RSRR conducts two -day Parliamentary Practicum Series with PRS Legislative Research

Board interviewes Ms. Anandita Bhargava

RSRR announces its Call for Blogs in collaboration with CTIL

Carpe Quartam

A Quarterly Newsletter by RSRR

RGNUL STUDENT RESEARCH REVIEW

Issue 3, April 2023

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RGNUL STUDENT RESEARCH REVIEW

Carpe Quartam

A QUARTERLY NEWSLETTER BY RSRR

APRIL 2023 || EDITION #3

PREFACE

Carpe Quartam, a quarterly newsletter published by RSRR, is committed to democratising legal research, making it more accessible to students and professionals alike while putting a spotlight on the activities undertaken by the RSRR Board in furthering its mission.

In this quarterly issue, read about our Panel Discussion, co-hosted by Common Cause India, revolving around the worsened interactions between the police and citizens during the lockdown. The discussion allowed the audience to appreciate myriad perspectives on police interactions and further the discourse on an acceptable policing framework in complicated sociolegal scenarios.

In other news, the Editorial Board of RSRR held an orientation session for the Batch of 2027. Filled with excitement and a willingness to explore, the students enthusiastically participated in discussions revolving around the mandate of RSRR, its various focus areas, and research assistantship programs which provide members with first-hand experience in legal research.

In our Editor's Column Series, Ridhi Gupta and B.D. Rao Kundan, Editors at RSRR, critically examine the 2022 Taxation Scheme of India and its influence on the cryptocurrency industry. Additionally, they help outline myriad suggestions to regulate virtual assets in India while allowing for faster technological innovation and adoption.

In light of the International Literacy Day celebrated around the world on the 8th of September, it becomes imperative to ensure quality, equitable, and inclusive education for all. Authored by Ms. Swati Singh Parmar, Assistant Professor at DNLU Jabalpur, the article from RSRR's Excerpts from Experts series, titled Academic Imperialism and Universal Academic Accessibility: Echoes from the Global South emphasizes how the International Law discourses are marked by a glaring absence of contribution by Global South academics, raising questions about the lack of representation and spaces.

We hope this edition is an insightful read!

RSRR Editorial Board

ABOUT RSRR

The RGNUL Student Research Review (RSRR) Journal (formerly RGNUL Student Law Review) is a bi-annual, student-run, blind peer-reviewed journal based at Rajiv Gandhi National University of Law, Punjab. It is a flagship law journal of RGNUL managed by the students of the University. It was founded with the objective of facilitating novel ideas and a research conducive environment. RSRR regularly engages the student community, as well as legal practitioners, to contribute to the legal discourse on various topics. Additionally, RSRR also runs its Blog Series, which deals with specific contemporary issues of law. The RSRR Blog Series was named as one of the top Constitutional Law Blogs internationally by Feedspot in 2022.

The journal encompasses myriad fields of law and proliferates novel legal discourse through opinions, suggestions and extensive analysis of contemporary issues from numerous areas of law, covering widely discussed topics like Tech law and antitrust law to more nascent areas like energy law, space law, Et al.

Initiatives of RSRR Law Journal

Each year, the RSRR Editorial Board selects a contemporary theme for its journal and invites research papers in the form of short articles, long articles, case comments and normative law articles, from academicians, industry stakeholders as well as law students. The Editorial Board also constitutes the Peer Review Board for the journal, comprising of distinguished experts and jurists in the field of the selected theme. The previous volumes of the RSRR Journal can be accessed here. The past Peer Review Boards and Guest Author roster can be viewed here and here respectively. No article submission or processing charge is required to be paid for the publication of any article in the journal.

Blogs

Themed Blog Series RSRR began running the 'RSRR Blog Series' in the year 2017. Periodically and typically for a month, RSRR releases a 'Call for Blogs' on contemporary and relevant themes. The Editorial Board also invites guest authors, who are distinguished experts in the selected field of law, to contribute to the Blog Series. Submissions are invited from academicians, scholars, as well as law students. A blog is typically 1500-2100 words, which are published on the RSRR website.

Editor's Column

This category constitutes blogs authored by the Editors of the RSRR Editorial Board. These blogs are written on current and relevant issues, which may be themed or open for the editors to choose.

Excerpts from Experts

Excerpts From Experts is a novel initiative by RSRR, started in 2020, initiated to bring forth discussion by experts on contemporary legal issues, belonging to their field of expertise. The aim is to provide our readers with well-researched and quality legal content written by the Guest Authors.

Research Assistantship Program

RSRR became the first Editorial Board at RGNUL, Punjab to offer Research Assistantship to its Editors and students of RGNUL. This is an opportunity to work with Guest Authors invited to contribute to RSRR's Journals and Blog Series. RSRR took this initiative to increase hands-on knowledge and to promote a culture of academic research and writing at RGNUL. With various Guest Authors invited to write for RSRR's Journals and Blog Series', RSRR is providing students with an opportunity to learn from and work under the guidance of various academicians and lawyers, pioneers in their fields. A Research Assistant (RA) works under the guidance of the Guest Author to assist with their research. An RA carries out supplementary research for them and assists in the overall research, in the instances required.

Notable Collaborations of RSRR

RSRR has occasionally collaborated with varied organisations for issues of the Journal or Blog Series. RSRR has had notable collaborations for projects with the following organisations:

- Collaboration with Ikigai Law for the Blog Series on the theme: "Regulating E-Sports: Paving the Road Ahead" and "Emerging Technologies: Addressing Issues of Law and Policy".
- Collaboration with Arogya Legal and Medical Students Association of India for RSRR Journal Volume 6.1 on the theme: "Healthcare in India: Tracing the Contours of a Transitioning Regime".
- Collaboration with Nishith Desai Associates for the Blog Series on the theme: "Digital Healthcare in India".
- Collaboration with Mishi Choudhary and Associates for the Blog Series on the theme: "Addressing Legal Concerns of AI: A Clarion Call".
- Collaboration with Mishi Choudhary and Associates for the webinar series on Artificial Intelligence.
- Collaboration with Common Cause India for panel discussion on "Citizen-Police Interaction and Policing in the Pandemic".

SECOND EDITION: RECAP

In the previous edition of Carpe Quartum, a quarterly newsletter published byRSRR, we read about our blog series in collaboration with Ikigai. It introduced the discourse around Emerging Technologies and how the issues of Law and Policy can be addressed in the same.

In other news, the Editorial Board of RSRR released the Concept Note for the RSRR Journal Volume 9.2, on the theme 'Instrumentalising Arbitration: Innovation, Interaction and Impact'. The purpose of this edition is to take the current discourse on Arbitration further considering there have been a lot of developments in this field. This includes the landmark Supreme Court decision in BALCO and various proposals to the Act culminated in the 20th Law Commission's Report No. 246 based on this theme.

In our Editor's Column Series, Deb Ganapathy, Junior Editor, and Sarthak Sahoo, Assistant Editor at RSRR, critically examine the defence of Insanity in the context of Psychiatric Evaluations and further explore the scope of the laws related to Neuroscience, which is a field knows as Neurolaw. Additionally, the article from the Excerpts of Experts series titled 'Does Fraud Vitiate Arbitration? Revisiting Arbitrability of Frauds in India' explored Judicial developments of Fraud Arbitrability and analysed the trajectory towards the current legal stance on this issue. Apart from this, the previous edition also featured a conversation Mr. Hamid Naved from the batch of 2020 which threw light on the concerns of Civil Services Examination and the college aspect of the same.

TWO-DAY PARLIAMENTARY PRACTICUM SERIES IN COLLABORATION WITH PRS LEGISLATIVE RESEARCH

The Editorial Board of RSRR, which stands for the Rajiv Gandhi National University of Law (RGNUL) Student Research Review, organized a two-day Parliamentary Practicum Series.

The event was held in collaboration with PRS Legislative Research, a non-profit organization that provides research support to Members of Parliament on legislative and policy issues.

The Practicum was themes on 'Understanding the Functioning of Parliament, Law Making and the Career Avenues in Public Policy'.

The event was aimed at providing students with an in-depth idea of the workings of the Indian Parliament, the process of law making, and the career opportunities available in the field of public policy.

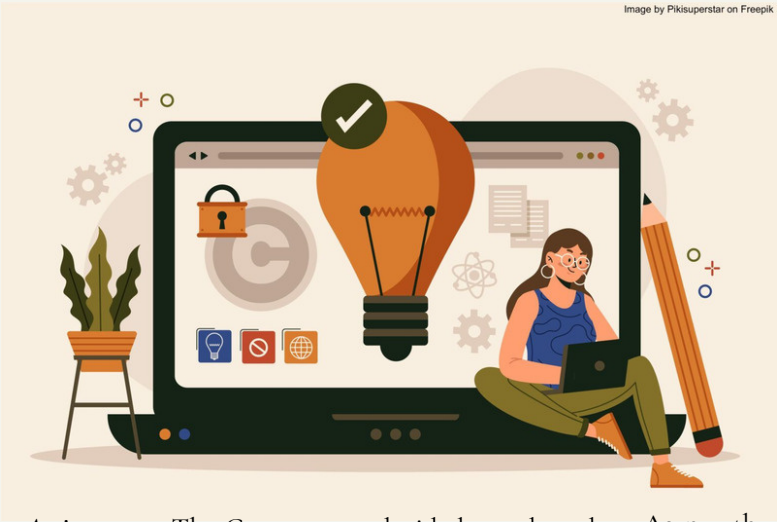
For this event, RSRR had the opportunity to host two guest speakers from PRS Legislative Research, Mr. Jayraj Pandya, who is the Manager of the Legislative Assistant to Members of Parliament (LAMP) Fellowship and Ms. Mitisha Sharma who is a Programme Associate in the Citizen Outreach Team at PRS Legislative Research.

Mr. Jayraj spoke about the various roles played by the Parliament and gave the students an insight into what a day in the Parliament looks like. He also talked about some landmark judgments like the Vodafone and Aadhar judgments.

While Ms. Mitisha Sharma spoke about the journey that a bill goes through before it gets introduced in the Parliament. She also described how a union budget is planned and made, providing valuable insights into the process of policy-making.

The Practicum was well received by the attendees, who actively participated in the event. The students found the Practicum insightful and informative, and they appreciated the opportunity.

REGULATING SHAPE MARKS IN INDIA: THE THRESHOLD OF SECONDARY MEANING CONTINUES TO HOLD GOOD



Ms. Niharika Salar is an Assistant Professor of Law at NALSAR, Hyderabad. This blog is a part of RSRR's Excerpts from Experts Blog Series, initiated to bring forth discussion by experts on contemporary legal issues.

Setting the scene: Trademark laws in India

The statutory Indian trademarks law dates back to 1860. Previously, numerous issues with infringement, passing off, and other issues were resolved by applying Section 54 of the Specific Relief Act of 1877, and the registration was unquestionably resolved by getting a declaration of trademark ownership under the Indian Registration Act of 1908. 1940 saw the passage of the Indian Trademarks Act, which mirrored the English Trademarks Act. The Trademark and Merchandise Act of 1958 replaced this statute. The purpose of this Act was to better protect trademarks, allow for their registration, and stop counterfeit marks from being used on goods.

The Government decided to rebrand the 1958 Act as the Trademark Act 1999 in order to bring the Indian Trademark Law into compliance with the TRIPS obligation.

In addition to appreciating special provisions for well-known trademarks and allowing registration of collective marks, it has also safeguarded service marks. Among other improvements, the Act has provided extensive definitions, tightened penalties for violators, prolonged the registration term, and permitted the registration of unconventional trademarks. The Trademark Act of 1999 and the Trademark Rules of 2017 now govern Indian Trademark Laws.

Shape marks and Trademark Laws

The Trade Marks Act of 1999 acknowledges the shape of goods as an essential trademark element.

As per the provisions, a 'trademark' is a mark capable of being conveyed graphically and capable of distinguishing one person's goods/services from those of another, and this includes the appearance of products, their packaging, and color schemes.

Because of this, Parliament has statutorily recognized that trade dress includes an item's packaging, color scheme, and shape in addition to how it is advertised. The Trademark Rules further state that the shape of the goods, which comprises of the shape of the goods or its packaging, may be registered by submitting at least five separate views of the trademark and a written description of the brand.

In addition, the Designs Act of 2000 normally protects these aesthetic traits and lays out the standards for registering a design. On the other hand, the design of the bottles is seen to be distinctive and greatly contribute to the brand's recognition and reputation, making it eligible for trademark protection.

In the case of shape marks, however, there is a strong contradiction between the mark's distinctiveness (or lack thereof) and its potential descriptiveness. In Lenskart Solutions Pvt. Ltd. v. M/s. Lenspark Optician, (TM No. 72/2018) the Plaintiff, an eyeglasses business, claimed that it had used the imaginative and inherently distinctive trademark 'LENSKART' since 2009. The Plaintiff further argued that it was the owner and proprietor of the copyright for the original artistic creation that was included on the label. The Defendant changed the name of its optical retail store to 'LENSPARK.' The Court determined that the Plaintiff's copyright as well as trademark rights were violated by the phrase 'LENSPARK.'

Similarly, in Cadbury India Limited and ors. v. Neeraj Food Products (2007 (35) PTC 95 Del), the Plaintiffs asserted that the defendant was using a package that was strikingly similar to that of the well-known 'Cadbury Gems. Moreover, Cadbury objected to the defendant's marketing of its product as 'James Bond,' which it said unjustly exploited the Plaintiff's popularity by sounding too similar to their own 'Gems Bond' character from an earlier advertising campaign, thus confusing customers. It was ruled that a mere possibility of confusion is adequate to establish trademark infringement; absolute confusion is not required.

A mark means much more than a mark now

The issue of shape marks came up again recently before the Delhi High Court in Knitpro International v. Examiner of Trademarks.

The Senior Examiner of Trade Marks rejected the appellant's trademark application for the registration of the shape of a knitting needle in class 26 in relation to "knitting needles and crochet hooks" (see below).

For the purposes of recording the legal position on shape trademarks, the Court noticed that according to section 2(1)(j) of the Trade and Merchandise Marks Act of 1958, a 'mark' includes a device, brand, heading, label, ticket, name, signature, word, letter, or numeral, or any combination of these. The Trade Marks Act of 1999 added to this definition by defining the term 'mark' in section 2(1)(m) as follows:

'Mark' comprises a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of products, packaging, combination of colors, or any combination of colors.

Comparing the definitions of 'mark' under the old and current trademark standards, it can be inferred that the term's scope and meaning have increased through time and are no longer confined to traditional trademarks as long as they fulfill the key purpose of a trademark, i.e. source identification.

Shapes leading to distinguishing factors

One of the biggest risks of registering shape marks as trademarks is that the owner of the shape could wind up with a monopoly on a specific set of goods, despite the fact that shape marks can assist in expressing creativity (and attracting more customers). That's one of the major reasons why any shape of a product that is essential for achieving a technical result cannot be trademarked. Therefore, any shape that consists only of the shape of a product due to the technical result cannot be trademarked. Invalidation of the Lego mark by European Courts dictates the relevance of technical result achieving shapes. In 2010, following years of legal battle, the European Court of Justice ('ECJ') concluded that allowing Lego to trademark its eight-studded building brick would prevent other manufacturers from making a basic technical construction shape. Having said that the ECJ, in another instance, has also ruled that Lego miniatures people are more than just building blocks, lending support to the Danish toy maker. Lego prevailed in that trademark dispute after a judge declared that its mini-figures should continue to be categorized as protected shapes, preserving its status in toytown.

Continuing with these themes, The Delhi High Court stressed upon Levi Strauss and Co. v. Imperial Online Services Private Limited, where it was held that the definition of 'mark' has changed throughout time.

Earlier, trademarks have covered names, words, gadgets, packaging, among other things. However, this list of trademarks has grown over time to now include things like color, color combinations, product shapes, product patterns, fragrance, and sound marks, among other things. The case revolved around the question of a stitching pattern that is incorporated on the plaintiff's jeans items but is not a product design.

It was stated that in such a case, the question would be whether the stitching design alone could serve as a trademark. If the answer to this question is affirmative, the pattern would be regarded as a trademark worthy of protection. When a trademark owner's stitching pattern uniquely identifies a pair of jeans without a name or logo, the owner intended for the stitching pattern to fulfill the same function as a trademark. The Court would then determine whether the stitching pattern has a "secondary meaning" or if it is distinctive in and of itself.

The Court determined that the bar for extending exclusive rights to the shape of a product is rather high. By itself, the form should indicate the origin of the product. Only if the term has acquired a secondary connotation is it eligible for registration. Relying on cases like Wal-Mart Stores and Nestle, the Court believed that the plaintiff will have to demonstrate that the design has taken a secondary meaning in the marketplace in order for the design of a product to be given exclusivity. It was noted that average customers are not accustomed to inferring a product's origin from its shape or packaging in the absence of any visual or word features, therefore it may be more difficult to establish distinctiveness for a three-dimensional mark than for a word or figurative mark. This remark was discovered during an evaluation of the distinguishing qualities of markings.

In addition, while determining whether a shape has acquired distinctive traits via usage, a thorough review must be conducted, taking into account all pertinent data and all probable situations in which the target audience may have encountered the mark. This is because the likelihood of a form without unique characteristics increases as the shape for which registration is sought approaches the form most likely assumed by the product. The Court noted that this should not prevent the appellant from obtaining legal protection for a form mark in the future, if authorized, by demonstrating that it has gained a secondary meaning and is distinctive if the mark has acquired a secondary meaning.

Concluding thoughts

The understanding of a trademark not forming a generic shape branches out from the consequences of monopoly.

The Delhi High Court has reiterated through Knitpro that in order for a trademark to be registered, it must be demonstrated that the trademarked shape is distinguishable from the generic shape of the product. The form must have gained a secondary meaning and lost its original or generic significance. It would require significant effort to get the required level of distinction. In old industries like hand sewing needles, having the threshold high for a shape mark reinforces the law's discouragement towards unjustified monopoly, maintaining fair competition.

Secondly, corporations realize that the duration of protection trademark law has to offer is much more than most other relevant IP protection. Therefore, trademark protection would have been especially desirable, as a trademark may be renewed as often as desired and the owner of such a trademark could have prevented competitors from using comparable marks indefinitely. On the other hand, other wings of IP laws offer protection, if standards are met, to precarious cases like these. For example, as mentioned above, Lego was denied shape mark protection but upheld its design protection in 2021. A registered design allows its owner a 25-year monopoly on the claimed design, which appears sufficient for a mark to enjoy monopoly, albeit for a limited time. The majority of products are unable to successfully market themselves with the same design for over a quarter century. Additionally, only a few designs are able to obtain blanket protection from design protection.

In the case of *CIT v. Thangamani*, the Hon'ble Madras High Court observed that income tax authorities are only concerned about the income and not about the mode and means of acquiring it. Similarly, the Hon'ble Gujarat High Court had allowed deductions from the income generated from a smuggler's confiscated gold, as it accounted for loss in his business. The Court also took note that for the purpose of taxation, no profit or loss can be excluded if it is carried out in a commercial manner, irrespective of its legality. However, it is to be noted that the guiding principles in these decisions do not sanctify illegal activities.

The recent judgement of Hon'ble Supreme Court in the case of *Internet & Mobile Association of India v. RBI*, which set aside the RBI circular banning the virtual currencies, suggested that cryptocurrencies are not prohibited. Further, in the absence of any law penalising any activities related to VDAs, it is difficult to determine whether holding, transferring or managing VDAs are legal or not. Despite the conundrum, the move of taxation of VDAs has given some sense of relief to the investors as the Government has changed its stance of imposing blanket ban on cryptocurrencies and has opted to come up with taxation scheme for it. However, at the same time imposition of a flat 30% rate shows the Government's inclination to deter the promotion of cryptocurrencies or any other VDAs.

Vidhi also released a Working Paper ("the Paper") titled, Taxing of Cryptocurrencies highlighting, among other things, the negative implications of the 30% tax levied by the Central Government on virtual assets.

Firstly, the Paper provides that a standard tax rate on all transactions involving crypto assets would be disruptive to the crypto industry due to the heavy tax cost it would result in. Secondly, it criticizes the provision of 'withholding of tax' at the rate of 1% on cryptocurrency transactions as this would drastically hinder the growth and innovation in this industry and suggest removing the withholding obligation altogether. Thirdly, it terms this levy of tax as violative of the 'tax neutrality' which is a key principle followed in taxation. This principle suggests that tax decisions should strive to be neutral so that the decisions of individuals depend on economic merits and not the amount of tax liability associated with a transaction. .The heavy tax levied on cryptocurrencies is likely to discourage individuals from dealing in cryptocurrencies. The Paper further suggests that cryptocurrencies should be taxed as either capital assets or stock in trade as is done in many jurisdictions. While the consideration from the transfer of a capital asset is taxed at a 'fixed rate' depending on the type of the asset and period of holding, the consideration from transfer of stock-in trade is taxed at ordinary slab rates. The Central Board of Direct taxes ("CBDT") had in a 2007 circular held that while classifying shares as capital assets or stock-in trade, factors such the nature of transactions, the manner of maintaining books of accounts, the magnitude of purchases and sales and the ratio between purchases and sales and the holding would furnish a good guide to determine the nature of transactions. Since both shares and cryptocurrencies are intangible assets, this approach may suit the latter as well.

The Way Forward

In this era of cutting-edge technology, countries, including third world nations, are adopting advanced technologies and becoming self-reliant with positive effects on their economies. In the recent past, the world has witnessed a dramatic rise in the popularity and use of virtual
currencies by the people which has led many countries to enact laws to regulate them. However, the Government has, so far, maintained an adverse stance on the legalisation and regulation of virtual currencies in India. Moreover, after numerous failed attempts to put a blanket ban over virtual currencies in the country, the Government has decided to impose a heavy tax on transfer of VDAs (which includes cryptocurrencies) and to come up with its own virtual currency. Considering the popularity of virtual currencies in the country and their role in economic growth, the authors

propose the following suggestions for .the regulation of virtual assets in India:
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- It is suggested that the Government enacts the Proposed Bill. The Proposed Bill should provide clear and inclusive definition for the term 'virtual digital assets', definitions for all key terms related to them, differentiate

- between fiat cryptocurrency and other cryptocurrency and address the issues raised by the draft strategy paper released by MoE. The Proposed Bill can be made

- on the lines of regulations enacted by Dubai and New York wherein to trade in cryptocurrencies, a license is mandatory. Further, as suggested by
- Vidhi, the Government may declare certain crypto assets as prohibited' based on grounds such as public interest and morality. The Proposed Bill may set up an independent regulatory authority to oversee the transactions involving crypto assets or authorise the existing regulatory authorities like RBI to regulate the industry.

- For the purposes of taxation both virtual currencies and NFTs are considered the same but in reality, they are not and hence, there is a need for different taxation schemes for virtual currencies and NFTs. The Government must rethink its 30% tax levy on VDAs in light of aforesaid issues and do away with the 1% withholding obligation in order to promote them and encourage more people to invest in them.

- Further, the Government should take into consideration untouched areas such as implications of the tax on crypto miners. Recently, it was clarified that no deductions would

- be allowed on infrastructure cost incurred in mining of virtual currencies. Since, the infrastructure cost in mining is too high, the Government should consider framing laws or rules to allow such deductions as is done in countries like Canada, where business expenses incurred in generating virtual currencies are deductible The trials for CBDC should be started and India should prioritise adopting its digital currency. India can take inspiration from countries like Nigeria which have introduced digital currencies and observe how countries like UK, US are moving towards adoption of their digital currencies.

Given India's position as the second largest cryptocurrency users' hub in the world, it only seems imperative that the country soon comes with a law to regulate this industry.

Government must reconsider its adverse stand on legalising private virtual currencies and should frame laws for its regulation. Looking at its popularity and adoption by the masses, a regulatory authority must be established to deal with any and every issue related to virtual currencies, be it issuing license or suspending it in case of violation of rules regulating it. Since the digital universe does not have any boundaries, regulation of the activities related to virtual currencies would require global cooperation especially from companies involved in this industry to make it more transparent and safe for the people to invest and to reduce any threat of terror financing.

THE DIGITAL DATA BILL: A PARADIGM SHIFT IN ADVERTISER-CONSUMER INTERACTIONS

This article has been authored by S. Lavanya, Junior Editor, and Murli Manohar Pandey, Digital Editor at RSRR. This blog is a part of the RSRR Editor's Column Series.

Introduction

In a recent ruling, the European Data Protection Board (EDPB) ruled that Meta, formerly Facebook, cannot continue targeting ads based on users' online activity without affirmative, opt-in consent. This ruling is based on the provisions of 'consent' of the General Data Protection Regulation (Hereinafter "GDPR") of the European Union and has been seen as a significant step in the right direction. Voluntary opt-in consent should be the baseline requirement for any data collection, retention, or use. The ruling states that the company should not track its users unless they opt-in. With laws constantly changing the relationship between advertisers and people, this article seeks to analyze the potential impacts of India's new Personal Data Protection Bill, 2022 on the same.

Targeted Advertisements: A Threat to Privacy?

"Surveillance is the Business Model of the Internet." – Bruce Schneier

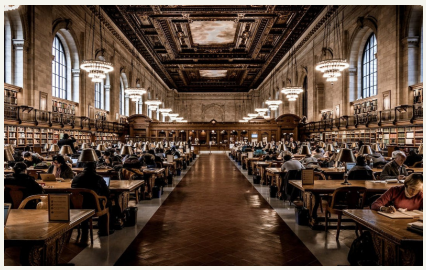
It has been three decades since the internet revolutionized the way we communicate, access information, and conduct business. Companies and brands that earlier relied on selling classified, print and television ads to cater to a larger audience, then shifted to digital advertisements on the internet, thereby dramatically expanding their marketing tool kit. This shift powered the growth of websites like Google, Twitter, and Facebook.

With the widening of technological horizons, a new and concerning method of marketing has developed. The internet has become a repository of its users' information, and this information is covertly used by advertisers to target demographics more accurately. Whether it be retailers being able to accurately predict a pregnancy, or political parties support through targeted propaganda, the widespread use and effectiveness of these techniques is startling.

The primary way in which such information is collected is through cookies. Cookies are small text files that are stored on a user's device by a website. It is pertinent to note that their intended purpose was to improve user experience by remembering preferences, login information, and browsing history. More recently, cookies have been found to serve more nefarious purposes. In 2018 it was discovered that Cambridge Analytica, a consulting firm, harvested data from millions of Facebook users without

their consent, and used this information to create targeted political advertising during the 2016 U.S Presidential election.

The extent of surveillance on the internet has been extensively documented. The growing concerns regarding use of personal data by large corporations through unscrupulous means led European advocacy group "None of Your Business" (NOYB) to file complaints against Facebook, Instagram, and WhatsApp in 2018 to several relevant data protection agencies in the EU, which finally led to the decision mentioned in the introduction.



The companies complained against, which now form a part of Meta, attempted to evade the consent requirements under the General Data Protection Regulation (GDPR) passed by the European Union. The GDPR under article 6(1)(a) and 7(3) requires companies to obtain express consent of data subjects for the use of their personal data, giving them an option to withdraw their consent at any time.

Meta attempted to bypass this requirement by adding their consent clause to the terms and conditions of their websites, in order to give the consent clause a contractual nature. The recent ruling is a firm stand against data mining, and targeted advertising without consent.

The harms of this sort of data collection and subsequent usage are several. Not only does targeted advertising violate one's right to choice, exploit vulnerable populations and contribute to the overall commodification of humanity, but it has also resulted in racist voter suppression and housing discrimination in the USA, where this form of data collection is more rampant.

In India, it is important to develop a framework that addresses the predatory nature of targeted advertising. Observing the way such data has been used to manufacture and amplify certain ideas and narratives, it is not a stretch to think that online user data has been and will be used to distort the social and political fabric of the country, in a clear violation of the right to privacy and autonomy under Article 21 of the Constitution.

In this context, does the new Bill offer an alternative landscape within which advertisers and individuals can interact with each other?

Targeted Ads under New Draft Data Protection Bill

In India, targeted advertising is primarily governed by the Indian Contract Act 1872 ("ICA") and the Information Technology (IT) Act 2000 with many other secondary and tertiary legislations primarily aimed at different objectives. The section 14 of ICA provides for an essential prerequisite of 'valid consent', which when combined with other provided conditions of valid contract give rise to a contract between users and service for the purpose of targeted advertising. The IT Act 2000 has provisions for protecting sensitive personal data and privacy of individuals. Moreover, the Advertising Standards Council of India (ASCI) is an independent body that regulates and monitors advertising content across all media, including digital, to ensure that all advertisements are legal, decent, honest, and truthful.

However, these provisions are insufficient, as they exist in silos and lack intelligible harmony to deal with evolving paradigm of data and safety concerns. The further shift from conventional methods of advertisement to personalized data-based targeted ads have posed novel challenges to lawmakers which resulted in rolling out the draft bill on data protection tailored as per Indian needs.

Consent has always been one of the grounds for processing personal data across jurisdictions, and the same has been provided under section 7 of the Digital Personal Data Protection Bill, 2022 (Hereinafter referred "DPDPB"). Section 6 of the bill further imposes notice as a precondition to consent. The said notice can either be in electronic form or a document. For any fiduciary to continue to process personal data of the data principal (users), they are obligated to seek explicit consent by providing itemized notice specifying the purpose of such data processing in clear and plain language as provided

in section 6(2) of the Bill. In effect, this provision would make it mandatory for any digital service provider to seek explicit permission from users for each specific purpose and therefore, a pre-ticked box that automatically opts a user in will not cut it anymore as opt-ins need to be a deliberate choice. Clause 7 of bill further provides for the withdrawal of consent through an accessible, transparent, and interoperable platform provided by a data fiduciary called Consent Manager.

The bill further went a step ahead by imposing the need to seek consent retrospectively for continuous data processing. These provisions are much in line with the recent decision of European EDPB and will provide users much control over their data on SM.

While GDPR recognizes 'contractual necessity' as a valid basis to process personal data, it's crucial to note that DPDPB omits this ground and provides 'consent' inter alia as the only tangible ground (since other grounds are circumstantial) for processing personal data which may, in practice, conflict with GDPR.

For instance, travel bookings require sharing of data with airlines and hotels; shipments of products require sharing of data with carriers and customs officials.

Under the GDPR regime, the above-mentioned data processing will be permitted within the ambit of contractual necessity whereas the similar situation in India would require a specific consent as discussed above.

A company that has been processing data under GDPR regime and now is operating under both regimes, will face inherent conflict of law because of the different processing grounds (from contractual necessity to consent). This appears to have been restricted by GDPR data protection authorities, such as the ICO, which may leave Indian companies in abeyance.

In certain circumstances, the bill also provides for the 'implied consent', where a data fiduciary would be able to process every kind of personal data (including sensitive personal data) on meeting simple and undemanding conditions. This provision dilutes the protection for personal autonomy granted under clause 7 as this 'implied consent' is not limited to a specific purpose & cannot be withdrawn.

In the growing consumer markets, children are the most vulnerable to targeted marketing, hence prone to data profiling, tracking and behavioral monitoring. Although clause 10 of the Bill explicitly prohibits any such surveillance-based advertisement directed towards children and in the circumstances where it's necessary to process their data, fiduciaries should obtain the verifiable parental consent.

But here the cause of concern is that the definition clause of the bill includes parents and legal guardians of the children under 18 years of age as 'Data Principals' (individual to whom personal data relates). Although this provision is inserted with an intent to provide safeguards to a child who cannot intellectually consent for his own data & other possible ramifications emanating out of it, here the bill fails to consider the distinction between mental acumen of a child who is a toddler & one who is a teenager.

This would be detrimental to autonomous development of a teenager who would be required to seek consent of his parent /guardian every time he wishes to access any service that requires processing of personal data.

Clause 13(2)(d) provides that a data principal can request for erasure of their personal data when the personal data is no longer necessary for the purposes for which it was processed unless it is not required to be retained for a legal purpose. However, clause 9(6) of the Bill permits data fiduciaries to retain

personal data for "business purposes". Here, a case of conflicting interpretation may arise where fiduciaries may refuse to erase the data citing this exception and employ the available voluntary & behavioral data to produce targeted advertising, defeating the primary purpose of this bill.

Clause 16(3) reads as "Data Principal shall, under no circumstances including while applying for any document, service, unique identifier, proof of identity or proof of address,

furnish any false particulars or suppress any material information or impersonate another person." Here the use of the word 'including' obliges the individual person to furnish correct data without suppressing material information under all circumstances even to private entities.

This provision can have a detrimental impact if a user of such digital services wishes to exercise his/her right to stay anonymous in his/her personal interactions, hence contravening the 'right to be left alone' as per Justice K.S. Puttaswamy (Retd) Vs Union of India (2017) 10 SCC 1. Further the collected data (email, contact details etc.) by private entities can be misused for targeted spamming and nuisance.

Conclusion

Understandably, advertisers are apprehensive about the enactment of this draft Data Protection Bill. Consent requirements would hamper business in the digital ecosystem, and advertisers who have relied on personal data would be losing consistent access to the resource.

Overall, the potential impact of the Bill on the business of advertisers could be drastic. However, there is evidence that points towards the potential benefits that transparency in advertising can bring.

A study conducted by Harvard Business Review found that while people are comfortable disclosing personal information by themselves, third party sharing (when information is passed unbeknownst to the subject) can make people feel uneasy.

The feeling of being "spied on" by advertisers negatively impacts the purchase interests of the subjects. Looking through this lens, the new bill provides an opportunity for advertisers to foster better and more effective relationships with potential customers.

A system that requires subjects to opt in and gives them the power to withdraw consent allows people to retain their autonomy and prevent against the predatory usage of their personal data. Since there is no clause that provides for "contractual necessity", data processing for the fulfillment of contractual obligations will also require the consent of the data subjects.

At least in the context of advertising, it is important that companies not engage in contractual relations that might compromise the privacy of data subjects without their knowledge. While inconsistency with the GDPR may force Indian companies to develop region-specific standards, it is no question that personal data should not be transacted for the purpose of advertising without the informed consent of data subjects.

While the Bill's inconsistencies and shortcomings may result in issues of applicability and execution, it has been well received specifically ensuring greater protections for data subjects against private entities. It will also force companies to adopt a more transparent business ethic that may ultimately be to the benefit of both the consumers and the advertisers.

CALL FOR BLOGS: RSRR IN COLLABORATION WITH CTIL

The RGNUL Student Research Review (RSRR) Editorial Board, in collaboration with the Centre for Trade and Investment Law (CTIL), announced its Call for Blogs on the theme 'Emerging Trends in Indian Approach to Trade & Investment: Treaties & Agreements'. CTIL is a prominent think tank and advisory centre that specializes in international trade and investment laws. Its primary objective is to advise the Indian Government on issues related to the field and to promote India's participation in international trade and investment negotiations by creating knowledge and utilizing legal resources.

The blog series seeks to spark a dialogue on the challenges facing the trade and investment law sector. The series aims to critically examine the legal void in terms of significant developments in this sector and suggest practical solutions to strengthen the convergence of law with trade and investment. The call for submissions were open to legal practitioners, academics, students, and members of the legal community.

The Editorial Board is delighted to receive intriguing submissions on the issue of trade and investment law. The board seeks to publish this blog series soon to enlighten students of law regarding the trade & investment law landscape in India and to contribute to the existing literature this issue.

KNOW YOUR ALUMNI

Ms. Anandita Bhargava: Batch Of 2021

RSRR is grateful to be given the wonderful opportunity to conduct an interview with Ms. Anandita Bhargava, a former student of RGNUL and a member of the Editorial Board, on her life in public policy. In this insightful segment, Ms Bhargava deals with her experiences in the policy space, as well as traces its trends and trials for prospective entrants. She explains the route to premier opportunities like the Legislative Assistant to a Member of Parliament (LAMP) Fellowship, and student considerations throughout law school in aiming towards them.

Q1) What initiated your liking for the legislative and public policy world? Were there any specific legal areas or college activities that helped enhance that interest?

It is since my childhood that legal events, to whatever extent I could understand, resonated with me. This was further propelled with the colossal Anna Hazare movement, and the furore, anger and frustration taken down into streets after the Nirbhaya incident. Very early on I realised the absence of women in change-making roles in the country. And that is where I saw myself to be in the future.

I was naturally driven to the legal profession because I believed it to be one of the most effective tools for bringing about social change. But early in the law school years I began to realise interplay of law with policy. I don't think I can particularly recall an incident or an event in the law school that made me felt drawn to legislative and public policy but certainly there were many small events and experiences that made me take a liking for this area. The inquisitiveness to unearth the 'whys' and 'hows' of a law, the intent of the law and attitude of the courts to certain issues led me to dip my toes into the field of policy, a very foreign space for me back then. Over the years, as understanding in the field of law became mature, I began to understand the close relationship law and policy share.

Q2) How would you evaluate the public policy space having had practical experience in the same?

Hmm, a very interesting question. in brief, it has been very welcoming. Law school acquainted me well with the laws, the machinery of our justice system, but the space of public policy very swiftly made me realise how the former is only a fragment of it. Working in this field has been particularly fascinating because of the ongoing process of learning, unlearning, and relearning. One meets so many more highly educated peers from other fields of study who have so much more to contribute, so much to learn from, and so much with which to share experiences and collaborate.

Undoubtedly, public policy is a space to unleash your creativity for solutions to the problems you seek to address. Five years of law school tend to confine one's thinking. But with the space of policy with various disciplines at work, it is enlivening and refreshing to challenge the thinking process with questions from new perspectives, learn to ask the questions rarely posed and map the vastness of the space public policy has to offer. I could hardly imagine myself analysing issues from purely economic, financial, or even political perspectives but I did! In a nutshell, I call it an enthralling experience.

Q3) What advice would you give to those law students who wish to enter the policy and legislative space? How should they orient their academic and career activities for the space?

I have always believed that law school, your college life, is a very safe space to experiment and explore. I firmly believe that doing something will save you from losing everything, whereas doing nothing is a 100% loss. So, I encourage taking part in committees, journal boards, academic and non-academic events, and exploring traditional as well as non-traditional internships, for everything has a different value, and enhances experience.

Moreover, one cannot just pick up a book to study public policy and recognise that this is their calling. It is a whole universe unto itself, and you cannot tell if you like it without some real exposure to it. This not necessarily indicates interning in the field but academic endeavours such as writing about it, researching about it, moots, or being a member of a journal can help one test the waters of public policy. Fellowships such as LAMP, and State Government Good Governance initiatives can serve as a seamless inlet into the legislative space and public policy.

Q4) How did being part of the RSRR help in your career and academic growth?

RSRR has undoubtedly been a significant part of my law school experience. My three-year journey, from a junior editor to graduating as the Editor-in-Chief has been one of hard work, with many a lesson, challenging but ultimately gratifying. Making a journal succeed involves far too many steps, and I'm pleased I had the chance to see each one in action. The choicest set of seniors and peers guided me well through the processes each year and helped me sharpen my skills. Throughout my period in RSRR, I had the pleasure of working with various industry professionals, exposing me to hows' and 'why's of diverse fields. This gave me a holistic and deep insight into the legal world.

What I cherish the most about this student run board is the ability to let the creativity flow, work in a channelised form yet enjoy the autonomy, and learn together in a supportive and professional setting. Being a part of it not only enhanced my research and writing skills, but helped hone my managerial skills as well. This particularly helped me gain edge over others post my law school journey and became one of my greatest assets in LAMP. The brainstorming sessions of RSRR encouraged me to dig deeper into issues, view a moot question from different perspectives, and be able to honour time sensitive submissions. Since RSRR does not confine itself to one branch of law alone, various volumes of journal and blog series allowed me to explore and understand various branches of law and policy, certainly a skill that eased and facilitated my LAMP journey.

Q5) How has your experience been working as a Legislative Assistant to a Member of Parliament (LAMP) Fellow at the PRS Legislative Research?

To put it shortly, it was exhilarating and rewarding. No two days are ever the same in LAMP, but every day is worthwhile. Working under the direction of the best PRS Legislative Research has to offer seemed like a dream come true. The LAMP Fellowship is one not limited only to law students, and I feel privileged to have had a cohort full of the finest people from their own respective fields. Surely it felt a little intimidating starting off all by myself with the assigned Hon'ble Member of Parliament (MP) but our shared vision of making a difference made the year so memorable and incredible. Fast-paced session times in particular presented their own set of difficulties, but overcoming them with the Honourable MP and the cohort's encouragement was wonderfully rewarding. LAMP involved vast range of experiences, from working upon the interventions in the Parliament, examining bills and budgets, offering well read and well researched views upon them, first-hand witness the drafting, to learn from the group on an everyday basis.

The Fellowship was a meaningful hands-on experience into what happens before a law or policy is drafted and enacted. LAMP resonated well with my interests of researching and writing, and the underlying passion to make a difference. After my experience in RSRR, I was eager to take another set of challenges and contribute in effecting a change, to efficient policy-making and dialogues in the Parliament. And I am glad I got to the opportunity to offer my best, and develop personally under the learned guidance of the Hon'ble MP.

In the Fellowship, we are also to undergo workshops and training programs, which further enhanced the experiences on my journey and offered a good platform to interact with the changemakers currently working in the sector, which helped me further chart my route. The Fellowship offered me a horizon to expand my knowledge base, realize potential outside my comfort zone and explore deeply into the field I had newly entered into.

Q6) What advice would you give to law students interested to be a LAMP Fellow? How should they orient their academic and career activities for the fellowship?

LAMP application accords great weightage to Statement of Purpose and Essays. Both these require proficient writing skills. research and writing abilities need time to develop, just as Rome did. These are two areas I lay emphasis on: researching and writing. For researching, one not only needs to know the direction, perspectives, and have a structured frame of mind but also be aware of the appropriate sources to tap into. And this comes from routine research and reading. To comprehend how the workings of policy are at play from many viewpoints, it helps to keep up with the affairs of the national and international developments.

For essays, the art of writing in the easiest language comprehensible by all goes a long way. Law frequently uses flowery language and complicated writing that is difficult for laymen to grasp. However, as future changemakers, our ideas should not only be thought provoking but be communicated in a manner understandable by all. Writing (and researching) practice, not necessarily long academic papers, can help one be prepared for the LAMP application processes and avoid last minute hastes.

QUARTER AT A GLANCE

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Short Notes

Short Notes are excerpts that succinctly analyse recent major happening every week and leave the readers with food for thought to simulate their research capabilities

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