FRAUD UNDER SEBI (PROHIBITION OF FRAUDULENT AND UNFAIR TRADE PRACTICES RELATING TO SECURITIES MARKET) REGULATIONS, 2003: A DOCTRINAL ANALYSIS DISTINCT FROM THE INDIAN CONTRACT ACT AND THE COMPANIES ACT, 2013, WITH A JUDICIAL MAPPING OF "DEALING IN SECURITIES

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ABSTRACT

This paper analyzes the concept of fraud as stated in SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (PFUTP Regulations) and to spot the differences between it and fraud under Indian Contract Act, 1872 Section 17 and Companies Act, 2013 Section 447. Even though a fraud by way of deliberate cheating is a crime in all these three statutes, they concern different levels of law. The Indian Contract Act regards fraud as a reason for breaking of contractual consent between the parties, who can be identified, whereas Companies Act, sees fraud as a corporate crime which requires proving of criminal intention. PFUTP, however, looking at the maintenance of fairness in the market, thinks that even without direct evidence of mens rea, the idea of manipulative intention can be inferred from trading patterns, market impact and other surrounding conditions.

Keywords: SEBI, PFUTP Regulations 2003, Fraud, Indian Contract Act, Companies Act 2013, Dealing in Securities, Market Manipulation, Insider Trading, Market Integrity, SAT.

I. INTRODUCTION

Fraud was surely one of the first issues discussed in law, but its legal definition varies from one place to another. For example, in contract law, a fraudulent act is the dishonest misrepresentation that causes a contracting party initiating consent to be misled. On the other hand, company law considers fraud as the intentional misuse of one's position in the company to procure loss to others (including the company) or to wrongfully cause them to suffer loss. But securities law sees fraud in a completely different way: "Fraud in securities is not targeted at an individual victim, but the very integrity of the securities market is what is being attacked. It consists in the alteration or manipulation of the market price mechanism. Basically, this refers to the communication of misleading or incomplete information to the large body of investors who base their buy and/or sell decisions of securities on such information.[1]

The Securities and Exchange Board of India (SEBI) regulations on the prohibition of fraudulent and unfair trade practices relating to securities market, 2003 or the PFUTP Regulations in short, are the main legal provisions used for fighting market fraud in India. These Regulations, which came out as a substitute for the earlier 1995 Regulations, were passed under Section 30 of the SEBI Act, 1992 and have been modified from time to time, including the years 2012, 2013, 2018, 2020, 2022 and the last one on June 28, 2024, so as to meet the challenge of the fraudulently sophisticated and complex methods of market manipulation.[2] Nevertheless, what appears as a simple thing to a common person that has been troubling courts and regulators for more than a decade is still to be resolved: Is a fraud as per the PFUTP Regulations the same thing as a fraud in private law? And, of equal significance, what are the kinds of activities that are covered by the term "dealing in securities" and which are the Regulations based on?

These questions are not just theoretical. The answer will determine whether a defrauded investor may initiate a regulatory proceeding at the same time as a civil action, whether companies and their auditors who commit securities fraud will be under SEBI's jurisdiction, and what standard of proof is necessary in securities enforcement cases is it the criminal standard of beyond reasonable doubt or the civil standard of preponderance of probabilities. In SEBI v. Rakhi Trading Pvt. Ltd., the Apex Court observed that, "Section 12A of the SEBI Act,

[1] SEBI v. Rakhi Trading Pvt. Ltd., Civil Appeal Nos. 3174-3177 of 2011 (Supreme Court of India, 8 February 2018).
[2] SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (PFUTP Regulations), notified 17 July 2003, as amended (most recently 28 June 2024).

1992 along with Regulations 3 and 4 of the PFUTP Regulations, 2003 are mainly targeted at protecting market integrity and preventing market abuse."[3] Preservation of market integrity is a systemic goal, not an individualistic one, and it is this systemic character of the securities market that makes securities fraud not explainable by categories of private law.

The paper sets out to do the following: after setting up the research framework, it looks at the development from contractual fraud to regulatory fraud, comparatively analyzes the statutes, looks at the changing judicial position of the mens rea standards and the extent of "dealing in securities, " examines governance implications, and finally comes up with the reform recommendations.

II. RESEARCH PROBLEM AND SCOPE

Conceptual scattering of 'fraud', as a problem exists in the entire legal system of India, and the authors have analyzed it as one of the major issues. Three different laws the Indian Contract

Act, 1872, the Companies Act, 2013, and the PFUTP Regulations, 2003 define fraud differently. That which is legally required, the type of knowledge involved, the nature of proof, and the legal consequences are all different in the three laws. This kind of dispersal at least causes problems of interpretation in the following three circumstances: market participants using regulatory and civil means to get redress for the same act, SEBI taking legal actions against auditors, advisors, analysts who are not traditional market intermediaries, and courts determining the level of guilt or blame constituting fraud under the PFUTP Regulations.

This paper's scope extends to the civil and regulatory dimensions of securities fraud under Indian law. It does not deal with criminal liability for market manipulation under the Bharatiya Nyaya Sanhita, 2023 or the Prevention of Money Laundering Act, 2002, but it does acknowledge that there is a common ground between these laws. The comparative part is confined to doctrinal issues in US securities fraud law under Rule 10b-5, which serves as the principal normative reference for India's PFUTP system.

"Whether the concept of fraud under the SEBI PFUTP Regulations, 2003 [4] *is doctrinally distinct from fraud as defined under the Indian Contract Act, 1872 and the Companies Act,*

[3] SEBI v. Rakhi Trading Pvt. Ltd. (n 1).
[4] Bhatt & Joshi Associates, "SEBI PFUTP Regulations 2003: A Comprehensive Analysis.

2013, and what activities constitute "dealing in securities" for the purposes of those Regulations, as illuminated by judicial pronouncements."

III. RESEARCH OBJECTIVES AND QUESTIONS

A. Research Objectives

1. To critically examine the definition of fraud as per Regulation 2(1)(c) of the PFUTP Regulations, 2003 and to carefully compare it with the meanings given in Section 17 of the Indian Contract Act, 1872 and Section 447 of the Companies Act, 2013.

2. To evaluate the role of mens rea, inducement, and actual harm in proving fraud under the three different legal documents and to understand the consequences of those variations for law enforcement and investor protection.

3. To trace, through the rulings of the Securities Appellate Tribunal and the Supreme Court of India, the changing meaning and extent of the term "dealing in securities" under the PFUTP Regulations.

B. Research Questions

1. In what material respects does the definition of fraud under Regulation 2(1)(c) of the PFUTP Regulations differ from Section 17 of the ICA and Section 447 of the Companies Act?

2. Is mens rea a required ingredient of fraud under the PFUTP Regulations, and how have courts resolved the tension conflict between regulatory efficiency and culpability standards?

3. How have the Securities Appellate Tribunal and the Supreme Court of India widened or limited the scope of the term "dealing in securities" in enforcement proceedings?

IV. RESEARCH METHODOLOGY

This paper employs a doctrinal research methodology. Primary sources analysed include the SEBI Act, 1992; the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to

Securities Market) Regulations, 1995 and 2003 (as amended); Section 17 of the Indian Contract

Act, 1872; Section 447 of the Companies Act, 2013; and SEBI's enforcement orders and the decisions of the Securities Appellate Tribunal and the Supreme Court of India. Secondary sources include peer-reviewed journal articles, SSRN publications, commentary from regulatory practitioners, and the Report of the Committee on Fair Market Conduct, 2018 (T.K. Vishwanathan Committee)[5]. Comparative reference is made to the US Securities Exchange Act, 1934 and Rule 10b-5 promulgated thereunder, as well as to the UK Financial Services and Markets Act, 2000, for purposes of doctrinal illumination, not transplantation. The method is both analytical and critical: it aims at understanding the internal logic of each fraud regime and identifying the points where they converge or diverge.

V. HISTORICAL EVOLUTION — FROM CONTRACTUAL FRAUD TO MARKET FRAUD

Tracing the historical trajectory of Indian securities regulation leading to the development of its unique notion of fraud is essential to understanding how fraud in the PFUTP Regulations was differentiated from its counterparts in private and corporate law. There was no sudden break; rather, through a series of market crises that revealed the inefficacy of private law measures in addressing systemic market damages, the differentiation was evolved.

A. The Common Law Inheritance: Derry v. Peek and Section 17 of the ICA

India's conception of contractual fraud derives from the English common law case Derry v. Peek (1889)[6], Fraud, according to the judgement, necessitates evidence of deliberately making false statements with an intention to deceive. Indian Contract Act Section 17, 1872, embodies this double-sided, inter-party conception of fraud primarily based on a person's being induced into a contract. However, this model is quite inadequate when it comes to securities markets as in these situations, fraudulent actions may affect a large number of investors who are not in any direct contractual relationship with one another.

B. The Securities Market Crises: 1992 and the Emergence of Regulatory Fraud

The Harshad Mehta securities scam of 1992 revealed the inefficiency of contract-based fraud laws vis-à-vis securities markets. The whole episode prompted the SEBI (Prohibition of

[5] T.K. Vishwanathan Committee, Report of Committee on Fair Market Conduct (SEBI, 8 August 2018)
[6] Derry v. Peek (1889) 14 App Cas 337 (House of Lords).

Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995.

The 1995 Regulations were superseded by the PFUTP Regulations in 2003, which drastically expanded the concept of fraud to encompass any act that is capable of deceiving investors or the securities market, thus, the attention was shifted from bilateral inducement to the systemic market protection.

C. Corporate Law's Response: Section 447 of the Companies Act, 2013

Section 447 of the Companies Act, 2013 is a middle position. It goes a bit further than just dealing with fraud under bilateral contracts by covering wrongful gain to any person. However, it still keeps intent to commit a crime as a condition and restricts the use to acts linked with the setting up or managing a company. Hence, it is different from ICA fraud on the one hand (which has a narrower scope) and PFUTP fraud on the other hand (which has a wider, market-oriented scope).

VI. FRAUD — THE THREE DEFINITIONS: A COMPARATIVE ANALYSIS

A. Fraud under Section 17 of the Indian Contract Act, 1872

Section 17 of the ICA states that fraud is a notion that entails two parties in a relationship. The main characteristics of fraud are: (i) a person commits one of the five categories of acts, (ii) a contracting party, his agent or connivance, (iii) the desire to deceive the other party or his agent, or to persuade him to enter into the contract; (iv) a specified, identifiable party.[7] All these features are absolutely required. Manipulation should be the reason why others decide to agree; it must be the act of a party to the contract; and there must be a subjective wish to mislead or to convince.

Section 17 has three major limitations which make it inappropriate for securities markets. First, it requires a bilaterally contractual relationship. Second, it necessitates proof that misrepresentation led to the particular contract. Third, it only allows for the contract to be voidable but does not provide for regulatory sanctions or market-wide remedies.

[7] Indian Contract Act 1872, s. 17 (n 5).

B. Fraud under Section 447 of the Companies Act, 2013

Section 447[8] of the Companies Act takes a big step forward compared to the ICA in that it not only recognizes fraud as a cause for a wrongful gain to a person but also for a wrongful loss to a company, thus it introduces a new concept of fiduciary abuse which is not present in contract law. Nevertheless, it still poses the element of criminal intent to fraud ("with intent to deceive") and its scope is confined to the wrongdoing related with company promotion, formation, management, or liquidation only.

C. Fraud under Regulation 2(1)(c) of the PFUTP Regulations, 2003

Regulation 2(1)(c) of the PFUTP Regulations actually provides a very broad definition of fraud. The beginning of the definition points out that fraud may "comprise any act, statement, omission or concealment that has been made, either directly or indirectly, by any person or even any other person with his connivance or by his agent while dealing in securities, for the purpose of inducing such other person to deal in securities, whether or not there has been any wrongful gain or the avoidance of any loss."[9] In the subsequent part of the paragraph, concrete examples of typical fraud cases are provided and among the nine cases, for example, are the filing of fraudulent statements or misrepresenting, concealing of facts while knowing they are material, giving false impressions about the security, and the act of an issuer disseminating misinformation which changes the market price even if investors are not directly relying on the information.

PFUTP can not be divorced from the rest of the legislative framework that it is supplemented by. These legislation also include Section 12A of the SEBI Act, 1992 which provide the legal basis for making this entire regulatory system. Among other things, Section 12A is a criminal offense if a person, directly or indirectly uses or employs any device, scheme, or artifice to defraud or manipulative, deceptive device or contrivance in connection with the purchase or sale of securities; (b) employ any device, scheme, or artifice to defraud, in connection with issue or dealing of securities;(c) participate in any act, practice or course of business which works or would work as a fraud or deceit on any person in connection with securities; or (d) at any time engage in insider trading. The PFUTP Regulations provide a detailed explanation, of the specifics of fraudulent and manipulative practices, which are the subject of these statutory

[8] Companies Act 2013, s. 447, Explanation.
[9] PFUTP Regulations 2003, reg. 2(1)(c) (as amended 2018).

prohibitions.Section 12A and Regulation 2(1)(c) link the notion of fraud to market integrity and the prevention of systemic manipulation. To put it simply, it is not the idea of protecting the individual parties to a contract that is the focus here, unlike the ICA framework.

Intending to deceive is not a prerequisite element of regulatory fraud, as clarified by the PFUTP definition. Firstly, the PFUTP definition explicitly mentions that acts may be included "whether in a deceitful manner or not, " a feature that is absent in the ICA or the Companies Act. Secondly, it could be argued that even conduct which may not constitute deceit in a traditional contract parlance can be included in the regulatory definition if it causes the securities market to become dysfunctional or leads to decisions being taken to trade.[10]

Secondly, Not only is wrongful gain or loss prevention not a precondition under PFUTP definition but the very text of the definition states the same. One of the points in the ICA is that the existence of damage is a precondition for a fraud case. Without harm, fraud does not occur.

Companies Act covers the intent towards causing wrongful gain or loss in the definition. Inducement is the regulatory wrong and not the consequence as per PFUTP Regulations.[11]

Thirdly and very importantly, the PFUTP definition does not premise the existence of a direct link between the perpetrator of fraud and the victim of fraud. The words "in order to induce such another person to deal in securities" do not entail the personal communication or the relational proximity besides the two parties. The ninth special example addresses the conduct of an issuer who issues false information even when investors depend only on the market price and not on the statement itself. This is a regulatory equivalent of what US securities law refers to as the "fraud on the market", a doctrine that the Indian statutory language can in fact accommodate, although the Indian courts have not explicitly accepted the efficient capital market hypothesis which is the basis of the doctrine.

VII. THE MENS REA QUESTION: INTENT, KNOWLEDGE, AND REGULATORY CULPABILITY

The doctrinal question most frequently challenged in jurisprudence related to the PFUTP regulations has been the extent to which mens rea plays a role. The question occurs naturally

[10] Corporate Professionals, "Latest Amendments in SEBI PFUTP Regulations" (2019) <https://www.corporateprofessionals.com>.
[11] ibid; PFUTP Regulations 2003, reg. 2(1)(c).

from the phrase in the inclusive definition, "whether in a deceitful manner or not". Does this language remove the necessity of subjective unlawful intent, and if that is so, what standard of guilt should SEBI follow?

A. The Kanhiyalal Standard: A Liberal, Expansive Interpretation

The Supreme Court has issued the most authoritative judgment on the clandestine intention under the PFUTP Regulations in the case of SEBI v. Shri Kanhiyalal Baldevbhai Patel. The twojudge bench of Justice N.V. Ramana and Justice Ranjan Gogoi both delivered their separate concurring opinions, however, they both concurred in the adoption of a liberal and expansive interpretation of the fraud definition. The Court held that the phrase "whether in a deceitful manner or not" was the determining factor and the definition "even includes an act or a failure to act that may be done in a deceitful manner as well as those acts which are not deceitful but still induce dealing in securities.[12] The Court thereby explicitly divorced the PFUTP definition from the Derry v. Peek tradition.

In the Supreme Court decision in *Kishore R. Ajmera v SEBI* (2016) 6 SCC 368, the Court remarked that in securities market cases it is difficult to obtain direct evidence of a pre-arranged trading scheme. It was decided that manipulative or coordinated trading can only be inferred through the circumstantial evidence such as the timing and pattern of the trades, price changes and other market activities. The decision has paved the way for SEBI to rely on circumstantial evidence while alleging manipulative behaviour under the PFUTP framework.

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B. The 2018 Amendment: Reinserting "Knowingly"

The amendment in 2018, which was a response to the T.K. Viswanathan Committee's

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[12] SEBI v. Shri Kanhiyalal Baldevbhai Patel, (2017) 15 SCC 1; analysed in Centre for Child and the Law NLUO, "Transposing the American Notion of Securities Fraud in Indian Securities Law" (2022) <https://ccl.nluo.ac.in>.
[13] ibid.

recommendations, added the word "knowingly" in some specific subsections of Regulation 4. However, Regulation 2(1)(c) was not amended. This discrepancy has led to interpretative problems: does the fact that some provisions are amended imply that all others require a mens rea? The main judicial opinion is that provisions that were left unchanged still uphold the Kanhiyalal standard. The SEBI enforcement proceedings standard of proof is the balance of probabilities, which is in line with the regulatory (as opposed to criminal) nature of the proceedings.

C. The Standard of Proof: Preponderance of Probabilities

Another related matter is the level of evidence that should be required in SEBI's enforcement proceedings. Since SEBI is a quasi-judicial authority, its proceedings are of a civil and regulatory nature, not criminal. The Supreme Court in SEBI v. Rakhi Trading Pvt. Ltd. (2018) recognized that the standard of proof in quasi-judicial proceedings before SEBI is that of the balance of probabilities, the civil standard, and not the criminal standard of proof beyond reasonable doubt.[14] This is a very important aspect which distinguishes the issue from both the ICA (where fraud in a civil suit is proved on a balance of probabilities but courts have normally asked for "clear and cogent" evidence) and Section 447 of the Companies Act (where criminal prosecution requires proof beyond reasonable doubt). The Supreme Court, however, has pointed out that the degree of probability required may vary according to the seriousness of the charge, thus more persuasive circumstantial evidence may be needed in situations where the final finding has very serious consequences.

VIII. THE SCOPE AND AMBIT OF "DEALING IN SECURITIES" — A JUDICIAL MAPPING

"Dealing in securities" is the main condition for the Securities and Exchange Board of India (SEBI) to enforce the Prevention of Fraudulent and Unfair Trade Practices Relating to Securities Market (PFUTP Regulations). Identifying that the accused activity either is dealing in securities or is so substantially connected with it is a fatal condition for the application of SEBI's execution power cascade under the Regulations. Courts have been frequently requested to decide whether the expression covers the various activities, for example, synchronised trading, front-running, auditing, advising, etc. The trend of these rulings indicates a gradual,

[14] SEBI v. Rakhi Trading Pvt. Ltd. (n 1); see also Kishore R. Ajmera v. SEBI, SAT Appeal.

frequently loud, expansion of its scope.

A. The Baseline: Transactional Dealing

"Dealing in securities" is a very simple concept, it just means buying, selling, or otherwise trading securities in the market. According to Regulation 3 of the PFUTP Regulations, no person shall be allowed to deal or trade securities by means of fraud either directly or through intermediaries. The regulation points out some ways that are considered fraudulent such as manipulation or deception to lure investors in securities, employing planning, scheming, or artifice to defraud in connection with listed securities, and any other act or conduct which may be a fraud or a deceit[15].

The 2018 amendments made it clearer that certain manipulative actions, especially those deliberately designed to influence the decision of traders, are considered fraudulent dealings in securities or actions "taken to help" such violations as covered by the law. Therefore, it is not only a fulfilled trade that can cause harm to the integrity of the market; a manipulation which changes the informational environment where trading decisions are made is also a regulated matter under the law.[16]

B. Synchronised Trading — SEBI v. Rakhi Trading Pvt. Ltd. (2018)

The major Supreme Court ruling on "dealing in securities" in connection with market manipulations is the SEBI vs. Rakhi Trading Pvt. Ltd. case. It concerned synchronized and reverse trading of NIFTY options in the futures and options segment. The traders placed buy and sell orders almost simultaneously at pre-determined prices and then reversed the trades with a significant price change, which gave the appearance of trading volume without actual change in beneficial ownership.[17]

According to the Securities Appellate Tribunal, synchronized trades are not unlawful in themselves, and since NIFTY is a large, diversified index, the trades could not have had an impact on market prices. However, the Supreme Court rejected that line of argument. The court held that by means of synchronization and rapid reverse trading, the price discovery mechanism is distorted, and such manipulative conduct also prevents genuine investors on equal footing

[15] PFUTP Regulations 2003, reg. 3.
[16] PFUTP Regulations (Amendment) 2018, expanding reg. 2(1)(b) (definition of "dealing in securities").
[17] SEBI v. Rakhi Trading Pvt. Ltd. (n 1) SEBI v Rakhi Trading Pvt Ltd (2018) 13 SCC 753.

from entering the market.[18] In fact, it is the very distortion of the trading mechanism that constitutes a violation of PFUTP Regulations, even if there is no direct market impact. "Through synchronization and rapid reverse trade, " the Court went on to say, "the price discovery system itself is being tampered."

Therefore, the traders were under the guilty finding that they had carried out fraudulent and unfair trade practices while "dealing in securities". Actually, the Court emphasized an essential point about brokers: "Merely because a broker has executed a deal, one cannot infer that a regulation violation has taken place. SEBI does not possess any proof that the brokers were either negligent or were participants in the wrongdoing."[19] This declaration essentially established a stricter criterion for brokers in the secondary market the knowledge of the non-genuine nature of the transaction must be demonstrated for the broker and the broker must have knowingly facilitated it.

Likewise, the Rakhi Trading case corroborated the stand that SEBI went about the matter correctly the principle called by the lawyers the "Evidentiary Approach Principle" in synchronized trading cases. According to this principle, SEBI is capable of demonstrating the manipulative intent by way of circumstantial evidence like: (i) the timing and sequencing of orders across different entities; (ii) the sharing of profits and losses in a manner inconsistent with arm's length trading; (iii) the existence of common beneficial ownership or control structures; (iv) unusually high volumes of trading or price changes coinciding with the trades in question; and (v) the absence of a reasonable commercial explanation for the pattern of trading. This is because direct proof of collusion or prearrangement hardly occurs in case of highly sophisticated market manipulation schemes, and hence SEBI can take an action on basis of the inferences drawn from objective market data.[20]

C. Front-Running by Non-Intermediaries — SEBI v. Kanaiyalal Baldevbhai Patel (2017)

Firstly, the point which the Supreme Court recently resolved in its decision in SEBI v. Kanaiyalal Baldevbhai Patel (2017)[21] was a very basic question with the securities market being

[18] Ibid.
[19] Ibid.
[20] SEBI v. Rakhi Trading Pvt. Ltd. (n 1); Nishith Desai Associates, "Sync or Swim: Navigating the Legal Waters of Synchronized Trades in India"
[21] Civil Appeal 2595 of 2013 https://www.sebi.gov.in/enforcement/orders/sep-2017/order-of-the-hon-ble-supremecourt-of-india-in-the-matter-of-sebi-vs-shri-kanaiyalal-baldevbhai-patel-and-other-connected-matters_36000.html

at the center of this issue. Whether "dealing in securities" might be a term that could even be used for the ones who are not registering as the intermediaries. The story is as follows. Some persons who had received from the portfolio managers the confidential information had executed the trades themselves before the large institutional orders were placed, which is also referred to as frontrunning. Actually, Supreme Court on several occasions has declared PFUTP Regulations applicable to "any person" committing such market manipulative acts in the context of frontrunning and insider information i.e. emphasis to third party rather than registered intermediaries.[22]

They argued in front of the Court that the front-running, a practice banned by Regulation 4(2)(q) of the PFUTP Regulations, only covers intermediaries and therefore does not extend to non-registered ones. The Court rejected the claim, called it completely unfounded and, on the contrary, observed that the broad wording used in Regulation 2(1)(c) where the word "includes" is used along with the phrase "by any person" clearly shows that the legislature wanted to capture a wide variety of fraudulent activities and not only those of intermediaries usage situation.[23] Besides, the Court said regulation of the market leading to market integrity will be very ineffective if limited only to registered intermediaries. Thus, front-running by non-intermediaries is also an offence punishable under the PFUTP Regulations. Further, the term "dealing in securities" is not restricted only to the persons who are officially registered with SEBI. Hence, it is a more extensive concept that also includes non-registered counterparts in the market.

D. Auditors and the Satyam-PwC Controversy

One of the most debated aspects of the Satyam-PwC case was whether the term "dealing in securities" could be stretched that far. SEBI charged that PricewaterhouseCoopers (PwC), as the company's auditors, were not just silent witnesses but active participants in the fraud, thus "dealing in securities."[24] The Securities Appellate Tribunal (SAT) decided that providing professional services by auditors is not even remotely close to dealing in securities. However, the Supreme Court put a stay on this order, and the 2020 amendment to Regulation 4(2)(f) has since made it clear that issuing false or misleading reports in relation to securities is also a form

[22] https://nishithdesai.com/default.aspx?id=15301
[23] ibid; CaseMine, "Expansion of FUTP 2003: Non-Intermediary Front-Running Prohibited"
[24] Regstreet Law Advisors, "Price Waterhouse-SAT Case: How Supreme Court Ruling Will Impact SEBI" (August 2023) <https://regstreetlaw.com>.

of securities dealing. This action by the legislature has effectively put an end to this dispute by siding with a wider jurisdictional scope.

IX. THE GOVERNANCE LANDSCAPE: WHY THE DISTINCTION MATTERS

First and foremost, the legal distinction in the doctrine between PFUTP fraud and ICA/Companies Act fraud causes tremendous practical problems especially in four areas. The first is that SEBI, through Section 11 of the SEBI Act, 1992, has a dual role of investor protection as well as the promotion of securities market orderly development.

A. Concurrent Proceedings

If someone commits a fraud in the securities market under PFUTP Regulations, apart from possible civil damages payment as per ICA (if there was a contract between the parties), he could also potentially face criminal prosecution under Section 447 of the Companies Act (if the fraud is in connection with the company's business). The burden of proof, the mental element required, and the defences available are different in these 3 kinds of proceedings. SEBI enforcement doesn't require the presence of mens rea; for civil litigation under the ICA, you need to prove the person had intention to deceive; and for criminal prosecution under Section 447, it needs to be proved beyond reasonable doubt that the person had intention. Therefore, defendants must be careful to not make themselves liable while at the same time prosecuting different cases arising from the same facts.

B. SEBI's Jurisdictional Reach

With the gradual widening of "securities dealing" scope, SEBI's enforcement reach has expanded as well. Similar to the instances of Dipak Patel and Satyam-PwC, SEBI can take the first step in the proceedings against non-registered market participants if their conduct, through advising, auditing or information intermediation, is a major factor in market fraud. Such enlargement is regulatory indication that market manipulation mostly involves collusion of several players, each of whose acts, even though not constituting direct transactional fraud, when combined, lead to a breach of market integrity.

C. Investor Protection and Remedial Adequacy

The big step up for investors' protection in the PFUTP framework, shifting away from the traditional bilateral ICA fraud model, is that it enables SEBI to act against market wide harm even if individual investors are not able to identify or prove a direct relationship with the fraudster, something that most investors would be unable to do. However, one of the limitations of the PFUTP Regulations is that investors do not get a strong private right of action and therefore cannot directly sue under the Regulations but must rely on SEBI enforcement proceedings or separate civil suits for their remedies, this disfavoring the effective utilization of the regulatory framework by the investors who have suffered losses.[25]

D. The Problem of Definitional Indeterminacy

PFUTP definition's open-textured nature, on one hand, it is the greatest regulatory strength of the definition of PFUTP, on the other hand, it is also a source of doctrinal indeterminacy. As NLUO commentaries point out, the definition of fraud, if static, cannot foresee "human ingenuity" in finding new manipulative methods; hence, an open-textured definition is normatively superior in the regulatory context.[26] However, lack of a clear mens rea level leads to the risk of going too far: those who trade in quite unusual ways, commercially motivated ones, might very well be subject to regulatory measures based on the inference of inducement, which they are not able to disprove. The 2018 Amendment introduction of "knowingly" in some parts of the regulations is a partial and, perhaps, an insufficient measure against this risk.

X. CRITICAL ANALYSIS: THE PFUTP REGULATIONS AS A SUI GENERIS INSTRUMENT

Analysis of the three fraud definitions, judicial mapping of "dealing in securities" and exploring the governance implications are the major reasons that support a central claim: the PFUTP Regulations are a unique set of regulations whose underpinning logic cannot be aligned with or reduced to the categories of private and corporate law fraud.

Firstly, the purposive divergence is very basic. The ICA defends individual contracting parties; Companies Act supports corporate stakeholders; PFUTP Regulations protect market integrity on a large scale and investor confidence which is not limited to a few individuals only.

[25] Global Investigations Review, "India: A Deep Dive into SEBI and Related Legislation Amid Insider Trading and Market Manipulation Investigations" (3rd edn) <https://globalinvestigationsreview.com>.
[26] "Transposing the American Notion of Securities Fraud in Indian Securities Law" (2022) <https://ccl.nluo.ac.in>.

Secondly, the difference in mens rea serves as an additional reflection of purpose difference. Regulation of market-wide harm should not be limited by the requirements for criminal intent.

Thirdly, extension of "dealing in securities" recognizes the fact that securities markets are characterized by complex intermediation, information asymmetry, and collective action problems unlike bilateral contracts.

Fourthly, the sui generis nature raises rule of law issues. Lack of clear definitional boundaries, together with a lowering of mens rea standards, make SEBI's discretion in enforcement very high. Legislative clarity and independent judicial scrutiny should work as safety nets.

XI. CONCLUSION AND REFORM RECOMMENDATIONS

This PJ has shown that fraud under the PFUTP Regulations is a different doctrine from fraud under the Indian Contract Act or Companies Act. The reason for this difference is that the

Acts have very different purposes: the Contract Act aims at protecting the parties to a contract, the Companies Act deals with company governance, and the PFUTP is about maintaining the integrity of the whole securities market.[27]

Four reform points are made in this article. First, a detailed, formal proportionality examination in enforcement cases should be made a part of PFUTP Regulations, so that the wide meaning of "dealing in securities" does not end up unfairly affecting actors who operate in good faith. Second, the creation of a private right of action under the PFUTP Regulations should be developed, just as US law has an implied right under Rule 10b-5, so that investors who have suffered loss due to fraud can themselves initiate actions for damages while the regulatory actions by SEBI are continuing. Third, a legislative committee should be set up to make the mens rea requirements in the three fraud laws more consistent with each other to minimise the problems caused by simultaneous cases with different levels of guilt. Fourth, the idea of "persons associated with the securities market" should be officially defined in a statute so as to give market players a clear understanding of how far SEBI's jurisdiction extends, taking into account in this context the experience of the Satyam- PwC matter.

A new line of thought for a fifth reform proposal is prompted by actual technological

[27] PFUTP Regulations 2003; Indian Contract Act 1872; Companies Act 2013.

innovations and it has to do with the PFUTP rules being applicable to algorithmic and highfrequency trading. The problem of assigning mens rea is meanwhile a pressing and very interesting conceptual issue: can a machine "intend" to manipulate the market? And if that is a mistake, then how should responsibility be shared among the programmer who designed the algorithm, the company which implemented it, and the human overseer? PFUTP Regulations' standard based on the effects without relying on dishonest intent, may really be closer to this futuristic scenario than the intention-based fraud laws. In light of this, a regulatory statement dealing with the sharing of responsibility for algorithmic fraud, including whether a faulty algorithm design can be a fraud under Regulation 2(1)(c), is very much needed to ensure the market players who operate at the tech- finance interface get a clear picture.[28]

At their core, the PFUTP Regulations constitute a highly advanced and flexible tool to preserve the integrity of the securities markets in India. Nevertheless, even the widest definitions of these Regulations will not make them effective unless they are applied in a consistent and quite proportional manner it is exactly these two qualities that the courts, the Securities Appellate Tribunal and SEBI collectively have to develop.

[28] PFUTP Regulations 2003, reg. 2(1)(c); Indian Contract Act 1872, s. 17; Companies Act 2013, s. 447.