analogous to digital cheques. The digital cheque system is run through the internet and has enough security built in.

2. *Electronic Cash:*

   Electronic cash, commonly referred to as digital money, is a type of payment method that is utilised in online banking and financial services. It's a secure and private online payment system that combines technological convenience with privacy and security. Electronic currency is a convenient way to pay for online purchases that combines the advantages of credit and debit cards and is only used by the account holder.

The owner or user must be identified and verified before electronic cash may be accepted. E-mint is the electronic cash issuing bank that is allowed to sign the electronic cash. E-cash security is ensured using security measures such as digital signature algorithms.

3. *Electronic Purse (E-purse):*

The "electronic purse" is a wallet-sized smart card with a programmable chip that saves e-money to be used in a virtual trading environment for making payments. In a virtual setting, the e-mint or a banker electronically loads money into an e-purse. It is utilised to complete any e-transaction payment. The user's authenticity is validated using a card vending machine located in the merchant's e-mall. It is a handy way of payment that allows you to pay your expenses for each transaction. When the value of an e-purse is exhausted, it is charged.

4. *Electronic Cards:*

The term 'electronic card' refers to an electronic card with a PIN that is used for online commerce transactions. The customer who e-shops, the e-merchant, the merchant's E-Banking institution, and the card issuing bank are the four entities that make up the electronic credit system. The merchant server, merchant bank, and card issuing bank are all involved in credit card transactions.

**LEGAL FRAMEWORK**

1. **Information Technology Act, 2000:**

The IT Act of 2000 is India's foremost regulation overseeing cybercrime and electronic business. This rule straightforwardly affects the activity of web based banking in India, and consequently it very well might be expressed that web banking can't be directed except if it is as per the IT Act 2000.



The following considerations highlight the importance of the IT Act of 2000 in the context of online banking:

- *Scrutinization of Documents:*

Any financial transaction needs the evaluation and storage of several papers, which are now saved and evaluated in an electronic format with online banking. The IT Act is the only piece of legislation that recognises these electronic documents.[7]

[7] Chapter III of The IT Act, 2000, No.21, Act of Parliament, 2000 (India).

- *Electronic Transaction:*

  The clause of the IT Act recognises every electronic transaction. Section 10-Aof the Act provides for the legitimacy and enforceability of an online transaction; subsequently, without the arrangements of the IT Act, no online transaction might be tried in a court.

- *Authentication:*

  The verification of this electronic information with the end goal of electronic banking ought to follow the provisions of this act.

- *Digital Signature:*

  In the event that the papers are marked electronically or carefully, they are controlled simply by the prerequisites of this demonstration. Subsequently, this act would address the issue of marking a record for Internet Banking.[8]

- *Privacy:*

  Internet banking would not have lasted if privacy and security had not been included.[9]

- *Data theft:*

  IT Act in Section 66 condemns an assortment and variety activities connecting with information stealing or hacking. A couple of instances of information theft incorporate hacking and inserting virus in to online system framework.

  The motivation behind the IT Act is to empower online business and e-administration, which are basic for the activity of online banking in India.

Following are some of the key provisions of the IT Act: -

1. Section 3(2): This section acknowledges just one kind of technology for authenticating electronic records (crypto function and hash function). In some countries, this strategy has been kept technology-neutral.
2. Section 4: This section gives legitimate acknowledgment to every electronic agreement and arrangements.
3. Section 72: It establishes a punishment in the event of a breach of privacy.

[8] Electronic Document.
[9] Penalized under Section 72 of The IT Act, 2000, No.21, Act of Parliament, 2000 (India).

4. Section 79: It safeguards communication network operators and shields them from liability in the case of unlawful behaviour on their connection.

## 2. Indian Penal Code, 1860:

The Indian Penal Code punishes a number of Internet banking-related offences. The IPC has several sections that safeguard Internet Banking-related frauds, thefts, and other crimes. Unsurprisingly, the Indian Penal Code has a number of sections that overlap with the IT Act of 2000. The following are a few of the provisions:

1. *Data Theft:*

Data theft, whether on web or not (online or offline), is included in the definition of theft under Section 378 of the IPC. Hacking, spreading malware, damaging information servers, and denying access to someone who has been authorised access are all methods for stealing data related with online banking. As a result, data security becomes critical. And the IPC prohibits such conduct in order to protect the interests of online banking customers. In India, data theft is also prohibited under Section 424 of the Indian Penal Code, which punishes anybody who aids or hides the data.

2. *Acquisition of a fraudulent transaction:*

In the event that an individual acquires the returns of taken merchandise through a web based financial exchange, he will be arraigned under Section 411 of the IPC and face a maximum sentence of 90 days in prison, a fine, or both. This IPC arrangement is equivalent to Section 66-B of the IT Act, which makes it illicit to get taken PC assets or correspondence hardware[10].

3. *Personation Fraud:*

Personation fraud is punishable under Section 411 of the IPC. The same is chargeable under Section 66-C of the IT Act[11]. Personation fraud refers to any individual who commits the offence of cheating using a computer.

4. *Mischief:*

[10] Information Technology Act, 2000: S.66-B.
[11] Information Technology Act,2000: S.66-C.

That anybody who injects/brings a virus into a system with malicious intent, damages the system, or restricts access to the person authorised to use the system is guilty of offence, which is punished by up to three months in jail, a penalty, or both u/s 425 IPC.

5. *Forgery:*

Forgery in Online transfers is possible by providing fraudulent electronic papers or other records.

Other illegal behaviours that are not punished under the IPC but are punishable under the IT Act are listed below. A few examples are:

The IPC doesn't punish an individual who charges the administrations/services he gives to the record of someone else by obstructing or controlling any system or network. Area 43(h) of the IT Act makes such a Punishable

- Attempting to tamper with a computer source document charged u/s 65 of the IT Act.[12]
- Banking puts a premium on protection while marking in, contributing passwords, and executing. Section 66E of the IT, Act[13] punishes Infringement of safety or security while managing on the online transfers.

3. **Additional Legislations:**

U/s 40A (3) of **Income Tax Act, 1961**: This section is accessible to the record client assuming the cash are sent through online transfers. This segment attempts to battle tax avoidance by oppressing any exchanges costing more than 20,000 to bank investigation.[14]

U/s 6 of **Negotiable Instrument Act, 1881**: The thoughts of Truncated Cheque and e-cheque were added. These checks are electronic negotiable instruments utilized in internet banking. These gadgets are expected to satisfy least security principles while utilizing advanced marks (which might be connected with biometric).[15]



U/s 11 of **Prevention of Money Laundering Act, 2002**: Each banking organisation and mediator must preserve a record of all transactions. This is true for all banks, regardless of

[12] Information Technology Act, 2000: S.17.
[13] Information Technology Act,2000: S.66E.
[14] Income Tax Act,1961: S.40A(3).
[15] Negotiable Instrument Act,1881: S.6.

whether they offer physical or online services. This regulation helps to prevent money laundering using the internet banking system.[16]

**Consumer Protection Act, 1986:** The objective of this Legislation is to safeguard the consumer rights. It is additionally relevant to banking administrations. This regulation shields issues, for example, protection, the mystery of buyer accounts, and the limitations of clients and banks with regards to internet banking.[17]

**Payment and Settlement Systems Act, 2007:**

The PSS Act of 2007 lays out the RBI as the administrative and administrative expert for instalment frameworks in India, as well as other related subjects. The RBI has given two guidelines under the PSS Act: The Board for Regulation and Supervision of Payment and Settlement Systems Regulation, 2008, and the Payment and Settlement Systems Regulations, 2008.

Assuming the framework supplier penetrates any areas of the Act or Regulations, neglects to consent to its requests/bearings, or abuses the agreements under which the authorization was given, the Reserve Bank has the position to pull out the authorisation.[18]

In light of a legitimate concern for the smooth activity of the instalment framework, the RBI has the position to coordinate an instalment framework or framework member to stop or halt from participating in any demonstration, exclusion, or course of lead, or to guide it to play out any demonstrations, as well as to give general headings.[19]

**JUDICIAL PRONOUNCEMENTS**

The aggrieved party guaranteed that his record was unlawfully charged inferable from the bank's ineptitude in **Umashankar Sivasubramaniam v. ICICI Bank**, a case heard by the Adjudicating Authority under the IT Act in Chennai. The occurrence, as indicated by ICICI, includes phishing, and the client is liable for documenting a FIR. The bank additionally contended that the case was not covered under the Information Technology Act of 2000. The Adjudicating Authority viewed ICICI bank blameworthy of abusing Section 85 of the IT Act,

[16] Prevention of Money Laundering Act, 2002: S11.
[17] Consumer Protection Act,1986.
[18]Payment and Settlement Systems Act, S. 8.
[19]Payment and Settlement Systems Act, Ss 17 and 18.

2000, as well as relevant provisions of Section 43A, and requested it to pay a fine of Rs. 12,85,000. The Adjudicating Authority viewed ICICI bank entirely liable of abusing Section 85 of the IT Act, 2000, as well as appropriate arrangements of Section 43A, and requested the bank to pay a fine of Rs. 12,85,000. In an allure documented with the Cyber Appellate Authority, ICICI bank was conceded a stay on the decision.

The Delhi High Court in **Avnish Bajaj v. State**[20], which tended to the criminal obligation of an organization specialist co-op, Baazee.com, for outsider information or data made accessible on their site. That's what the court held if Sections 67 and 85 of the IT Act, 2000 are perused together, it very well may be presumed that, under the guideline of considered criminal responsibility, a body of evidence can be made out against any overseer of an organization regardless of whether the organization isn't named as a denounced, gave the segment's fixings are met.

The aggrieved party in **Rishi Gupta v. ICICI Bank**[21], before the Consumer Disputes Redressal Forum in Bangalore, looked for a request guiding the contrary party bank to discount Rs. 230,000/, in addition to premium of 24% per annum, which the complainant had lost because of the contrary party's supposed carelessness, as well as a request guiding the bank to pay Rs. 100,000/ - as harms for carelessness of administration. The District gathering excused the protest, expressing that the complainant had misbehaved in revealing touchy information of his internet banking to an outsider in light of an email purportedly sent by the contrary party bank, without first checking with the contrary party bank.

In **M/s Pachisia Plastics v. ICICI Bank Ltd**.[22] it was brought before the Consumer Disputes Redressal Forum in Bangalore, claiming insufficiency of administration with respect to the ICICI Bank after a measure of Rs. 1,18,000 was unlawfully deducted from the complainant's record through net banking. The objection was dismissed by the Forum in light of the fact that the bank had neglected to offer satisfactory support.

In **K. Thagyarajan v. ICICI Bank**[23], the complainant guaranteed that his web-based ledger was attacked and a measure of Rs. 77,000/ - was unlawfully moved to one more record by

[20] 150(2008) DLT 769.
[21] CC No. 514 of 2010.
[22] CC No. 1059 of 2008.
[23] CC No. 2969 of 2009.

obscure individuals before the Consumer Disputes Redressal Forum in Bangalore. The grievance guaranteed that the contradicting party bank offered unfortunate support and mentioned a discount of the cash in addition to premium, as well as remuneration of Rs. 300,000/ - . The grumbling was excused since the aggrieved party had given the secret phrase and client id for web-based banking to outsiders, showing that there was no shortfall in help on the contradicting party bank.

**ISSUES AND CHALLENGES IN ELECTRONIC FUND TRANSFER**

1. *Security and Privacy Issues:*

   Security is the main hindrance to online/internet banking it is a major risk aspect for the system and one of the top concerns for regulators. Human or non-human, accidental or unintended security problems can be classified as internal or external.

   The problem of security entails the use of globally recognised technologies, encryptions/decryptions, and the verification of digital signatures, among other things. Internet banking is an obvious target for hackers because of the quick access to financial accounts. One of the most prevalent techniques of stealing and obtaining personal information from clients is 'phishing.'

   In today's world, privacy is essential for humanity and mankind. In addition, a lack of securitized transactions can lead to data loss, theft, tampering with customers' or banks' information, and other crimes, such as money laundering. There have been several occasions when security breaches have resulted in the disclosure of sensitive data, and so we may conclude that security concerns are the primary impediment to India's complete adoption of online banking.

2. *Legal Issues:*

   Because the internet is a public realm with no geographical boundaries, it poses questions about legal jurisdiction, legal standards for electronic trade, commerce and transactions, and so on.

3. *Supervisory and Operational Issues:*

   Operational risk is the danger of direct or indirect loss caused by inadequate or failed inner

cycles, peoples/people/individuals, and systems, as well as outside occurrences.[24] They are also known as Transactional Risks and are the most prevalent risk connected with internet banking. Operational hazards include inaccuracies in transaction processing, contract non-enforceability, illegal access, and penetration into the bank's system, among others.

This type of risk is usually caused by poor banking software design, other technical inefficiencies, human carelessness, employee fraud, and so on[25]. Although there is a fine border between security and operational challenges, they are frequently used interchangeably. To confirm the authenticity of an instrument, security processes such as PIN numbers, Customer Relationship Numbers, Passwords, OTPs, Account Numbers, and so on are used.

Different countries have established different criteria for determining the validity of a transaction. The Information Technology Act of 2000 in India [26]stipulates that any subscriber may use a Digital Signature to validate his electronic record. The problem with authentication is that the Act only acknowledges one type of technology for authenticating electronic documents (the asymmetric cryptosystem), which creates questions about whether the legislation recognises alternative financial authentication methods. Other nations' legislatures have chosen to keep the authentication method technology neutral.

**RECOMMENDATIONS AND SUGGESTIONS**

- Banks must protect the privacy and security of their customers' accounts, as well as adopt appropriate risk management steps to prevent hacking and technological malfunctions.
- Banks should ensure that sufficient security infrastructure is in place, such as using at least 128-bit SSL for browser-to-web-server interactions and encrypting sensitive data in transit inside the organisation, such as passwords.
- Banks should utilise the most recent software versions or upgrade old software to improve security and management and eliminate bugs and weaknesses.
- Banks should focus their efforts on offering greater technical assistance to their consumers.
- To avoid data loss, banks should ensure that a comprehensive data backup mechanism is in place.



[24] Basel Committee on Banking Supervision Consultative Document Operational Risk, Jan.31, 2001.
[25] S.N GUPTA, THE BANKING LAW, 112, (14th Edition, 2015).

[26] IT Act, 2000: Section 3(2).

## CONCLUSION

Each country's financial framework has a crucial capacity to play in its economy. The financial framework as it exists presently has gotten progressively and increasingly complex, with many administrations coming about because of specialized headways that have changed the entire financial framework from a manual-concentrated business to one that is exceptionally robotized and innovatively based. Presently, online banking permits you to carry on with work from anyplace and whenever. Online Banking has now turned into a virtual gift, as it has settled various troubles in the financial business and has demonstrated advantageous to both banks and their customers.

In terms of variety and creativity, the Indian financial sector has seen a significant transition throughout time. The present payment system must be turned into a future-proof infrastructure. This may be accomplished through standardisation, interoperability, consolidation, the construction of a common infrastructure, and sharing, all of which are linked to product and delivery channel improvements. More capacity building in terms of both systems and human resources in the sector and the RBI is required to move this process ahead. In addition to the requirement to avoid and restrict cybercrime and security concerns, special attention is necessary to maintain flawless business continuity strategies.

# PREVENTION OF CRUELTY TO ANIMALS ACT, 1960

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## INTRODUCTION

India has a wide variety of wildlife. It has a wide range of plant and animal species, inaddition to being abundant in domestic animals that are vital to the daily life of humans.With diversity comes great responsibility, and today, people are cruelly mistreating animals in order to further their own self-serving objectives. Animal cruelty cases are increasing every day both abroad and in India.There are laws in India such as Prevention of Cruelty to Animals Act 1960, The Wildlife Protection Act 1972, and Animal Birth Control Rules 2001 at the national level, cattle protection, and cow slaughter prohibition legislations at the State levels. But these laws are not stringent enough to curb the menace of animal cruelty. There is a need for strict amendments to the present laws and the formulation of new laws in the Indian legal system.[1] Every animal of our ecosystem has a unique role in the preservation of nature and for carrying on the life on earth. Every living thing is specifically placed on our food web or food chain where it can contribute in its own way for the integrityof the ecosystem. Animals are used by humans for a variety of purposes, including food, cosmetics, research, and medicines that are made from them. As a result, animal protection becomes even more crucial for humans to survive.

One more area that should be the focus of our concern is the relationship between animal cruelty and crime rates. Studies show that committers of serious crimes are more likely to have abused animals when they were children . In India cases of animal cruelty have seen a huge surge in their numbers. A report compiled by FAIO (Federation of Indian Animal Protection Organisations) and ACGS (All Creatures Great and Small)shows that , between 2010 to 2020 an exponential increase can be seen in the cases of animal cruelty. It is unfortunate that our animal protection laws have not been amended to make them more effective as a bulwark against animal cruelty. Animal cruelty cases sometimes go undiscovered as a result of weak laws. The major law for the protection of animals against human cruelty is The Prevention Of Cruelty To Animals Act 1960. The law was passed more



[1]M Nayana Das, "Analysis of Animal Protection Laws in India : An intent to check cruelty against animals", *available at*: https://heinonline.org.

than 60 years ago, and since then, numerous new challenges have emerged that can only be addressed by amending the aforementioned act.

**MEANING OF ANIMAL CRUELTY**

In the Prevention of Cruelty to Animals Act 1960, animal cruelty is defined as "the infliction of unnecessary pain or suffering on animals". Here the term animal means "any living creature other than a human being."[2]

Section 2 (a) of the PCA Act defines two types of animals - Captive Animals and Domestic Animals.Captive animals are defined as "any animal (not being a domestic animal) whether permanent or temporary captivity or confinement, on which is subjected to any appliance or contrivance with a view of hindering or preventing its escape from captivity or confinement or which is pinioned or appears to be maimed."[3]This definition gives rise to a new question – Who is considered as a domestic animal? The term domestic animal is defined in the act as "any domesticated or tamed or sufficiently domesticated to serve some useful purpose of the man, or which is wholly or partly domesticated or neither has been nor is being intended."
Further, there are two types of animal cruelty: Active cruelty, which happens when an animal is exploited in such a way to cause it immediate pain and suffering, and passive cruelty (harm inflicted by wilful neglect that leads to prolonged suffering). Examples of either one or both types of cruelty include the use of animals in research, sport and ritual, the slaying of animals for their fur, skins, and other body parts , hoarding etc.[4]

**PREVENTION OF CRUELTY TO ANIMALS ACT 1960**

This act has a total of 6 chapters and 44 sections along with 16 rules. The parliament enacted the act on 26 December1960.The Animal Welfare Board of India was also established to supervise and control the cruelty inflicted on the animals.It was established in 1962 in accordance with section 4 of the act. Smt. Rukmini Devi Arundale pioneered the setting up of this board. Some of the important sections of this act are -

Section 11 of the PCA Act defines Animal cruelty in more detail. According to this sectiona person commits animal cruelty when he"beats, kicks, over-rides, over-drives, over-loads, tortures or otherwise treats any animal soas to subject it to unnecessary pain or suffering",

[2]Prevention of Cruelty to Animals Act, 1960, s. 2(a).
[3]*Supra* Note 2.
[4]Animal Abuse, *available at*: https://wildlife-rescue.org/services/advocacy/animal-abuse.

"employs in any work or labour or for any purpose any animal which, by reason of its ageor any disease, infirmity, wound, sore or other cause, is unfit to be so employed , "wilfully and unreasonably administers any injurious drug or injurious substance to animal" or attempts to do so , "conveys or carries, whether in or upon any vehicle or not, any animal in such a manner orposition as to subject it to unnecessary pain or suffering" , "keeps or confines any animal in any cage" or " mutilates any animal or kills any animal (including stray dogs)". Owners of domestic animals can also be made liable for animal cruelty. For example – not providing sufficient food and water to the animals.[5]

Section 12 talks about the practise of Phooka or Dhoom Dev which are performed for improving the lactation of a milch animal. Injecting animals to improve their lactation capacity is prohibited. If a person "permits suchoperation being performed upon any such animal in his possession or under his control, he shall bepunishable with fine which may extend to one thousand rupees, or with imprisonment for a termwhich may extend to two years, or with both."[6]

Sections 17 to 20 talk about the experimentation on animals. These sections provide the conditions which need to be ensured while conducting experiments such as ensuring that animals are only experimented when there is no other alternative option available and when there is a need for experimentation, these animals are given proper medication to avoid unnecessary pain or suffering.

Section 21 talks about the training and exhibition of animals for the entertainment of the public.Animals are only allowed to be trained for such purposes when they are registered in accordance with the provisions mentioned in the PCA Act. The government through its official gazette may also specify animals which are prohibited from training and exhibition by giving notification through its official gazette.[7]



**LACUNAE IN THE PREVENTION OF CRUELTY TO ANIMALS ACT 1960**

- According to Section 11 (m) and Section 11 (n) of the PCA Act, a person commits animal cruelty if he "incites any animal to fight or bait any other animal" or "organises, keeps, uses

[5]Prevention of Cruelty to Animals Act, 1960, s.11.
[6]Prevention of Cruelty to Animals Act, 1960, s.12.
[7]Prevention of Cruelty to Animals Act, 1960, s.21.

or acts in the management of, any place for animal fighting or for the purpose of baiting any animal or permits or offers any place to be so used or receives money for the admission of any other person to any place kept or used for any such purposes".

Despite such provisions animal fighting takes place in the form of a cultural and religious practise in many parts of India. For example , the famous bull fighting also known as Jallikattu still takes place in the State of Tamil Nadu. Despite the Supreme Court's Ban in May 2014, the practise was revived in 2017 by the Tamil Nadu government.[8] Nothing is mentioned in section 11 about the cultural and religious practises which involve animals fighting and the conditions which must be satisfied while performing them.

- The Prevention of Cruelty to Animals Act of 1960 does not talk about the genetic manipulation of animals. Though the Environment (Protection) Act of 1986 talks about genetic manipulation, there is no stringent law that prevents the exploitation of animals which takes place during the process of genetic modification.
- Section 11 of the PCA Act 1960 mentions a variety of practises that will come under the ambit of animal cruelty such as "abandoning an animal to kicking it, mutilating it or killing it". However the problem is that, same punishment is provided for every act of animal cruelty and the intensity of crimes is not taken into consideration while providing the punishment.The idea of natural justice is blatantly violated because the severity of the crimes is not taken into consideration, putting a number of offences of differing severity on a par with one another. An amendment is required to establish the appropriate punishments and to classify the offences based on their seriousness.
- As compared to the severity of crimes committed, the punishment provided in this act is not proportionate. If a person is guilty of animal cruelty, he is punished "in the case of a first offence, with fine which shall not be less than ten rupees but which may extend to fifty rupees and in the case of a second or subsequent offence committed within three years of the previous offence, with fine which shall not be less than twenty five rupees but which may extend to one hundred rupees or with imprisonment for a term which may extend to three months, or with both." However, when seen in light of the current situation, the fine that must be paid is extremely low and manageable. This can make it possible for the perpetrators to avoid responsibility by making a little payment. There should be changes made to this area.

[8]Editorial, "Jallikattu begins today — the 'barbaric sport' that celebrates hard-working Tamil farmer" *The Print*, Aug 15, 2020.

- Majority of offences mentioned in this act are non-cognisable as well as bailable. This makes it easier for the offenders to undergo punishment. It also encourages police passivityas the police cannot take action without the approval of the magistrate.
- Section 11 also mentions some practises that do not fall under the ambit of animal cruelty such as "the dehorning of cattle, or the castration or branding or nose-roping of any animal, in the prescribed manner."However, because there are no appropriate parameters specified for these procedures, this dilutes the process of bringing justice to the animals. This enables the abusers to take advantage of these lacunae for their own gain.
- Captive animals and wild animals are protected under this act. However there is no mention about the exotic species of animals and the migratory birds that come to India during the migration period. This allows for the trade of these migratory birds and exotic species as no punishment is provided in the PCA Act.
- The PCA Act also allows the practise of Bali which results in the death of animals for religious purposes. According to section 28, "Nothing contained in this Act shall render it an offence to kill any animal in a manner required by the religion of any community." By allowing the practice of Bali, the act allows the unreasonable exploitation of animals that takes place in the name of religion.
- The definition of "animal cruelty" in the legislation is likewise ambiguous. This law was enacted in order to "avoid the infliction of unnecessary pain or suffering on animals." But this definition is vague as what is considered as "unnecessary pain" is highly subjective. This means that whether an act can be equated to animal cruelty is purely based on the discretion of the judges. Therefore the definition needs to be more precise as ambiguity will lead to confusion about the law.[9]

**CASE LAWS**

***Gauri Maulekhi V. Union of India***

In order to prevent smuggling of animals to countries like Nepal, where large-scale animal sacrifices are performed during the gadhimai festival, the Supreme Court issued an order establishing guidelines. It was claimed that buffaloes were bought at marketplaces, maintained there in filthy conditions, and transported in abhorrently horrific circumstances to Nepal for mass-murder. A stay was placed on their transit to Nepal. Additionally; a

[9]Parth Maniktala, "For the welfare of animals" *The Hindu* , Sept 18, 2020, *available at* : https://www.thehindu.com.

committee was formed to offer suggestions on how to stop these acts of cruelty against animals. The court also ordered the formulation of rules on livestock markets.[10]

***Animal Welfare Board V. A Nagaraja***

After wide protests from various organisations such as AWBI and FAIO, the Supreme Court banned the practise of Jallikattu or bull fighting in the state of Tamil Nadu.According to the Supreme Court, every species has an intrinsic right to live and should be safeguarded by law, with the exception of those situations where it is necessary to do so. Additionally, animals have honour and dignity that cannot be unilaterally taken away, and their rights and privacy must be respected and safeguarded against unlawful acts.[11]

Even after the court's ban in 2014, the Tamil Nadu government removed the ban on this practise in the year 2017.

**CONCLUSION**

Even though the Prevention of Cruelty to Animals Act suffers from significant flaws , it cannot be concluded that the act is totally ineffective to safeguard the animals. The Act mentions a variety of acts that are considered as a form of animal cruelty such as experiment on animals for cosmetics and improper treatment of pets by their owners. Considering the time it was made, the Act was quite advanced in its approach. However as the time has passed, more problems have come to our notice which can only be solved by amending the Act.However, despite having extensive and complex animal protection laws, India does not have an effective system to apply them. It is essential to realise that India's current legal system is not sufficiently strong and rational to bring a meaningful change. A few changes that can be made includes strengthening of Section 11 by raising punishment, a more clear and concise definition of animal cruelty and a robust monitoring system. Recently adraft for the amendment of PCA Act was introduced in November 2022, however it is yet to be passed in both the houses.



[10]Kunal Nema and Akshita Prasad , "Animal Cruelty In India: A Fatal Oversight"5 *Journal On ContemporaryIssues Of Law* 45.
[11]*Idem.*

# SPLASHES OF ADM JABALPUR IN VIJAY MADANLAL V. UOI AND ANALYSIS OF THE JUDGMENT IN THE LIGHT OF THE MODELS OF THE CRIMINAL PROCESS

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## INTRODUCTION

This article aims to trace the Constitutional rights of the accused in terms of personal liberty by showing a parallel between *ADM Jabalpur vs. Shivkant Shukla and Vijay Madanlal Choudhary & Ors. vs. Union of India & Ors*. It discusses the Criminal Law Jurisprudence in terms of both Crime Control Model and Due Process Model to trace the legal developments of the fundamental protection against self-incrimination as envisioned under the Indian Constitution with the help of landmark judgements such as M.P Sharma, Selvi, Kathi Kalu Oghad, R.C Cooper, Nandini Satpathy, K.S Puttaswamy. The article discusses the unbridled power of the Enforcement Directorate in leading the lamb to the slaughter.

## BACKGROUND

"O'Cracy, D.E.M., beloved husband of T. Ruth, loving father of L.I Bertie, brother of Faith, Hope, Justice expired on June 26."[1]This obituary notice was considered to be an act of defiance against the Emergency imposed on the nation. The Maintenance of Internal Security Act, 1971 was amended on June 29 1975, firstly, to bar courts from applying the Principle of Natural Justice in detention cases whereby an individual could be detained without disclosing to them the grounds of detention. Secondly, an ordinance of July 15 1975, allowed for the attachment of the property of anyone who had absconded. Fast forward to 2022, the Enforcement Directorate ("ED") under The Prevention of Money-Laundering Act, 2002 ("PMLA") do not supply the Enforcement Case Information Report ("ECIR") to the accused which is akin to the First Information Report violating the basic tenets of the criminal justice system and the rights enshrined under Article 14, 20 and 21 of the Constitution. The ECIR contains the grounds of arrest and details of the offence without which the accused cannot



[1]Obituary, *The Times of India*, June 28, 1975.

even defend him at the stage of bail. The revival of twin bail conditions under Sec 45[2] further prolong the agony. The ED exercises unbridled power of arrest search and seizure under the PMLA which was upheld by the Apex Court citing the seriousness of the offences committed under PMLA giving way to detentions without remedy.

After the Emergency was clamped, writ petitions were filed against the illegal detentions giving way to the famous ruling of *ADM Jabalpur V Shivkant Shukla*, famously known as the Habeas Corpus case. Justice Khanna seek clarification from Niren De "Would there be any remedy if a police officer because of personal enmity killed another man?" The answer of Mr De was unequivocal: "There would be no judicial remedy in such a case as long as emergency lasts", and he added, "It may shock your conscience, it shocks mine, but consistently with my submissions, no proceedings can be taken in a court of law on that score."[3] History repeats itself quickly, in this case, way quicker. The Apex Court in *Vijay Madanlal Choudhary* not only upheld the malefic state power but also grant the power of Wolf to ED and what happens when the wolf hunts? Well, the prey has preyed.

**DECODING ARTICLE 20(3): THE JOURNEY FROM CRIME CONTROL MODEL TO THE DUE PROCESS MODEL**

'Repression of criminal conduct' is the ultimate goal of the Crime Control Model and so primacy is given to the criminal process which suspects, determines guilt and secures appropriate deposition of persons convicted of a crime. The Due Process Model, on the other hand, place strong emphasis on human dignity and individual rights as being non-negotiable in the criminal process.[4]

In *Vijay Madanlal Choudhary & Ors. V. Union of India & Ors.*[5], the validity of Section 50 of the 2002 Act[6] was challenged as being violative of Article 20(3) and 21 of the Constitution. Sec 50 allows the authorised officer to summon any person and record his statement during the course of the investigation. Sec 50 also mandates that the person should disclose true and correct facts known to his personal knowledge in connection with the subject matter of

[2]The Prevention of Money Laundering Act, 2002 (Act 15 of 2003).
[3]H.R. Khanna, *neither roses nor thorns* 85 (EBC, Lucknow, 1987).
[4]Gautam Bhatia, *The Transformative Constitution* 303(Harper Collins, Noida, 2019).
[5]2022 LiveLaw (SC) 633.
[6]The Prevention of Money Laundering Act, 2002 (Act 15 of 2003).

investigation (vide sec 50(3) of the 2002 Act). The person is also obliged to sign the statement so given with the threat of being punished for the falsity or incorrectness thereof in terms of Section 63 of the 2002 Act. The director is also empowered to exercise the same powers as are vested in a civil court under the Code of Civil Procedure while trying a suit in respect of matters specified in sub-section (1). Vide Section 50(4) the proceeding under the 2002 Act is considered to be a judicial proceeding within the meaning of sec 193 and 228 of the Indian Penal Code, 1860.[7]

The Court while answering the above challenge observed that Article 20(3) would come into play only when the person so summoned is an 'accused' of an offence at the relevant time. At the stage of 'recording of a statement' for the purpose of inquiring into the relevant facts in connection with the property being proceeds of crime, according to the Court, not an investigation for prosecution as such; and in any case there would be no formal accusation against the person summoned.[8]

**DECODING "WITNESS" VIS-À-VIS ARTICLE 20(3) OF THE CONSTITUTION OF INDIA**

In *M.P Sharma v. Satish Chandra*[9] the court answered whether the phrase 'to be a witness against himself'also means self-incrimination through documentary evidence? Court defined "witness" as a person who furnished evidence (both oral and documentary), performing a testimonial act of some kind (beyond the courtroom, also includes police interrogations) within the meaning of Art 20(3)[10]. Vide Sec 50 of the 2002 Act the person summoned is required to produce the documents required which makes him a witness against himself and acts as self-incrimination. The Court in *M.P Sharma* also answeredwhether a search and seizure would amount to compelling a person to be a witness against himself? Adopting the Crime control model the court answered this in negative because in search and seizure the documents were recovered by the police and there was no testimonial act.



[7]The Prevention of Money Laundering Act, 2002 (Act 15 of 2003), s.50.
[8]*Vijay Madanlal Choudhary&Ors. v. Union of India &Ors. 2022 LiveLaw (SC) 633.*
[9]1954 SCR 1077.
[10]The Constitution of India.

The broad definition of 'witness' was later challenged in *State of Bombay v. Kathi Kalu Oghad*[11] where the 11 judge Bench held that to be a witness meant something narrower. It means to communicate knowledge of a relevant fact and cannot include merely the mechanical process of producing documents in court. To be 'witness' only included a conscious testimonial or communicative act. With the advancement in technology and in interrogation techniques the Apex court was called upon to re-examine the meaning of Article 20(3) of the Constitution in *Selvi v.State of Karnataka*[12]. The court applied the Due process model by reading Article 20(3) in the language of choice, a choice whether or not to convey personal information. Article 20(3) does not exist in isolation from Article 21 of the Indian Constitution and rights in Part III are interdependent on each other.[13] 'Right to privacy' is one aspect of personal liberty and there is a distinction between privacy in a physical sense and privacy of one's mental processes. The importance of personal autonomy must be recognised as the choice between remaining silent and speaking. The court in*Selvi* drew a distinction between physical and mental privacy. Article 20(3), therefore, is illuminated by the constellation of freedoms that surround it, all of which point to due process being at the heart of the guarantee against self-incrimination.[14]

The Court in *Vijay Madanlal* narrowly interpreted Sec 50 of the 2002 Act by limiting Article 20(3) of the constitution to a person summoned as 'accused'. To begin with, there is no way for the person summoned to know whether he is summoned in the capacity of an accused or a witness. In the scheme of the Code of Criminal Procedure a witness is summoned under section 160 or an accused/suspect is summoned under section 41A. In either of the cases, statements of both are recorded under section 161 and they both enjoy the protection under section 162. Moreover, to invoke protection under Article 20(3) of the Constitution it is not necessary to make a formal accusation in the form of FIR/chargesheet/complaint and that protection is available even to a suspect at the time of interrogation.[15] Vide section 50(3) of the 2002 Act the person summoned is bound to state the truth about the subject for which he is examined and to disclose true facts known to his personal knowledge which in a way amounts to 'compulsion' and violates both Article 20(3) and Article 21(mental privacy) of



[11]AIR 1961 SC.
[12](2010) 7 SCC 263.
[13]*R.C. Cooper v. Union of India* AIR 1970 SC 564.
[14]Gautam Bhatia, *The Transformative Constitution* 321 (Harper Collins, Noida, 2019).
[15]*Nandini Satpathy v. P.L Dani & Anr.* (1978) 2 SCC 424.

the constitution. The court believes that the statement recorded by the Authorities under section 50 of the 2002 Act will not end in prosecution. In *Selvi*, the word 'witness' was linked with testimony and testimony is nothing but imparting personal knowledge which the person summoned under the 2002 Act is bound to state (vide Sec 50(3) of the 2002 Act) and which exist within the mind of the individual giving way to the concept of mental privacy which was later affirmed by a nine-judge bench in Justice *K.S. Puttaswamy v. Union of India.*[16] The court in *Vijay Madanlal* re-adopted the crime control model (which was adopted in *M.P Sharma*) rather than the due process model (in *selvi*) in interpreting Sec 50 of the 2002 Act.

**CONCLUSION**

What happens when a person is arrested or detained? His troubles begin then.[17] By bypassing Article 20(3) of the Constitution the authorities exercise wide power over an individual whereas his Constitutional protection of personal liberty has been taken over by the courts by citing the detrimental impact of white-collar crime. The personal liberty and the Constitutional guarantee has forsaken by the Constitutional Court by citing the interest of the state. The Supreme Court accepted the review of the judgementlimiting it to just two points i.e. (i) regarding no legal requirement to provide ECIR copy to the accused and (ii) the reversal of the presumption of innocence by calling the object noble[18]. Till the Apex Court grants some relief, We, the people of India, are at the mercy of the arbitrary lawgiver.



[16]AIR 2017 SC 4161.
[17]Thakur Das Bhargava, Constituent Assembly Debates (September 1949).
[18]*Karti P Chidambaram vs. The Directorate of Enforcement RP(Crl) 219/2022 in TC(Crl) 4/2018.*

# THE WORLD TRADE ORGANISATIONS AND ANTI DUMPING IN DEVELOPING COUNTRIES: IMPACT ANALYSIS

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## ABSTRACT

Developing countries have been frequent users of the WTO-sanctioned antidumping trade policy instrument since the organization's founding in 1995. The pattern of antidumping application in developing economies' industries, on the other hand, is little understood. This paper relates statistics on production in 28 different 3-digit ISIC sectors to data on antidumping investigations, findings, and imports at the 6-digit Harmonized System (HS) product level in nine of the world's major "new user" emerging countries. Using a cross-section of this data, we estimate a two-stage model of the industry's decision to launch an antidumping investigation and the national government's decision on the amount of antidumping import protection to provide. We show that enterprises in developing countries who successfully seek antidumping protection exhibit characteristics that are consistent with endogenous trade policy theory and are susceptible to the changing market conditions described in the WTO Antidumping Agreement.

## INTRODUCTION

Over the last two decades, AD policy has been expanded to developing countries, and they are now among the major AD users. We examine the empirical literature on Alzheimer's disease in emerging countries and provide recommendations for further research. We address–without concluding–the often-expressed question of whether AD is a necessary safety valve for further trade liberalization or whether AD is a barrier to free trade in and of itself[1]. Both sides of the safety valve argument have anecdotal evidence to back them up (we distinguish between three different types of safety valves). There is greater empirical evidence of AD's negative trade repercussions in poorer countries. The antidumping policy has just become 100 years old. AD law was first enacted in Canada (1904), New Zealand (1905), and Australia (1906). Nonetheless, it is reasonable to say that the last two decades



[1] Blakley N, 'WTO And Anti DumpingIn Developing Countries' (Academia.edu, 2022) <https://www.academia.edu/4262169/WTO_and_Anti_Dumping_in_Developing_Countries> accessed 27 March 2022

have witnessed some of the most significant developments in the area of Alzheimer's disease. To begin, traditional AD regimes in industrialised countries increased their use of AD as other trade barriers were gradually removed under the GATT and other trade agreements. Second, as the usage of the term grew, so did the number of economics articles on dumping and AD policy, both theoretical and empirical[2]. Finally, and most critically for the purposes of this study, the mix of countries that utilise AD has shifted considerably.

Between 1969 and 1993, the traditional regimes–the United States, the European Union, Canada, and Australia–accounted for about 90% of all Alzheimer's disease cases. Emerging countries' new governments, on the other hand, have conducted more AD research since 1993 than the four traditional consumers combined. Between 1998 and 2001, the proportion of traditional users fell to 37%. 2 According to a number of studies performed since the mid-1980s, South Africa, India, Argentina, Mexico, and Brazil are the top new AD regimes. Around the time they started the process of trade liberalisation, the majority of these countries enacted AD laws or were active AD users. In terms of the new AD regimes, there is a major gap in the empirical research[3]. Despite the fact that the economic issues presented by AD laws impact all GATT/WTO members, almost all research has focused on AD use in the US and EUT, as Blonigen and Prusa (2003) point out in their evaluation of the literature (p. 253). Existing empirical research on the US and the EU has clearly offered useful insight into the procedures, effects, and political–economic components of AD policy, and many of these lessons will be applicable to other AD regimes. Given the new users' distinct characteristics, it is logical to expect that their AD regimes will differ from those in the United States and Europe in terms of tactics, effects, and political economy. Many of the new users come from developing countries, where AD adoption has risen in tandem with an often sudden shift toward trade liberalisation. Furthermore, for decades, poorer countries have been the focus of AD research by traditional users. For these and other reasons, empirical research on AD policy in developing countries is required to get a better understanding of global AD policy as it enters its second century.



[2]'Trade Liberalization And Antidumping: Is There A Substitution Effect?' (Www2.gwu.edu, 2022) <https://www2.gwu.edu/~iiep/assets/docs/moore-zanardi_gwu_ad_conference.pdf> accessed 27 March 2022
[3] Supra note 1.

**ANTI-DUMPING, SUBVENTIONS, AND SAFEGUARDS: UNFORESEEN CIRCUMSTANCES, ETC.**

Tariffs that are legally binding and apply to all trading partners equally (most-favored-nation treatment, or MFN) are crucial to the smooth flow of goods trade. While the WTO agreements uphold core values, they also allow for exceptions in particular circumstances.

The following are three of these concerns:

• Activities aimed towards preventing dumping (selling at an unfairly low price)

• Subsidies and particular "countervailing" duties to make up for the subsidies

• Import restrictions will be temporarily imposed to "defend" domestic industries.

**ANTI-DUMPING ACTIONS**

People say a product has been "dumped" if it is sold outside of its home market for less than it would normally charge there[4]. Is this a case of unethical corporate practises? While opinions vary, numerous governments take efforts to protect local businesses from dumping. The accord of the World Trade Organization is not a court of law. It is often referred to as the "Anti-Dumping Agreement" since it focuses on how governments may or may not respond to dumping. (The strategy of the Subsidies and Countervailing Measures Agreement varies from this limited emphasis on countervailing measures in response to dumping.)

While the legal rules are more sophisticated, the WTO agreement generally permits countries to join in dumping proceedings if domestic rivals are suffering substantial ("material") harm. To do so, the government must demonstrate that dumping is occurring, quantify the amount of dumping (how much lower the export price is than the exporter's home market price), and demonstrate that the dumping is damaging or threatening to impair the exporter's home market price.



Article 6 of the GATT empowers nations to take action against dumping. Article 6 of the Anti-Dumping Agreement is clarified and expanded, and the two work together. Anti-dumping action often comprises imposing an extra import charge on a particular product from a certain exporting nation in order to bring its price closer to its "normal value" or to relieve harm to the importing country's domestic sector.

[4] Supra note 1.

There are many methods for determining whether a product was dropped heavily or softly. The agreement reduces the number of possibilities available. There are three approaches for determining a product's "normal value" in it. The major one is determined by the exporter's domestic market price. When this option is not accessible, the only two options are the exporter's price in another country or a computation based on the exporter's manufacturing costs, other expenditures, and usual profit margins. The agreement also specifies how to make a reasonable comparison between the export price and usual pricing.

Calculating a product's degree of dumpedness is insufficient. Anti-dumping actions may only be employed if the dumping is causing damage to the industry of the importing nation. As a result, a thorough investigation must be done first, in accordance with established norms. The inquiry must encompass all significant economic issues affecting the status of the sector under study. If the inquiry reveals that dumping is occurring and that local industry is suffering as a result, the exporting business may agree to increase its price to a pre-determined level in order to avoid paying anti-dumping import charges[5].

The processes for submitting anti-dumping complaints, conducting investigations, and ensuring that all parties involved have the chance to offer evidence are all written out in great detail. Unless an examination indicates that repealing anti-dumping measures will cause harm, anti-dumping measures will expire five years after they are adopted.

Anti-dumping investigations must be halted promptly if authorities establish that the margin of dumping is negligibly narrow (defined as less than 2 percent of the export price of the product). New criteria have also been developed. The investigation must end if the volume of dumped imports is negligible (i.e., if a single country's volume is less than 3% of total imports of that product — although investigations may continue if several countries, each supplying less than 3% of total imports, account for 7% or more of total imports).



According to the agreement, all preliminary and final anti-dumping measures must be disclosed to the Committee on Anti-Dumping Practices in a timely and complete manner. In addition, they must provide a report on all investigations twice a year. Members are urged to

[5]Niels G, and ten Kate A, 'Antidumping Policy In Developing Countries: Safety Valve Or Obstacle To Free Trade?' (2022) <https://www.sciencedirect.com/science/article/abs/pii/S017626800500114X> accessed 27 March 2022

counsel one another when they disagree. They may also use the WTO's (World Trade Organization) dispute resolution procedure.

**SUBSIDIES AND COUNTERVAILING MEASURES**

This agreement does two things: it limits the use of subsidies and it limits the activities countries can do to lessen the effects of them. In the WTO's dispute resolution process, a country can ask for a subsidy to be taken away or its negative effects to be reduced. Instead, the government could do its own investigation and then impose an extra tariff (called "countervailing duty") on subsidised imports that are found to be bad for local businesses[6].

Subsidy is spelled out in the agreement. The idea of a "specific" subsidy is also introduced. This is a subsidy that only a certain company, industry, group of companies or a certain group of industries in the country (or state, or whatever) that gives it can get. The agreement's rules only apply to certain subsidies. In some cases, subsidies are meant to help people in the area.

The agreement says that there are two types of subsidies: those that aren't allowed and those that can be sued for. In the beginning, there was a third type: non-actionable subsidies. These rules were in place for five years. They didn't get changed, so they didn't stay in place. All agricultural and industrial goods are covered, except when subsidies aren't covered by a "peace clause" that expires at the end of 2003.

Subsidies that aren't allowed include those that make recipients meet export goals or buy local goods instead of imported ones. They aren't allowed because they are made to mess with international trade, which could hurt other countries' trade. They could be challenged in the WTO's dispute resolution system, which runs quickly. If a dispute resolution system rules that the subsidy is illegal, it must be quickly removed from the system. Otherwise, the countries that were hurt might fight back. If domestic producers are hurt by low-priced imports, countervailing duties may be used[7].



Subsidies that can be taken to court: in this category, the complaining countries must show that the subsidy has a negative effect on their own interests. Otherwise, they can be given. The agreement says that they can cause three different types of harm to each other. Subsidies from one country may hurt a local business in the country that imports them. When two countries compete in third markets, they might hurt exporters from the other country. In

[6] Supra note 4.
[7] Ibid.

addition, domestic subsidies in one country could hurt exporters who want to compete in that country's own market. In this case, the Dispute Resolution Body must decide that the subsidy has an unfavorable effect. Either the subsidy must be removed or the negative effect must be eliminated. Again, if domestic businesses are hurt by low-priced imports, countervailing duties may be put in place to protect them.

The Anti-Dumping Agreement has a lot of things that are similar to the things in some disciplines. The anti-dumping equivalent, countervailing duty, can only be imposed after the country that imports the goods does a thorough investigation like that required for anti-dumping proceedings. There are very specific rules for determining whether a product is subsidized, which isn't always easy. There are also rules about how to start and finish investigations, how long countervailing measures can last, and how they work. In addition, the subsidized exporter may agree to raise the prices of its exports in exchange for not having to pay a countervailing duty on its exports[8].

Subsidies may be important in developing countries and when countries move from centrally planned to market economies. Least-developed countries and developing countries with a GDP per capita of less than $1,000 aren't subject to export subsidy rules. Other countries in the developing world have been told by 2003 that they must stop giving money to exports. By 2003, the least developed countries must stop giving subsidies to boost local production and cut back on imports. The deadline for other developing countries was 2000. As a result, developing countries get better treatment if their exports are being looked into for countervailing duties. By 2002, illegal subsidies were to be phased out for countries that were in the process of becoming more stable.

**SAFEGUARDS: IMMEDIATE PROTECTION AGAINST IMPORTS**

When a member of the World Trade Organization sees that its own industry is being hurt or is at risk of being hurt by an increase in imports, the member can put in place "safeguard" measures. Damage in this case should be very bad. Under the GATT, there were always ways to protect yourself (Article 19). Some governments didn't use them very often because they were more interested in protecting their own industries with "grey area" measures, like getting exporting countries to limit their exports "voluntarily" or agree to other forms of

[8]Aggarwal A, 'Macro Economic Determinants Of Antidumping: A Comparative Analysis Of Developed And Developing Countries' (2022) <https://doi.org/10.1016/j.worlddev.2004.01.003> accessed 27 March 2022

market sharing through bilateral talks outside of the GATT's rules. These agreements have been used for a wide range of things, including cars, steel, and semiconductors[9].

The WTO agreement set new rules. It restricts "grey area" measures and puts a time limit on any safety activities that need to be done quickly (a "sunset clause"). As part of an agreement, members can't try to set their own voluntary export limits or set up orderly marketing agreements, or do anything else that would be similar on either the export or import side. It was at the end of 1998 that bilateral measures that were not changed to match the agreement were phased out. Countries could keep one of these measures in place for an extra year (through the end of 1999), but only the European Union took advantage of this option. It used this option to limit the imports of Japanese cars.

A "surge" in imports that needs to be protected from could be either a real rise in imports (an absolute rise) or an increase in the share of a shrinking market, even though the import amount has stayed the same (relative increase). Governments may put rules in place for certain industries or businesses. The WTO agreement sets rules for how national agencies should conduct safeguard inquiries. The focus is on being open and adhering to established rules and procedures – not using arbitrary methods, which aren't good. People who want to give evidence to an investigation must know when hearings will be held and what other ways, they can do it. Arguments about whether a policy is good for the public should be in the proof.

The agreement sets rules for determining whether "severe harm" has happened or is likely to happen, as well as the factors that must be taken into account when evaluating the impact of imports on local businesses. When safeguard measures are put in place, they should only be used to the extent necessary to avoid or repair major damage and help the affected industry adapt[10]. As a general rule, quantitative restrictions (quotas) should not lower import volumes below the average for the three most recent representative years for which statistics are available. This is unless a strong case can be made that a different level is needed to avoid or correct serious harm.

In theory, safeguards can't be used to stop certain countries from getting certain goods. A clause in the agreement does, however, say that certain countries may have to share quotas with other countries when their imports rise at an unusually high rate. A safety measure can't



[9] Supra note 7.
[10] Supra note 4.

last more than four years, but it can be extended up to eight years if the measure is needed and there is evidence that the industry has changed. There must be a gradual change in rules that have been in place for more than a year.

To protect its own businesses, a government might ban imports. In theory this means that the government has to make up for the loss. According to the agreement, the exporting country (or countries exporting) can ask for compensation through talks. If a deal can't be made, the exporting country may take the same action, like raising export taxes on goods from the country that is taking a protective measure. In some cases, the exporting country must wait three years after the safeguard measure was put in place before retaliating in this way[11]. That is, if the safeguard measure is in line with the agreement's provisions and is taken in response to an increase in the volume of imports from the exporting country, then the exporting country can do this. Exports from countries that aren't very wealthy are partly protected from safeguards. People in importing countries can take steps to protect their goods from people in developing countries only when they make up more than 3% of the total imports from that country, or when developing country members make up more than 9% of all the total imports from that country.

The WTO's Safeguards Committee is in charge of making sure the agreement is being carried out and that members are meeting their obligations. Each part of a safety investigation and the decisions that follow must be reported to the committee, which reviews these reports.

**CONCLUSION**

Antidumping measures are being used more often by developing countries, raising fears that many of the trade liberalization commitments made during the Uruguay Round debates may be successfully matched by further protection. This paper looks at antidumping efforts by businesses in developing countries from 1995 to 2003 and shows that they meet the standards set by the World Trade Organization and the theory of endogenous trade policy. The industries that are able to get new protection against imports through antidumping have the following characteristics: they are bigger, more concentrated, spend more money on capital, and face a lot of import competition and rapidly dropping prices of competing imports.



[11] 'Antidumping As A Development Issue' (2022) <https://www.researchgate.net/publication/227378475_Antidumping_as_a_Development_Issue> accessed 27 March 2022

Understanding why developing countries use antidumping measures is important for a lot of different reasons.

To start with, more and more of these countries are agreeing to WTO rules that limit their ability to take more trade-restrictive actions. Antidumping import protection, as a result, may become more and more important as a sign of how these countries protect their industrial imports. However, some researchers say that the antidumping measures taken by these countries may have a good reason. A few of the Latin American countries Finger and Nogués (2005) studied used antidumping as a "escape valve" to keep the rest of the world's trade open. Antidumping may help make the total liberalization commitment more long-term sustainable and/or make a country more willing to make more broad liberalization commitments than it would have been willing to make without antidumping.

However, even if antidumping helps a country move toward more open trade, it's important to look at the long-term economic effects of this help. Finally, we point out some of the costs that antidumping users in countries where the programme has been around for a long time have had to deal with. There's no surprise that governments find it hard to get rid of antidumping policies after they've been put in place and an industry has benefited from them. Article 11 of the WTO Antidumping Agreement says that each imposed measure must be reviewed every five years. Data from the US shows that this requirement has little effect on the removal of previously imposed measures (Moore, 2006; Liebman, 2004). As a result, there is no precedent in the history of the WTO for a country that has used antidumping a lot to suddenly stop. These data show that antidumping measures can have a big impact on an economy over time, even if each individual antidumping investigation only looks at a few items and doesn't seem to have a big impact on the whole economy. In fact, Gallaway, Blonigen, and Flynn (1999) found that the US-imposed import protection under antidumping law was the second most costly trade policy programme in terms of lost US economic welfare in 1993, trailing only the Multi-Fibre Arrangement, which was the most costly trade policy programme for the US.