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## 19 OPPOSITION PARTIES TO BOYCOTT PARLIAMENT INAUGURATION BY PM

*Caught in a storm: A view of the new Parliament building, right, coming up next to the existing Parliament in New Delhi. R.V. MOORTHY*

*Sidelining the President not only a grave insult but also a direct assault on democracy, they say; Biju Janata Dal, YSR Congress to attend May 28 event*

**THE HINDU BUREAU**  
NEW DELHI

Declaring their intention to boycott the inauguration of the new Parliament, 19 Opposition parties, including the Congress, issued a joint statement on Wednesday saying there was no value in a new building when the "soul of democracy has been sucked out from Parliament".

Their primary objection is against Prime Minister Narendra Modi's decision to inaugurate the building himself, "completely sidelining President Droupadi Murmu", which the Opposition said was not only "a grave insult but also a direct assault on our democracy, which demands a commensurate response".

The signatories are the Congress, Dravida Munnetra Kazhagam, Aam Aadmi Party, Trinamool Congress, Janata Dal (United), Nationalist Congress Party, Shiv Sena (UBT), CPI(M), CPI, Samajwadi Party, Rashtriya Janata Dal, Indian Union Muslim League, Jharkhand Mukti Morcha, National Conference, Kerala Congress (Mani), Revolutionary Socialist Party, Rashtriya Lok Dal, Marumalarchi Dravida Munnetra Kazhagam, and the Viduthalai Chiruthaigal Katchi.

The Biju Janata Dal and the YSR Congress Party said they would attend the event on Sunday.

The Bharat Rashtra Samithi (BRS) was also approached by the Opposition bloc to join the boycott. However, according to sources, the party does not intend to sign the joint statement. "We are still discussing the issue and will take a decision tomorrow," BRS leader K. Keshav Rao said.

Mr. Modi will inaugurate the new building on Sunday. Lok Sabha Speaker Om Birla will also be present at the function. The Opposition has

argued that it is the President and not the Prime Minister who is the head of the Indian state, and also the head of Parliament.

Their statement quotes Article 79 of the Constitution which states, "There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People." The Opposition sought to remind the government that it is the President who "summons, prorogues and addresses" the Parliament.

"In short, the Parliament cannot function without the President. Yet, the Prime Minister has decided to inaugurate the new Parliament building without her. This undignified act insults the high office of the President, and violates the letter and spirit of the Constitution. It undermines the spirit of inclusion which saw the nation celebrate its first woman adivasi President," the Opposition parties said in the statement.

### Muting Opposition

The Opposition accused Mr. Modi of relentlessly hollowing out Parliament by disqualifying, suspending and muting Opposition members, and by passing several controversial legislation without any debate. It also pointed out that the new building was constructed at "great expense" during a "once-in-a-century" pandemic, with "no consultation with the people of India or MPs".

"When the soul of democracy has been sucked out from the Parliament, we find no value in a new building. We announce our collective decision to boycott the inauguration of the new Parliament building. We will continue to fight in letter, in spirit and in substance against this authoritarian Prime Minister and his government and take our message directly to the people," they said.

Minutes after the joint statement was released, former Congress president Rahul Gandhi said in a tweet that the Parliament is not built by "bricks of ego" but through constitutional values.

Andhra Pradesh Chief Minister and YSR Congress president Jagan Mohan Reddy, however, said his party's MPs would attend, and slammed those planning to boycott the inauguration. He also urged all parties to set aside the political differences and to attend the event.

## NEW PARLIAMENT TO HOUSE SCEPTRE THAT SYMBOLISED TRANSFER OF POWER IN 1947

**VIJAITA SINGH**  
NEW DELHI

Prime Minister Narendra Modi will install the Sengol, a sceptre given by the British to India's first Prime Minister Jawaharlal Nehru to represent the transfer of power in 1947, in the new Parliament building, Union Home Minister Amit Shah said on Tuesday.

The sceptre, kept in a museum in Prayagraj, formerly Allahabad, will be installed near the podium of the Lok Sabha Speaker.

"Sengol makes the spirit of August 15, 1947 unforgettable and the Parliament House is the most appropriate and sacred place to install it," Mr. Shah said. "Transfer of power is not a mere exchange of documents; it is done when the government runs according to traditions and culture. Sengol in the new

Parliament building indicates the sentiments espoused by Nehruji in 1947."

It was originally used to mark the handing over of power from one king to another during the Chola dynasty in Tamil Nadu.

The five-foot-long intricately carved, unbending gold-plated silver sceptre, with a finial of Nandi (bull deity), was specially commissioned by the then Thiruvavaduthurai Adheenam (pontiff) and was handed over to Nehru.

The Thiruvavaduthurai math is located in Mayiladuthurai district of Tamil Nadu, at the heart of the erstwhile Chola kingdom.

"All 20 Adheenam presidents will also be present to shower blessings in reminiscence of this sacred ritual. I am glad that 96-year-old Vummidi Bangaru Chettyji, associated with its construction, will also participate," Mr. Shah said. (With inputs from Sai Charan N. in Mayiladuthurai)

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## WON'T LET ANYONE MAR INDIA-AUSTRALIA TIES, SAYS PM

**KALLOL BHATTACHERJEE**  
NEW DELHI

India and Australia will not tolerate any elements that may harbour plans to harm strong bilateral ties, Prime Minister Narendra Modi said on Wednesday.

Speaking at a "joint press statement" event, Mr. Modi announced that India will open a new consulate in Brisbane, and said that the two sides have "decided to focus" on upgrading the Economic Cooperation and Trade Agreement (ECTA) to the level of a comprehensive economic cooperation agreement.

**Sticking point**

"Prime Minister Albanese and I have in the past discussed the issue of attacks on temples in Australia and activities of separatist elements. We discussed the matter today also again. We will not accept any elements that harm friendly ties with India," Mr. Modi said in Sydney.

The issue has been a sticking point in bilateral ties, especially in the backdrop of a spurt in Khalistani activities in Australia.

Foreign Secretary Vinay Mohan Kwatra, in an interaction with the media, welcomed the actions taken by Australian authorities against separatist elements. Mr. Kwatra said Mr. Modi had acknowledged Canberra's "correct appreciation" of the activities of separatist forces operating out of Australian territory. Mr. Kwatra also said that the two leaders had discussed the need for "reform" of the UN Security Council (UNSC).

Speaking before Mr. Modi, Mr. Albanese emphasised regional security and said the Quad's leaders stood together for "an open, stable secure and prosperous Indo-Pacific region". The two countries had operationalised the ECTA in December 2022, and Mr. Modi said the plan is to upgrade the discussion towards a Comprehensive Economic Cooperation Agreement (CECA).

## GDP GROWTH EXPECTED TO EXCEED 7% ESTIMATE IN FY23, SAYS RBI GOVERNOR

**THE HINDU BUREAU**  
NEW DELHI

India's GDP growth in 2022-23 may well surpass the 7% estimate, while retail inflation is likely to go below the 4.7% mark this month, Reserve Bank of India (RBI) Governor Shaktikanta Das said on Wednesday.

He added that gross non-performing assets in the banking system are likely to have dipped further in the January to March 2023 quarter.

"I will not be surprised if India's GDP growth last year turns out to be higher than the 7% estimated earlier," the Governor said, noting that almost all of the 70 high-frequency indicators monitored by the central bank have maintained growth momentum through the last quarter of 2022-23. The National Statistical Office will release the GDP data for 2022-23 next week.

The RBI's growth expectation of 6.5% for this year — which Mr. Das noted is higher than the 5.9% projected by the International Monetary Fund — is based on the hope of agriculture doing well, a normal monsoon and a sustained uptick in the services sector, though geopolitical risks, slowing world trade and goods exports remain a risk.

Mr. Das, who was speaking at the annual session of the Confederation of Indian Industry, said that there was a private investment revival under way which was noticeable in sectors such as steel and cement. He added that the industry body's surveys suggest that capacity utilisation in manufacturing is higher than the 75% level last estimated by the RBI.

"Inflation has moderated to 4.7% in the last print and the next print could be even lower but there us no room for complacency. In February last year, the outlook was very benign, but then we had the big surprise from the Ukraine war. Nobody expected it to happen with such intensity," Mr. Das said.

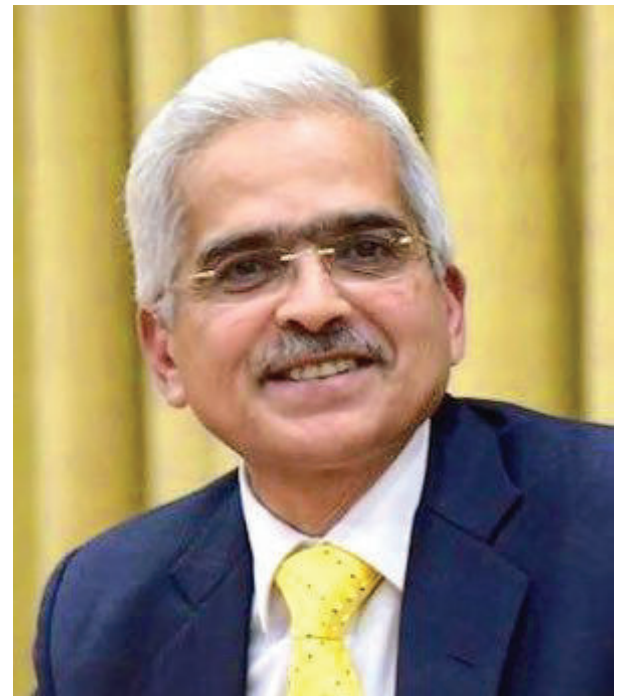
**Evolving situation**

On whether the coming monetary policy review could see another pause in rate hikes, Mr. Das said: "It's not in my hands. It depends on the situation on the ground as it evolves."

While some central banks have hit a pause on rate hikes in recent meetings, the Governor pointed out that the Bank of New Zealand had raised interest rates by 25 basis points earlier on Wednesday, while Canada — which had paused hikes — opted to increase rates again recently.

"So, therefore, global monetary policy is still settling down because the inflationary conditions are fast evolving and all central banks are watching it," he said.

Mr. Das alluded to unaudited fourth quarter results (Jan-March 2023) from banks that



*Shaktikanta Das*

suggested gross non-performing assets at the systemic level were even lower than the 4.4% recorded as of December 31, 2022. "But I would not like to mention the number because they are unaudited and we would rather wait for the audited figures," he added.

## CHINA APPOINTS NEW ENVOY TO U.S. IN SIGN OF THAW IN TIES



*New innings: Xie Feng speaks to the media upon his arrival at the John F. Kennedy International Airport in New York on Tuesday.AP*

*'I have come here to enhance China-U.S. exchanges and cooperation, and I take this as my important mission,' veteran diplomat Xie Feng tells reporters after arriving in Washington*

**ANANTH KRISHNAN**

China's new Ambassador to the U.S. finally landed in Washington on Tuesday, filling a post that unusually remained vacant for close to five months and heralding what some observers see as a possible sign of a limited thaw in recently frosty relations.

Veteran diplomat Xie Feng, who has spent much of his career dealing with the U.S., told reporters after landing in Washington that he had "come here to enhance China-U.S. exchanges and cooperation, and I take this as my important mission". He also added that "as a representative of the Chinese people, I have come here to safeguard the interests of China, and I take this as my sacred responsibility." Mr. Xie succeeds Qin Gang, who was promoted

as China's Foreign Minister, after a close to five month gap, leaving a key post vacant during tense relations.

Beijing is also yet to appoint a new Ambassador to New Delhi for almost seven months, another unusually long gap amid a continuing chill in ties. The former envoy, Sun Weidong, left his post in October and took over as a Vice Foreign Minister in Beijing. It is understood that Beijing as of this month had not yet proposed the name of a successor to New Delhi.

The new U.S. envoy, Mr. Xie, noted that "at present, the China-U.S. relationship is faced with serious difficulties and challenges" and referring to President Xi Jinping's "three principles of mutual respect, peaceful coexistence, and win-win cooperation", said China "hopes that the U.S. will move in the same direction with China, and act in the common interests of the two peoples and the world, properly handling important and sensitive issues, such as the Taiwan question... so as to bring China-U.S. relations back to the right track."

U.S. President Joe Biden last week said a thaw in recently strained

relations could be possible "very shortly", speaking after the G-7 Summit in Japan which saw the grouping take a united stand against what they called Chinese economic coercion, sparking a sharp response from Beijing. The Chinese Foreign Ministry on Monday took a dim view of Mr. Biden's comment, questioning U.S. "sincerity".

#### Resuming visits

Both sides have, however, been in talks over resuming high-level visits. A blueprint agreed by Mr. Biden and Mr. Xi following their meeting in Bali in November laid out a plan to boost relations, but tensions over the Chinese "spy balloon" incident led to Secretary of State Antony Blinken calling off a visit that was part of that plan.

National Security Advisor Jake Sullivan and Chinese Politburo member Wang Yi met for two days of talks in Vienna earlier this month, part of what was described as "ongoing efforts to maintain open lines of communication and responsibly manage competition".

## FDI FLOWS LIKELY TO REBOUND ONLY FROM 2024-25: NOMURA

*Japanese firm expects FY24 to be a challenging year for FDI due to global uncertainty; says domestic pull factors like supply chain relocations are yet to materially lift investment flows*

THE HINDU BUREAU  
NEW DELHI

Foreign direct investment (FDI) flows into India, which fell 25.6% in 2022-23 to \$28.7 billion, are likely to remain sedate this year as well and may only rebound from 2024-25 onwards, Nomura said on Wednesday.

The drop in net FDI flows last fiscal, from \$38.6bn in 2021-22 and \$43.5bn in FY21, was more likely due to global push factors such as tighter monetary policies in developed markets, while domestic pull factors like supply chain relocations were yet to materially lift investment flows, the Japanese financial firm said.

"This marks a fall [in FDI] to 0.8% of GDP vs around 1.5% in the past three years," Nomura economists Sonal Varma and Aurodeep Nandi wrote in a note. "Even though outward FDI dropped by \$4 billion, net inflows suffered as the fall in inward FDI was steeper," they added.

Nomura reckoned the fall in inflows was led by the services sector.

"We expect 2023-24 to also be a challenging year due to global uncertainty, with a turnaround in FDI inflows more likely from 2024-25," the Nomura economists wrote.

### Inflows interrupted

**Net foreign direct investment shrank 25.6% in FY23 to to \$28.7 bn amid tighter monetary policies in developed markets**

■ Net FDI inflows were \$38.6bn in 2021-22 and \$43.5bn in FY21

■ This marks a fall [in FDI] to 0.8% of GDP vs around 1.5% in past three years: Nomura

■ Nomura reckons fall in inflows was led by the services sector



## TIES THAT BIND

*The Modi visit to Australia adds to the bipartisan strength of growing bonds*

Prime Minister Narendra Modi's three-day visit to Australia this week coincided with a year since Labour Party leader Anthony Albanese was elected Prime Minister, and gave a fillip to growing bipartisan ties. While his visit was originally planned for a multilateral event, the meeting of the Quad, it transformed into a purely bilateral visit after the U.S. President pulled out over domestic political constraints; Japanese Prime Minister Fumio Kishida followed suit, and a shortened Quad Summit was held in Hiroshima. As a result, Mr. Modi's Sydney sojourn was much more in the spotlight, particularly his address to the Indian community which Mr. Albanese joined in, as well as the address to business groups. In what was their sixth such meeting in the past year, the announcements from the Modi-Albanese meet included opening an Australian consulate in Bengaluru and an Indian consulate in Brisbane, an agreement on Migration and Mobility, and the finalisation of terms of reference for an India-Australia Green Hydrogen Task Force. Defence and security ties, cooperation on renewable energy, and critical minerals were also part of the substantive agenda, as was the need to sign a Comprehensive Economic Cooperation Agreement by December. On international issues, despite their differing stances on Russia's invasion of Ukraine and western sanctions, they found continuing and common cause on

maintaining a free and open Indo-Pacific, and dealing with an aggressive China.

However, it was the celebration as well as the concerns of the Indian-origin community that appeared to overshadow all else. While both leaders exulted in the mammoth crowd at Sydney's SuperDome, Mr. Modi said that the "real reason, the real power" behind the bilateral relations came from people of Indian-origin in Australia. On the subsequent morning, activities of other groups and conflicts also tracing back to people of Indian origin were discussed as Mr. Modi repeated his concerns over vandalism and attacks defacing community centres and temples with pro-Khalistani, anti-India and anti-Modi graffiti. These had been raised during Mr. Albanese's visit to India in March. While any attack on an Indian consulate is a valid bilateral concern, New Delhi must consider how much attention it wishes to pay to attacks by Australian citizens on Australian citizens and Australian property. While the growing incidents may be cause for worry, it is by no means clear that giving them centre-stage during such visits is conducive to strengthening the common understanding between both countries, or in the best interests of the "three D's" Mr. Modi said bind the two countries today — Democracy, Diaspora and Dosti [Friendship].

## BRINKMANSHIP

*Republicans should not put partisan goals ahead of the greater public good*

The U.S. is close to breaching its \$31.4 trillion debt ceiling, the government-imposed limit on the total funds it can borrow to pay for existing legal obligations including interest on national debt, military salaries tax refunds and Medicare and Social Security. A breach, should it happen by the June 1 deadline, risks an economic debacle that could lead to a credit rating downgrade, with the knock-on effect of soaring interest rates and tanking stock markets. This in turn

would have a deleterious impact on retirement and savings accounts, the pace of business activity, and therefore on employment. With the global economy limping out of the COVID-19 recession scenario, a U.S. federal government debt default would represent a shock to the financial system and a still-fragile recovery across many economies may be compromised. Matters could worsen if the U.S. federal government goes into its 22nd shutdown and government

employees are furloughed. In an attempt to coax lawmakers into cooperation and hammer out an agreement to raise or suspend the debt ceiling, the White House put out its calculations of the damage that would result: 8.3 million jobs lost, 6.1% drop in annualised growth of real GDP, and unemployment at 5%.

At the heart of this fiscal quagmire is a lack of bipartisan consensus on how to avoid repeating cycles of national economic stress stemming from the debt ceiling itself. Some analysts observe that the ceiling is a useful device for the U.S. government to tie its own hands and submit to a credible commitment to limit public spending, especially as it requires legislative consent, and with it, some congressional oversight authority. Others argue that the ceiling is an "antiquated mechanism" that places unwarranted restrictions on robust fiscal policy, including on the need to meet previously legislated fiscal obligations.

## A 'MIDDLE KINGDOM' DAWNS ON INDIA'S WEST

*Mahesh Sachdev a retired Indian Ambassador and Arabist, is President of Eco-Diplomacy and Strategies, a Delhi-based consultancy*

The 32nd Arab League Summit held in Jeddah was unique in multiple ways. After 12 years, all 22 Arab states got together again, with 17 of them represented at the head of state or government level. The summit readmitted Syria and heard the Ukrainian President, a special invitee. The post-summit "Jeddah Declaration" was moderate in political optics and showed realism for the contemporary socio-economic challenges facing the Arabs. Although it highlighted the staple pro-Palestinian agenda, it conspicuously refrained from mentioning Israel by name. Similarly, all Iran-related issues were omitted. Instead, it called for "stopping foreign interference in the domestic affairs of Arab countries and categorically reject all support for the formation of armed groups and militias". There was no mention of any non-Arab issue, including Ukraine and the oil market.

### The Saudi angle

These subtle nuances would hint at the emergence of Saudi Arabia under Crown Prince Mohammed bin Salman as the main arbiter of the Arab world's agenda for the foreseeable future. During the months of the run-up to this summit, Crown Prince Mohammed bin Salman took several steps to declutter the Kingdom's regional agenda: he held triple summits in Riyadh with the Chinese President.

Relations with Iran were normalised, aiming to end nearly 45 years of hostility and geo-religious rivalry. This reduced the friction among their respective proxies in conflict such as Yemen, Lebanon, Syria and Iraq. In particular, it has raised hopes of putting an end to the civil war in Yemen, the Kingdom's "Vietnam" since 2015. On the other hand, ties with the United States have been stabilised.

Crown Prince Mohammed bin Salman, 37, has adroitly chalked out a middle path to take the Arab world's leadership, currently in a vacuum. Egypt, the usual pretender for Arab leadership, is in a precarious economic state as the Kingdom has curtailed its assistance, demanding greater financial accountability. Syria and Iraq are still battling their internal demons and Iranian interference.

By reconciling with Iran through Chinese mediation, but without a U.S. nod-and-wink, Riyadh has asserted its diplomatic autonomy. The move seriously undermined Washington's attempt to demonise Tehran and its nuclear programme and put into question the rationale of its economic sanctions regime. Direct ties with Iran have also reduced the importance of Qatar, Iraq, Oman and Pakistan as intermediaries.

Further, by re-engaging Hamas ruling Gaza, the Kingdom has sought to replace Qatar and Iran as the main benefactor. This should help deradicalise the Palestinians. The Kingdom's instinctive animosity with Israel has been replaced by ambiguity as Riyadh is in no hurry to join the Abraham Accords. In recent weeks, Jeddah has become the venue for peace talks among warring

Either way, the deeper reason to worry about the debt ceiling bringing the economy to the "precipice of default every few years" is that the ceiling readily serves as a political tool for the party not in control of the White House to gain leverage over the fiscal priorities of the administration and hobble its plan to deliver on campaign promises. A major debt payment is due on June 15. The government could make do with the ever-shrinking fiscal wiggle room until then. However, House of Representatives Speaker Kevin McCarthy, a Republican, would be wise to realise that putting partisan goals and personal popularity ahead of the greater good will not be something that the American middle class will forgive easily in the 2024 presidential election, especially if this brinkmanship ends up causing a painfully intractable economic crisis.

factions in Sudan.

### Riyadh's advantage

In this ongoing quest for Arab supremacy, Saudi Arabia has the advantage of its economic heft: in 2022, its GDP grew by 8.7% to reach \$1,108 billion, more than twice as large as the second-placed United Arab Emirates (UAE). Already the world's largest oil exporter, Saudi oil income grew by 51% to reach a record \$228 billion, giving it a sway over both the Organization of the Petroleum Exporting Countries (OPEC) and OPEC+, much to the West's chagrin.

With the global oil market facing high volatility, only Saudi Aramco, the world's largest oil company, has adequate spare capacity. As the global economic turmoil raises the costs of post-crisis regional reconstruction, Riyadh is emerging as the first go-to destination.

However, the Kingdom's rapid ascendance to the pinnacle of the Arab world also faces several challenges. First, the Kingdom's foreign policy has been through several lurches since the Jamal Khashoggi episode in 2018 and greater maturity and consistency would be needed to make it more effective. Second, the various initiatives towards regional reconciliation have not yet become irreversible and could still unravel. Third, the Kingdom's ties with the UAE and Qatar are friction-prone and could exacerbate. Last but not least, while Saudi Arabia is internally stable, the likely anointment of Crown Prince Mohammed bin Salman as the next Saudi king could be a disruptive and distractive development.

### India's stakes

India has well-known high stakes in the Arab world, particularly in the neighbouring West Asian region. We, therefore, need to acknowledge the importance of this incipient geo-political shift, watch the developments very carefully, realign our strategy accordingly and vigorously pursue our national interests. Although we enjoy cordial and substantive ties with Saudi Arabia, these are still below the potential and need periodic upgradation. To this end, we could consider several bilateral initiatives. Crown Prince Mohammed bin Salman should be re-invited for the India visit postponed last year; his likely presence at the forthcoming G-20 Summit in New Delhi can be leveraged bilaterally for this purpose. Separately, we should synergise the bilateral Strategic Partnership Council at various levels, leverage the potential for energy complementarity, work together more effectively to secure the region, enter a bilateral Comprehensive Economic Partnership Agreement, suggest India-Saudi partnership for building socio-economic infrastructure, both bilaterally and regionally, and raise our participation in various projects under the Kingdom's ambitious "Vision 2030".

## ON COPYRIGHT INFRINGEMENT AND AI

*How do U.S. courts determine whether a use case is considered fair use or infringement? What is the Andy Warhol Foundation case? What have the courts decided on the case and how does it affect the future of generative artificial intelligence?*

### ARUL GEORGE SCARIA

#### EXPLAINER

#### The story so far:

The recent decision of the U.S. Supreme Court in the Andy Warhol Foundation for the Visual Arts Inc. versus Goldsmith et al. has added more unpredictability to the process of being exempted from copyright infringement liabilities. The judgment is set to have implications for how we regulate a powerful form of artificial intelligence.

#### To what extent does copyright law protect artists?

Copyright law protects the work of diverse artists, including photographers, and provides a set of exclusive rights for artists over their creative output. This includes controlling the manner in which others reproduce or modify their work. However, these exclusive rights are balanced with the rights of the users of such work, including other artists who might want to build on or comment on them, with the help of diverse exceptions under the copyright law.

#### What is exempt from infringement liability

Different jurisdictions follow different approaches to exceptions. Some

countries, particularly those in continental Europe, adopt the ‘enumerated exceptions approach’— the use in question needs to be specifically covered under the statute to be considered as an exception to copyright infringement. Some others, including the U.S., follow an open-ended approach that does not specify exemptions beforehand, instead, they have guidelines about the types of uses that can be exempted.

The U.S. courts primarily consider four factors when determining whether a particular use can be considered to be an instance of fair use — the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion taken by the defendant, and the effect of the use on the potential market of the plaintiff’s work. Of these, the U.S. courts have been giving the highest importance to the first factor — whether the use of something can be considered “transformative” has often played the most critical role in determining the final outcome in a fair-use case.

This open-ended approach to exceptions provides U.S. copyright law considerable flexibility and strength to deal with challenges posed by emerging technologies on the copyright system. However, it has a major limitation: there is no way to know whether an activity will be exempted from liabilities until after litigation. That is, it is very hard to predict *ex ante* whether an activity will be exempted from copyright infringement liabilities.

#### What is the AWF case?

Known for her concert and portrait shots, Lynn Goldsmith photographed the famous musician Prince in 1981. One of those photos was licensed in 1984 to Vanity Fair magazine for use as an “artist reference”. The licence specifically said the illustration could appear once as a full-page element and once as a one-quarter page element, in the magazine’s 1984 November issue. Vanity Fair paid Ms. Goldsmith \$400 for the licence.

It then hired the celebrated visual artist Andy Warhol to work on the illustration. Mr. Warhol made a silkscreen portrait of Prince using Goldsmith’s photo. It appeared in the magazine with appropriate credits to Ms. Goldsmith. But while the licence had authorised only one illustration, Mr. Warhol additionally created 13 screen prints and two pencil sketches. In 2016, Condé Nast, the media conglomerate that publishes Vanity Fair, approached the Andy Warhol Foundation (AWF) to reuse the 1984 illustration as part of a story on Prince. But when they realised that there were more portraits available, they opted to publish one of them instead (an orange silkscreen portrait). As part of the licence to use it, they paid \$10,000 to AWF, and nothing to Ms. Goldsmith.

When the AWF realised that Ms. Goldsmith may file a copyright infringement suit, it filed a suit to declare that it had not committed infringement. Ms. Goldsmith then counter-sued AWF for copyright infringement.

#### What did the courts find?

First, a district court summarily ruled in favour of the AWF, opining that Mr. Warhol’s use of Ms. Goldsmith’s photo constituted fair-use. The court banked on the first factor and held that Mr. Warhol’s work was “transformative” as they “have a different character, give Goldsmith’s photograph a new expression, and employs new aesthetics with creative and communicative results distinct from Goldsmith’s”. It also observed that Mr. Warhol’s work added something new to the world of art “and the public would be deprived of this contribution if the works could not be distributed”.

However, the Court of Appeals for the Second Circuit reversed these findings and disagreed that Mr. Warhol’s use of the photograph constituted fair-use. The case subsequently went to the U.S. Supreme Court, which delivered its verdict on May 18, 2023.

The majority of judges concluded that if an original work and secondary work have more or less similar purposes and if the secondary use is of a commercial nature, the first factor may not favour a fair-use interpretation unless there are other justifications for copying.

In this particular instance, according to the majority decision, both Ms. Goldsmith’s photos and Mr. Warhol’s adaptations had more or less the same purpose — to portray Prince. The majority said that while copying may have helped convey a new meaning or message, that in itself did not suffice under the first factor. The dissenting opinion focused extensively on how art is produced, particularly the fact that no artists create anything out of a vacuum. Justice Elena Kagan, author of this opinion, wrote of the need for a broader reading of ‘transformative use’ for the progress of arts and science. The dissenters also opined that Mr. Warhol’s addition of important “new expression, meaning and message” tilted the first factor in favour of a finding of fair-use.

#### How does this affect generative AI?

While this dispute arose in the context of the use of a photograph as an artistic reference, the implications of the court’s finding are bound to ripple across the visual arts at large. The majority position could challenge the manner in which many generative artificial intelligence (AI) tools, such as ChatGPT4, MidJourney, and Stable Diffusion, have been conceived. These models’ makers ‘train’ them on text, photos, and videos strewn around the internet, copyrighted or not.

For example, if someone is using a generative AI tool to create pictures in the style of Mr. Warhol, and if the resulting images are similar to any of the work of Mr. Warhol, a court is likelier now to rule against this being described as fair use, taking the view that both the copyrighted work and the models’ output serve similar purposes.

The majority’s reliance on the commercial nature of the use may also result in substantial deviation from the established view — that the commercial nature of the use in itself cannot negate a finding of fair use. But the true extent of the implications of the verdict will be clear only when trial courts begin applying the ratio in this judgment to future cases.

#### What about the implications on Indian copyright law?

There may not be any direct implications for Indian copyright law, as the framework of exceptions here is different. India follows a hybrid model of exception in which fair dealing with copyrighted work is exempted for some specific purposes under Section 52(1)(a) of the Copyright Act 1957. India also has a long list of enumerated exceptions.

This said, the observations by the U.S. Supreme Court’s decision could have a persuasive effect, particularly when determining ‘fairness’ as part of a fair-dealing litigation. Then again, only time will tell which one will have a more persuasive effect — the majority or the minority.

Arul George Scaria is an associate professor at the National Law School of India University (NLSIU).



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Museum Road. Bangalore -  
560001. Karnataka, India.

*GCC Office:*

**Bobscoedu,**  
Bobsco Trading & Contracting Co. W. L . L  
Office 22, Dream Tower 1,  
Road: 2701, Adliya, Kingdom of Bahrain  
[www.bobscoedu.com](http://www.bobscoedu.com)