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(HNLU JLSS)

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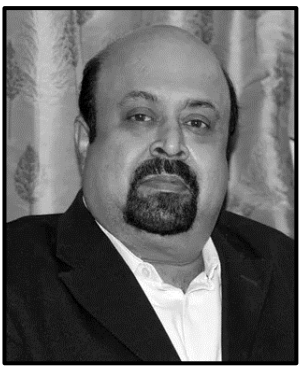

From the Editor-in-Chief

I am delighted to pen the preface for the Journal of Law and Social Science, 2023 Volume -IX Issue 2. The volume is a veritable treasure trove of diverse and contemporary articles from authors.

Dr. Bir Pal Singh and Ms. Saubhagya Bhadkaria in the article, 'Constitution, Individual and Religion in India: Conciliation between Society and Individual Rights' have discussed how a diverse democratic nation should feature acceptability and accommodating religious differences, and the right to disagree while expressing intellectual challenge without fear of reprisal and advocate that protecting Article 25 of the Constitution of India as the moral and Constitutional responsibility of every individual.

Dr. Mudassir Nazir, in the article 'Dispute Redressal Mechanism Under CPA, 2019: A Critical Appraisal' has analysed the various modes of redressal mechanism under the Consumer Protection Act and pointed out that there is a need to strengthen and regulate the mechanisms for effective dispute redressal including online dispute redressal.

Mrs. Komal Priya, in the article 'Evaluating the Part that Independent Directors Play in Indian Corporate Governance' has examined existing laws on appointment, roles, and duties of independent directors and addressed the question of effectiveness of independent directors.

Dr. Prashant Kumar Varun, in the Article 'Assessing the Impact of Smoking Laws on Health among the Students in Lucknow City, Uttar Pradesh, has emphasised that it is essential to strengthen the enforcement of smoking laws in public places and other suggestions to make the law effective.

Ms. Pratistha, in the article 'Deciphering the Enigma of Pay Transparency: A Legal and Economic Analysis of the USA and Nordic Countries, Paving the Way for India's Progress, and Bridging Gender Disparity' has examined the theoretical and empirical evidence regarding pay transparency and its potential

benefits and highlighted that pay transparency can lead to greater fairness in pay structures, reduced gender pay gaps, and increased employee satisfaction and productivity.

Sheheen Marakkar in the article 'Beyond the Bench: India's Pioneering Judicial Interventions in Human Rights' has highlighted the numerous challenges such as a considerable backlog of cases and delays in the justice delivery system, that impede the efficient fulfilment of human rights.

Dr. Jayamol P.S. in the article, 'Combating Human Trafficking through Legal Action: The Challenges Ahead' has analysed the legal framework to combat human trafficking at the global and national level and pointed out that though regulatory mechanisms to combat trafficking are very strong everywhere, the increasing nature of the human trafficking cases raises questions about the enforceability of these legal mechanisms and prescribes suggestions with a victims-oriented approach.

Dr. Parvesh Kumar Rajput and Mr Ashutosh Pande, in the article, 'Intersectionality, Transparency, and Artificial Intelligence: A Critical Assessment of India's AI Policy' have highlighted the of assessing the legal implications of integrating 'Aadhaar' data with AI and adopt adequate safeguards for protecting individual privacy while achieving the intended socio-economic objectives.

V Suryanarayana Raju and Anadi Tiwari, in the article, 'Anti-competitive Agreements with Reference to Indian Competition Law' have in their detailed analysis and review of agreements for the purpose of Section 3, the Commission goes beyond the text of the relevant agreement and examines the effect in terms of clearly identified parameters in Section 19 of the Act.

Ms. Yogita Upadhayay and Ms. Shubhangi Khandelwal in their paper 'An Analytical Study of the Spectrum of LGBTQ in the Contemporary Era' advocate the contemporary discourse on the constitutional rights of the LGBT community, pointing out the historical biases and the need for fairness to those who have a different orientation than the majority.

In the paper entitled **'Doctrine Of Constitutional Morality: Unearthing Historical, Judicial And Philosophical Aspects' Dr. Avinash Kumar** delves into the concept of "constitutional morality" in Indian law, exploring its historical roots from George Grote's work to its integration by Dr. B.R. Ambedkar in the background of the cases of Naz Foundation and Navtej Singh Johar, where the Supreme Court prioritized constitutional morality over popular ethics, affirming its role as a counter-majoritarian institution.

Mr. Shree S. Shingade and Mr.Abhijit Durunde in their paper entitled 'Exploring India's Places Of Worship Act: Historical

Significance, Constitutional Integrity, And Contemporary Controversies' article encapsulates India's millennia-spanning religious evolution, its constitutional commitments to diversity, and the societal tapestry of faiths, reflecting both unity and occasional discord in the nation's spiritual journey.

Miss Kashish Singhal in her paper 'Unravelling the Untapped Aspects: UP's Population Control Bill Analysis' takes a critical view of the "Uttar Pradesh Population (Control, Stabilization and Welfare) Bill, 2021" to address population growth through a two-child policy with suggestions for it effective amendments.

The paper entitled **'Election Laws and Information Technology Law: Testing the Sufficiency of the Legislative Framework for Free and Fair Elections in India'** authored by **Mr. Sarath Mohan** explores technology's integration, legal frameworks, and associated challenges in conducting elections for its effective role in preserving the cherished Democratic process.

Ms. Vaishali Singh in her paper **'Amelioration Of Solid Waste Management Policies In India: An Assessment In Light Of Germany's Circular Economy Action Plan'** analyses the Solid Waste Management Rule, 2016, and extorts to follow other models like the Germany's circular economy action plan for effective results of the Swatch Bharath Mission.

Dr. Atif Khan in his paper **'The Rise Of A Troubling Trend: Religious Freedom In India'** analyses the constitutional mandate on religious freedom with the recent developments eroding the values based on reports from entities like the UN and USCIRF apart from National concerns and extolls to effect the values envisaged in our constitution.

The research paper **Legal Paradigm to Regulate Domestic Workers in India: Intersectionality and the ILO Convention 189** authored by **Mr. Animesh Srivastava** discusses regulating domestic workers in India through the lens of intersectionality and the ILO Convention 189, aiming to reform an unregulated sector. The author urges a consultative process involving labor unions, NGOs, and domestic worker associations to address intersectional issues effectively.

The research paper **Defending Freedom of Expression in the Digital Age: Analysing the Legitimacy and Implications of India's Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2023** written by **Ms. Rashi Savla and Ms. Saanchi Dhulla**, probes freedom of speech under the new rules where constitutional challenges, including vagueness, Article 14 and 19 violations are discussed.

The research paper **From Constitutional Vision to Digital Realities: Tracing India's Privacy Rights Journey** by **Mr. Dhairya Jain** highlights privacy concerns, citing precedents like Puttaswamy V

Union of India AIR 2017 SC 4161. The paper advocates for exceptions to privacy rights and views the technology as a facilitator than one that hinders.

The paper **Pendency Penalty: Fighting Unfairness In Section 33 Through Maruti Suzuki India Ltd. V. Lal Chand** by **Mr. Chetan R** scrutinizes Section 33 and 33A of the Industrial Disputes Act, 1947, in the backdrop of Maruti Suzuki India Ltd. v. Lal Chand CWP No. 10832 of 2014 as a pivotal case. It underscores the need for social justice, advocating for laborers' rights during suspension and beyond, urging a comprehensive understanding and reform of the labor legislation framework.

The paper **Rural Justice System in India** by **Ms. Kiruthika P.** explores the complexity of rural justice in India, highlighting the prevalence of traditional informal mechanisms in resolving disputes. While referencing High Court precedents, the paper concludes with suggestions for improvement, noting a research gap that could be addressed through relevant literature reviews and enhanced factual matrices.

In the paper **Breaking the Cycle: Correction And Rehabilitation In The Fight Against Recidivism, Sourabh Jha** and **Shivani Kataria** observe that justice transcends revenge, benefiting both victim and accused. It explores systemic lacunas and problems, leveraging notable publications, reports, and governmental recommendations. Methodologically, it relies on non-empirical evidence.

The paper **Politics of Defection and Democratic Distortion: Critiquing the Representativeness and Legitimacy of the Post-Defection Governments in India** by **Dr. Avinash Samal** questions the legitimacy of post-defection governments and examines international perspectives on defection in the backdrop of the case studies of Goa and Karnataka. The paper's sections delineate the problem, definitions, international context, Indian dynamics, and propose solutions, culminating in comprehensive conclusions.

I take this opportunity to commend the Editors for their painstaking work and meticulous editing for getting it published keeping the timeline.

Best wishes,

Prof. (Dr.) V. C. Vivekanandan
Vice-Chancellor
HNLU, Raipur

Contents

Constitution, Individual and Religion in India: Conciliation between Society and Individual Rights

Dr. Bir Pal Singh[*]

Ms. Saubhagya Bhadkaria[**]

1. Introduction

Religion is said to have been derived from the Latin word, "*religio*", which is derived from the word *leg-* which means "to gather, count or observe", or from the word *'lig'*, which means "to bind". Religion is a universal phenomenon, but it is often difficult to describe in a single definition. Emile Durkheim in his book, The Elementary Forms of Religious Life, defines religion as a "unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden —beliefs and practices which unite into one single moral community called a Church, all those who adhere to them[1]". Max Weber in his work, Economy and Society, states, "To define 'religion', to say what it is, is not possible at the start of a presentation such as this. Definition can be attempted, if at all, only at the conclusion of the study"[2]. Ogburn considered 'Religion is an attitude towards superhuman powers Religion and personal law in India are more or less closely intertwined[3]. Religion can be called as a collective phenomenon that is very social. It is a shared set of practices and beliefs. Society and religion are inextricably linked and religion remains an indispensable part of an individual in a traditional society. From time to time, men find themselves forced to reconsider current and inherited beliefs and ideas, to gain some harmony between present and past experience, and to reach a position which shall satisfy the demands of feeling and reflection and give confidence for facing the future. If, at the present day, religion, is considered a subject of critical or scientific inquiry, of both practical and theoretical significance has attracted increasing attention, this can be ascribed to (a) the rapid progress of scientific knowledge and thought;

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[**] Ms. Saubhagya Bhadkaria, Assistant Professor of Law, National Law Institute University, Bhopal (M.P.), India.

[1] ROBERT LAUNAY, DEFINING RELIGION: DURKHEIM AND WEBER COMPARED BY ROBERT LAUNAY DEPARTMENT OF ANTHROPOLOGY 89 (Northwestern University, Evanston, IL 60208, USA 2022)

[2] MAX WEBER, THE SOCIOLOGY OF RELIGION 1(Beacon Press Boston 1922, 1993)

[3] MALCOLM HAMILTON, THE SOCIOLOGY OF RELIGION: THEORETICAL AND COMPARATIVE PERSPECTIVE 98 (2nd Edition 2001 Routledge London).

(b) the deeper intellectual interest in the subject; (c) the widespread tendencies in all parts of the world to reform or reconstruct religion, or even to replace it by some body of thought, more 'rational' and 'scientific' or less 'superstitious'; and (d) the effect of social, political, and international events of a sort which, in the past, have both influenced and been influenced by religion[4]. All deep-stirring experiences, whether or not they are openly religious, require a re-evaluation of the most fundamental concepts whenever the ethical or moral worth of behaviours or circumstances is questioned. In the end, issues with justice, human destiny, God, and the cosmos arise, which in turn raises issues with how religious notions relate to other ideas, the reliability of common knowledge, and workable conceptions of 'experience' and reality[5].

When analyzing their relationship with society as a whole and for individuals, both participants and observers must think in theological, sociological, cultural, and political terms as well as in terms of personal predilection[6]. Personal laws in India are majorly dominated by religious texts and ideologies and govern the individual following that religion only. Though freedom of religion of an individual is considered a civil and political right but is considered secondary only to the basic right to life and the right to freedom of speech and expression. Individual liberty to maintain his/her religious beliefs and practice the same is ensured in varied legal systems in different models about their historical and cultural ideals. Also, Article 18 of the Universal Declaration of Human Rights and Article 18 of the International Covenant for Civil and Political Rights include the freedom of thought, conscience, and religion or belief, which is protected and affirmed in numerous international instruments specifically, the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.

Varied legal systems across the globe follow their own system of secularism and religious freedom of an individual. France categorizes religion to be a private affair and prohibits the public display of any religious identity to be projected in the public sphere. Whereas, the United States of America and Canada ensure individual freedom to practice any religion of their choice subject to Constitutional principles. The Constitution of India is religion-neutral and guarantees freedom of religion to a citizen with certain restrictions. Constituent Assembly, catering to the demand of the diverse

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[4] Vol. X LINDSAY JONES (ed.), ENCYCLOPAEDIA OF RELIGION AND ETHICS, 669 (2nd edition 2005 Thomson Gale).

[5] Ibid.

[6] GRANVILLE AUSTIN, RELIGION, PERSONAL LAW IN SECULAR INDIA, In GERALD JAMES LARSON, RELIGION AND PERSONAL LAW IN SECULAR INDIA A CALL TO JUDGMENT (edited), 15 (Indiana University Press Bloomington and Indianapolis, 2001 by Indiana University Press, Bloomington USA).

populace, then adopted Secularism as the intrinsic feature, though explicitly included the term "Secular" in the Preamble with the 42nd Amendment Act, 1976 in the Constitution of India. With the celebrated individual liberties of freedom of speech and expression, and that to practice, profess, and propagate religion, individuals do abridge their limitations. The discussion of individuals' freedom of religion forms a part of the secular standard followed in a legal system.

This writing is restricted to discussing the freedom of religion of an individual as provided under Article 25(1) of the Constitution of India and does not include the religious freedom granted to religious denominations under Article 26 and any other feature of Indian secularism. Further, the writing is divided into four aspects discussing first, the idea of Secularism in India, secondly, the religious freedom in the Constitution of India to an individual and restrictions thereof. The third part of the writing examines how this religious freedom of an individual is often exercised which is creating conflict and challenges. The last fragment is reserved by the authors for the determination of a palpable solution to the issue for a directional effort from the State as well as Civil society. The religious divide in the Indian society is visible and leading to polarization of the masses which was once considered as *Ganga-Jamuna sabhyata*[7]. The answer to this emerging issue lies in strict adherence to the concept of constitutionalism and validating constitutional values of promoting fraternity to ensure the unity and integrity of the nation.

2. Secularism in India

In the 19th Century, an Englishman, George Holyoake devised the term 'secularism' to identify a life orientation designed to attract both theists and atheists within its banner. He believed that human enlightenment would be accompanied by a rational form, scientific understanding of religious knowledge and experience, and would not be fractured, by its earlier divisions[8]. The concept of 'secularism' is difficult to define in the Indian context as it has not been defined in the Constitution of India. From the 1920s onward, declarations made by the leaders and political parties during the independence movement showed sensitivity to the issues of the many communities and minorities in the cause of equality and togetherness. A statement of rights was required due to the country's sectarian divisions, as stated in the 1928 Nehru Report[9]. Report mentions:

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[7] Ganga Jamuna culture manifests itself as adherents of different religions in India celebrating each other's festivals, as well as communal harmony in India.

[8] E. L. CADY, E. S. HURD, COMPARATIVE SECULARISMS AND THE POLITICS OF MODERNITY: AN INTRODUCTION. In E. L. CADY & E. S. HURD (Eds.), COMPARATIVE SECULARISMS 3–25 (Palgrave Macmillan USA)

[9] Supra note 3, p 17.

Certain safeguards are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We could not better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the Constitution.[10]

Though religion was considered to be the voice of ancient Indian civilization, Hari Vishnu Kamath in the Constituent Assembly, while discussing religion and secularism in India famously quoted, "Here we are not individuals. Here we are all the people of India. There is much difference between the two[11]." The Sub-Committee on Fundamental Rights of the Constituent Assembly determined the right to the freedom of religion to be a right to freedom of conscience, freedom of religious worship, and freedom to profess religion. This change in terminology was opposed initially, especially by Amrit Kaur, Jagjivan Ram, G.B. Pant, P.K. Salva, and B.R. Ambedkar. It was further proposed to include an article expressly forbidding any linkage between the state and religion[12]. Further, the Constituent Assembly negated the idea of granting citizenship based on religion. On 26th January 1950, the Indian Constitution came into force creating India into a Sovereign, Democratic, Republic but not particularly Secular. The word 'Secularism' was been added to the Preamble by the Constitution (Forty-second Amendment) Act, 1976. The object of insertion was stated to express the high ideals of secularism imbibed throughout the provisions and the obsession needed to maintain the integrity of the nation which is subjected to considerable threats and prevent vested interests from being promoted to the detriment of the public good[13].

Secularism as we see, it in the context of India, can never mean the alienation of religion from the State like the Western concept. It cannot also mean indifference to religions and religious institutions given India's volatile religious scenario. However, the Constitution can ascribe to a concept of secularism where all religions are given equal status and freedom to make their laws but also with a reasonable scope for state interference. Personal laws should not be allowed to override the fundamental rights or the ideas of natural justice. It is here where the global perceptions and scenarios must be taken into account, the global perception of women's rights and human rights, and at the same time taking the religious justification of the same[14]. Secularism was held to be the basic structure of the

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[10] ALL PARTIES CONFERENCE, REPORT OF A COMMITTEE TO DETERMINE PRINCIPLES OF THE CONSTITUTION FOR INDIA 89– 90 (Allahabad: Indian National Congress, 1928).
[11] CONSTITUENT ASSEMBLY DEBATES, Vol. X, p. 441.
[12] Shefali Jha, *Secularism in the Constituent Assembly Debates, 1946-1950,* Vol. 37 ECONOMIC AND POLITICAL WEEKLY 3175, (2002).
[13] M. P. Gopalakrishnan Nair v. State of Kerala, (2005) 11 SCC 45
[14] Swagat Baruah, Can Secularism be a Constitutional Morality, Indian Constitutional Law Review: Edition I (January 2017

Constitution in the case of S.R. Bommai v. Union of India[15]. It held that in matters of state, religion has no place and that the application of secularism would extend to political parties as well since they were part of the state. But its verdict was more on the lines of defining the relationship between religion and politics, and that the both must never be mixed. The Supreme Court has agreed that our Constitution makers had always intended to make the country a secular democracy, giving the State a neutral status regarding religious affairs[16]. Although secularism is the fundamental law of the land, the Court has always called for a neutral status rather than a separation of State from religion, the existence of a classless, cohesive, and unified society[17]. The Supreme Court of India further, in State of Karnataka v. (Dr.) Praveen Bhai Togadia[18] held that the State has no religion, an individual must get an assurance from the State that he has the protection of the law to freely profess, practice, and propagate his religion and freedom of conscience.

3. Religious Freedom under the Constitution of India

The Draft Constitution, of 1948 adopted the provisions for freedom of religion under Article 19[19] and was debated on the 3rd and 6th December 1948. This debate majorly focussed on the question that the right to propagate religion may facilitate forced conversion. The Constitution of India provided two sets of religious freedoms, also discussed in the Constituent Assembly debates, one that of the individual and another of the religious denomination. For the study, the authors deliberated on the individual freedom of religion only, instead of emphasizing the religious freedoms provided under the Constitution of India. Religion, as explained by Rohinton Nariman, J. means matters of faith with individuals or communities, based on a system of beliefs or doctrines that conduce to spiritual well-being. The aforesaid does not have to be theistic but can include persons who are agnostics and atheists[20].

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[15] S.R. Bommai v. Union of India, AIR 1990 Kar. 5

[16] Ziyauddin Burhanuddin Bukhari v. Briujmohan Ram Das Mehra, AIR 1975 SC 1788

[17] Keshavanand Bharati v. State of Kerala, AIR 1973 SC 1461

[18] (2204) 9 SCC

[19] Draft Constitution of India, 1948, Article 19 (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
Explanation -The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.
(2) Nothing in this article shall affect the operation of any existing law or preclude the State from making any law-

(a) Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) For social welfare and reform or for throwing open Hindu religious institutions of a public character to any class or section of Hindus.

[20] Indian Young Lawyers Association v. State of Kerala, (2019) 11 SCC 1, (para 176.5).

Individual freedom of religion

The Constitution of India under Article 25[21] provides the following freedom about religion to an individual:

i. All persons are equally entitled to freedom of conscience and the right to freely profess, practice, and propagate religion[22].

ii. There shall be freedom as to payment of taxes for the promotion of any particular religion by virtue of which no person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religious denomination[23].

iii. Fully state-funded educational institutions shall not provide any religious instructions, disciples attending state-recognized/aided educational institutions cannot be imparted religious instructions without the consent (of their guardian in case of a minor)[24].

Discussing Article 25(1) can be classified into two dimensions:

a. Freedom of conscience

Conscience, as described by M. Afzal Wani means the 'inmost thought' or the sense of moral correctness that governs or influences the actions of an individual[25]. The Black's Law Dictionary, explains conscience as the moral sense; the faculty of judging the moral qualities of actions, or of discriminating between right and wrong; particularly applied to one's perception and judgment of the moral qualities of his conduct.

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[21] Constitution of India, 1950, Article 25 (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-

(a) Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and section of Hindus.

Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.
Explanation II. —In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

[22] Article 25(1)

[23] Article 27

[24] Article 28

[25] M. Afzal Wani, *Freedom of Conscience: Constitutional Foundations and Limits*, Vol. 42 JOURNAL OF THE INDIAN LAW INSTITUTE Constitutional Law Special Issue (April-December 2000) 289, 289 (2000).

Freedom of Conscience refers to the freedom to mould their relation with the almighty, their spiritual well-being, or even be non-believers. Supreme Court in India has interpreted, Freedom of Religion in Ratilal Panachand Gandhi v. State of Bombay[26] as "Freedom of conscience connotes a person's right to entertain beliefs and doctrines concerning matters, which are regarded, by him to be conducive to his spiritual well-being.[27]" Article 25 has been read to postulate that there is no fundamental right to convert another person to one's religion because that would impinge on the "freedom of conscience" guaranteed to all alike[28].

Freedom of conscience is further explained in the National Anthem case[29], that no person can be compelled to sing the National Anthem following his genuine, conscientious religious objections, upholding the religious consciousness of Jehova's witnesses.

Practically speaking, the right to freedom of conscience entails the freedom to freely hold or believe any faith or belief in line with one's caution and conscience. This is essentially an endorsement and acceptance of several religions that exist among individuals who coexist in a community or nation. In terms of contemporary constitutional law, a state that adopts this tolerant way of life is referred to as a "secular" state[30].

b. Freedom to practice, profess, and propagate religion

Practice – actual application emerging out of an idea or belief or habit, to practice a religion refers to the external and the applied part of the religion. Certain practices though regarded as religious are based on superstition or are unessential. Every person is granted a fundamental right under Article 25 to not only hold any religious views that may be accepted by their judgment or conscience but to also openly express such beliefs and ideas through overt acts and practices that are permitted by their faith. The courts in India have evaluated which behaviors are protected by the Article in light of the doctrine of essential religious practices, including those that the community regards as being a part of its faith. The right to perform religious practice may be acquired through a custom, such will be interpreted based on the version of the group practicing and not of the persons opposing it[31].

The criteria to determine if a certain religious practice is an essential component of a religion or not is always whether the community that practices the religion views it as such. Indeed, the

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[26] AIR 1954 SC 388
[27] Ibid. 384
[28] Rev. Stainislaus v. State of M.P., AIR 1977 SC 908.
[29] Bijoe Emmanuel v. State of Kerela, **1987 AIR 748**
[30] Supra note 24.
[31] Gulam Abbas v. State of U.P., AIR 1981 SC 2198 (para 2, 34)

Court will have to decide on this matter, and that decision will be based on the facts presented on the community's conscience and religious beliefs[32]. Notably, Religious Practices may vary from State to State, religion to religion, place to place, and sect to sect[33]. What constitutes an integral or essential part of a religion or religious practice is to be decided by the courts concerning the doctrine of a particular religion and includes practices regarded by the community as parts of its religion[34]. The Supreme Court categorically stated that the practice should not only be *enjoined or sanctioned* by one's religious belief but must be an *obligatory overt act of* the concerned religion[35]. **(refer to page no.13)**

Article 25(1) guarantees the right to entertain religious beliefs as may appeal to his conscience but also the right to exhibit his belief in his conduct by such outward acts as may appear to him proper to spread his ideas for the benefit of others[36]. Faizan Mustafa, argues that the essential test denies religious adherents of constitutionally granted rights and impermissibly substitutes the judgment of the Court for religious conscience[37].

Profess – to make a claim, demonstrate informed awareness, to profess a religion means the right to declare freely and openly one's faith. Under the Indian Constitution, it would refer right to exhibit one's religion in an overt act such as teaching, practicing, or observing religious precepts and ideals (not including any idea of propagating) such as wearing or carrying religious identities or symbols. Matters of conscience come in contact with the State only when they become articulate. While freedom of "profession" means the right of the believer to state his creed in public, freedom of practice means his right to give it expression in forms of private and public worship[38].

To profess a religion means the right to declare freely and openly one's faith[39]. Therefore, the right to take out religious processions and to have religious gatherings in public areas fall within the right to profess a religion under Article 25(1). However, these rights are not absolute. Additionally, Section 144, Cr.P.C., enables the Magistrate to ban the processions and meetings where there is apprehension of a breach of peace including communal tensions. This provision is valid under the restriction of *Public Order*. **(refer to page no.13)**

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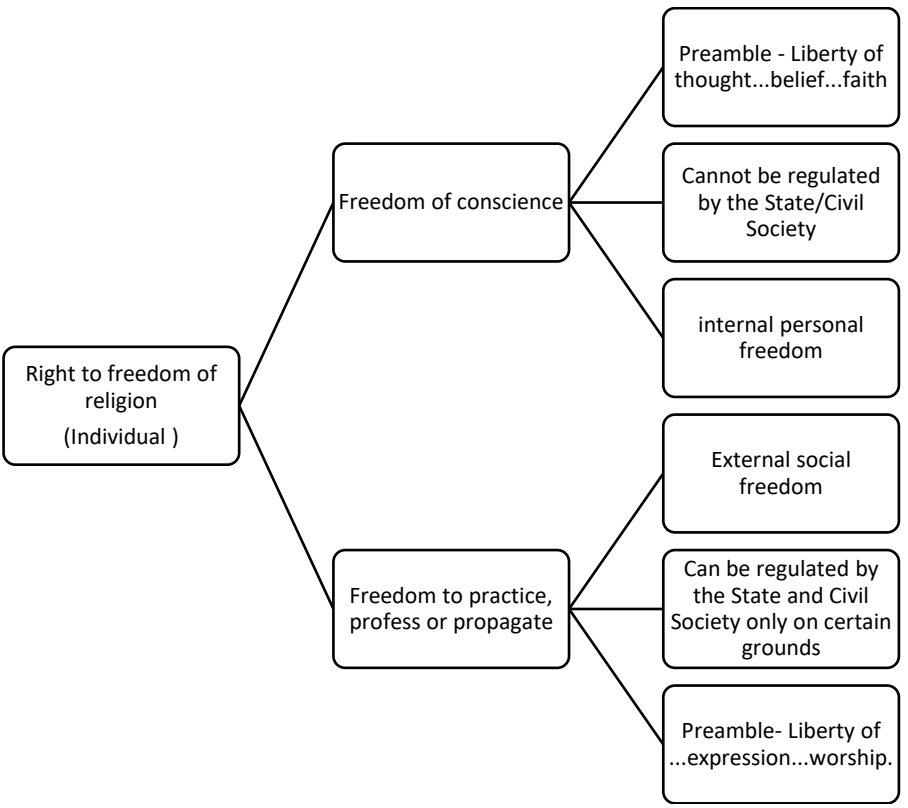
[32] Govindalalji Maharaj, Tilkayat Shri. v. State of Rajasthan, AIR 1963 SC 1638 (1660).
[33] Gedela Satchidananda Murthy v. Dy. Commr, Endowments Deptt, A.P. (2007) 5 SCC 677 (para 17)
[34] Seshammal v State of Tamil Nadu AIR 1972 SC 1586.
[35] Mohammad Hanif Quareshi v. State of Bihar, AIR 1958 SC 731, 739.
[36] S.P.Mital v. Union of India, AIR, 1983 SC 1(para 77-78)
[37] FAIZAN MUSTAFA, JAGTESHWAR SINGH SOHI, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy,* Volume 2017 Issue 4 Brigham Young University Law Review 915, 917 (2017).
[38] Stainislaus Rev. v. State of M.P., AIR 1975 MP 163 (166)
[39] Punjab Rao v DP Meshram AIR 1965 SC 1179.

Propagate - transmit/pass on in a direction, spread, disseminate, right to propagate a religion means the right to communicate religious tenets to others with a clear intention of convincing others about the goodness of a (my) religion. It means to expose the tenets of that faith but would not include the right to convert another person to the former's faith as the latter also has a freedom of conscience[40]. Right, to Propagate one's religion means to disseminate his ideas for the edification of others, and the purpose of this right is immaterial 'whether propagation takes place in a church or monastery or a temple or parlour meeting'[41].



The two aspects are strongly asserted in the figure above, the below restrictions can be made by any state of civil society only and only in the second aspect of freedom of religion, where there is an expression of the belief that an individual holds. It is to argue that what I as an individual think or perceive is not the concern of the State and the same cannot be deciphered and regulated by the

[40] Supra note 27.
[41] Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282.

Government. It is only the external socio-religious freedom that can be regulated in a legal system. In India such can be regulated in terms of restriction upon the exercise of fundamental rights.

As a final point, each person within India, irrespective of his religion, is provided a constitutional assurance from the State that he has the protection of the law freely to profess, practice, and propagate his religion and freedom of conscience. Otherwise, the rule of law will become replaced by individual perceptions of one's presumptions of good social order[42].

4. Restrictions on Freedom of Religion

The US and Australian Constitutions did not impose any statutory limitation on the right to freedom of religion of an individual. However, the US and Australian courts introduced the limitations on the grounds of 'morality, order, and social protection'. The Indian Constitution was an improvement on other Constitutions since it laid out restrictions to be imposed on the religious freedom of an individual on certain grounds. Therefore, the freedom of religion imbibing the right to freedom of conscience, practice, profess, and propagate one's religion is a conditional right by practical virtue of the Constitution makers. So, when any practice, profession, or propagation of a religion by an individual involves a violation of the letter and spirit of the Constitution, it can be checked[43]. Article 25(2)(a) further provides a scope of restriction over the Religious Practices by the State that are really of an economic, commercial, or political character though associated with religious practices[44].

Individual freedom of religion guaranteed under Article 25 of the Constitution of India, is subject to other fundamental rights in Part III[45], implying that the Freedom of religion of Mr. A, a citizen of India is subjected to the following:

a. **Other fundamental right**s exercised along with their reasonable restrictions **of Mr. A**

b. **Other fundamental rights** exercised along with reasonable restrictions of **rest of citizens of India**

c. **Freedom of religion of rest of citizens of India**

d. **Public order, morality, and health** (these are to be decided by the State)

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[42] State of Karnataka v. Dr. Praveen Bhai Thogadia, (2004) 4 SCC 684, (para 6)

[43] M.V. PYLEE, AN INTRODUCTION TO THE CONSTITUTION OF INDIA 124 (Vikas Publishing House Pvt. Ltd., New Delhi, 4th ed., 2005).

[44] Supra note 41 (para 6)

[45] 25. Freedom of conscience and free profession, practice and propagation of religion (1) Subject to public order, morality and health and *to the other provisions of this Part*, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion

This subjection of freedom of right to religion is considered "not a matter without substantive content" and makes it evident that "in the constitutional order of priorities, this individual right was not intended to have an over-arching effect but was subject to the overriding constitutional postulates of equality, liberty, and personal freedoms recognized in other provisions of Part III[46]. The reason why only this fundamental right to freedom of religion is made subject to other provisions of this Part is unanswered by the Constituent Assembly Debates but we cannot ignore the deliberate usage of words and presume this clause to be unthoughtful. It's a sheer departure from the usual practice and therefore, holds importance and may imply that 'Right' under Article 25 is secondary as compared to other *A-religious* civil and political rights under Part III. Shri. K. Santhanam, in the Constituent Assembly, marked that "*Hitherto it was thought in this country that anything in the name of religion must have the right to unrestricted practice and propagation. But we are now in the new Constitution restricting the right only to that right which is consistent with public order, morality, and health*"[47]. Thereafter, the Courts discussed in length the meaning of the expression, "Public Order, Morality, and Health", and explained the context of restrictions such as morality is Constitutional Morality and not public morality, which means the overarching morality about the Preamble and Provisions, it is the values inculcated in the Constitution[48]. Notably, religions in India hold the importance of public display of celebrations which increases the scope of state intervention.

Public order

Restriction on this ground implies that the State is empowered to regulate religious activities such as meetings or processions in public places which are anticipated to distort the law-and-order situation. Eg. public processions are barred on the occasion of *Ganesh Chaturthi* and *Muharram*[49]. Religion can be used to polarize societies. Historically in India, religion has been used as a tool to divide society. A Report by the European Parliament considered India among the countries of particular religious concern[50]. The right to profess, practice, and propagate religion does not extend to the right of worship at any or every place of worship so any hindrance to worship at a particular place per se will infringe religious freedom[51]. "Public Order" has been held to have a stricter ambit as compared to "Law

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[46] Indian Young Lawyers Association v. State of Kerela, 2018 SCC Online SC 1690, para 184. (Chandrachud J.)
[47] Vol. VII, CONSTITUENT ASSEMBLY DEBATES 834.
[48] Kantaru Rajeevaru (Right to Religion, *In re* – 9 J.) (2) v. Indian Young Lawyer's Association, (2020) 9 SCC 121.
[49] DNAINDIA.COM, DDMA bars public procession on Ganesh Chaturthi, Muharram in view of COVID-19 13.08.2023.
[50] Supranote 36, 924.
[51] Ismail Faruqi v Union of India (1994) 6 SCC 360

and Order". A mere disturbance of law and order leading to disorder in society is not the one that affects the Public Order[52]. The order of Commissioner of Police, Calcutta prohibiting the use of loudspeakers for prayer in Mosques located in some residential areas in the city was held valid under the constitution. The Court stated that Article 25(1) does not divest the citizens from their duty to cooperate with the State to maintain public order so that people may live their ordinary lives in dignity[53].

Morality

The state can prohibit immoral practices or activities, which may be a part of religious practices. There have been many pre-constitutional restrictions on religious practices based on morality such as the abolition of *sati,* the *Devadasi* system, gambling on *Deepawali,* etc. It is considered to be the duty of the state to prohibit immoral practices under the garb of religious freedom. The *triple talaq* practice in *Islam* was declared unconstitutional[54] by the Supreme Court of India and violative of the Constitutional morality[55] of reasonableness and does not fall within the essential religious practice[56], as there are other forms of divorce available.[57]

Health

With a vision to protect an individual's life and to maintain the good health of the human being the State can impose an individual's freedom of religion. Death by starvation or by self-inflicted torture to attain spiritual ends is also an offence under the Indian Penal Code. The law, therefore, forbids suicide even if the act is motivated by religious intention. Considering the outbreak of the pandemic, the Government bans *Muharram* and *Ganesh Chaturthi* processions[58].

The Supreme Court, rejecting a plea to prohibit participation in the *Ratha Yatra* during the outbreak of the Pandemic, held that on the grounds of health, the State Government can be directed to take necessary steps including medical tests of the participants to prohibit the outbreak[59].

Other Provisions of this Part (Part III of the Constitution of India)

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[52] Commissioner of Police v. Acharya Jagdishwarananada Avadhuta, AIR 2004 SC 2984 (para 60).
[53] Masud Alam v. Commissioner of Police, AIR 1956 Cal. 9.
[54] Shayara Bano v. Union of India, (2017) 9 SCC 1, Para 21
[55] Supra note 53, Para 193, (opinion of CJI)
[56] Supra note 53, Para 25
[57] Supranote 53, Para 27
[58] Supra note 50.
[59] Odisha Vikash Parishad v. Union of India, oder dated 22.06.2020, https://main.sci.gov.in/supremecourt/2020/12648/12648_2020_34_1_22686_Order_22-Jun-2020.pdf

The restriction primarily imposes an obligation to balance the freedom under Article 25 and other fundamental rights but if there is any conflict between the two, provisions of Part III will prevail over Article 25[60]. The limitation "subject to the other provisions of this part" occurs only in clause (1) of Article 25 and not in clause (2). Clause (1) declares the rights of all persons to freedom of conscience and the right freely to profess, practice, and propagate religion. The freedom of religion under Article 25 (1) is, therefore, subject to the power of the State to enact laws for social welfare and social reforms, under the scheme of equality, such as banning of bigamous marriage within Hindus[61]. Thus, the banning of bigamous marriage was upheld as a measure of social reform. Further, the Supreme Court of India held that a Hindu cannot claim, as part of his rights protected by Article 25 (2) (b) that a temple must be kept open for worship at all hours of the day and night, or that he should personally be allowed to perform puja services or rituals which acharyas or pujaris alone could perform[62].

5. State of Affairs in India

India has a rich heterogenous culture of world religions. As per the latest census available (2011), Out of the total population exceeding 1.3 billion: 79.8% follows Hinduism, 14.2% Islam, 2.3% Christianity, 1.7% Sikhism, and the rest are smaller religious groups including Buddhists, Jains, Baha'is, Jews, Zoroastrians (Parsis), and nonreligious persons[63].

The Constitutionally acknowledged secular state of India having celebrated a history of religious tolerance, recognizing the same as the Constitutional vision of the nation had seen a sharp rise in religion-based violence. It is not the first time such crimes have been witnessed by the heterogenous nation, the plight of the partition of India in 1947 based on religion, the infamous Anti-Sikh riots in 1984, the *Babri Masjid* demolition followed by religion-based riots, the Godhra massacre leading to 2002 riots in Gujrat, etc. are instances of massive religious hate crimes. However, the nation as a whole has witnessed individual exercise of freedom in a manner intimidating other individual's freedom and certain Constitutional principles including fraternity, liberty, etc.

A few instances include forceful conversion into a religion, hate speeches (often made by political leaders) under the garb of propagating one's religion, cow protection, banning beef consumption, etc., India was ranked highest by the Pew Global

[60] Part III: Fundamental rights (Article 12-35) Constitution of India.
[61] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.
[62] Venkataramana v. State of Mysore, AIR 1958 SC 255.
[63] https://www.census2011.co.in/religion.php

Religious Restrictions Report[64], released in 2020, indicating India imposed the highest number of society-based restrictions on the exercise of religion, by the Government, proving Constitutional morality upheld over the exercise of religion by an individual. The facts such as religious persecution[65], and communal riots[66], threaten constitutional morality in a nation. A few of these threats are discussed below:

1. Quest to establish religious superiority, no religion in its original understanding preaches hatred or competition with other faiths. It is, however, promoted by the later interpreters of religion that the missionary approach was adopted and claims of superiority were made. This promotes hatred within the society resulting in religion-based violence and polarization.

2. Every individual is free to maintain his religious conscience and any instance of forceful conversion is a breach of such freedom, frightening the concept of brotherhood and increasing hatred for a particular religion[67]. The state is primarily responsible for ensuring that such freedoms guaranteed under the Constitution are freely exercised by the citizen, therefore the UP Government while deciding that such acts will be punished under the National Security Act, is an offence prejudicial to the defense of India is justified.

3. The anti-conversion legislation has a peculiar feature declaring marriages done for the sole purpose of religious conversion are liable to be declared void[68]. The legislation was in response to the increased reported cases of *Love jihad* whereby males of a particular religion intentionally enter into love affairs leading to marriage alliance and conversion of the females into their religion.

4. Cow slaughter in 21 States within the Union of India is banned, the legislation was also held constitutionally valid by the Supreme Court[69]. The State may adopt this policy but individuals confirming a particular religious identity cannot usurp such

[64] https://www.pewresearch.org/fact-tank/2020/11/10/government-restrictions-on-religion-around-the-world-reached-new-record-in-2018/, 20.08.2023.
[65] USCIRF placing India in TIER 1 nation along with North Korea and Saudi Arabia.
[66] 25 communal riots reported and quoted by the Centre for the Study of Society and Secularism, https://csss-isla.com/fact-finding-reports/fact-finding-report-howrah-and-hooghly-communal-violence/, 25.08.2023.
[67] Anti-Terrorist Squad in Uttar Pradesh arrested two people on ground of forcing over 1000 people to convert to Islam. Accessed on https://economictimes.indiatimes.com/news/india/two-held-for-forcing-over-1000-conversions-in-up/articleshow/83727045.cms?from=mdr, 28.09.2023.
[68] Section 6, The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020 and Section 6, Uttarakhand Freedom of Religion Act, 2018.
[69] State of Gujarat v/s. Mirzapur Moti Kureshi Kassab Jamat & Others, (2005) 8 SCC 534

power to punish for a crime under this legislation, as often reported, contributing to religion-based violence nationwide[70].

5. Superstitious beliefs lead to practices that can be categorized as religious practices and are contrary to constitutional morality of freedom of individuals, animals, etc.

6. The practice of *Santhara*, which means "a fast until death is the complete renunciation of material sustenance, in the recognition that even the digestive process involves violence to microscopic organisms voluntarily renouncing food until death by followers of Jainism[71], was declared unconstitutional by the Rajasthan High Court[72] amid hue and cry within the religious denomination.

7. Digital hatred is creating a divide into *Us v. Them* even on religious lines, feeding sentiments of individuals, often reported to be offensive, across nations and cultures leading to communal tensions and polarization of the masses. Indian Constitutional principles aim for equality and fraternity across diverse religions and cultures and are often compromised for such free propagation of religion.

6. Conclusion and Way Ahead

The equality dimension of religious freedom requires that people be free from arbitrary discrimination or unequal treatment because of their religious beliefs or identities. Violation of religious equality—as through the infliction of systematic discrimination on particular individuals or groups merely because of their religious beliefs or identities, or the creation of an environment of hatred or intolerance of certain people because of religion is unjust and illegitimate even when it does not directly block or limit one's free exercise of religion of by an individual.

A heterogeneous society that does not accommodate differences is either totalitarian or undemocratic. A diverse democratic nation should feature acceptability and accommodating religious differences, the right to disagree while expressing intellectual challenge without fear of reprisal. Religious tolerance is not new to Indian society but seems alien to present-day India. Tolerance amongst religious denominations is missing in the context of the co-existence of religions, communal harmony, respect for other individuals' freedom of conscience, and practice, profess, and propagate religion. One should accept that protecting Article 25 of the Constitution of India is not only the burden of the State but also the moral and Constitutional responsibility of every individual claiming such right.

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[70] **https://acleddata.com/2021/05/03/cow-protection-legislation-and-vigilante-violence-in-india/,** 29.09.2023

[71] JEFFERY D LONG, JAINISM: AN INTRODUCTION, 98 (I.B. Tauris 2009)

[72] Nikhil Soni v. Union of India, 2015 Cri LJ 4951

That is the difference between internal personal freedom and external social freedom. The State could only regulate an individual's external social freedom of religion.

Indians choose a secular(A-religious) state instead of any religion-based governance such as one adopted by the brother nation Pakistan or the United Kingdom, etc., establishing the fact that no religion or its ideals and beliefs can ever dominate the Constitutional principles in the newly formed nation. More than seven decades of working of the Indian Constitution has witnessed, several misuses of the freedom of religion of an individual, which was often restricted by the State and the Judiciary. It is time that we as a responsible civil society take the initiative to promote social harmony in light of the vision of the Constitution of India imbibing religious tolerance, and communal harmony while admiring the rights and sentiments of others.

The problem cannot be dodged with a strict carrot-and-stick approach rather a behavioural subtle transformation is suggested. The authors opine the following suggestions to the Constitutional machinery and the individual practising freedom of religion:

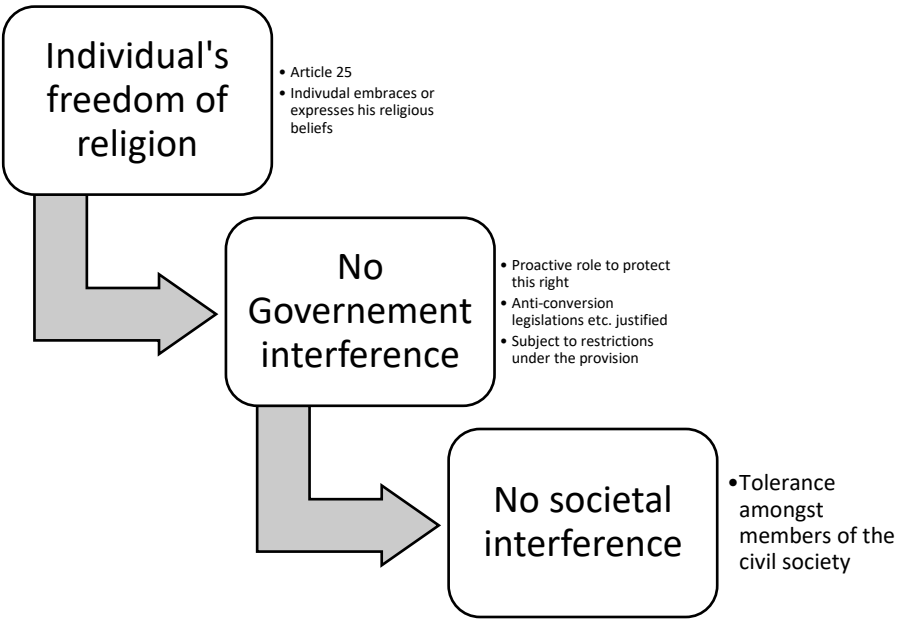
- The state should keep away from regulating essential religious practices by an individual owing his freedom to maintain conscience, practice, profess, and propagate his religion as far as the same is not against public order, morality, health, and other fundamental rights under Part III of the Constitution of India.

- Beliefs and religions are dynamic and dynamism should be harnessed, even the most traditional religions have reformed and continue to do so. Hence assuming that beliefs are static or permanent can result in fundamental misrepresentations of religion, undermining peace, security, and non-discrimination.

- Diversity should be promoted over uniformity and it applies to both, states that have adopted a theocratic framework to govern their societies and to states that choose to be secular. The latter must protect the rights of religious minorities (or non-religious residents); the former has a responsibility to protect residents' right to adopt or practice a religion of their choice.

- Literacy about religion or belief is a foundation for peaceful coexistence and the ability to understand different practices and perspectives is a foundation by which societies can promote peaceful coexistence. Enabling the followers to decipher the original readings of the religious texts and their logical understanding rather than blindly following the middlemen. Peaceful coexistence could be derived from mutual understanding while recognizing that understanding need not imply agreement.

The following diagram explains the process for a peaceful, ideal exercise of freedom of religion by an individual, in India.



To conclude, we wish to quote a question posed by Dr. B. R. Ambedkar, in Constituent Assembly stating:

"How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life?[73]*"* and thereby the answer lies in the acceptability of Constitutional principles, and internalization of constitutional morality by the legal system and individual while interpreting Freedoms under the constitution.

[73] Vol XII, Constituent Assembly Debates, D.R. B.R. Ambedkar in a speech to the Constituent Assembly on 25 November 1949.

Dispute Redressal Mechanism Under Cpa, 2019: A Critical Appraisal

Dr. Mudassir Nazir[*]

Aiman Chasti[**]

1. Introduction

"*Customers are the most important visitor on our premises, they are not dependent on us, and we are dependent on them. They are not an interruption in our work. They are the purpose of it. They are not outsiders in our business. They are part of it; we are not doing them a favor by serving them. They are doing us a favour by giving us an opportunity to do so.*"

– Mahatma Gandhi.

Consumer protection ensures the attainment of the constitutional goal of social and economic justice. Consumer protection is essential in attaining economic justice because it promotes fair competition, protects consumers from fraudulent or deceptive business practices, and ensures that all consumers have access to safe, affordable, and high-quality products and services.

It is crucial for attaining social justice because it promotes fairness, equity, and equal opportunities in the marketplace. The consumer also plays a key role in the world economy. The growth and development of a nation is dependent on the consumption of the goods. Therefore, Consumer protection is crucial for economic systems to function well, and to ensure the balancing of rights of the parties within the constitutional mandate. The object of Consumer Protection Act (herein after CPA) is delivery of speedy justice and dispute settlement arising between consumer and seller or service provider. In this paper we will delve into the important aspects of dispute redressal mechanisms set up at different stages.

2. Transformation in the Legal Framework Safeguarding Consumers in India

Early forms of consumer protection can be traced back to ancient times, such as in the Old Testament and the Code of Hammurabi, these mainly focused on commercial interests. It was not until the United States that consumer advocacy movements began to form in response to monopolistic and fraudulent business practices that were prevalent at the time.

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In the past, consumers were responsible for verifying the quality of the goods they purchased, and sellers could only be held accountable in cases of gross negligence. However, as consumerism and concerns about capitalism and food fraud grew, the need for more robust consumer protection became apparent. The first phase of consumerism emerged, leading to the formation of consumer organizations in the 1940s and 1950s, such as in Denmark and Great Britain where the government established the Consumer Council to provide a platform for consumers to voice their opinions on issues related to producers and traders.

However, the significant progress towards consumer protection came with the Single European Act, which revised the Rome Treaty and empowered the Economic and Social Committee to safeguard the interests of consumers. Subsequent amendments were introduced, creating a path for a more comprehensive consumer policy. Despite these improvements, a strong foundation for effective consumer protection was still lacking. This spurred further development towards more robust consumer protection policies.

The UNGA adopted the UN Guidelines for Consumer Protection[1] in April 1985, which were later updated in 1999. This served as a tool for nations to promote consumer protection and, at the international level, served as the foundation for the consumer movement. Today, more than 240 organizations from over 100 countries are united under a single entity called Consumers International.

In accordance with United Nations guidelines, a National Consumer Protection Council was established in India, consisting of 28 members who were representatives of various ministries. After conducting two meetings, it was decided to arrange a National Workshop on Consumer Protection on March 11-12, 1985, where consumer representatives would be present. A draft bill was created based on the inputs and advice shared by representatives from State Governments, Voluntary Consumer Organizations, Central Ministers, and Officials from different Government departments at the national seminar. The bill was formulated by closely studying and analyzing the consumer protection laws of the United Kingdom, United States of America, Australia, and New Zealand.[2]

The final draft of the consumer protection bill was prepared and presented to the Lok Sabha on December 9, 1986, by the then Minister of Parliamentary Affairs and Food and Civil Supplies, H.K.L. Bhagat, following several inter-ministerial meetings. In addition, amendments were made to six other consumer protection laws to empower

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[1] The UN Guidelines for Consumer Protection, 1999, *available at:* https://www.un.org/esa/sustdev/publications/consumption_en.pdf (last visited on 19 March, 2023).

[2] Dr. M Rajanikanth, "A Study on Evolution of CPA in India–CPA1986," 6(4) *International Journal of Application or Innovation in Engineering & Management* 133-138 (2017).

consumers and their organizations to take legal action against offenders. The laws that are included in this category are the Standards of Weights and Measures Act, 1976; Prevention of Food Adulteration Act, 1954; Bureau of Indian Standards Act, 1986; Agricultural Produce (Grading and Marking) Act, 1937; Monopolies & Restrictive Trade Practices Act, 1969; and Essential Commodities Act, 1955.

The Consumer Protection Act, 1986 was passed by the Parliament and received approval from the Indian President on December 24, 1986. The objective of this Act was to establish a three-level quasi-judicial mechanism to swiftly and affordably address consumer complaints. This mechanism provides a single avenue to resolve consumer grievances.

Law is a living document, hence with the development in technology and time, the need and requirements of a consumer has also changed. In order to address the shortcomings of 1986 Act, in 2019 the consumer protection law has gone through a major amendment. The Indian legislature passed the CPA, 2019, which addresses issues related to violations of consumer rights, unfair trade practices, and misleading advertisements, as well as any other actions that are detrimental to consumers. The main aim of enacting this Act was to include provisions for e-consumers as online buying and selling of goods and services have increased significantly in recent years.

This Act aims to protect the interests and rights of consumers by establishing Consumer Protection Councils to resolve disputes and provide adequate compensation to consumers in case their rights are infringed upon. It also emphasizes the use of alternate dispute resolution mechanisms to ensure the speedy and effective disposal of consumer complaints[3]. Moreover, the Act promotes consumer education to create awareness about their rights, responsibilities, and options for seeking redressal of grievances.

Meaning of Consumer

Before going into the details of the dispute settlement mechanism it is important to know the meaning of the consumer as the complaint is initiated by him and it is entertained by the Commission only if he qualifies the definition as per the act.

The act defines Consumer[4] refers to someone who purchases goods for a consideration that has been made or promised, or a combination of both, including anyone who uses those goods with the approval of the purchaser, but not someone who obtains the goods for resale or commercial purposes; or hires or uses services for a payment that has been made or promised, or a combination of both, including anyone

[3] The Consumer Protection Act, 2019.
[4] The Consumer Protection Act, 2019, s.2(7).

who benefits from those services with the approval of the person who hired or used the services, but not someone who uses the services for commercial purposes.

In the case of *Shrikant G. Mantri* v. *Punjab National Bank*[5], the Supreme Court held that in order for a person to be considered a 'consumer' while using a service for commercial purposes, they must prove that the service was solely intended for self-employment livelihood. The court found that the relationship between the appellant and the respondent in this case was purely a "business to business" arrangement, which falls under commercial purpose. The court emphasized that if business disputes were to be considered consumer disputes, it would defeat the purpose of the CPA, which aims to provide swift and simple resolution to consumer grievances. The court noted that the intention of the legislature was to keep commercial transactions outside the scope of the Act, while still granting protection to those who use such services solely for their self-employment livelihood.

3. The Three Tier Dispute Redressal Mechanism under CPA, 2019

The chapter-IV of the Act[6] provides for the establishment of a dispute redressal commission which is divided into three levels, namely the District, State and National Commission.

Establishment of District, State and National Consumer Disputes Redressal Commissions

Section 28[7] states for the establishment of a Consumer Disputes Redressal at the level of District, also known as the District Commission. in every district of the State is obligated to notify it. However, if deemed necessary, the State Government may establish more than one District Commission in a district. The District Commission shall be composed of a President and a number of members as prescribed in consultation with the Central Government, ranging from two to a maximum limit.

The State Government needs to set up a State Consumer Disputes Redressal Commission, known as the State Commission, by issuing a notification to enhance the resolution of consumer disputes. The State Commission will be headquartered in the State capital but may operate in other areas based on a notification issued in the Official Gazette by the State Government, in consultation with the State Commission. Additionally, the State Government may establish regional benches of the State Commission in various locations as it deems necessary. The composition of each State Commission shall include a President and a

[5] Civil Appeal No.11397 of 2016.
[6] The Consumer Protection Act, 2019.
[7] The Consumer Protection Act, 2019,s. 41

minimum of four members, or the number of members specified in consultation with the Central Government.[8]

The National Commission is primarily based in the National Capital Region and carries out its duties in other locations as determined by the Central Government in collaboration with the National Commission, which will be announced in the Official Gazette. However, the Central Government may also set up regional Benches of the National Commission in various locations, as deemed appropriate, by issuing a notification[9].

In the case of *Vodafone Idea Cellular* v. *Ajay Kumar Aggarwal,*[10] the Supreme Court ruled that the availability of arbitration clause in the contract does not prevent the jurisdiction of the consumer forum. The court clarified that although consumers have the option to pursue arbitration, they are not obligated to do so and may choose to seek relief under the CPA. The court also stated that the addition of "telecom services" to the definition of Section 2(42) in the CPA of 2019 does not imply that telecom services are exempt from the jurisdiction of the consumer forum under the CPA of 1986. In fact, the definition of "service" in Section 2(o) of the 1986 Act is broad enough to encompass all types of services, including telecom services.

Jurisdiction of the respective Commissions

Territorial Jurisdiction

To file a complaint, one must approach the District Commission established within the local jurisdiction: [11]

(a) The opposite party, or all of the opposite parties (if there are multiple), at the time of filing the complaint, usually reside, conduct business, operate a branch office, or work for personal gain; or

(b) Any of the opposite parties (if there are multiple), at the time of filing the complaint, actually and willingly reside, conduct business, operate a branch office, or work for personal gain. However, in such cases, the permission of the District Commission is required.

(c) The cause of action, either wholly or partially, arises;

(d) The complainant resides or works for gain personally.

The State Commission is authorized to hear appeals against orders issued by any District Commission operating within the State and

[8] The Consumer Protection Act, 2019, s. 42.
[9] The Consumer Protection Act, 2019, s. 53.
[10] 2022 Live Law (SC) 221.
[11] The Consumer Protection Act, 2019, s.34.

review the records and issue appropriate orders in consumer disputes that are either pending before or have been decided by any District Commission operating within the State. This applies when the State Commission finds that the District Commission exceeded its lawful jurisdiction, failed to exercise jurisdiction when it was required, or acted unlawfully or with significant irregularity in exercising its jurisdiction.[12]

The National Commission is empowered to:

(a) adjudicate appeals against orders issued by any State Commission;

(b) hear appeals against orders issued by the Central Authority; and

(c) scrutinize records and provide suitable orders in consumer disputes that are either ongoing or have been resolved by any State Commission. This is applicable if the National Commission determines that the State Commission exceeded its legal jurisdiction, failed to exercise jurisdiction when necessary, or acted illegally or with considerable irregularity in exercising its jurisdiction.

The National Commission's jurisdiction, powers, and authority may be exercised by its Benches, which can be constituted by the President with one or more members as deemed fit.[13]

The announcement of the Consumer Protection (Jurisdiction of the District Commission, the State Commission and the National Commission) Rules, 2021 by the Central Government brings attention to the quasi-judicial system established by the Consumer Protection Act of 2019. This system comprises three consumer commissions at different levels- district commissions, state commissions, and national commission, each with its pecuniary jurisdiction. However, it was observed that the existing provisions were leading to cases that should have been under the National Commission's jurisdiction to be filed in State Commissions and those that should have been under State Commissions to be filed in District Commissions. This led to a significant increase in the workload of District Commissions, leading to a backlog of cases and slowing down the resolution process, which went against the Act's aim of providing prompt relief.

Pecuniary Jurisdiction

The Consumer Protection Act of 2019 has specified the financial jurisdiction for each level of the consumer commission, and in line with this, the Central Government has issued the Consumer Protection Rules of 2021. As per the Act's provisions, the District Commissions have the authority to handle complaints where the value of goods or

[12] The Consumer Protection Act, 2019, s. 45.
[13] The Consumer Protection Act, 2019, s. 58.

services paid is up to one crore rupees. Complaints where the value of goods or services exceeds one crore rupees but does not exceed ten crore rupees are to be addressed by the State Commissions, while complaints where the value of goods or services paid exceeds ten crore rupees come under the jurisdiction of the National Commission.

However, it was noted after the Act came into effect that the current provisions regarding the financial jurisdiction of consumer commissions resulted in a surge of cases being filed in District Commissions, which were previously under the jurisdiction of State Commissions. Furthermore, cases that should have been heard by the National Commission were now being filed in State Commissions, leading to a significant increase in the workload of District Commissions. This delay in resolving cases undermined the purpose of providing timely redressal to consumers, which the Act aimed to achieve.

As per the provisions of the Act, complaints that involve goods or services worth up to one crore rupees as consideration are within the jurisdiction of the District Commissions. For complaints where the value of goods or services paid exceeds one crore rupees but is not more than ten crore rupees, the State Commissions have jurisdiction. Complaints that involve goods or services worth over ten crore rupees as consideration fall under the jurisdiction of the National Commission.[14]

The 2021 rules stated[15] that, subject to other provisions of the Act, the new pecuniary jurisdiction will be as follows:

- Complaints with a value of goods or services paid as consideration not exceeding 50 lakh rupees will fall under the jurisdiction of District Commissions.
- Complaints with a value of goods or services paid as consideration exceeding 50 lakh rupees but not exceeding 2 crore rupees will fall under the jurisdiction of State Commissions.
- Complaints with a value of goods or services paid as consideration exceeding 2 crore rupees will fall under the jurisdiction of the National Commission.

It should be noted that the CPA, 2019 mandates that every complaint must be resolved as quickly as possible, with an effort made to make a decision within 3 months from the date of notice by the opposite party for complaints that do not require analysis or testing of commodities, and within 5 months for complaints that do require analysis or testing of commodities.

[14] The Consumer Protection Act, 2019, s. 58.
[15] Ibid.

Filing of Complaint

According to Section 2(6) of the Act, a complaint is defined as a written allegation made by a complainant seeking relief under the Act for various reasons, including unfair trade practices, defective goods, deficient services, excessive pricing of goods and services, and the selling of hazardous goods. Furthermore, the complainant has the right to claim product liability against the manufacturer or service provider. The new Act has also introduced a provision for product liability, which makes the manufacturer or service provider liable to compensate consumers for any injuries caused by manufacturing defects or deficient services.

In regards to the sale or delivery of any goods or services or any agreement, a complaint can be filed with the respective Commission having jurisdiction"

The parties eligible to file a complaint include:

(a) The consumer who purchases or receives the goods or services, or claims unfair trade practices related to such goods or services;

(b) A recognized consumer association, irrespective of whether the consumer who purchased or received the goods or services or alleged unfair trade practices related to such goods or services is a member of the association or not;

(c) With the Commission's authorization, one or more consumers on behalf of all consumers with similar interests, for their benefit; or

(d) The Central Government, the Central Authority or the State Government, as applicable.

It is worth noting that complaints under this subsection can be submitted electronically, as prescribed. **A "recognized consumer association," as used in this subsection, refers to any voluntary consumer association registered under any prevailing law**.

Every complaint submitted should be accompanied by a fee, as prescribed, payable in the prescribed manner, including electronic form.[16]

In the case of *Debashis Sinha* v. *M/S RNR Enterprise represented by its Proprietor/Chairman, Kolkata,*[17] the Supreme Court held that complaints by consumers should not be rejected by consumer forums on the ground that the consumers knew what they were purchasing.

E-Daakhil Portal: A Convenient Electronic Filing System for Consumer Complaints

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[16] The Consumer Protection Act, 2019, s. 35.
[17] Civil Appeal No. 3343 OF 2020

The Act[18] offers consumers the convenience of filing their complaints electronically. To facilitate this, the Central Government has created the e-portal Portal, which enables consumers to approach the relevant consumer forum from anywhere in the country without the need for physical travel. This portal offers many features, such as e-notices, links to download case documents, and links for video conferencing hearings. The opposite party can file a written response, while the complainant can file a rejoinder, and alerts via SMS/email are also available. **The E-Daakhil facility is currently available in 544 consumer commissions, including the National Commission and consumer commissions in 21 states and 3 Union Territories. Over 10,000 cases have already been filed on the portal, with more than 43,000 users having registered**[19].

Procedure for Dispute Redressal in District Commission

The District Commission shall be presided by the President and at least 1 member shall preside over each proceeding before the Commission. However, if a member is unable to continue the proceeding for any reason, the President and the remaining member carry on with the case from the point at which the previous member left off.

Upon receiving a complaint under Section 35, the Commission may accept or reject the complaint by order. The complaint cannot be rejected without giving the complainant an opportunity to be heard. The admissibility of the complaint should be determined within 21 days from the date of filing, except in exceptional circumstances. If the District Commission fails to make a decision on the admissibility of the complaint within the specified time, it will be presumed that the complaint has been admitted[20].The same procedure is applicable to the State and National Consumer Commissions as well.

In *Ibrat Faizan* v. *Omaxe Buildhome Private Limited,*[21] the Apex Court ruled that the National Consumer Disputes Redressal Commission (NCDRC) qualifies as a "tribunal" as defined by Articles 227 and 136 of the Indian Constitution. Furthermore, the court determined that a writ petition against an order issued by the NCDRC under Section 58(1)(a)(iii) or Section 58(1)(a)(iv) of the CPA can be filed before the High Court under Article 227.

[18] supra note 14.
[19] Ibid.
[20] The Consumer Protection Act, 2019, s. 36.
[21] The Consumer Protection Act, 2019, s. 74.

Mediation as a Mode of Dispute Settlement Under CPA

Mediation is an alternative method of resolving disputes outside of court, allowing parties to determine the procedure themselves. It is known for its efficiency in facilitating the settlement of disputes.[22] Under the CPA, 2019, a provision has been introduced allowing the relevant Commission to refer a consumer dispute for mediation if there is potential for a settlement between the parties. However, the parties must consent to the mediation process within a 5-day timeframe, as their agreement is crucial to the success of the mediation. In the event of a dispute being referred to mediation, the fee paid to the Commission for dispute redressal will be refunded to the parties[23].

To settle consumer disputes, a panel of mediators is available at the "Consumer Mediation Cell". This cell maintains a record of the proceedings and the cases. Before the mediation begins, the parties are required to pay a fee to the mediator. The mediator is expected to act impartially and make a fair judgment. The mediation process is confidential and both parties are required to attend the proceedings. They must provide all the necessary information and documents to the mediator. If the parties reach an agreement within three months, a settlement report is submitted to the Commission along with the signatures of the parties. The Commission is required to issue an order within seven days of receiving the settlement report. If no agreement is reached through mediation, a report of the proceedings is sent to the Commission. The Commission then hears the issues and decides the matter. Once the dispute has undergone the mediation procedure, it cannot be taken to other proceedings such as arbitration or court litigation.[24]

4. Recent Jurisprudence Demonstrating Effective Dispute Resolution Under the CPA

The passenger in M/S. Lufthansa German Airlines v. Mr. Rajeev Vaderah[25] misplaced seven luggage on a Lufthansa flight from Frankfurt to London. The bags were sent to him after a few days, completely empty and without any valuables. The customer claimed that the airline had not given them enough money to make up for their loss, anxiety, and mental anguish, and they lodged a consumer complaint with the District Consumer Commission. The District Consumer Commission concluded, after considering the facts, that the airline's employees had provided services negligently and could not be released from liability by asserting limited liability alone. The airline was ordered to reimburse the stolen goods for $5,000 USD and to pay Rs. 1.5 lakh in compensation for the costs of harassment, litigation, and other charges. The Delhi State Consumer Disputes Redressal

[22] The Consumer Protection (Mediation) Rules, 2020, rule 5.
[23] The Consumer Protection Act, 2019, s. 37(2).
[24] The Consumer Protection (Mediation) Rules, 2020, rule 6.
[25] First Appeal No.-791/2014.

Commission (DSCDRC) has maintained the District Forum's ruling on compensation for loss and mental harassment experienced by a passenger as a result of Lufthansa Airlines' improper handling of their baggage**.**

The National Commission denied that it lacked pecuniary jurisdiction in Anil Rawat v. Clarion Properties Limited[26], arguing that it did so because of Section 21 of the Act, which gave it jurisdiction over claims for compensation and goods and services valued at more than one crore rupees. The defendants' failure to give the complainant possession of the flat meant that the cause of action remained open, dismissing the objection that the Complaint was time-barred. The Commission was unable to locate any documentation to back up the opposing parties' assertion of "Force Majeure." Due to the developer's inability to furnish apartments within the allotted time frame, the matter was deemed to be in deficient service and fell under the purview of consumer forums. The respondent parties were directed by the Commission to provide delay compensation in the form of simple interest at an annual rate of 6% on the sum paid by the complainants between the date of the offer of possession and the promised date of possession.

Similarly, in *Dr. Anand Gnanaraj* v. *Floor N Dector*,[27] the District Consumer Disputes Redressal Commission, partly upheld a complaint filed by an individual against the company that supplied defective tiles for the complainant's house. The Opposite Party was directed to either replace the defective tiles in the complainant's house or pay a sum of 4,18,080/- INR, which was the cost of the tiles. Additionally, a compensation of 50,000/- INR was awarded to the complainant for the deficiency in service and mental agony caused.

The State Commission upheld a consumer complaint against a car dealer, service provider, and manufacturer for a brake-mechanism problem in Saravana Stores Tex v. Audi-Chennai[28]. The complainant applied for relief from the Commission, asking Audi, the automaker, to replace the defective car and to compensate him or her for suffering and mental anguish, among other things, to the tune of thirty lakhs/- INR.

Furthermore, the District Forum and State Commission's Order was maintained in Dr. Indra Chopra v. Rashmi Saxena…[29], a revision petition that was heard by a single bench of the National Consumer Dispute Redressal Commission. The Doctor was ordered by the NCDRC to pay Rs. 3,00,000 in compensation and Rs. 15,000 towards litigation costs after it was determined that they had engaged in carelessness. The patient had been admitted to the physician's assisted living facility

[26] C.C. No. 1512 of 2017.
[27] Consumer Complaint No 313/2019.
[28] C.C. No. 171 of 2014.
[29] Revision Petition No. 2716 Of 2016.

in preparation for giving birth; but, as a result of the physician's and her helpers' carelessness, the patient's ureters were damaged during the caesarean section, and the infant was stillborn. The patient required more surgery, which added to the costs. An FIR was issued against the doctor under Sections 316 and 326 of the IPC after the patient's spouse filed a police case. A consumer complaint was also pending before the District Forum in Lakhimpur, Uttar Pradesh, in addition to the criminal prosecution. Following hearing from all parties, the NCDRC found that the doctor had failed to uphold his duty of care. When the woman began experiencing intense labour pains, the doctor did not see her right away. The patient was placed in the care of untrained and unqualified aides by the doctor. The infant died because the caesarean section was hastily done at a later stage.

The NCDRC accepted a complaint against IDBI Bank Limited in Binod Dokania v. IDBI Bank[30] Limited, alleging a failure in service on the side of the respondent bank. The complainants have lodged their initial complaint against the other party/IDBI bank under sections 21 and 22 of the CPA, 1986. The complaint claimed that the other party had lost or destroyed the original title documents to his residential flat, so constituting a failure in service. In order to obtain a house loan from the Bank, the paperwork was sent to the other party.

Regarding all the papers that have not been returned to the complainants in their original form, the NCDRC ordered the opposing party to provide an indemnity bond in the complainant's favour. Additionally, the NCDRC ordered the respondent to pay the complainants Rs. 20 lakhs for financial damages, Rs. 1 lakh for mental suffering and harassment, and Rs. 50,000 for litigation costs.

5. Conclusion

A crucial component of consumer protection legislation are dispute resolution procedures, which give customers a way to resolve any complaints they may have against companies. These procedures may be conducted in court, through arbitration or mediation, among other formats.

Because they offer a fair playing field for customers who might not have the financial or legal means to sue companies in court, consumer forums are crucial to consumer protection. In the absence of such procedures, customers might feel helpless and unable to hold companies responsible for any harm they may have caused.

Additionally, dispute settlement procedures offer a more effective and economical means of resolving conflicts, especially in cases involving lesser claims. For instance, disputes handled through mediation and arbitration can frequently be settled faster and more affordably than those resolved through drawn-out, costly judicial

[30] C.C. 2218 of 2018.

procedures. Furthermore, strategies for resolving disputes can promote improved ties between customers and companies. Consumers are more inclined to trust firms and keep doing business with them when conflicts are settled fairly and effectively, while businesses are more likely to see customers as valued clients and treat their complaints seriously.

In many countries, consumer protection laws require businesses to have dispute settlement mechanisms in place, which can be a powerful deterrent against fraudulent or deceptive business practices. When businesses know that consumers have access to a fair and impartial dispute settlement process, they are more likely to comply with consumer protection laws and avoid engaging in unethical or unfair trade practices.

The recent judicial approach has adopted the process of consumer constitutionalism by adopting consumer centric approach. The judicial approach is more inclined towards consumer rights centric as it has adopted the model of right based approach. The adoption of mediation centric mode as one of the model of dispute redressal under the Act has added its importance and relevance as expressed by the various judicial dictums. There is a need to regulate the mechanism for effective redressal mechanism. The identified gaps need to be regulated for effective adminstartition of redressal mechanism. The online dispute redressal mechanism need to be strengthen more.

Evaluating the Part that Independent Directors Play in Indian Corporate Governance

Ms. Komal Priya*

1. Introduction

There has been an evolution of corporate governance reforms around the globe. One such reform is the independence of the board so that the board can work effectively and efficiently. Presence of independent directors on boards of companies has been considered to be the answer to many problems related to corporate governance.[1] Independent Directors are non-executive directors, who are not materially involved with the company. They play an integral role in corporate governance as they act as watchdogs of corporate governance in the company.

The independent directors before being mandated by law were introduced in the USA in the 1950s as a voluntary measure to improve corporate governance.[2] However, the Enron scandal led to the recognition of independent directors by a statute (Sarbanes-Oxley Act, 2002) in the USA.[3] In the UK, Cadbury Committee Report, 1992 triggered the requirement of independent directors on the board. Furthermore, publication of the Cadbury Report gave birth to the evolving idea of corporate governance in economies like Australia, Canada, Singapore, Japan, India, etc.[4]

In India the idea of corporate governance is often traced back to the Arthashastra, which provided guidelines for governance of the Mauryan empire. In 1998 Confederation of Indian Industry ("CII") proposed the first major corporate governance norms in India which was voluntarily adopted by few companies. However, the idea of independent directors was conceptualised in 1999 when Birla Committee report formulated recommendations on the independence of the board and also defined independence.[5] Subsequently, SEBI in 2000 on the basis of recommendations of the Birla Committee

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[1] Donald C. Clarke, 'Three Concepts of the Independent Director' (2007) 32 Del. J. Corp. L. 73.

[2] Jeffrey N. Gordon, 'The rise of Independent Directors in the United States, 1950-2005, of Shareholder value and Stock Market Prices' (2007) 59 Stanford Law Review 1465.

[3] Umakanth Varottil, 'Evolution and Effectiveness of Independent Directors in Indian Corporate Governance' (2010) 6 Hastings Business Law Journal 281.

[4] ibid.

[5] SEBI, 'Report of the Kumar Mangalam Birla Committee on Corporate Governance' (1996).

introduced clause 49 in the listing agreement.[6] Many concepts that were introduced in clause 49 were those that emerged in the USA and UK.[7] SEBI appointed the Murthy Committee in 2002 to examine clause 49 and suggest changes needed if any.[8] However, Satyam fiasco in 2009, raised doubts over corporate governance norms in India. Thereafter, MCA introduced the voluntary guidelines for the companies. These guidelines had put many measures including process for the appointment of independent directors, also their roles and responsibilities, etc.[9] These guidelines were voluntary and were in resemblance with the cadbury committee report and in contrast to the Sarbanes-Oxley Act, 2002. Subsequently in 2013 Companies Act, 2013 ("Act, 2013") was introduced which brought changes to the role of a company's board and brought the concept of independence of a company's board under a statute. The SEBI in response to this converted the listing agreement into SEBI (LODR) Regulations, 2015. Thus, corporate governance in India has evolved with time and consequently the duty of independent directors of keeping check on the promoters and other executives of the company has also evolved.

2. The Significance of Board Independence in Corporate Governance

The corporate governance concerns are mainly dependent upon the control and separation of ownership in the companies. There are two types of concerns as envisioned by various scholars: first, as in India where companies have controlled shareholders, the main concern is that the majority shareholder may exploit the minority shareholders. This is called the insider model. Second, as present in the USA and UK where the companies are held by dispersed shareholders and there are no controlling shareholders. This is called the outsider model. In this system the main concern is that management of any company may exploit the assets of the company and act in "an opportunistic or non-value maximising manner".[10] In the outsider model where there is diffuse ownership, shareholders appoint professional managers to run the company which gives rise to the "agency problem" of "manager-shareholders" as agents (manager) may not always act in the best interests of the principal (shareholder). This leads to high agency costs because the principal has to set up a system for monitoring actions of

[6] Varottil (n 3).
[7] ibid.
[8] ibid.
[9] Umakanth Varottil, 'India's Corporate Governance Voluntary Guidelines 2009: Rhetoric or Reality?' (2010) 22 National Law School of India Review 1.
[10] Vikramditya Khanna and Shaun J. Mathew, 'The Role of Independent Directors in Controlled Firms In India: Preliminary Interview Evidence' (2010) 22 (1) National Law School of India Review 35.

the agents and also to incentivise them.[11] In the insider model, conflict between majority and minority shareholders gives rise to "majority-minority agency problem".[12] In such scenarios, the board of directors act as a vital governance mechanism to solve agency problems.[13] In an outsider model, the role of the board is of "vertical governance" where they work on behalf of the shareholders to maximise their wealth and also to maximise managerial opportunism.[14] Whereas, in an insider model, the function of the board is that of "vertical governance" where they try to achieve a balance between the interests of the majority vis-a-vis minority shareholders. Protecting the interests of minority shareholders is also one of the functions.[15] Accordingly, the presence of independent directors on the board becomes important to monitor that the manager acts in the interests of the company.[16] In countries like India where businesses are family owned and promoters have strong control over the management, independent directors have an added role of protection of the rights of minority shareholders.

According to the Cadbury report the independent directors must be independent of any influence and should not be involved in any business or any other material relationship that could affect their "independent judgement".[17] This is an important feature of independent directors across the globe.

There has been growing acknowledgement that presence of independent directors on the board helps in promoting interests of shareholders, especially minority shareholders.[18] Sufficient number of inside directors on the board is also important to minimise the problem of information asymmetry. Proper information provided to the independent directors by the executive directors or the inside directors, helps the independent directors in effectively assessing the performance of the management of the company.[19] This further helps in effective corporate governance in the company.

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[11] Michael Jensen & William Meckling, 'Theory of the firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 J. Fin. Econ. 305.
[12] Varottil (n 3).
[13] Jayati Sarkar, 'Board Independence and Corporate Governance in India: Recent Trends & Challenges Ahead' (2009) 44 (4) Indian Journal of Industrial Relations 576.
[14] Mark J. Roe, 'The Institution of Corporate Governance' (2004) Harvard Law School Discussion Paper No. 488
<http://www.law.harvard.edu/programs/olin_center/papers/pdf/Roe_488.pdf > accessed on 25 April 2023.
[15] ibid.
[16] ibid.
[17] Financial Reporting Council, 'Committee on the Financial Aspects of Corporate Governance Report' (1992).
[18] Sarkar (n 13).
[19] ibid.

3. Appointment, Roles, and Duties of Independent Directors in India

a. Appointment of Independent Directors Under the Companies Act, 2013

Companies Act, 1956 did not have any express provisions for the appointment of independent directors. Act, 2013 brought up the law related to independent directors under section 149 which deals with the board of directors. Under the section 149(4) of the Act, 2013 every listed company must have at least one-third of all directors on the board as independent directors.[20] A requisite number of independent directors are also required to be on committees such as audit committee, nomination and remuneration committee (NRC), etc.

Independent director is defined under Section 149(6) of the Act, 2013. An independent director means director who is not a managing director or a whole-time director or a nominee director. The person must possess high degree of integrity and must possess relevant expertise and experience.[21] The promoter or persons related to them or directors in the company, its holding or subsidiary companies, or anyone who has had the pecuniary relationship with the company in the 3 preceding financial years cannot be appointed as independent directors of the company.[22] Further, the person should not have been a legal consultant or auditor or employee or member of the key managerial personnel ("KMP"), etc of the company in the 3 preceding financial years.[23] The emphasis of existing statute is on who cannot be appointed as an independent director and thus there is a lack of clarity on who qualifies to be an independent director. The Act also mentions that an independent director can hold office for a term of five consecutive years and is eligible for reappointment if the board has passed a special resolution but the same has to be disclosed in the board's report.[24] The independent director is not eligible for renewal after the expiry of two consecutive terms and will be eligible again after the expiry of three years from the date he ceases to be an independent director.[25] Section 150 of the Act, 2013 provides for the manner through which an independent director may be selected. Independent directors may be selected from a data bank that contains the name, address, qualifications, etc of persons who are eligible to be an independent director.[26] The appointment of independent directors has to be approved in an annual general meeting of the company and the

[20] The Companies Act 2013, s 149 (4).
[21] The Companies Act 2013, s 149 (6).
[22] ibid.
[23] ibid.
[24] The Companies Act 2013, s 149 (10).
[25] The Companies Act 2013, s 149 (11).
[26] The Companies Act 2013, s 150 (1).

explanatory note annexed to the meeting must contain justification for the appointment of such persons as independent directors.[27]

The process established for appointment of independent directors is rigorous. However, they have not always been able to ensure that the independent directors work in the interests of the company and minority shareholders.[28] Despite all the checks and balances in place the majority or the controlling shareholders or the promoters of the company remain powerful as they were before the institution of independent directors was established in India.[29]

Majority shareholders have more control and thus they will influence the appointment of independent directors appointed at the annual meeting. They may also influence the renewal of their appointment.[30] Absence of clearly laid out procedure for the appointment of directors and leaving them on the board makes it "vulnerable to be captured by the majority shareholders" and thus hampering their independence.[31] This further hampers their role of protection of minority shareholders. This problem can be solved by giving the minority shareholders proportionate voting rights so that they have a say in the appointment of independent directors on the board.[32] Another issue with their appointment is lack of diversity in terms of gender, background, age, which can affect their ability to bring different perspectives on the board. To address these concerns, the Act, 2013 has mandated their independence through various provisions related to limitation of their term of office and by requirement of disclosure of conflict of interests. However, there is a need for continuous vigilance and enforcement mechanisms to ensure that the independent directors efficiently work in the interests of the minority shareholders and other stakeholders.

b. Roles and Duties of Independent Directors according to the Companies Act, 2013

Section 166 of the Act enumerates general duties for all the directors. These duties are duty of care, skill and diligence and to exercise independent judgement this requires the directors to give requisite time to the company and to raise "red flags" on any issue using their independent judgement and to take important actions against it that does not expose the company to any unnecessary risks. Another set of duties is the fiduciary duties which require the directors

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[27] The Companies Act 2013, s 150 (2).
[28] Rajat Sethi and Sarangan Rajeshkumar, 'Monitoring Independent Directors: who will Guard the Guards?' (Mondaq, 22 June 2022) <https://www.mondaq.com/india/shareholders/1204346/monitoring-independent-directors-who-will-guard-the-guards> accessed 26 April 2023.
[29] ibid.
[30] Varottil (n 3).
[31] ibid.
[32] ibid.

to act in the interests of the company and not for their personal interests. Rules which prevent self-dealing, and any conflict of interests are important for these duties to be implemented properly.[33]

Apart from these duties Act, 2013 also provides specific duties for independent directors. J.J Irani Committee Report recommended that the independent directors will have an element of independent judgement and objectivity to the board process as inside directors will represent their own specific interests.[34] Accordingly 2013 Act, brought a comprehensive "Code for Independent Directors" under Schedule IV, which sets down the guidelines of professional conduct and also their roles, functions and duties.[35] Some roles and duties are to independently oversee the affairs of the companies by attending all board and committee meetings, to safeguard the interests of the minority shareholders by providing their independent judgement on board process, they have to pay important attention to all the related party transactions, duty to report about any violation of laws or any fraud in the company, etc.[36] Thus, Act, 2013 has made their role critical in bringing independent judgement and also promoting transparency in the corporate governance of the company. However, these roles and duties are very perspective in nature. They may help in the effective corporate governance but also make the role of the independent directors difficult with increased responsibilities.[37] These may bring fear in their minds which will affect their efficiency.[38]

In the next section we will investigate the various instances in which the independent directors have failed to fulfil their duties through two case studies of Tata and Sons and IL&FS.

4. Case Studies: Tata & Sons and IL&FS

a. The Case of Tata and Sons

Even after Act, 2013 providing detailed roles, functions and duties and also code of conduct of independent directors, India has seen many cases of lack of corporate governance and corporate mismanagement.[39] Thus, raising doubts over the effectiveness of the institution of independent directors in enforcing high standards of corporate governance. There have been instances of independent

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[33] Umakanth Varottil, 'Directors' Duties and Liabilities in the New Era' (Quarterly briefing to Mumbai NSE Centre for Excellence in Corporate Governance 2014).
[34] Bhumesh Verma and Sara Jain, 'Independent Directors: Role, Responsibilities, Effectiveness' (SCCONLINE, 12 July 2019) <https://www.scconline.com/blog/post/2019/07/12/independent-directors-role-responsibilities-effectiveness/> accessed 26 April 2023.
[35] The Companies Act 2013, schedule iv.
[36] ibid.
[37] Varottil (n 33).
[38] ibid.
[39] M Damodaran, 'Board Failures: If Winter Comes' *BQ Prime* (24 Dec 2018) <https://www.bqprime.com/opinion/board-failures-the-year-corporate-governance-came-of-age-m-damodaran> accessed 28 April 2023.

directors resigning from their positions without adequate reasons, when the company is in distress to escape liabilities.[40]

Tata and Sons case highlights the ineffectiveness of independent directors in the current corporate governance framework our country. The case involved a dispute between the Tata Sons and its former chairman Cyrus Mistry. Cyrus Mistry was removed as the chairman of Tata Sons by its board. Mistry alleged that he was removed for bringing corporate governance reforms in the company and for opposing the decisions of the board.[41] Independent directors of Tata Chemicals including Nusli Wadia released a statement in support of Mistry. In response Nusli Wadia was himself removed from the board. This triggered a debate whether the removal of an independent director by the promoter based on personal rather than professional matters undermine the effectiveness of corporate governance in India.[42] This instance raises important questions with respect to the institution of independent directors. How can directors function independently if they can be removed by the majority shareholders? Thus, a policy issue arises whether the promoters who play an important role in the appointment should be allowed to vote for their removal.[43] The control of majority shareholders over decisions like removal of independent directors from the board "undermines the integrity of the process and institution" unless there has been any serious misconduct or fraud on part of the independent director.[44]

Tata and Sons shows the challenges that the independent directors face in acting on their independent judgement. They are expected to act in the best interest of the company and its stakeholders. However, they often face pressures from the management as well as promoters of the company which hampers their ability to contribute towards effective corporate governance.

b. The Case of IL&FS

The IL&FS case is another example of ineffectiveness of independent directors in India. The IL&FS, a major infrastructure

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[40] Jayshree P. Upadhyay, 'Why Independent Directors are Rushing for the Exit Doors '*Mint*' (Mumbai, 19 Dec 2018) <https://www.livemint.com/Companies/bntAau6XcAhPfTZ5yCVx7O/Why-independent-directors-arerushingfortheexit-door.html> accessed 28 April 2023.

[41] Aveek Datta, 'Tata Vs. Mistry: The Inside Story' *India Forbes* (7 Nov 2016) <https://www.forbesindia.com/article/battle-at-bombay-house/tata-vs-mistry-the-inside-story/44721/1> accessed 28 April 2023.

[42] Shally Seth Mohile, 'Is Tata Sons Right in Seeking Nusli Wadis's Expulsion?' *Mint* (Mumbai, 17 Nov 2016) <https://www.livemint.com/Companies/gAKkMI6ycCoArsnaYfs7xJ/Is-Tata-Sons-right-in-seeking-Nusli-Wadias-expulsion.html> accessed 28 April 2023.

[43] Nand L. Dhameja and Vijay Agarwal, 'Corporate Governance Structure: Issues & Challenges- Cases of Tata Sons & Infosys' (2017) 53 (1) Indian Journal of Industrial Relations 72.

[44] Mohile (n 42).

servicing and development company, collapsed in 2018 due to the debt crisis. The board was suspended, and a new board was formed by the NCLT on the ground that the board had mismanaged the fund of the company. The new board was granted immunity for the past actions of the suspended board by the NCLT.[45] Thus, it was found that the management of the company was involved in multiple irregularities and violation of corporate governance norms. Institute of Chartered Accountants of India ("ICAI") found that the financial statements prepared by statutory auditors were manipulated. ICAI declared statutory auditors to be guilty of "professional misconduct".[46]

It was found that independent directors of the company were unable to fulfil their duties to provide oversight, monitor the operations of the company, and also failed to ensure that the company complies with the laws and regulations of the country.[47] They failed to raise red flags to the issues that were related to ongoing malaise. The risk management committee of the company which comprises independent directors failed to deduce and report the risk.[48]

The Act, 2013 enlists the duties of independent directors and they require that the independent directors report any fraud or unethical behaviour. They are also required to attend "constructively and actively" all the meetings of the board as well as the committees in which they are chairpersons or members.[49] The independent directors of the IL&FS had failed to fulfil these duties as they did not report about the fraud, and they are being part of the audit committee did not raise red flags or asked questions. Moreover, directors are required to have skill and expertise. In the case of IL&FS the independent directors did not have the appropriate set of skills or expertise to understand the technicalities of financial mismanagement or to detect fraud.[50] This shows that companies appoint independent directors on the board or committees just to make sure that the necessary compliances are adhered to and do not understand that it is for the benefit of the companies and other stakeholders in the long term.

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[45] Shashank Pandey, 'Explainer: The IL&FS Insolvency Case' (*Bar & Bench*, 21 July 2019) <https://www.barandbench.com/columns/litigation-columns/ilfs-insolvency-the-journey-so-far> accessed 29 April 2023.

[46] ibid.

[47] 'IL&FS Crisis: Independent Directors come under Corporate Affairs Ministry Scanner' *The Economic Times* (15 May 2019) <https://economictimes.indiatimes.com/news/company/corporate-trends/ilfs-crisis-independent-directors-come-under-corporate-affairs-ministry-scanner/articleshow/69344775.cms> accessed 29 April 2023.

[48] Ians, 'MCA Wants to Question Erstwhile IL&FS Independent Directors' (*Moneylife,* 14 May 2019) <https://www.moneylife.in/article/mca-wants-to-question-erstwhile-ilfs-independent-directors/57156.html> accessed 29 April 2023.

[49] The Companies Act 2013, schedule iv.

[50] 'Independent Directors at IL&FS: Put on Notice' (*India Legal*, 13 April 2019) <https://www.indialegallive.com/constitutional-law-news/economy-news/independent-directorship-at-ilfs-put-on-notice/> accessed 29 April 2023.

The IL&FS and Tata and Sons cases highlight the limitations of independent directors in effective corporate governance in India. Despite their crucial role in promoting good governance practices, they have often been unable to prevent malpractices and fraud due to reasons such as lack of skill, independence, transparency, information asymmetry, etc.

5. Moving Forward

The Act, 2013 has improved the role of independence directors that was present under Clause 49. Thus, with the evolving society the role has also evolved. Act, 2013 has provided many responsibilities on the shoulders of the independent directors thus making them overburdened with these responsibilities which affect their independence.

One very important weakness in the current position of an independent director is related to her appointment. They are appointed by a promoter-controlled board which hampers their independence. As seen in the Tata and Sons case, the promoters not only control the appointment but also their removal. Thus, there is a need for an independent body or third-party agency that will enhance transparency. The Section 178 of the Act, 2013 provides that every listed company must have a Nomination and Remuneration Committee (NRC). The NRC which is appointed by the board is not an effective enough mechanism for ensuring independence. Though the NRC is mandatory it is not as effective as it is in the USA because of "concentrated shareholding" in India.[51] The concentrated shareholding allows the controlling shareholders to influence the process. The SEBI must make laws that can supervise the process of appointment and removal of an independent director. A national level supervisory board of independent directors can be set up to oversee and monitor the appointment and functioning of independent directors.

One of the purposes of having independent directors on board is that they bring wisdom and professional experience and knowledge. However, the kind of violations that can be observed in implementing corporate governance shows that the independent directors have failed in their role resulting in many scams.[52] Thus, independent directors should be trained and groomed properly to monitor frauds and to ensure that corporate governance in India is implemented in spirit.[53] The regulators should come up with metrics to test the efficiency of independent directors.[54]

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[51] Varottil (n 3).
[52] Kembai Srivastava Rao, 'Role of Independent Directors in Steering Corporate Governance' *The Times of India* (28 February 2022) <https://timesofindia.indiatimes.com/blogs/kembai-speaks/role-of-independent-directors-in-steering-corporate-governance/> accessed 30 April 2023.
[53] ibid.
[54] ibid.

Proper and sufficient incentives should be provided to the independent directors so that they can function efficiently without any fear. One such incentive can be assuring reputable directors of positions in a greater number of companies. It will create a market for independent directors and thus enhance the public perception of the institution.[55]

6. Conclusion

Increasing the responsibilities of the independent directors will not help in minimising frauds or scams in the country as not all scams or frauds can be attributed to areas that independent directors oversee. They are also not involved in monitoring the day-to-day functioning of the company. Increasing responsibilities or liabilities of independent directors, may not provide them with the right incentives to act independently as they will always be fearful of the consequences. Independent directors must be provided additional protection. It is important that the appointment and removal are not completely in the control of the majority shareholders. Minority shareholders should also play an important role to ensure transparency and independence. There should be proper enforcement mechanisms to ensure that independent directors fulfil their responsibilities and act in the best interest of the company and other stakeholders. If independent directors are given adequate protection under the laws and their responsibilities are reduced, then only will they be able to function diligently and thereby increasing the effectiveness of corporate governance in India.

[55] Varottil (n 3).

Assessing the Impact of Smoking Laws on Health among the Students in Lucknow City, Uttar Pradesh

Dr. Prashant Kumar Varun*

1. Introduction

India's tobacco problem is very complex, with a large use of a variety of smoking forms and an array of smokeless tobacco products. It is now well established that most of the adult users of tobacco start tobacco use in childhood or adolescence. The tobacco companies are now aggressively targeting their advertising strategies in the developing countries like India[1]. The Indian Judiciary[2] recognized the harmful effects of smoking in public and also the effect on passive smokers, and in the absence of statutory provisions at that time, prohibited smoking in public places such as auditoriums, hospital buildings, health institutions, educational institutions, libraries, court buildings, public offices, public conveyances, including the railways. It has been observed that, "Tobacco is widely recognized as a significant threat to public health, leading to approximately eight hundred thousand deaths each year in the country. Additionally, the cost of treating tobacco-related illnesses and the subsequent decline in productivity impose an annual financial burden of approximately Rs. 13,500 crores on the nation. This economic load outweighs any advantages derived from the revenue and employment generated by the tobacco industry. Furthermore, the Kerala High Court, in its ruling, underscored that the right to a healthy environment constitutes an integral aspect of the right to life as guaranteed under Article 21 of the Indian Constitution. The court acknowledged that public smoking not only endangers the health of smokers but also encroaches upon the rights of non-smokers to inhale clean air. According to the National Family Health Survey-V (NFHS-5), roughly 44.1% of men and 8.4% of women, both aged above 15 years, are consumers of various forms of tobacco in the state of Uttar Pradesh.

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[1] Chadda, R., & Sengupta, S. (2002), Tobacco use by Indian adolescents. *Tobacco Induced Diseases, 1*(June), 111 https://doi.org/10.1186/1617-9625-1-2-111

[2] Murli S. Deora v. Union of India & Ors., Writ Petition (civil) No. 316 of 1999, (2001) 8 SCC 765

2. International framework for smoking laws

The international scenario on smoking reflects a diverse range of smoking laws, tobacco control measures, and tobacco use prevalence rates across different countries. The tobacco epidemic is one of the biggest public health threats the world has ever faced, killing morethan 8 million people a year, including around 1.2 million deaths from exposure to second- hand smoke[3].

- The World Health Organization Framework Convention on Tobacco Control (WHO FCTC) is a worldwide treaty aimed at reducing tobacco consumption and mitigating the adverse effects linked to tobacco use. It provides a comprehensive framework of guidelines and recommendations for the effective implementation of tobacco control measures. India became a signatory to the WHO Framework Convention on Tobacco Control on February 27, 2005, thereby becoming a participating member of this global treaty.

- The World Bank provides support to countries for implementing effective tobacco control policies through its Tobacco Control Program. It offers technical assistance, research, and funding to support tobacco control initiatives, particularly in low- and middle-income countries.

- The *International Agency for Research on Cancer* (IARC), a specialized agency of the WHO, conducts research on the carcinogenicity of tobacco and evaluates the scientific evidence related to tobacco and cancer. It provides recommendations for policy actions based on the latest scientific findings.

3. National Legal Framework

India has implemented various laws and regulations to control smoking and tobacco use. The first legislation regarding tobacco in India was the *Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975.* The India parliament passed the comprehensive law for governing tobacco control in India known as *Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply, and Distribution) Act, 2003* (COTPA). It prohibits smoking in public places[4], direct and indirect advertising of tobacco products[5], sale of tobacco products to minors[6] (below 18 years of age), and sale of

[3] Institute of Health Metrics, (2019), Global Burden of Disease [Database],Washington, DC

[4] Sections 4 of Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply, and Distribution) Act, 2003

[5] Ibid, § 5

[6] Ibid, § 6

tobacco products within a specified distance from educational institutions[7]. In 2004, the Ministry of Health and Family Welfare exercised the powers granted under the Act[8] by promulgating a first set of rules, which, with respect to smoke free and tobacco advertising issues, have been stayed by court order or superseded. The Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Export, Transport, Sale, Distribution, Storage and Advertisement) Act, 2019 (No. 42 of 2019) replaces the 2019 E-Cigarette Ordinance and bans the sale and advertising of e-cigarettes, e-cigarette components.

4. Objectives of the study

The object of Study is:

i. To evaluate the level of awareness and understanding of smoking laws among students. This includes examining their knowledge of specific regulations, such as smoking bans in public places or restrictions on tobacco advertising near educational institutions.

ii. To analyze changes in smoking prevalence, initiation rates, and patterns of tobacco use before and after the implementation of smoking laws.

iii. To explore students' attitudes and perceptions towards smoking laws. Investigate their opinions on the appropriateness, effectiveness, and enforcement of these laws.

iv. To identify barriers and facilitators to the implementation and enforcement of smoking laws among students.

5. Research Methodology

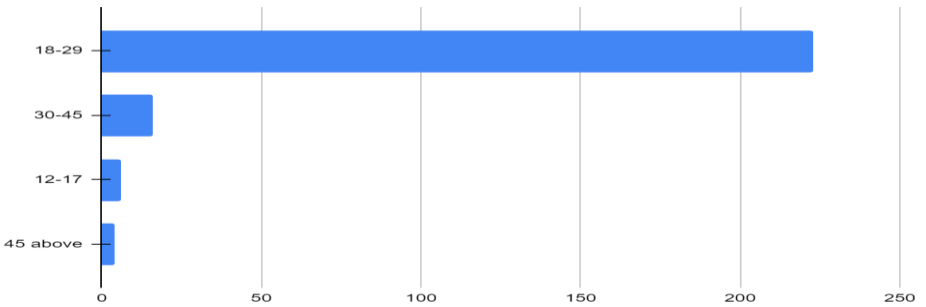
The current study is an empirical, non-doctrinal research project with a tight timeframe, focused on gathering the most credible data. Empirical research in the legal field is a relatively recent development. To evaluate the impact of smoking laws on the health of students in Lucknow, Uttar Pradesh, data was collected through surveys based on questionnaires. In this regard, a well-structured questionnaire was utilized to solicit responses from participants. The data collection process involved in-person visits to the respondents. Data analysis was conducted using Excel. The primary aim of this survey is to explore the extent of awareness among students regarding smoking laws. The response given by the respondents has been analyzed and produced in a structured format in the form of

[7] Ibid, § 7
[8] Ibid, § 31

Questionnaire for easy and logical understanding. An analysis of every question has been made along with the question. Finally, in the end, conclusion has been drawn. Suggestions have also been made.

6. Universe and Sample size

The current survey takes place in Lucknow, a city located in the northern state of Uttar Pradesh, India. As the capital of Uttar Pradesh, Lucknow boasts a significant and culturally rich heritage. Geographically, the city, often referred to as the "City of Nawabs," embodies a dynamic blend of tradition and modernity. Encompassing approximately 3,204 square kilometers in total area, Lucknow's strategic location ensures easy accessibility via air, rail, and road transportation[9]. Various schools, colleges, central or state universities located in the city of Lucknow were selected for this research. Since study aims to examining the level of legal awareness and students attitudes towards smoking laws.



7. Limitation of research

a. Student characteristics, cultural contexts, and variations in smoking laws candiffer across regions and institutions, limiting the generalizability of findings.

b. Low response rates or small sample sizes can limit the representativeness andstatistical power of the study.

c. Ethical constraints can impact the study design and limit the types of data thatcan be collected.

d. The sample obtained may not fully reflect the diversity and characteristics of the student population, limiting the generalizability of the findings.

[9] Geography of City Available at https://lucknow.me/geography.html https

8. Data analysis and discussion

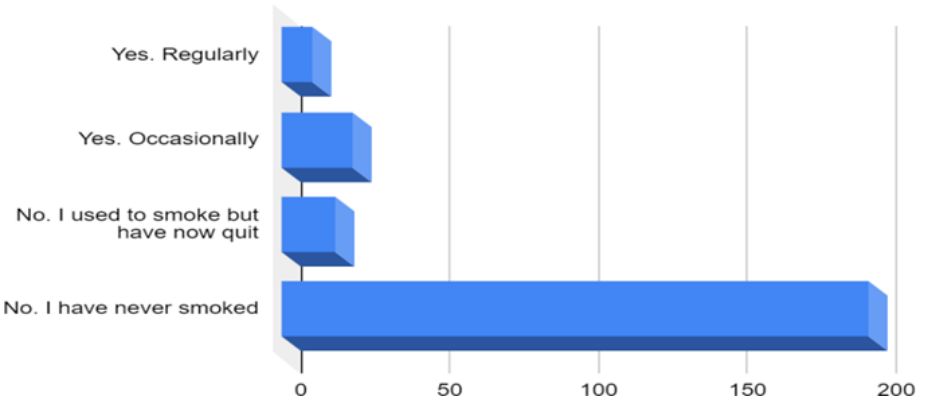


Fig: 1 Smoking Habit

The majority of respondents 79.1% have never smoked, indicating a significant proportion of non-smokers in the sample. A small percentage of respondents 7.2% used to smoke but have now quit, suggesting that some individuals have successfully stopped smoking. A moderate percentage of respondents (9.6%) smoke occasionally, indicating that a portion of the sample engages in smoking on an irregular basis. A smaller percentage of respondents 4% smoke regularly, implying a minority of individuals who engage in smoking as a regular habit.

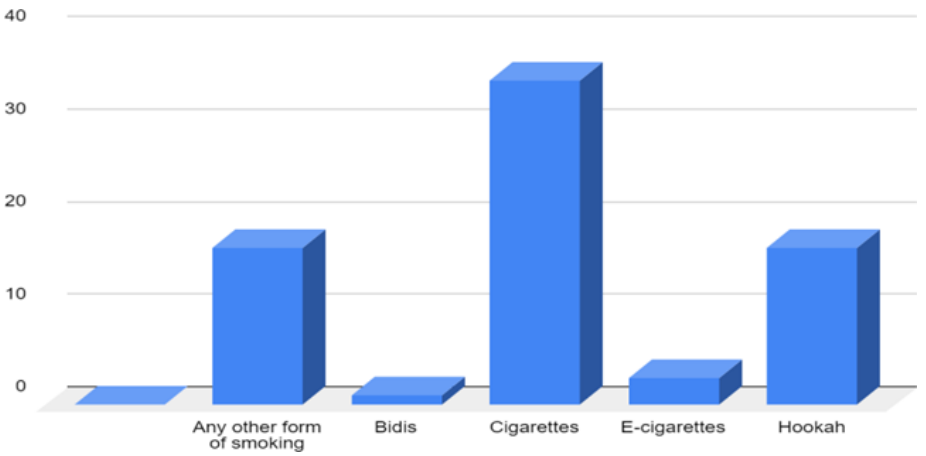


Fig: 2 Smoking Methods

The data represents the number of occurrences or instances for each type of smoking method. Cigarettes have the highest percentage of smokers, accounting for approximately 47.9% of respondents. Hookah is the second most prevalent form of smoking, with around 23.3% of respondents reporting its use. E-cigarettes have a relatively

lower percentage of users, with approximately 4.1% of respondents reporting their use. Bidis have the lowest percentage of smokers, accounting for only around 1.4% of respondents.

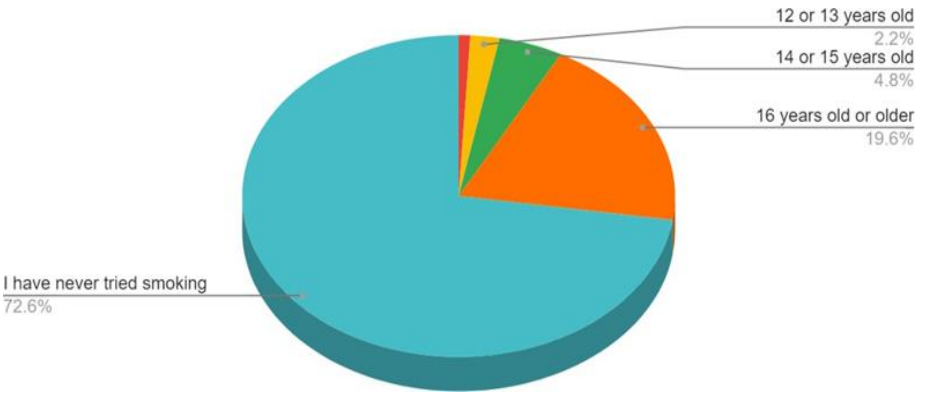


Fig: 3 Age of Smoking

To analyses and interpret the data on the age at which individuals first tried smoking. The majority of respondents 72.6% reported that they have never tried smoking. Among those who have tried smoking, the highest percentage of respondents 19.6% reported trying it at 16 years old or older. The remaining respondents who tried smoking reported the following age distributions: 14 or 15 years old 4.8%, 12 or 13 years old 2.2%, and 10 or 11 years old 0.8%.

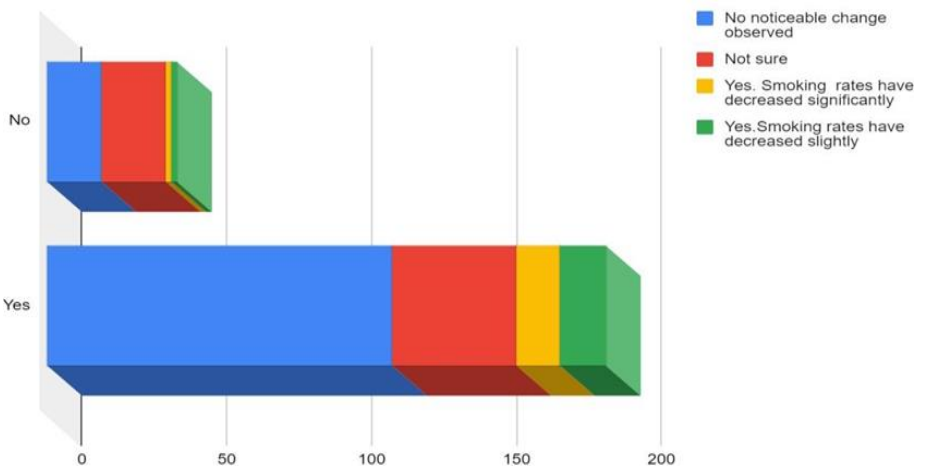


Fig: 5 Smoking Behavior and pattern

The x-axis represents the knowledge in respect of law related to the prohibition of smoking in India, and the y-axis represents the changes in smoking behavior and pattern among people after the implementation of smoking laws in India. The research shows that 78.54% of the respondents believe that there is a law related to the

prohibition of smoking in India, while 21.46% of the respondents believe that there is no such law. The majority of respondents 58.16% reported no noticeable change in Smoking behavior and patterns after the implementation of smoking laws in India. This suggests that a significant portion of the respondents did not observe any significant impact on smoking habits. A notable proportion of respondents 27.20% indicated that they were not sure about any changes in smoking behavior. This indicates a level of uncertainty or lack of awareness among this group regarding the impact of smoking laws on smoking patterns. A small percentage of respondents 7.11% reported that smoking rates have decreased significantly after the implementation of smoking laws. This suggests that there is a subset of individuals who have observed a noticeable decline in smoking habits, indicating a positive effect of the implemented laws. Similarly, another small percentage of respondents 7.53% mentioned that smoking rates have decreased slightly. This implies that a fraction of respondents noticed a modest reduction in smoking behavior, indicating a potential positive impact of the smoking laws.

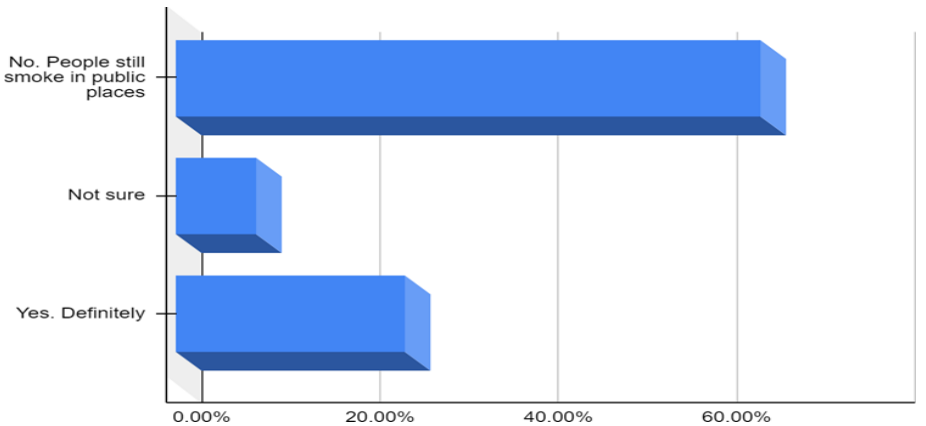


Fig: 6 Smoking at Public Place

The majority of respondents 65.45% believe that smoking laws have not effectively deterred people from smoking in public places. This suggests that a significant portion of the respondents perceive that smoking still occurs in public areas despite the implementation of smoking laws. A relatively smaller percentage of respondents8.94% are unsure about the effectiveness of smoking laws in deterring smoking in public places. This indicates a level of uncertainty or lack of knowledge among this group regarding the impact of smoking laws. A notable percentage of respondents 25.61% believe that smoking laws have definitely been effective in deterring people from smoking in public places. This suggests that a significant proportion of respondents have observed a positive impact, perceiving a reduction in smokingbehavior in public areas due to the implemented laws.

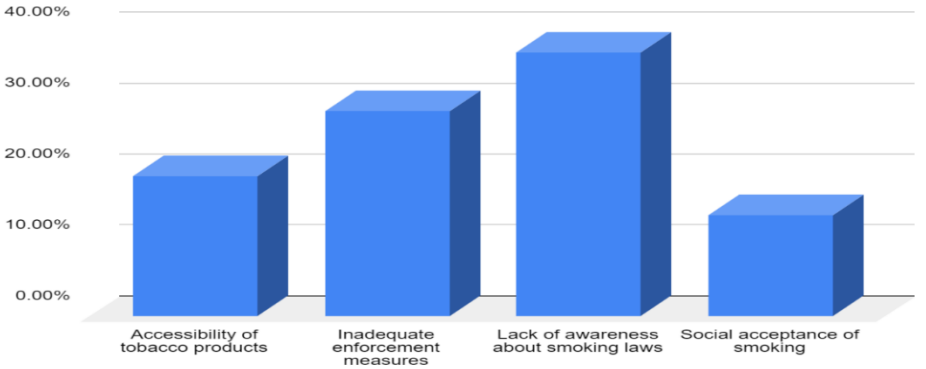


Fig: 7 Barriers in the implementation of Law

The above diagram addresses the challenges or barriers in the implementation and enforcement of smoking laws in India. 19.72% of respondents identified this as a challenge or barrier in the implementation and enforcement of smoking laws. This suggests that a proportion of respondents perceive that easy access to tobacco products hinders the effectiveness of the laws. 28.90% of respondents mentioned this as a challenge or barrier. This indicates that a significant number of respondents believe that the lack of proper enforcement measures affects the implementation and effectiveness of smoking laws. The highest percentage, 37.16%, of respondents identified this as a challenge or barrier. This suggests that a significant portion of the respondents perceive a lack of awareness about smoking laws as a hindrance to their implementation and enforcement. 14.22% of respondents mentioned this as a challenge or barrier. This implies that a smaller proportion of respondents believe that the social acceptance of smoking creates obstacles in effectively implementing and enforcing smoking laws.

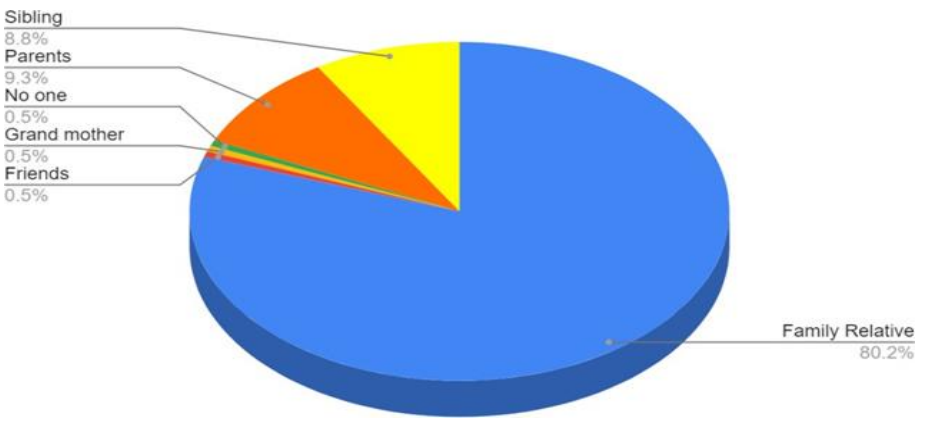


Fig: 8 Influence of smoking

It appears that the highest percentage of smokers in respondents surroundings are family relatives 80.22%, followed by parents 9.34% and siblings 8.79%. Friends and Grandmothers constitute a smaller percentage, while a minority of respondents reported no one smoking around them.

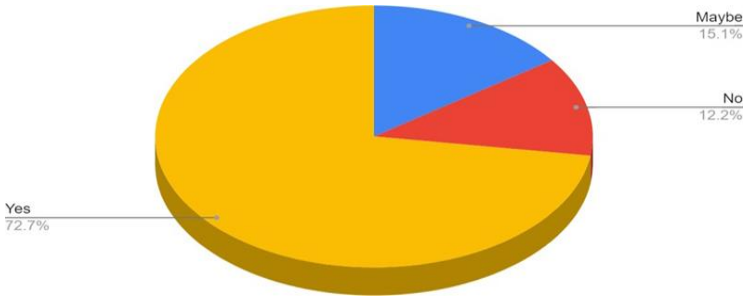


Fig: 9 Tobacco Shops

The majority of respondents, 72.65%, answered affirmative that there is a tobacco shop within 100 yards of their school or university. This suggests that a significant portion of the surveyed population has access to a tobacco shop in close proximity to their educational institution. This finding raises concerns about the potential impact on students' health and well-being, as proximity to tobacco shops may increase the likelihood of exposure to tobacco products and influence smoking habits. On the other hand, 15.10% of respondents answered "Maybe," indicating uncertainty about the presence of a tobacco shop near their school or university. This response could stem from a lack of awareness or accurate information regarding nearby tobacco shops. A smaller proportion of respondents, 12.24%, answered "No," indicating that there is no tobacco shop within 100 yards of their school or university. This response suggests that some educational institutions are located in areas where tobacco shops are not immediately accessible.

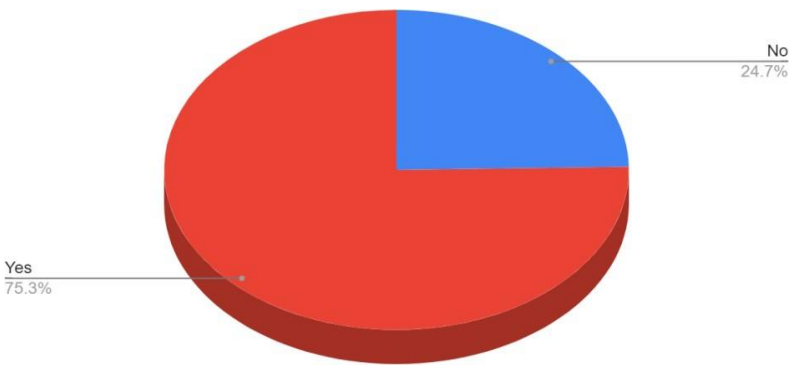


Fig: 10 Smoking inside or outside university

We can see that 75.30% of the respondents have reported witnessing someone smoking inside or outside the school/university building property. On the other hand, 24.70% of the respondents have not seen anyone smoking in those areas. This data suggests that a significant majority of the respondents have observed instances of smoking either inside or outside school/university buildings. It highlights a potential concern regarding smoking behaviors within educational premises.

9. Conclusion and Recommendations

The aim of this study was to evaluate the impact of smoking laws on the health of students in Lucknow city, Uttar Pradesh, by analyzing survey data obtained from a sample of students. Several significant findings emerged from this study. Firstly, the study revealed that cigarettes were the most prevalent form of smoking among students, and smoking habits typically started around the age of 16. Unfortunately, smoking laws have not effectively deterred people from smoking in public places. The easy accessibility of tobacco and social acceptance of smoking pose challenges and barriers to the successful implementation and enforcement of smoking laws. Additionally, students are influenced by their family members and friends when it comes to smoking. It is important to acknowledge certain limitations of this study. The reliance on self-reported data in the survey introduces the possibility of recall bias or social desirability bias. Furthermore, the study focused solely on students in Lucknow city, limiting the generalizability of the findings to a broader population. To further advance this research, future studies should consider employing more rigorous methodologies, such as longitudinal designs, to assess the long-term impact of smoking laws on student health. Additionally, exploring enforcement mechanisms and evaluating the effectiveness of smoking cessation programs targeted at students could provide valuable insights into enhancing the overall effectiveness of tobacco control efforts. In conclusion, the findings of this study underscore the importance of strictly implementing smoking laws in public places and raising awareness among the population, not only in theory but also in practice. It is crucial to preserve human health and protect the environment by actively promoting and enforcing smoking regulations. There are several suggestions and recommendations can be made to further enhance the effectiveness of tobacco control efforts. These suggestions aim to promote healthier habits among students and reduce the harmful effects of smoking.

a. It is essential to strengthen the enforcement of smoking laws in public places. This can be achieved through increased monitoring and strict penalties for violations.

b. Public health campaigns and school-based initiatives can play a vital role in promoting awareness and educating students about the dangers of smoking.

c. Implement stricter regulations on the sale, distribution, and accessibility of tobacco products.

d. Foster collaboration among various stakeholders, including government agencies, educational institutions, healthcare providers,parents, and student organizations.

10. References

- Global Burden of Disease. (2019). Database. Washington, DC: Institute of Health Metrics.
- Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply, and Distribution) Act, 2003.

Murli S. Deora v. Union of India & Ors., Writ Petition (civil) 316 of 1999, (2001) 8 SCC 765.

Deciphering the Enigma of Pay Transparency: A Legal and Economic Analysis of the USA And Nordic Countries, Paving the Way for India's Progress, and Bridging Gender Disparity

Ms. Pratistha Priyadarshi*

Mr. Arunav**

1. Introduction

Pay transparency refers to the practice of making employee salary information available to both current employees and job candidates. Companies may choose to publicly disclose this information on job postings, or limit the information to specific departments or stages of the interview process[1]. It includes a variety of methods such as regular disclosure of pay, gender pay gap reporting, and pay assessments within companies. These tools aim to promote equal pay for equal work[2] by improving access to information.

Pay transparency reduces information asymmetry between different actors in the labor market, allowing for more informed decision-making and improving the ability of all actors to make better choices. By openly displaying employee salary information, pay transparency creates a level playing field for hiring and pay negotiations, enabling workers to identify potential discriminatory pay practices and take corrective actions to eliminate enterprise-level gender pay gaps[3]. Therefore, pay transparency offers a direct improvement in the labor market's information, positively impacting the ability of all actors to make informed decisions. Pay transparency have various effects such as the increase in the collective bargaining

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[1] International Labour Organization. *Pay Transparency Legislation: Implications for Employers and Workers' Organizations*. Geneva: ILO, (2022). https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/document/publication/wms_84920.pdf

[2] Martha Ceballos, Annick Masselot and Richard Watt., "*Pay Transparency across Countries and Legal Systems"*. CESifo Forum (2022). https://www.cesifo.org/DocDL/CESifo-Forum-2022-2-ceballos-etal-gender-employment-and-pay-gap-march.pdf

[3] Aumayr-Pintar, Chritine, Gustafsson, Carsten, "*Pay Transparency in Europe: First Experiences with Gender Pay Reports and Audits in Four Member States",* Eurofound (2018), https://www.eurofound.europa.eu/en/publications/2018.

power of the employees. It also leads to a lower pay gap between co-workers and also closes the void of the gender pay gap.

Pay transparency has been a topic of much debate in the global business community for years. While some argue that it can help promote fairness and reduce wage discrimination, others suggest that it may lead to negative effects, such as decreased motivation and productivity among employees. In light of these contrasting opinions, this paper examines the impact of pay transparency on workplace equity in two countries with vastly different cultural and economic contexts: India, Norway, and the USA.

In this research paper, we explore the impact of pay transparency in Norway and the United States and consider the potential benefits and drawbacks of introducing similar legislation in other countries. We argue that, while there may be some short-term challenges associated with implementing pay transparency measures, the long-term benefits in terms of increased equity and employee satisfaction make it a worthwhile endeavour.

India, USA, and Norway provide an interesting comparison due to their unique characteristics[4]. India is a rapidly developing country with a highly diverse workforce, while Norway and USA are highly developed countries with relatively homogenous populations. Furthermore, India has a history of wage discrimination based on gender, caste, and religion, whereas Norway has achieved great progress toward gender equality and is regarded as one of the world's most gender-equal nations. Thus, a comparison of these two countries can provide valuable insights into the impact of pay transparency on workplace equity.

This paper begins by providing an overview of the concept of pay transparency, including its different forms and potential benefits and drawbacks. It then delves into the specific cases of India and Norway, examining their respective labour markets, pay systems, and levels of pay transparency. Finally, the paper presents a comparative analysis of the impact of pay transparency on workplace equity in these two countries, drawing on existing literature and empirical evidence. The findings of this paper have important implications for policymakers and businesses in India and other countries seeking to promote workplace equity through pay transparency.

2. Pay Transparency: An Instrumental Step in Tackling Gender Pay Disparities

The gender pay gap is an intricate and multifaceted measure that reflects deep-seated gender-based biases and disparities in wage determination and wage structures, as well as disparities in the

[4] Martha, supra note 2, at 3.

allocation of work hours and occupational and sectorial distributions. This indicator captures a wide range of inequities that women encounter in the labor market, which are rooted in complex social, cultural, and economic factors.

The International Labour Organization (ILO) has established the principle of equal remuneration for men and women for work of equal value in its constitution, as well as in the Equal Remuneration Convention, 1951[5] , and the Discrimination (Employment and Occupation) Convention, 1958[6]. The main purpose of the convention is to fight against the discriminatory practices. Further it emphasizes on eliminating discriminatory pay practices specially in labour markets. The fundamental principles of non-discrimination and equal pay for equal work are emphasized and encouraged for adoption, respect, and implementation by all member states of the International Labour Organization, as articulated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work[7].

The European Commission's 2014[8] study provides estimates on the potential reduction of the gender pay gap through pay transparency measures. Based on these assessments, affording employees the right to access salary information within their organizations has the potential to significantly decrease the gender pay gap, with estimates ranging from 0.33% to 0.5%. Furthermore, consistent reporting of pay transparency by businesses could lead to a reduction in the gender pay gap of 0.66% to 1.5%. Additionally, the implementation of equal pay audits may result in a reduction of the gender pay gap within the range of 0.66% to 2%, and integrating equal pay principles into collective bargaining processes might lead to a reduction of 0% to 0.33% in the gender pay gap.

According to the research findings, the comprehensive adoption of a pay transparency strategy that encompasses all four elements could potentially bring about a substantial decrease in the gender pay gap, estimated to be within the range of 1.65% to 4.33%.

Despite considerable progress, India's gender wage gap remains large when compared to international standards. According to National Sample Survey Office (NSSO) labour force survey statistics, women in India earned 48% less than their male counterparts in 1993-94, which reduced to 28% in 2018-19. However, the COVID-19 epidemic has

[5] International Labour Organization, Equal Remuneration Convention, 1951, No. 100, 2A U.N.T.S. 257 (entered into force May 23, 1953).
[6] Discrimination (Employment and Occupation) Convention, 1958, 111 U.N.T.S. 65, adopted June 25, 1958, [Registration No. 3624], [Entry into force date: June 15, 1960], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312243
[7] ILO, Declaration on Fundamental Principles and Rights at Work (adopted June 18, 1988) (entered into force Sept. 2, 1998),https://www.ilo.org/declaration/lang--en/index.htm.
[8] European Commission 2014.

reversed decades of progress, with early data from the Periodic Labour Force Survey (PLFS) in the year 2020-21 indicating a 7% rise in the gap between the years 2018-19 and 2020-21.[9]

The gender pay gap has become an undisputed issue that needs to be addressed. Pay transparency measures have proven to be effective in identifying pay disparities between genders, making them useful tools in tackling the gender pay gap. However, there is no uniform approach to implementing pay transparency legislation, and countries have employed diverse strategies to achieve the desired outcomes.

Some countries compel corporations to produce report regarding pay transparency, while others mandate certification following audits conducted by authorized agencies. In most nations, employers and employees consult, enabling employees to enquire about or negotiate their salary. Furthermore, rather than depending on a single strategy, a combination of metrics is typically used to improve pay transparency. For instance, the practice of reporting pay transparency could lead to the implementation of equal pay audits, which can be linked to various incentives like tax incentives or consequences such as fines. The data collected through equal pay reporting might also be examined alongside worker representatives and employed during collective bargaining processes.

Governments must play a proactive role in engaging employers' and workers' organisations through discussions and the formulation of pay transparency laws. They are also responsible for providing support, including accessible and practical information and guidance on pay transparency measures, to ensure that employers comply with statutory obligations and that workers can understand and exercise their rights.

Employers' organizations should actively participate in discussions regarding pay transparency and the gender pay gap, as well as workplace gender equality, to anticipate legislative action and assess the effectiveness of implemented measures. They can also gather evidence-based enterprise concerns and challenges and communicate enterprise efforts to reduce the gender pay gap. Moreover, employers' representatives can ensure that the design of measures accounts for the specific challenges that smaller enterprises may face in complying with complex and administratively burdensome legislative requirements.

[9] Id.

3. Equal Pay for Work Of Equal Value: How Pay Transparency Can Empower Employees

The principle of ***equal pay for work of equal value, stated in the preamble of the ILO Constitution***[10], is distinct from equal pay for equal work. Equal pay for equal work only applies to work performed by two people in the same company and area of work, while equal remuneration for work of equal value extends to all work that is equal in value regardless of where it is performed.

Equal remuneration for work of equal value is a more comprehensive concept that covers instances where men and women perform dissimilar work. To establish whether different types of work are equivalent in value, they can be assessed using a job evaluation technique. For instance, comparing jobs such as cleaners and caterers (predominantly held by women) with gardeners and drivers (predominantly held by men); social affairs managers (predominantly held by women) with engineers (predominantly held by men); and flight attendants (predominantly held by women) with pilots and mechanics (predominantly held by men) have been evaluated for equal pay for work of equal value[11].

In India, the constitutional scheme under ***Article 39***[12] itself prescribes equal pay for equal work for both genders, and now with the new code at hand i.e., Section 3[13] of the code on wages, which prescribes no discrimination for all genders. With the inclusion of legislation on pay transparency in India, a positive impact will be observed regarding the pay gap and gender inequality.

In the landmark case of ***Mackinnon Mackenzie & Co. Ltd vs Audrey D'Costa & Anr***[14], it was observed that '*Discrimination occurs when men and women performing the same or similar work are paid different salaries. Before investigating any allegations of gender discrimination, a proper job evaluation should be conducted. If the two jobs in an organization have been assigned equal value through non-discriminatory criteria, such as those based on the nature and extent of job demands, and a man and a woman employed in those jobs are found to be paid different salaries, then it is clear that gender discrimination has occurred.*

Employers are required to pay equal remuneration to men and women workers for work of equal value *unless it can be shown*

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[10] International Labour Organization (ILO), Constitution of the International Labour Organisation (ILO), 1 April 1919, https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO.

[11] Robb, Roberta Edgecombe. *Equal Pay for Work of Equal Value: Issues and Policies*, 13 Canadian Public Policy 455, 455–61, (1987)

[12] Article 39 of the Indian constitution,1949.

[13] Article 3 of the Code on Wages,2020.

[14] Mackinnon Mackenzie & Co. Ltd vs Audrey D'Costa & Anr, (1987) 2 SCC 469

that women are not fit to perform the same job as men. Employers cannot create unfavorable working conditions to drive women away from a particular type of work and pay them less in another area of the establishment. Thus, the employers were held liable to pay lady stenographers the same as male stenographers'.

In the above case, the apex court of India emphasized the principle of equal remuneration for work of equal value. It was very well highlighted that employers must pay workers equally who do work of equal value.

And similarly in the case of ***State Of Punjab And Ors. vs Devinder Singh And Ors***.[15], the supreme court observed, '*that payment can only be considered equal when it is provided for work that is both equivalent and carries the same worth or value*.' The court noted that the application of the *'equal pay for equal work' doctrine hinges on various factors such as the equivalence of the work performed, its value, the method and origin of employment, the sameness of the group involved, and whether the equivalence applies to the whole group or only to certain members*. The same was reiterated in the case of ***Avtar Singh vs State Of Punjab And Others***[16].

There is a consistent shifting of dialogue in the Indian judiciary regarding the constitutional goal of 'Equal pay for equal work'. The supreme court from time to time has emphasised the importance of the factor i.e. 'Equal pay must be given for work of equal value'. Adopting the principle of 'Equal pay must be given for work of equal value' in place of 'Equal pay for equal work' will broaden the scope of the fixation of wages. The factors will now be fairer rather than only depending upon arbitrary standards.

Countries like US and UK are already applying the principle very effectively which has already given results that are favourable for the employees of every stratum. Both countries have statutes for the very same principle like the UK has Equality Act 2010. But still, the gender disparity exists to an extent.

Overall, pay transparency can be a powerful tool for promoting equal pay for work of equal value, and can help to create a more just and equitable workplace for all employees. By providing employees with clear and open information about the pay scales and job classifications within the organization, pay transparency can help to ensure that workers are compensated fairly and equitably. This can lead to greater levels of trust and engagement among employees, as well as a more positive workplace culture overall.

In addition, pay transparency can help to reduce the likelihood of pay discrimination and promote greater accountability among

[15] State Of Punjab And Ors. vs Devinder Singh And Ors (1998) 9 SCC 595
[16] Avtar Singh vs State Of Punjab And Others (2011) 27 SC 793

employers. When workers can see how their pay compares to that of their colleagues, they are better able to identify and challenge pay disparities that may be unjust or unfair.

4. Empowering The Workforce: The Role Of Pay Transparency In Increasing Collective Bargaining Power

Collective bargaining is a process of negotiation between employers and employees (often represented by labour unions) to reach mutually acceptable agreements on various aspects of employment, such as wages, benefits, working conditions, and job security[17].

Inequality of bargaining power refers to a situation where one party in a negotiation has an advantage over the other party, either in terms of their bargaining position or their ability to influence the outcome of the negotiation[18].

With the effective implementation of pay transparency, it will not only evolve the concept of corporate democracy. But the employees or the workers will have a higher degree of collective bargaining power. For example, two companies A and B are in the same business, if A, pays Rs. 300 Per day to its workers and B gave Rs. 350 to its workers for the same nature of work. And due to the effective implementation of the pay transparency legislation in a country like India, now company A workers are aware of company B's worker's salaries. Now, the workers will be at a very high pedestal of a position to ask for the same pay.

No employer wants its company to wound up so there will be a definite increase in the pay of the workers. Or otherwise, the workers will leave to work in another company for getting higher pay.

Despite various efforts, there has been a tremendous gap between equality in bargaining power[19]. The fact that wages are fixed according to the effects of the markets that is demand and supply. Now, when the employee class will be having information on wages due to the pay transparency legislation. The employee class will be having the advantage of higher negotiation power. It will lead to an increase in their salary. Pay transparency will not only close pay gaps between workers but also will help in strengthening the bargaining power of the worker.

Moreover, pay transparency can increase the bargaining power of unions and other collective bargaining organizations, as they are better

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[17] HAMEED, S. M. A., *A Theory of Collective Bargaining*, 25, Relations Industrielles / Industrial Relations 531 (1970)
[18] International Labour Office, *Collective bargaining: a policy guide,* (Geneva: ILO, 2015).
[19] Robert, supra note 19 at 10.

able to negotiate on behalf of their members when they have access to information about pay and working conditions. This can lead to more favorable outcomes for employees in terms of wages, benefits, and working conditions, and can help to reduce economic inequality within organizations and society as a whole. This can be one of the most important determining factors for narrowing the down the inequality of bargaining power.

5. **Demystifying Pay Transparency Legislation in the USA**

In the United States, pay transparency policies have gained momentum in recent years, with companies like Salesforce and Google making headlines for their efforts to promote wage equity through increased transparency. However, there is still a long way to go toward achieving full pay transparency, and the effects of these policies on the labor market are still being studied and debated.

In 2019, Colorado implemented a law[20] aimed at rectifying wage discrepancies tied to gender or race. This law mandates that employers include salary details in their job postings. Subsequently, California, Washington, and New York City also adopted similar legislation, with the rest of New York state poised to do the same. Prior to the enactment of these statutes, only 16% of job advertisements in the United States featured salary details. Due to the influence of these laws and a growing public interest in this matter, the proportion of job advertisements that included salary information has seen a substantial increase. In February 2020, 18.4% of job listings on platforms like Indeed provided pay information, whereas as of February 2023, that figure had more than doubled, reaching 43.7%.

There has been a significant rise in pay transparency, even in regions where there are no current obligations for disclosing salary information, over the decades. While a tight labor market may be incentivizing employers to share salary information to attract workers, there are also indications of the influence of states with regulations in place spreading to other areas. It's important to note that while there are pay transparency laws in place, the United States does not have the same level of full pay transparency as the Nordic countries. In the U.S., employees typically need to actively seek out information about their colleagues' pay, rather than it being publicly available by default.

There is limited research on the specific impact of pay transparency policies in the United States. However, some studies have suggested that pay transparency can lead to more equitable pay practices and potentially reduce gender and racial pay gaps.

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[20] Equal Pay For Equal Work Act, USA, https://leg.colorado.govtes/default/files/20195pdf?isid=hiringlab_us&ikw=hiringlab_us_2023%2F03%2F14%2Fus-pay-transparency-march-2023%2F_textlink_https%3A%2F%2Fleg.colorado.gov%2Fsites%2Fdefault%2Ffiles%2F2019a_085_signed.pf

For example, a study by researchers at the University of California, Berkeley[21] found that when employees at a tech company were informed about the salaries of their peers, the gender pay gap within the company decreased by 7%. Another study published in the Harvard Business School Review found that companies with high levels of pay transparency had smaller gender pay gaps than companies with low levels of transparency.

Additionally, a survey[22] conducted by Glassdoor found that employees who reported knowing their colleagues' salaries were more likely to be satisfied with their pay, suggesting that pay transparency can also improve employee morale and engagement.

However, some concerns about pay transparency could lead to negative consequences, such as resentment and jealousy among employees or even reducing the bargaining power of individual workers, leading to lower average wages[23]. Companies need to implement pay transparency policies carefully and thoughtfully to avoid these potential pitfalls.

As for India, the issue of pay transparency has yet to be addressed on a large scale. However, with increasing awareness of wage discrimination and growing demands for workplace fairness and equality, it is possible that pay transparency policies may gain traction in the future. One potential way forward for India would be to draw on the experiences and lessons learned in countries that have already implemented pay transparency policies. For example, Norway's public income tax records or the UK's gender pay gap reporting requirements could serve as useful models for India to consider.

The use of technology to facilitate pay transparency, as suggested for India, has become a global trend in promoting wage equality and fairness in the workplace. The creation of online databases of salary information that employees can access and compare has the potential to increase transparency and reduce pay disparities. However, implementing such policies should be done with caution, taking into consideration potential drawbacks, such as privacy concerns and the potential for employers to manipulate salary data. Furthermore, effective enforcement of pay transparency policies is crucial to achieving their intended goals. Employers should be held accountable for providing accurate and up-to-date salary information, and employees should be protected from retaliation for accessing or sharing this information.

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[21] Hannah Shiohara, *Pay Transparency,* Berkeley Economic Review (Nov.21, 2022), https://econreview.berkeley.edu/pay-transparency/

[22] Seiter Courtney, *The Transparent Pay Revolution: Inside the Science And Psychology of Open Salaries*, Buffer (February 11, 2016), https://buffer.com/resources/transparent-pay-revolution/

[23] Zoe, supra note 12 at 8.

Overall, the global push for pay transparency is a step towards promoting greater equity in the workplace, and as more countries consider implementing such policies, it is important to strike a balance between promoting transparency and protecting the rights of employers and employees alike.

6. The Nordics' Wage Transparency Experiment

In many cultures, it is considered inappropriate to inquire about someone's salary or wages. However, in the Nordic countries of Sweden, Norway, and Finland, there is a culture of openness regarding income. Media outlets regularly publish articles revealing the highest earners in various municipalities and demographics[24]. This transparency has benefited some lower-income individuals, who have been able to negotiate higher wages after discovering what others in their field earn.

In general, the disclosure of salary information has resulted in increased wages for certain individuals with low incomes, as they were able to use this information to negotiate better pay. Women are less inclined to ask for higher pay during negotiations, which is why the International Labor Organization (ILO)[25] believes that pay transparency is an effective means of addressing the gender pay gap. The ILO[26] reports that globally, women receive an average of 20% less pay than men, and while various individual factors such as education, skills, experience, working hours, and occupational segregation contribute to this gap, a significant portion is attributable to discrimination against women

The practice of pay transparency has been established in Sweden and Norway since the 18th and 19th centuries, while it is a more recent development in Finland. Sweden has had a policy of public access to official documents[27] for over two and a half centuries, with the incorporation of this principle into the Freedom of Press Act in 1766.

The public access concept guarantees the right of the general public to view official documents made or submitted to the authorities. This involves the public's awareness of the salaries received by public employees. All tax returns submitted by adults residing in Sweden are also regarded as official papers and are made public once they have been processed by Skatteverket, the country's tax authority. Therefore, by calling the tax agency or conducting a search online, anybody may

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[24] Victor, *24-year-old is Norway's richest, NRK (Oct, 27, 2017),* *https://www.nrk.no/norge/dette-er-norges-100-rikeste-kvinner-og-menn-1.13745997*

[25] International, supra note 1 at 3.

[26] Id.

[27] Government offices of Sweden, *The principle of public access to official documents,* https://www.government.se/how-sweden-is-governed/the-principle-of-public-access-to-official-documents/

learn more about the taxable incomes and total taxes payable by any Swedish person.

Norway's Public Access Act [28] bears similarities to Sweden's, which is not surprising given that these two countries were under a common union until 1905. The purpose of this law is to provide Norwegian citizens with access to information related to the determinations and processes of Norwegian governmental bodies, allowing them to better comprehend the functioning of these authorities. It is a practice by the Norwegian government to publicly disclose the data about the t of all Norwegian citizen on its website including details about taxable income, wealth, and tax payments. Previously, it was feasible to anonymously search the tax lists, but as of 2014, the tax agency now notifies individuals when someone queries their financial information, disclosing other details.

There is a negligible gender wage disparity within public authorities at the municipal and state levels, at 1.5% and 5.3%, respectively, according to statistics from the Swedish National Mediation Office[29]. However, the salary gap in the private sector is over 10%, and it was above 15% last year for white-collar professionals. The choice of industry and employment made by women, which in turn influences their salaries, accounts for a major portion of this gap. The Swedish public sector[30], which normally pays and compensates less what the private sector, is dominated by women. In addition, women are overrepresented in low-paying occupations including sales clerks, childminders at preschools, and assistant nurses.

Men and women in Norway often earn similar compensation for jobs that require the same level of education and experience, according to statistics from Statistics Norway[31]. Over the past two decades, the wage gap has reduced from 17% to 12% last year. Men outnumber women in high-paying occupations, which is the major cause of the wage discrepancy. However, the wage disparity is more than cut in half when the highest 10% of income is excluded.

While full pay transparency has not eliminated the gender pay gap in the Nordic countries, their pay gaps are smaller compared to the rest of the world, partially due to high collective agreement coverage. It should be noted that ethnicity and race data are not collected in

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[28] Freedom of Information Act, Norway, https://app.uio.no/ub/ujur/oversatte-lover/data/lov-20060519-016-eng.pdf

[29] John Ekberg, *The pay gap between women and men,* Medlings Institute, https://www.mi.se/lonestatistik/loneskillnad-mellan-kvinnor-och-man/

[30] Simon Torstensson, Women in managerial position, Ekonnomifakta (May 5, 2023), https://www.ekonomifakta.se/fakta/arbetsmarknad/jamstalldhet/kvinnor-i-chefsposition/

[31] Ingvild Alseth, *This is how the pay gap between women and men can be explained,* Statistisk Sentralbyra (March 4, 2022), https://www.ssb.no/arbeid-og-lonn/

these countries, which makes it difficult to determine if there are racial disparities in pay.

7. Overcoming Potential Negatives: How Pay Transparency Can Drive Productivity and Employee Engagement

Researchers in the **US have developed a theoretical framework**[32] to explain how pay transparency could lead to lower, rather than higher wages. According to this model, when salary information is publicly available, **employees' bargaining power may be weakened**, resulting in lower average wages. In other words, narrowing gender pay gaps may come at the expense of lower wages for all workers and higher profits for the company. Additionally, the model cautions that inadequate pay transparency measures may result in greater pay disparities among employees[33].

In an organization where salary information is transparent, employees can share their pay. This leads to a situation where individuals will demand the same wage as the highest-paid colleague doing similar work. As a result, firms will be less willing to pay higher wages to employees, leading to a decrease in starting salaries. This situation leads to an information externality, as the increased chance of salary information spillovers can negatively impact all employees by compressing wages.

Another counterargument[34] that is being provided for the implementation of pay transparency is that pay transparency may create inefficiencies in the workplace by encouraging a culture of comparison and competition among employees. When employees have access to each other's salaries, they may become fixated on achieving the same or higher wages than their peers, regardless of their actual job performance or value to the company. This can lead to a situation where employees are more focused on their salaries than on their job duties, which can have negative consequences for productivity and overall organizational performance.

However, according to the author’s humble opinion, such arguments are flawed. This is because while pay transparency may decrease an individual's bargaining power initially, it can lead to more effective negotiations in the long run. With access to more information, employees can negotiate more effectively for fair compensation and can better understand what factors influence their salary. Furthermore, while it is true that pay transparency may initially create some inefficiency among workers, it is important to note that it can also lead to greater employee satisfaction and retention. When employees are aware of what their colleagues are being paid, they are more likely to

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[32] Zoe, supra note 12 at 8
[33] Robert Hall, supra note 19 at 10.
[34] Hannah, supra note 33 at 17

feel valued and respected, which can lead to increased loyalty and commitment to the organization.

A company's ability to attract and retain talented people over the long term may also be aided by its transparency regarding pay practices and reputation for fairness and equity. Employers can gain from higher levels of productivity, increased innovation, and greater profitability by fostering a healthy work environment where employees feel appreciated and respected. To maintain a competitive workforce, employers may need to raise overall wages to retain top talent, ultimately benefiting all employees.

8. Conclusion

Pay transparency is still a relatively new concept in India, with most companies preferring to keep employee salaries confidential. However, there is growing recognition of the benefits of pay transparency in promoting fairness, equality, and productivity. The government of India has taken some steps towards promoting pay transparency, such as requiring companies to disclose the salary of their top executives in their annual reports. In addition, some large companies in the private sector have adopted pay transparency practices as a way to attract and retain talent.

However, there is still a long way to go in terms of the widespread adoption of pay transparency practices in India. This is partly due to cultural factors and a lack of awareness among companies and employees about the benefits of pay transparency. Nonetheless, as India's economy continues to grow and become more competitive, there may be increasing pressure on companies to adopt pay transparency as a way to stay competitive in the global market.

Introducing pay transparency in India can have numerous benefits for both employees and employers. Firstly, it can help in reducing pay discrimination and promote equality in the workplace. Especially in a nation where women earned 28% less than their male counterparts in 2018-19, according to National Sample Survey Office (NSSO) labour force survey statistics.[35] Employees will be rewarded based on their talents, experience, and performance, rather than their gender, religion, or caste.

Secondly, pay transparency can lead to increased trust and transparency between employees and employers, leading to better employee engagement, motivation, and retention. Thirdly, it can help in attracting top talent and creating a competitive advantage for companies that are committed to fair pay practices. Overall, introducing pay transparency in India can lead to a more equitable and

[35] Supra note 10 at 6

fair workplace, which can benefit both employees and employers in the long run.

One potential way forward for India would be to draw on the experiences and lessons learned in countries that have already implemented pay transparency policies. For example, Norway's public income tax records or the UK's gender pay gap reporting requirements could serve as useful models for India to consider.

Additionally, India could explore the use of technology to facilitate pay transparency, such as creating online databases of salary information that employees can access and compare. To go forward with pay transparency in India, both the government and the private sector must work together. The government can play a role by introducing legislation that requires companies to disclose their pay structures and ensure that there are penalties for non-compliance. The private sector can also take the initiative to voluntarily adopt pay transparency measures, demonstrating their commitment to promoting equity and fairness in the workplace.

Lastly, there needs to be a cultural shift towards valuing transparency and accountability in all aspects of society, including in the workplace. Ultimately, pay transparency can lead to a more equitable and efficient labour market in India, benefiting both employees and employers.

Beyond the Bench: India's Pioneering Judicial Interventions in Human Rights

Sheheen Marakkar*

1. Introduction

India, being the largest democracy in the world, possesses a strong and independent judiciary that plays a crucial role in upholding and safeguarding human rights within the nation. The response of the Indian judiciary to human rights issues has been influential in shaping the legal framework and ensuring the enforcement of fundamental rights guaranteed by the Constitution of India. The Constitution of India embodies a comprehensive framework for protecting the rights and freedoms of its citizens, reflecting India's commitment to human rights.[1] It covers a diverse range of fundamental rights, comprising aspects such as equal treatment, the right to express oneself freely, the entitlement to life and personal freedom, freedom of religion, and safeguards against discrimination.

The Supreme Court of India, as the primary judicial body, has played a pivotal role in interpreting and safeguarding these constitutional rights.[2] The judiciary, through pivotal rulings and forward-looking interpretations, has played a substantial role in advancing the evolution of human rights jurisprudence within the nation[3]. The judicial response pertaining to human rights in India encompasses a broad range of issues, including social justice, gender equality, minority rights, freedom of expression, privacy rights, fair trial, and the protection of marginalized and vulnerable communities.[4]

Over the years, the Indian judiciary has addressed numerous significant human rights challenges and provided relief to individuals and groups facing violations. Notable examples include the recognition of privacy as an inherent fundamental right, decriminalizing consensual same-sex relationships, promoting gender justice through affirmative action, and protecting the rights of indigenous communities and religious minorities.

However, despite these commendable efforts, challenges persist. The Indian judiciary faces a considerable backlog of cases, delays in the justice delivery system, and constraints in resources that impede

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[1] JAIN M.P, INDIAN CONSTITUTIONAL LAW 210(5th ed. 2008).

[2] Baxi, Upendra, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107, 107-132 (1985).

[3] PRAVIN H PAREKH, HUMAN RIGHTS YEAR BOOK 74 (1st ed. 2010).

[4] Balakrishnan Rajagopal, *Pro-Human Rights but Anti-poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective*, 18 HUM. RTS. REV. 157, 157-187 (2007).

the efficient fulfilment of human rights. Additionally, the judiciary's response to certain human rights issues has been subject to debate and criticism, underscoring the need for continuous improvement and vigilance. The judicial response concerning human rights in India is a fundamental element of the nation's democratic fabric. The judiciary's commitment to upholding constitutional values and protecting fundamental rights has played a pivotal role in ensuring justice, fostering equality, and cultivating a culture of human rights in India. However, ongoing endeavours are necessary to address challenges, bolster the justice system, and ensure the effective protection of human rights for all individuals in the country.

2. Championing Collective Rights: An Overview of PIL

Public Interest Litigation (PIL) plays a crucial role in protecting the fundamental and human rights of individuals who are unable to seek legal recourse due to factors such as poverty, disability, or other impediments.[5] In such instances, any individual has the right to initiate a PIL in either the Supreme Court of India or the relevant High Court, utilizing the provisions outlined in Articles 32 or 226 of the Constitution. It is essential, however, that the petitioner in the PIL does not harbour a personal stake in the issue. While PIL has demonstrated significant advantages for marginalized individuals, it has, on occasion, been subject to misuse by certain parties.

In the pivotal People Union for Democratic Rights v. Union of India[6] case, there was a challenge to the conventional doctrine of locus standi. This rule restricts access to justice only to those whose legal rights or protected interests have been infringed. This results in an unequal opportunity for individuals facing economic or social disadvantages, as they may lack the means to secure legal representation. Acknowledging this imbalance, the Supreme Court adopted a proactive stance and introduced the notion of PIL, enabling socially conscious individuals to initiate legal proceedings for the protection of the rights of others.

The Supreme Court elaborated on the PIL concept in the case of S.P. Gupta v. Union of India[7], commonly referred to as the first Judges Transfer case.[8] The Court unequivocally affirmed that any individual from the public, possessing adequate interest, has the right to petition the court for the enforcement of constitutional or legal rights on behalf of others and to seek remedies for shared grievances.[9]

Concerns over the misuse of PIL have led Justice Bhagwati to urge caution, emphasizing the significance of ensuring that individuals approaching the court in such instances do so in good faith, without

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[5] Nidhi Gupta, *Human Rights in India*, 27 Indian Soc. Legal J. 101 (2001).
[6] AIR 1982 SC 1473.
[7] AIR 1982 SC 149.
[8] *Id*
[9] JAIN M.P, INDIAN CONSTITUTIONAL LAW 165 (5th ed. 2008).

seeking personal gain, private profit, political motivations, or any other hidden agendas. The court must be vigilant to prevent its procedures from being exploited by politicians or those with vested interests.

Justice Bhagwati asserted that no state has the authority to deprive its citizens of access to justice merely due to a backlog of cases.[10] In the matter of M.C. Mehta v. Union of India[11], the Supreme Court of India broadened the ambit of PIL or Social Interest Litigation under Article 32 of the Constitution. Other noteworthy cases contributing to the evolution of PIL include Bandhua Mukti Morcha v. Union of India[12], A.B.S.K. Sangh v. Union of India[13], Janta Dal v. H.S. Chowdhari[14], and several more. These instances have played a pivotal role in shaping the concept of PIL and have garnered acclaim for their judicial responses to social issues.

3. The Proactive Judiciary: Unpacking Judicial Activism

Under Article 32 of the Constitution, the Supreme Court of India possesses the authority and jurisdiction to uphold fundamental rights, equated with human rights and enumerated in Part III of the Constitution. Article 32 not only assures the right to directly seek the intervention of the Supreme Court for the enforcement of these rights but also safeguards the protection of the rights enumerated in Part III.[15] The Supreme Court is empowered to issue appropriate writs, orders, or directions to uphold these rights. This power bestowed upon the Court positions it as a vigilant sentinel, ever-watchful and ready to protect the rights enshrined in the Constitution.

In this regard, any person, whether seeking personal protection or filing a petition on behalf of others belonging to disadvantaged groups such as the poor, children, women, Scheduled Castes (SC), Scheduled Tribes (ST), persons with disabilities, victims of natural calamities, or others, have the option to seek the Court's protection or submit a petition for the enforcement of their rights. Additionally, the Court can also intervene on its own initiative (suo moto) in matters concerning the protection of rights, the Constitution, and cases involving arbitrary actions or functions of the executive or legislature, thereby upholding the Rule of Law. This proactive role of the Court is commonly known as judicial activism. Significant cases such as Romesh Thapar v. State of Madras[16] have confirmed the Supreme Court's role as the guardian of fundamental rights, with State of Madras v. B. G. Rao[17] highlighting the Court's duty as a watchful sentinel protecting fundamental rights.

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[10] People Union for Democratic Rights v. Union of India AIR 1982 SC 1473
[11] AIR 1987 SC 1087.
[12] AIR 1984 SC 802.
[13] AIR 1981 SC 298.
[14] (1992) 4 SCC 305.
[15] SURESH H, ALL HUMAN RIGHTS ARE FUNDAMENTAL RIGHTS 45(Universal Law Publishing, 2010).
[16] AIR 1950 SC 124.
[17] AIR 1952 SC 196.

Justice Through Letters: Understanding Epistolary Jurisdiction

Epistolary Jurisdiction is a concept originated and evolved by the judiciary, enabling individuals to directly address a letter to the Supreme Court of India or the respective High Court in pursuit of justice. Court can initiate necessary processes without requiring the formalities or technicalities typically associated with writ petitions or formal petitions. This jurisdiction is referred to as the Epistolary Jurisdiction of the Court.

The basis for this jurisdiction was laid in the judgments of S.P. Gupta v. Union of India and M.C. Mehta v. Union of India. In these instances, the Supreme Court affirmed that individuals, especially those facing economic challenges, can pursue the protection of their fundamental rights by directly penning a letter to any judge of the court. Such correspondence is not required to be accompanied by an affidavit.

This epistolary jurisdiction acts as an effective means for individuals to pursue the realization of their inherent fundamental rights or rights outlined in the Constitution of India. It provides a simplified avenue for individuals, especially those who may lack legal knowledge or resources, to access justice.

4. The Power of Courts: Exploring Judicial Review

The authority for judicial review is conferred upon the Supreme Court of India by Article 32 and upon the High Courts by Article 226 of the Constitution.[18] Article 13 of the Constitution provides for the judicial review of all past and future legislation in India. By judicial review, the courts possess the power to assess the constitutionality of legislation. If a law is determined to be inconsistent or derogatory to the provisions of Part III of the Constitution (which guarantees fundamental rights), the courts can declare it unconstitutional.

In the matter of L. Chandra Kumar v. Union of India[19], it was established that the authority of judicial review is an inherent component of the "Basic Structure" of the Constitution and cannot be omitted or dismantled. Other pertinent cases contributing to the comprehension and application of judicial review include I.R. Coelho v. State of Tamil Nadu[20], Charanjit Lal Chowdhury v. Union of India[21], A.K. Gopalan v. State of Madras[22], and numerous others.

The Apex Court of India have declared certain provisions of the Constitution as invalid, null, void, and unconstitutional in various cases. Here are a few noteworthy instances, Keshavananda Bharti v.

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[18] Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1,1-69 (2009).
[19] AIR 1988 SC 1125.
[20] AIR 2007 SC 861
[21] AIR 1951 SC 41.
[22] AIR 1950 SC 27.

State of Kerala[23]: The invalidity of Article 31C of the Constitution was pronounced. Indira Nehru Gandhi v. Raj Narain[24]: Article 329 of the Constitution was invalidated. Minerva Mills Limited v. Union of India[25]: Provisions associated with Article 368(4) and (5) of the Constitution were declared unconstitutional. Supreme Court on Record Association and others v. Union of India[26]: On October 16, 2015, the Supreme Court declared the 99th Constitution Amendment concerning the National Judicial Appointment Commission as unconstitutional and void. These cases exemplify the strong judicial responses and the power of judicial review, which are commendable in safeguarding the interests and welfare of all people by protecting, preserving, and promoting fundamental and human rights.

5. Navigating The Doctrine of Prospective Overruling

The doctrine of prospective overruling is an integral part of judicial response in India. It refers to the practice of overruling or reversing previous decisions or judgments by the Supreme Court. The laws set forth by the Supreme Court carry authoritative weight and are applicable to all courts in India.

The Supreme Court has overturned numerous rulings in the past. In the instance of Golak Nath v. State of Punjab[27], the Court reversed its earlier judgments in Shankari Prasad v. Union of India[28] and Sajjan Singh v. State of Rajasthan[29]. In the Golak Nath case, the Court asserted that the authority to amend the Constitution was not derived from Article 368 but from the residual legislative power. The Court applied the doctrine of prospective overruling, implying that the decision would only have effect from that moment onward. In the landmark case of Keshavananda Bharati v. State of Kerala, the Court reevaluated its stance in the Golak Nath case and overruled it. The majority opined that the Golak Nath case was incorrectly decided and that the term "law" in Article 13 did not encompass constitutional amendments made under Article 368.

In his dissenting opinion in the Desiya Murpokku Dravida Kazhagam v. Election Commission of India,[30] Justice Chelameswar contended that there is no constitutional restriction preventing the Supreme Court from deviating from its earlier rulings if it acknowledges a mistake and the potential adverse impact it might have on public interest.

6. Constitutional Fundamentals: The Basic Structure Doctrine

[23] AIR 1973 SC 1461.
[24] AIR 1975 SC 2299.
[25] AIR 1980 SC 1789.
[26] AIR 2015 SCW 5457.
[27] AIR 1967 SC 1643.
[28] AIR 1951 SC 458.
[29] AIR 1965 SC 845.
[30] AIR 2012 SC 2191.

The concept of "Basic Structure" of our Constitution is an integral part of the judicial response in India, and it is highly commendable in ensuring the interests and welfare of all individuals. Article 368 of the Constitution grants the power to the Parliament of India to amend the Constitution and its procedures. However, this power is subject to the limitation that the Parliament cannot destroy or alter the Basic Structure of the Constitution.

The term "Basic Structure" was first introduced in landmark legal decision of Keshavananda Bharati v. State of Kerala. The Apex Court held that while the Parliament has authority to amend the Constitution, it cannot infringe upon its Basic Structure. The Basic Structure refers to the core principles, fundamental features, and essential framework of the Constitution, which are vital for upholding democracy, rule of law, and fundamental rights.

The doctrine acts as a safeguard against arbitrary or drastic amendments that could undermine the fundamental principles of the Constitution. It guarantees the preservation of the fundamental nature and integrity of the Constitution, even when confronted with constitutional amendments.

7. Understanding the Curative Petition Process

The Curative Petition is a significant achievement resulting from the judicial response. It is considered one of the most effective remedies available to individuals in a democratic system. In the matter of Rupa Ashok Hurra v. Ashok Hurra[31], where a Constitution Bench consisting of five judges unanimously ruled that to address any miscarriage of justice in its conclusive judgments, the Court would entertain the Curative Petition.

Chief Justice S.P. Bharucha of the Supreme Court underscored that despite the best efforts of the highest court's judges within the confines of human fallibility, there might be exceptional instances requiring a reassessment of a conclusive judgment to remedy a miscarriage of justice. The Court acknowledged this as both a legal and moral duty of the Apex Court to address any inaccuracies in its decisions that might otherwise persist.

The Judgement was issued in consideration of several petitions that raised concerns about the possibility of challenging a final judgment even after the rejection of a review petition. The Court recognized the significance of the principle of certainty of judgment in the public interest, but emphasized that the obligation to uphold justice in extraordinary circumstances holds greater importance. This is particularly applicable when there is a breach of natural justice or an exploitation of the court's proceedings.

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[31] AIR 2002 SC1771.

The Court established specific criteria for considering a Curative Petition, including demonstrating a genuine violation of the principle of natural justice and a concern of bias or adverse impact on the petitioner. The petition must be supported by an affirmation from a senior lawyer verifying compliance with these criteria. It needs to be presented to the three judges of the Bench that delivered the contested judgment. If a majority of these judges conclude that the matter warrants further examination, it will be scheduled before the same Bench. Additionally, the Court has the authority to impose "Exemplary Costs" on the petitioner in cases where their appeals lack merit.

8. Pivotal Human Rights Judgments: A Review

The Supreme Court of India has been instrumental in safeguarding and upholding fundamental rights through significant cases. The Supreme Court of India has played a crucial role in defending and preserving fundamental rights through pivotal cases. In Romesh Thapar v. State of Madras, the Supreme Court was affirmed as the guardian of Fundamental Rights, while in State of Madras v. B. G. Rao[32], it was recognized as a vigilant sentinel of Fundamental Rights. These cases underscored the court's dedication to protecting the rights of individuals. Additional noteworthy cases encompass Parmanand Katara v. Union of India[33], affirming the right to medical aid, and Francis Coralie Mullin v. Administrator, Union Territory, Delhi[34], recognizing the entitlement to a minimum wage. Subhash Kumar v. State of Bihar[35] upheld the right to protection from poverty, and Unnikrishnan v. State of Andhra Pradesh[36] established the right to education.

The Supreme Court has delved into matters concerning human dignity as well. In Menka Gandhi v. Union of India[37], the emphasis was on the right to life with dignity, while M. C. Mehta v. Union of India[38] recognized the right to public health and a clean environment. Olga Telis v. Bombay Municipal Corporation[39] affirmed the right to livelihood, and P.U.C.L. v. Union of India[40] acknowledged the right to food.

Cases like Subhash Kumar v. State of Bihar[41] and In Re Noise Pollution[42] underscored the entitlement to a pollution-free environment and the right to life without the disturbance of noise

[32] AIR 1952 SC 196.
[33] AIR 1989 SC 2039.
[34] AIR 1981 SC 746.
[35] AIR 1991 SC 420.
[36] (1993) 4 SCC 645.
[37] AIR 1978 SC 507.
[38] 1988 SC 4711.
[39] AIR 1986 SC 180.
[40] 2000 (5) SC 30.
[41] AIR 1991 SC 420.
[42] AIR 2005 SC 3036.

pollution, respectively. M.H. Hoskot v. State of Maharashtra[43] solidified the right to free legal aid, while Hussainara Khatoon v. State of Bihar[44] and Abdul Rahman Antulay v. R.S. Nayak[45] highlighted the right to a speedy trial.

Chameli Singh v. State of Uttar Pradesh[46] acknowledged the right to shelter, affirming the significance of providing a secure and habitable living environment. On a different note, Murli S. Deora v. Union of India[47] imposed restrictions on smoking in public places, emphasizing the right to a healthy and smoke-free environment for the public. These cases reflect the court's commitment to upholding and expanding the scope of fundamental rights in India.

These cases have been pivotal in instituting and protecting a diverse array of rights in India. In Prem Shankar v. Delhi Administration[48], the recognition of the right against handcuffing ensures that individuals cannot be subjected to this practice by authorities without a valid and justifiable reason. In the case of Vishakha and others v. State of Rajasthan[49] and others, a substantial precedent was set, offering protection from sexual harassment of women in the workplace. The judgment provided comprehensive guidelines to prevent and address such incidents, establishing a framework for safeguarding the rights and dignity of women in professional settings.

Attorney General of India v. Laxmi Devi[50] addressed the right against hanging in public, recognizing that public hangings violate an individual's right to life and dignity, and should not be carried out. Swapan Kumar Saha v. South Point Montessori School[51] recognized the responsibility of schools to ensure the safety of students during transportation and emphasized the need for necessary measures to prevent accidents and protect children.

In the matter of Mohammad Hussain alias Julfikar Ali v. State (Government of N.C.T. Delhi)[52], the court underscored that the mere elapse of time since the commencement of prosecution does not warrant the cessation of the prosecution or the dismissal of the indictment. The court asserted that the right to a fair trial is an inherent and fundamental right that the legal system must consistently uphold and safeguard. This principle was firmly established in the case of Rattiram v. State of Madhya Pradesh[53]

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[43] AIR 1978 SC 1548.
[44] AIR 1979 SC 1360.
[45] AIR (1992) 1 SCC 225.
[46] 1996 SCC 549.
[47] (2001) 8 SCC 765.
[48] AIR 1980 SC 898.
[49] AIR 1997 SC 3011.
[50] AIR 1986 SC 467.
[51] (2007) 2 GLR 10.
[52] AIR 2012 SC 3860.
[53] AIR 2012 SC 1485.

through Inspector of Police, reinforcing the imperative nature of protecting and preserving the right to a fair trial within the legal framework.

Additionally, the case of State of Haryana v. Ram Mehr[54] clarified that while the right to a fair trial is crucial, it does not mean that the trial process can be indefinitely extended or stretched beyond reasonable limits. In the case of Hardeep Singh v. State of Madhya Pradesh[55], the court acknowledged the importance of ensuring a speedy trial and recognized the need for compensation in cases where the right to a speedy trial has been denied.

Addressing a different issue, Budhadev Karmaskar v. State of West Bengal[56] focused on the rehabilitation of sex workers, highlighting the necessity of implementing appropriate measures and support systems to aid their reintegration into society. Lastly, in Mithu v. State of Punjab[57], the Supreme Court of India deemed Section 303 of the Indian Penal Code unconstitutional and struck it down. This decision marked a significant legal development and reaffirmed the court's commitment to upholding constitutional principles and safeguarding individual rights.

9. Critical Takeaways and Future Directions

The current state of the Indian judiciary's response to human rights issues showcases both commendable achievements and areas that require further attention. To enhance the protection of human rights, it is essential to consider several future directions, reforms, and policy changes.

One key area that demands improvement is the reform of the judicial system. Efforts should be made to address the backlog of cases, reduce delays, and improve the overall efficiency of delivering justice. This can be accomplished by increasing the number of judges, implementing technology-based solutions to streamline court processes, and promoting alternative dispute resolution mechanisms to expedite the resolution of cases.

Furthermore, it is crucial to focus on sensitization and training programs to enhance the understanding of human rights among judges, lawyers, and court personnel. Specialized training in human rights can foster a more informed and rights-conscious judiciary, empowering them to make well-founded decisions that effectively uphold and protect human rights.

Ensuring access to justice for marginalized and vulnerable groups is of paramount importance. This necessitates prioritizing affordable and accessible legal aid services. Expanding the scope and reach of

[54] AIR 2016 SC 3942.
[55] AIR 2012 SC 1751.
[56] AIR 2011 SC 2636.
[57] AIR 1983 SC 473.

legal aid programs, coupled with efforts to raise awareness about available services, can significantly contribute to greater access to justice for individuals facing socioeconomic barriers.

It is imperative to enhance the capabilities of human rights institutions at both the national and state levels, including bodies like the National Human Rights Commission and State Human Rights Commissions. Empowering these institutions with sufficient resources and authority will enhance their effectiveness in addressing human rights violations and providing remedies to victims.

Promoting public interest litigation (PIL) can serve as another powerful tool for enforcing human rights and addressing systemic issues. Encouraging active engagement by civil society organizations and individuals through PIL can bring important human rights concerns to the forefront, enabling the judiciary to comprehensively address them.

Advocating for comprehensive legislative reforms is essential to align domestic laws with international human rights standards. These reforms should encompass emerging issues like data protection, hate crimes, and discrimination, creating a strong legal framework to safeguard human rights.

While the Indian judiciary has made significant progress in responding to human rights issues, continuous efforts are needed to strengthen human rights protection. Implementing judicial reforms, enhancing sensitization and training, ensuring access to justice, strengthening human rights institutions, promoting public interest litigation, and advocating for legislative reforms are all vital steps towards achieving effective and comprehensive human rights protection in India.

10. Conclusion

In conclusion, the judicial reactions examined earlier underscore the vital role undertaken by the Indian Judiciary in safeguarding, advancing, and upholding human rights within the democratic structure of the nation. The efforts of the judiciary in ensuring justice and equality for all citizens are commendable and have had a significant impact on the welfare of the Indian Republic.

The judicial responses have demonstrated a positive and appreciable approach towards human rights and their enforcement. However, it is important to acknowledge that there may be exceptions and challenges in implementing these rights based on the specific time, circumstances, and requirements of the people. The judiciary must adapt to the evolving needs of society and uphold the principles of the Constitution of India.

It is essential that the implementation of human rights aligns with the current realities and the mandates of the law. The focus should be

on ensuring that human rights are protected and enforced without discrimination, in line with the democratic, sovereign, secular, and socialist values of India. There is a need to address any shortcomings or gaps in the enforcement system to improve the overall conditions of human rights in the country. This requires a comprehensive and inclusive approach that prioritizes the interests and welfare of the public and the nation as a whole.

While the judicial responses have made significant strides in advancing human rights in India, there is still work to be done to ensure their effective implementation and address any deficiencies. The commitment to upholding human rights remains crucial for the progress and well-being of the nation.

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Combating Human Trafficking through Legal Action: The Challenges Ahead

Dr. Jayamol P.S.[*]

1. Introduction

The general function of law is to maintain order in different groups, sub-groups, and persons belonging to society to conform to the group's expectations. In every society, the problem of adjustment of conflicting claims inevitably arises.[1] Injurious consequences of human actions impinge upon the interests of others which call for an interplay and balancing of rights.[2] Crimes and criminals are the major threat to the balancing of interests. In this modern world, crimes are grouped into the beautiful labels of organized and unorganized crimes. One of the serious organized crimes the contemporary world faces in recent days is human trafficking. It is not an isolated phenomenon. Human trafficking is a contemporary manifestation of slavery, characterized by the illicit movement of people through coercion or deceit, often for purposes of forced labor, sexual exploitation, or financial gain by the traffickers.[3] Human trafficking can happen within a country and between countries. It is a clear-cut violation of the human right to life. Despite the efforts of the international community and national efforts to combat human trafficking, the system and practice continue without any interruption and the menace of the trafficking of humans persists. According to the report released by the United Nations Office on Drug and Crime (UNODC), "out of the 10 victims of human trafficking detected globally, five are women and two are girls. A significant number of victims are migrants.[4] Traffickers target the marginalized and impoverished. Cases examined by UNODC found that half of the victims were trapped due to economic vulnerability."[5] In this context,

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[1] See DR. M.P. TANDEN, JURISPRUDENCE 10(Allahabad Law Agency, Faridabad,18th Ed., 2013).

[2] P.ISHWARA BHAT, FUNDAMENTAL RIGHTS: A STUDY OF THEIR INTER RELATIONSHIP13 (Eastern Law House, Kolkata, 2014).

[3] Janie A Chuang, EXPLOITATION CREEP AND THE UNMAKING OF HUMAN TRAFFICKING LAW, 108 *The American Journal of International Law* 609 (2014).

[4] Suhas Munshi, *Human Trafficking Hit Three-year High in 2019 as Maha Tops List of Cases Followed by Delhi, Shows* NCRB DATA, NEWS 18, October 8, 2020 available at: https://www.news18.com/news/india/human-trafficking-hit-three-year-high-in-2019-as-maha-tops-list-of-cases-followed-by-delhi-shows-ncrb-data-2944085.htm(last visited on 30 August 2023).

[5] *Global Report on Trafficking in Persons 2020,*4(United Nations, New Yorck,2020) available at: https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf (last visited on 30 August 2023).

this paper analyses in detail the legal measures in the national and international realm to combat the trafficking of human beings.

2. Meaning and Definition of Human Trafficking

Human trafficking is such a heinous human action that can create long-term impacts on society. The crime of trafficking in human beings is a complex and multidimensional one that has worldwide application It has become the world's third largest criminal business, following trafficking in drugs and weapons.[6] Victims of trafficking have, in most cases, suffered harmful and multiple human rights abuses. The heinous activities of trafficking affect the basic principles of human rights of the people like human dignity, personal liberty, freedom of movement, privacy, and self-determination etc., All basic rights have been violated by the traffickers and have left traces in the victims' physical and mental dispositions, often clearly visible in post-traumatic stress syndrome.[7]

Even though this so-called sophisticated organized crime existed since ancient times, it has not been given a clear-cut definition. Moreover, the existing international instruments were not adequate to cover the entire facets of human trafficking. The United Nations in its attempt to uphold the human rights of the victims of human trafficking, especially women and children, has attempted to give a comprehensive definition of trafficking.[8] It defines trafficking in persons [9] as the act of recruiting, transporting, transferring, harboring, or receiving individuals through various means such as the use of force, coercion, abduction, fraud, deception, abuse of power, exploitation of vulnerabilities, or offering or receiving payments or benefits to gain consent from a person in control over another, to exploit them. Exploitation encompasses, at the very least, activities like prostituting, engaging in sexual exploitation, compelling individuals into forced labor or services, practicing forms of slavery or activities akin to slavery, subjecting individuals to servitude, or illegally removing organs.[10]

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[6] Gabriela Konevska, Policy Responses to Human Trafficking In The Balkans 120 (University of Pittsburgh Press, 2007).

[7] *Supra* n 2 at 123.

[8] .See United Nations Convention Against Transnational Organized Crime and the Protocols Thereto**,** Adopted by the UN General Assembly**:** 15 November 2000, by resolution 55/25
Entry into force: 29 September 2003, by article 38, available at United Nations Convention against Transnational Organized Crime (unodc. org)(last visited on 17 July 2022).

[9] .Article 3 of The Protocol to Prevent Suppress and Punish Trafficking in Persons, especially Women, and Children.

[10] The definition runs as follows: "Trafficking in Persons means the recruitment, transportation, transfer, harboring or receipt of persons, using the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others

The United Nations Protocol has rightly addressed all aspects of trafficking pinpointing its main purpose as exploitation. The traffickers take advantage of the vulnerability of the victim. The definition analyses the nature of exploitation played by the traffickers.

3. Different Forms of Trafficking

The United Nations has categorized human trafficking into three forms such as trafficking for sex, for labour and removal of organs.[11] It will be accompanied by force or fraud to engage in the sex trade, labor services or organ trade. The universality and global dimension of human trafficking can be understood by looking into the following words of one of the reports of the United States of America.[12] "Human trafficking is a global phenomenon and no country is exempted from that. Victims of this modern form of slavery are exploited in every part of the world. The evil consequences of the issue extend the upraise of a unified, comprehensive response from across the globe to address collectively the crime that all borders."[13]

Various factors contribute to the existence of human trafficking. Some of these factors include poverty and the effects of globalization, shifts in political and institutional landscapes, the demand for commercial sex and labor, particularly involving minors recruited in places like malls and schools. Additionally, traffickers often exploit vulnerable individuals through deceptive means, such as fraudulent romantic relationships, enticing online job advertisements for opportunities abroad, and misleading promises of education or travel experiences, ultimately trapping the victims.[14] Women and children are trafficked for money. They will be sexually exploited and later used for domestic help like animals.[15] In certain cases, parents sell their child out of poverty and receive a monthly income as a relief. Poverty, illiteracy, unemployment, displacement, lack of knowledge or experience, broken homes, cultural practices, etc. all can be cited as the reasons for human trafficking. There are innumerable reasons for the growing number of trafficking that spread over legal, social, cultural and other aspects. Human trafficking is a global problem affecting all sorts of people.

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or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs."

[11] *Supra* note 9.

[12] *2018 Trafficking In Persons Report*, available at: https://www.state.gov/reports/2018-trafficking-in-persons-report/(last visited on 30 September 2023).

[13] *Ibid.*

[14] *Ibid.*

[15] *Supra* note 15.

4. International Perspective

There were no international arrangements exclusively to protect victims of trafficking till the year 2000. The *Convention on the Elimination of All Forms of Discrimination against Women*, 1979 *(CEDAW)*[16]*; Convention on the Rights of the Child, 1989 (CRC)*[17]*; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, child prostitution and child pornography, 2000*[18]*; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990(CRMW)*[19]*; International Covenant on Civil and Political Rights, 1966 (ICCPR)*[20]*; International Covenant on Economic, Social and Cultural Rights, 1966 (ICESC)*[21] *and in addition, the Universal Declaration of Human Rights(UDHR)*[22] were in force to protect against exploitation and discrimination. Later, in the year 2000, the General Assembly in its resolution[23] resolved to constitute a committee to prevent transnational organized crimes and also to cover up the trafficking of women and children.[24]

5. The Protocol to prevent Human trafficking.

Human trafficking has international implications and application as recognized by the United Nations in the '*Protocol to prevent, suppress and punish trafficking in persons' especially women and children* signed in the year 2000 in Palermo Italy.[25] The Protocol has to be interpreted in the light of the United Nations Convention against Transnational Organised Crimes.[26] It is the first-ever legal document on human trafficking at the international level. The Protocol has several objectives mainly to combat trafficking and to support international cooperation in the investigation and punishment of traffickers. The Protocol has also given attention to women and children respecting their human rights. They have to be given special protection and also prevent them from being the victims of trafficking. It also insists on promoting cooperation among States Parties to meet the objectives of the Protocol. It empowers the State

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[16]This is an international treaty adopted by the General Assembly in the year 1979.
[17] The CRC deals with the human rights of children. It was Ratified by the General Assembly in the year 1990.
[18] It is a Protocol to the Convention on the Rights of the Child. All types of sexual abuse against children are prohibited under this Protocol.
[19] Adopted by General Assembly resolution 45/158 in the year 1990.
[20] It recognized the inherent dignity and equal and inalienable rights as the foundation of freedom, justice and peace. Adopted by the General Assembly in the year 1966 by resolution 2200A(XXI).
[21]It ensures economic freedom to all individuals General Assembly adopted in the year 1966.
[22] UDHR is the Declaration of Human Rights adopted by the world communities. On 10 December 1948, the UDHR was adopted by the General Assembly. This declaration was constantly kept in mind to ensure human rights to all.
[23] General Assembly Resolution 53/111 was adopted in the year 1998.
[24] Convention against Transnational Organised Crimes
[25] Adopted on 15 November 2000 by General Assembly resolution 55/25
[26] Article 1 of the Protocol.

Parties to employ such penal measures that are necessary to establish criminal offenses when it is done intentionally. The Protocol serves the following purposes:-

5. a. Support to victims of trafficking

It also lays down the assistance to and protection of victims of trafficking in persons. It insists on the confidential treatment of the victims of trafficking to respect the privacy and identity of the victim. Obligation is given to the State parties in this respect.[27] They have to be given information and support to establish their case against offenders. They have to be provided with basic amenities like housing, counseling, medical, and psychological assistance, employment opportunities, and measures to obtain compensation in their appropriate legal system. The protocol also emphasizes the measures to be adopted by the receiving state to ensure the safety of the victims.[28] When receiving a victim of trafficking in their nation by a State party, the victim's safety will be given high priority by the State.[29]

5. b. Co-operation among the State parties to prevent trafficking

The State parties have to adopt adequate measures and policies to prevent trafficking and also to protect victims from the prey of re-victimization.[30] The State parties are directed by the Protocol to undertake measures to combat and prevent trafficking. They can initiate such measures through research, mass media campaigns and social and economic activities. It is also directed to strengthen bilateral or multilateral cooperation to prevent all forms of exploitation of human beings, mainly women and children.

5. c. Exchange of information among state parties

The law enforcement and immigration authorities of the State parties have to cooperate to disseminate information relating to the traffickers. It will be helpful for them to identify the perpetrators and the victims of trafficking. The means and methods adopted by the organized criminal groups will be different. The Cooperation among the State parties will make them identify the ways and means of crimes and criminals. Moreover, the cooperation among State parties identifies them to detect organized criminal groups for the recruitment and transportation of humans.[31]

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[27] *Ibid*, Article 6.
[28] *Ibid*, Article 7.
[29] *Ibid*, Article 8.
[30] *Ibid*, Article 9.
[31] *Ibid*, Article 10.

5.d. Strengthen Border controls

State parties shall strengthen border controls to detect trafficking in persons through direct channels of communication[32] Traffickers misuse and forge travel documents to cross the borders. The Protocol directs the State parties to take appropriate precautionary measures against the misuse of travel documents by unlawful creation, or issuance of such documents. It is also made clear that the interpretation and application of these measures shall be consistent with internationally recognized principles of nondiscrimination.[33]

5.e. Negotiation

State parties are advised to settle the disputes through negotiation. If it cannot be settled, then it can be submitted for Arbitration and even after that period if the matter cannot be settled, the State parties may refer the dispute to the International Court of Justice.[34]

It is clear that the international legal framework widely encompasses all areas of trafficking. It gives more importance to the victims and the measures for their rehabilitation.

6. Indian Legal Framework Against Human Trafficking

The *Constitution of India* provides a clear mandate against trafficking by prohibiting it directly.[35] Apart from that there are statutory laws like the *Immoral Traffic (Prevention) Act*, of 1956,[36] which is against trafficking for commercial sexual exploitation. The *Criminal Law (Amendment) Act,* 2013, provides for elaborate provisions to counter the human trafficking of children for exploitation or any form of sexual exploitation, slavery, servitude, or the forced removal of organs.[37] There are other legislations like *the Prohibition of Child Marriage Act*, of 2006,[38] *Bonded Labour System (Abolition) Act*, 1976,[39] *Child Labour (Prohibition and Regulation) Act*, 1986,[40] *Transplantation of Human Organs Act*, 1994[41] and also the *Protection of Children from Sexual Offences Act*, of 2012[42] that prohibit

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[32] *Ibid,* Article 11.
[33] *Ibid*, Article 14(2).
[34] *Ibid,* Article 15.
[35] Article 23(1) of the Indian Constitution which prohibits trafficking in human beings.
[36] An enactment against Prevention of Immoral Traffic.
[37] Section 370 IPC. Which makes buying or disposing of any person as a slave a punishable offense.
[38]. It forbids child marriages and protects and provides assistance to the victims of child marriages.
[39] This is to abolish the bonded labor system to prevent the economic and physical exploitation of the weaker sections
[40] Employment of children below 14 and 15 is prohibited
[41] This statutory framework regulates the removal, storage, and transplantation **of** human organs for commercial and other purposes.
[42] This is to protect the children from sexual abuse, prescribe severe punishments and establish Special courts for the speedy disposal of cases

the trafficking of human beings. The major step taken by the Parliament to combat trafficking is in the form of the ***Trafficking of Persons (Prevention, Protection, and Rehabilitation) Bill*, 2021.**[43]

The Bill intends to protect women and children and for the rehabilitation of the victims of trafficking and also seeks to provide a supportive environment for the victims of trafficking. The Bill as it is mentioned in the Preamble has cross-border implications and binds all Indian citizens in India and abroad. The Central Government has to coordinate the actions of various Ministries, Departments and other authorities for the proper implementation of the provisions of this Act.[44] The Bill has provisions for the establishment of Anti Human Trafficking Committees and Nodal Officers to ensure overall enforcement of the Act. The Committee has to coordinate for the prevention of the offenses prescribed under the Act. Moreover, the Committee has to monitor the overall performance of the Act relating to rescue, protection, medical support, counseling, rehabilitation and reintegration of victims.[45] District Anti-Human Trafficking Committees or the Child Welfare Committees, as the case may be, shall be responsible for repatriation and reintegration of victims into society and family.[46] It is also prescribed that, after registering a First Information Report (FIR) against any accused under the provisions of this Act, the copy of the FIR has to be forwarded to the District Anti-Human Trafficking Committee and the District Legal Services Authority by the investigating officer. The purpose is to provide immediate relief to the victim and dependents if any. Within seven days of the receipt of FIR, after assessment, proper medical and rehabilitation support has to be extended to the victims.[47] Moreover, stringent penalties are prescribed under the Bill for the various offenses relating to human trafficking.[48]

7. Judiciary against Human Trafficking

The judiciary in India is keen on delivering judgments against trafficking to strengthen the institutional machinery and other agencies prescribed by various enactments for the protection and rehabilitation of victims of human trafficking. It has been monitoring various schemes for the protection and rehabilitation of trafficked victims.[49] Within the realm of judicial power, judges should search for justice and they have to strive to impart justice to all victims. This

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[43] This is enacted to prevent trafficking in persons, especially women, and children. It has provisions for the rehabilitation of victims.
[44] Section 3(2)(a) of the Bill.
[45] Ibid, Section 5(1).
[46] *Ibid*, Section 21(1).
[47] *Ibid*, Section 22(1).
[48] Section 24 of the Bill prescribes stringent punishments. The punishments shall not be less than seven years but may go up to 10 years. Moreover fine is also prescribed which shall not be less than one lakh.
[49] *Neerja Chaudhury v. State of M.P.*, AIR 1984 SC 1099.

is evident through the various judgments delivered by courts in trafficking. Several judgments of the Supreme Court and High Courts have helped the governments to frame guidelines for upholding the rights of the victims of trafficking.

The Hon'ble Supreme Court being the guardian and protector of fundamental rights has given various landmark judgments against the evil practice of human trafficking. In *Vishal Jeet v. Union of India*,[50] the Supreme Court has pointed out the menace of the growing sexual exploitation and trafficking of young women and children. It is stated that despite the strict provisions provided under different enactments, the expected results have not been achieved. The court observed that this is a socio-economic problem that warranted the attention of the society and therefore, the measures to be taken in this regard should be more preventive rather than punitive. The Court after recording its deep concern over this matter laid down guidelines for the formation of an 'Advisory Committee' in all States and Central Government to tackle the problems of trafficking. In *Budhadev Karmaskar v. State of West Bengal*[51] the court has insisted on the setting up of rehabilitation centers for sex workers through 'Social Welfare Boards.' It is also directed to setting up centers for technical or vocational training for sex workers and sexually abused women in all cities in India for their rehabilitation. It is also insisted that the programs oriented to these victims should mention in detail who is eligible to provide the technical or vocational training and how it can be given. Moreover, the apex court also gave direction to the Central and State governments to preplan the rehabilitation and employment opportunities of the victims to bring them to the mainstream of society.

The attitude of the judiciary is more evident in *State v. Sartaj Khan*[52]where the court has set aside the order of acquittal granted to the accused by the lower court stating the reason that, the respondent has kidnapped the prosecutrix from lawful guardianship and has imported her from Nepal to India for exploitation. In this case, the court has issued strict directions to the state governments. 'The State should take preventive measures to check the trafficking of children from the State of Uttarakhand by improving the basic conditions of the areas which are more amenable to human trafficking.' The State Government is directed to provide proper accommodation and rehabilitation measures for the victims of trafficking. They should be provided basic health care. Apart from this, the victims should be given proper counseling by a psychiatrist. The judicial attitude is more humanitarian oriented and the judiciary in India acts as the savior of victims of trafficking.

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[50](1990)3 SCC 318.
[51] (2011) 11 SCC 538.
[52] MANU/UC/0695/2017

8. Findings and Conclusion

A close appraisal of the International and national legal strategies to combat human trafficking reveals the fact that the regulatory mechanisms to combat trafficking are very strong everywhere. Still, the increasing nature of the human trafficking cases poses questions about the enforceability of these legal mechanisms. At this juncture, the following suggestions can be put forward to meet the challenges faced in this regard.

1. The increasing number of crimes points to the fact that there should be national and international cooperation and collaboration in different fields covering the different facets of crime. Moreover, the implementation agencies have to be strengthened to achieve the desired objectives. The existing statutes should have provisions for severe punishments, international cooperation, extraterritorial operation of criminal laws and other measures which will provide a more effective environment for the prosecution of the offenders.

2. Sex trafficking particularly of women and children for sexual exploitation and prostitution is on ascending line. Therefore, immoral traffic and prostitution as an evil should be controlled by the States

3. The government approach should be more victims oriented as pointed out in the International Protocol and for that purpose, more victim's support organizations have to be encouraged. These organizations should provide assistance and counseling to the preys of trafficking and it should be adequately funded by governments.

4. Combating human trafficking requires more concentrated and organized efforts from all stakeholders. It is the responsibility of all human beings to see that brutal, heinous crimes are not practiced.

5. Trafficking is a human rights issue and human trafficking is a human rights violation. Whatever may be the nature of trafficking, it is to be addressed as a human rights issue.

The victims should be provided with education and there should be awareness campaigns on trafficking which would be helpful to the vulnerable groups against trafficking. The survivors of the trafficking can support the governments in their efforts to prevent trafficking. The rescued and rehabilitated victims of trafficking can explain how they were trapped. Their personal experiences can provide some awareness about the *modus operandi* of trafficking agents. Trafficking is a human rights violation. While addressing the issues of trafficking, it shall not be confined to an issue of migration or an

ordinary crime. It is the responsibility of the international forums to ensure that trafficking is projected as it is. Then only the victims will get the justice they deserve. Moreover, taking into consideration the vulnerability of the victims, which is often exploited by the traffickers, the governments have to empower the women and the marginalized sections of society by providing proper education and awareness. The right to life of the victims shall not be ignored.

Intersectionality, Transparency, and Artificial Intelligence: A Critical Assessment of India's AI Policy

Dr. Parvesh Kumar Rajput[*]
Mr. Ashutosh Pande**[**]

1. Introduction

This paper examines the application of artificial intelligence and its efficacy in relation to the implementation of various schemes made by the government for the benefit of minorities and disadvantaged sections of society. It investigates the problems of data collection and the various challenges faced by AI in the implementation of the schemes.

The paper is a doctrinal research based on data drawn from a variety of shreds of evidence; primary and secondary data from government portals, figures obtained from various governmental and non-governmental agencies' websites and responses to questions in parliament. Apart from that, news reports and various research papers have been used to highlight emerging issues for which official data are not readily available. In this paper, the author has first, discussed the importance of the UID (unique identification) for the Government of India, especially, in the implementation of various social security schemes run by the Government. The supporters of the UID project have claimed that Indian citizens were denied the benefits of welfare schemes by the government because people did not have proper identification documents[1]. In the second part of this paper, the author has discussed the legislative enactment behind the UID and the problems associated with its implementation. The third part of this research paper talks about the usefulness as well as limitations and challenges of UID data in implementing government policies with the help of AI. At the last, conclusion and suggestions are drawn.

2. Unique Identification Number (Aadhaar), Citizens, and the State: An Overview

The idea of a unique identification number (Aadhaar) for every citizen was conceptualized in the year 2004 when the Indian National Congress came into power after the general election. The basis of the introduction of Aadhaar was that biometric-based authentication was essential to eliminate the perpetual problem of duplicate beneficiaries which would put an extra burden on the public exchequer. The

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[1] Reetika Khera, "Impact of Aadhaar on Welfare Programmes", Vol LII, Economic & Political Weekly, December 16, 2017.

purpose of Aadhaar (Unique Identification Number) was intended to be used to authenticate the identity of a person at the time of accessing their welfare benefits from the government schemes[2]. The importance and appeal of a biometric-based authentication system are undeniable. The Aadhaar database has truly transformed how Indian residents interact with their government. Considering how integral Aadhaar has become in our daily lives, it's essential to establish a legal framework that not only enhances its effectiveness but also ensures that the government behaves responsibly.[3]

The supporters of UID are successful in creating an image that Aadhaar would guarantee access to benefits end the red-tapism culture in India, and enable people to assert their rights vis-à-vis state structures. At the same time, it also raises various questions. The marginalized and poor tribal population largely lives in poor conditions without getting sufficient support from government schemes. Most of them have one or another identification card or number; even then they are excluded from the government schemes. Hence, critics question that how additional identification would solve their problems. Also, available evidence does not substantiate any significant gains from Aadhar integration in the welfare programme. According to critics, the Aadhaar project began without much understanding of the problem that it was expected to solve[4].

3. Legislative Backing Behind the Unique Identification Number (UID)

For the implementation of UID verification, management and other works, the Parliament has enacted certain legislations to control the functioning of the Unique Identification Authority of India (UIDAI).

i. **The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits, and Services) Act, 2016**; the act was passed to provide targeted delivery of governmental subsidies, and other services through the integration of demographic and biometric data using unique identification number. In addition to this, the unique identification Authority of India (UIDAI) was established to administer and regulate the entire Aadhaar process.

ii. **The Unique Identification Authority of India (Transaction of Business at Meetings of the Authority) Regulations, 2016;** the objective of this regulation is to oversee and govern business transactions at UIDAI. It also regulates the day-to-day operations and meetings of the authority. The procedures and requirements for achieving a quorum are also addressed within

[2] Vrinda Bhandari and Renuka Sane, "A Critique of the Aadhaar Legal Framework", Vol.31, No.1, National Law School of India Review, pp.72-97 (2019).
[3] *Ibid*
[4] Supra note 2 at 1

the regulation. Furthermore, the role and functions of the chief executive officer are outlined in this regulation.

iii. **The Aadhaar (Authentication) Regulations, 2016**; different modes of authentication processes are provided under the regulation, such as demographic data and OTP, among others. The regulation also prescribes procedures for the appointment of authentication services agencies. Furthermore, this regulation has introduced the e-KYC authentication facility.

iv. **The Aadhaar (Data Security) Regulations, 2016;** the regulation discusses the information security policy, confidentiality and other security obligations of service providers and personnel. Unfortunately, even after 7 years, we are still waiting for the security policy.

v. **The Aadhaar (Sharing of Information) Regulations, 2016;** this regulation regulates the identity information of Aadhaar number holders and provides conditions on how this identification can be shared with third parties. The relevant provisions are found in section 6(5) and section 29(1) (a) of the regulation.[5]

Another crucial element concerning the gathering of biometric data pertains to its registration, storage, and distribution, including concerns about sensitive personal information is acquired, verified, retained, utilized, and disclosed to external parties. The absence of established standards for safeguarding information security is a cause for concern, especially in light of the substantive volumes of sensitive personal data stored within a single centralized repository[6].

The regulations established under the Aadhaar Act play a crucial role in defining how the Aadhaar system operates in real-world scenarios. However, it's important to note that both the Act itself and these regulations often lack essential details; are uncertain in certain area, and overly rely on executive decision-making. This kind of drafting can create opportunities for potential misuse of power or violations of rules. This issue is made more serious due to the inadequacies in the mechanism for holding those in charge accountable for any lapses and violations. Further, the mechanisms for addressing grievances in relation to Aadhaar are also inadequate. These issues are further discussed by the Author in the upcoming sections.

4. Multidimensional and Intersectional Inequality Vis-à-vis Governmental Policies

[5] Aadhaar Act define "biometric information" as photograph, fingerprint, iris scan, "or such other biological attributes of an individual as may be specified by regulation".
[6] *Supra*

In the year 2017, the Union Ministry of Commerce and Industry constituted an artificial intelligence task force with the objective of integrating AI into our economic, political, and legal frameworks, thereby developing a systemic capacity to facilitate India's aspirations of becoming a leading AI-driven economy[7]. Considering AI as a socio-economic problem solver, the Government of India singled out 10 important sectors of AI in India. These encompass various sectors such as manufacturing, financial technology, agriculture, healthcare, technology for individuals with different abilities, national security, environmental initiatives, essential public services, retail and customer interaction, as well as education[8]. To achieve its goal the Government of India has established a nodal agency, the National Artificial Intelligence Mission that would coordinate AI-related activities in India. Among all the National Institution for Transforming India (NITI Aayog) a government-run think tank, has been given the task of developing a robust National AI Policy to direct the government in its AI efforts[9]. In consequence, a report was published, which recognizes that a number of biases are embedded within the existing data and all these biases are of a social and economic nature with the possibility of creating a different result altogether if reinforced without checks. So, identification of in-built biases and assessment of their implication upon a certain group is important before using it in machine learning[10]. To reduce bias within these systems, it is crucial to understand and adapt to the social environment in which they will function[11]. This point is clearly reflected in the following: V. Eubanks has identified that "*unless automated decision-making tools are built to dismantle structural inequities, their use will only intensify them*"[12]. There are different kinds of inequalities existing in Indian society. It would be multidimensional and intersectional in nature.

The correlation is such that a deficiency in one aspect result in the household facing deprivation in other areas. Research indicates that the connection between income, health, and education is such that lower incomes or a loss of income leads to difficulties in accessing and affording services in the fields of health and education. According to the periodic labour force survey conducted in India for the years 2017-18, 2018-19 and 2019-20, the top 10% of earners approximately match the income of the bottom 64% with this top 10% accounting for

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[7] Artificial Intelligence Task Force. See https://www.aitf.org.in

[8] *Ibid*

[9] Y.S.Sharma and S.Aggarwal, 2018, NITI Aayog to come out with national policy on artificial intelligence soon. The Economic Times. See https://economictimes.indiatimes.com/news/economy/policy/it-ministry-forms-four-committees-for-artificial-intelligence-ravi-shankar-prasad/articleshow/62853767.cms.

[10] Vidushi Marda, "Artificial intelligence policy in India: a framework for engaging the limits of data-driven decision-making", *Phil.Trans.R.Soc.* A 376:20180087. See https://dx.doi.org/10.1098/rsta.2018.0087

[11] *Ibid*

[12] V. Eubanks, "Automating inequality: how high tech tools profile, police, and punish the poor", St. Martin's Press, New York, pp.190

one-third of all income earned. In the context of income inequality in India, an examination reveals a significant disparity between men and women, highlighted gender-based inequalities in the labour market[13]. Now, if we introduce the AI-based solution that would increase the gap further. As the complex nature of our society would produce a different result altogether, the implementation of any kind of technology without having sufficient data in hand will create multidimensional inequalities within the society. As we have already discussed the Unique Identification Number (Aadhaar) and its hasty implementation by the government in social security schemes has led to inequalities in the access to social security schemes benefits. The Aadhaar project has been controversial from the starting because it raises concerns about privacy, security, and collecting a lot of personal data like biometrics without clear rules. When it started being used for more than just giving out benefits, it became even more controversial. People even took it to the Supreme Court, saying it could leave some people out, might not be secure, and lacked proper rules. This was partly because the Aadhaar project wasn't implemented well, and there were no laws to protect people's data[14].

5. The Aadhaar (UID), Artificial Intelligence and Society:

Artificial Intelligence and extensive datasets are deeply interconnected, as AI algorithms depend on abundant data to acquire knowledge, identify patterns, and make precise forecasts. India has been steadily embracing data utilization for improved governance, facilitated by digital public infrastructure that facilitates services such as Aadhaar and the unified payment interface. Therefore, it is fascinating to contemplate the potential of enabling AI to uncover valuable insights from these vast datasets. Around 1.3 billion people have been registered in this database. The large amount of registration under Aadhaar programme would provide a huge dataset to train the AI system. However, allowing AI to be trained on datasets like Aadhaar has also raised many questions in front of civil society. One of the main concerns is privacy. The centralized nature of the Aadhaar database accelerates privacy issues, as there is a chance of compromising the data because of the intervention of a third party. Therefore, the policy makers should have considered these issues and made possible changes in the policy of registering citizens with Aadhaar and taken steps for providing its citizen's protection against the possible breach of data[15]. At the time while implementing the Aadhaar system in India, the Government of India had not taken into consideration the privacy-related issues. However, the same was challenged in the Supreme

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[13] Amit Kapoor and Jessica Duggal, "The State of Inequality in India", Economic Times, May 19, 2022.
[14] *Supra* note 3 at 2
[15] Jenna Stephenson, Striking the Right Balance: AI, Aadhaar and Governance, June 12, 2023, available on https://www.orfonline.org/expert-speak/striking-the-right-balance/

Court of India in the year 2017, in the landmark case of *Justice K.S.Puttaswamy v/s UOI* in which the supreme court upheld that privacy is a fundamental right and important in the development of human life, and without which an individual cannot realize their right to freedom[16].

Thus, If we allow AI models to access the Aadhaar database without making a robust policy on data privacy and protection, it would have a negative implication on citizens' right to privacy. Therefore, it is necessary to make a proper policy and law on the subject matter. Another important factor is that the people currently registered with Aadhaar have not given their consent to use the data for AI purposes. The next important factor associated with linking of Aadhaar database with AI solution is cybersecurity. Many experts have expressed their reservations over 'unhackable' cybersecurity claims regarding the Central Identities Data Repository (CIDR). AI and huge databases are deeply interconnected, as AI algorithms depend on abundant data to acquire knowledge, identify patterns, and make precise forecasts. The Tribune also revealed that its reporters successfully located an unidentified WhatsApp group engaged in selling Aadhaar card information for a mere Rs.500. After the payment was processed, the journalists obtained access credentials, including a login ID and username, to a portal facilitating easy retrieval of all data linked to the individual's Aadhaar number.

Hence, in this context, we can say that the incorporation of the Aadhaar link AI system will pose major challenges in the front of majority of the population. If we look into the existing model of Aadhaar integration with the social security schemes, it can be seen that no substantial gain has been achieved till date, despite the claims made by the Government of India. People are still not able to properly link with the scheme. The total enrollment under Aadhaar identification is more than 100% but if we analyse the data, it is apparent that five states from the northeastern part of the country are way behind the national average.

[16] *Ibid*

Table No.1
Aadhaar Saturation >18 years[17]

S.No	State Name	Population (>18yrs) 2023	Number of Aadhaar assigned	Saturation
1.	Arunachal Pradesh	12,09,143	9,03,705	74%
2.	Ladakh	2,32,230	1,83,705	79%
3.	Manipur	24,94,923	19,59,639	78.55%
4.	Meghalaya	25,92,459	17,56,255	67.74%
5.	Nagaland	17,28,564	10,70,847	61.95%
	National Enrollment	**95,74,95,339**	**97,60,08,448**	**101%**

Direct Benefit Transfer (DBT): Social Security Schemes run by the Government of India

Different departments and ministries have run multiple welfare schemes under the Government of India. All these schemes provide direct benefits to the public linked with Aadhaar. The objective of Aadhaar integration is to minimize leakage and to ensure that benefits are directly transferred to the beneficiaries. Interestingly, the decision to link Aadhaar with social welfare schemes was taken by the departments and ministry themselves. It was revealed when an answer was received by the Member of Parliament in response to his queries[18]. Therefore, the power was delegated to the concerned ministry to decide on the use of Aadhaar as per sections 7 and 57 of the Aadhaar Act, 2016. In total 314 schemes are run by the various departments and ministries of the government of India.

Another important development in the integration of the Aadhaar number is poor rural digital infrastructure. The existing infrastructure is very poor and makes it nearly impossible to transfer the cash benefits directly to the account of the beneficiary. Therefore, to improve the rural digital infrastructure Government of India has started the Bharat Net scheme to connect 2.5 Lakh Gram Panchayats (Local Village Bodies). However, even after six years, the desired objectives are not achieved[19]. A very interesting part of this Aadhaar integration

[17] Unique Identification Authority of India, July 2023, available at: https://uidai.gov.in/en/media-resources/uidai-documents/parliament-questions/lok-sabha/3815-aadhaar-linked-welfare-schemes.html#main-content (last visited on 06.09.2023)
[18] Lok Sabha (Lower House of Indian Parliament) Debates on July 26, 2017 available at: https://uidai.gov.in//images/loksabha/LS1761.pdf (last visited on 06.07.2023)
[19] The Financial Budget of year 2023 extended its deadline from 2023 to 2025.

is that the government does not have any data as to how much loss the people of rural areas would bear due to lack of digital connectivity. The major setback has been caused to the employment schemes like MGNRERA (National Rural Employment Guarantee Act, 2005), which guaranteed 100 days of work (per household) to any adult willing to work. In 2008, the government decided on the mandatory transfer of wages to beneficiaries' accounts, but the question remains the same; in the absence of proper internet connectivity, how it is possible to transfer the money to the beneficiary's account? It is a case of gross violation of human rights as well as legal rights provided under the Act.

Another important social scheme is the Public Distribution Scheme (PDS), under which every household is entitled to get monthly food grains from the government in subsidies rate. This scheme has also mandatorily linked with the Aadhaar number and every month individuals will get subsidies food grains after giving his or her thumb impression in a POS machine. The main problem with this system is that many a times the thumb impression of an old age person is not properly recorded by the machine and hence, denies his legal right to get subsidies in food grains. There are many more schemes in which Aadhaar integration poses challenges before the authorities. The Table No. 2 reflects these schemes in which Aadhar integration poses a challenge:

Table No.2
Departments and Schemes integrated with Aadhaar (UID)

S.no	Department/Ministries	Total no. of Schemes
1.	Department of Rural Development	5
2.	Ministry of Petroleum and Natural Gas	2
3.	Ministry of Women and Child Development	7
4.	Department of School Education and Literacy	4
5.	Department of Higher Education	21
6.	Ministry of Minority Affairs	10
7.	Ministry of Labour and Employment	16
8.	Ministry of Tribal Affairs	09
9.	Department of Social Justice and Empowerment	13

10.	Department of Empowerment of Persons with Disabilities	06
11.	Department of Health and Family Welfare	01
12.	Department of Financial Services	03
13.	Ministry of Ayush	01
14.	Department of Sports	09
15.	Ministry of Electronics and Information Technology	02
16.	Department of Public Enterprises	02
17.	Ministry of Corporate Affairs	01
18.	Ministry of Micro, Small and Medium Enterprises	22
19.	Ministry of water Resources, River Development	04
20.	Department of Biotechnology	08
	Total no. of Ministry 51	**Total no. of schemes 314**

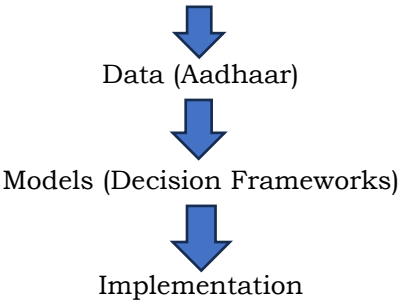
Thus, the integration of Aadhar through AI in many of the schemes raises privacy issues and concerns and the Aadhaar Data is not ready to integrate with Artificial Intelligence. To understand this complex issue, it is necessary to understand the workings of the AI technology.

Working of Artificial Intelligence Technology and the Challenges

Implementation of AI technology with the present database would create myriad problems within society. To understand this complex phenomenon, firstly we should understand how this technology works; what are their limitations and how far it will help us to promote social equality. It can be seen that, AI model requires data, and the problem starts from this very basic requisition. For the sake of convenience one can refer the work of Vidushi Marda who talked about three stages of machine learning i.e., data, models, and application[20]. One can try to understand this concept of machine learning in the background of available data. I have divided the entire process into three parts:

[20] Vidushi Marda, "Artificial Intelligence Policy in India: A Framework for Engaging the Limits of Data-Driven Decision-Making" *Phil.Trans R. Soc.* A376:20180087

Technical Aspects of the Machine Learning System



As already discussed above the collection of data is crucial to understand the problems existing in the society. Therefore, if data is laced with regional, religious, and other prejudices one cannot use it in machine learning. Hence, the availability, accessibility, accuracy, affordability, and bias-free data is very crucial in developing AI-based systems. In a country like India, multi-dimensional problems exist in the society as the community is divided on the lines of Regions, Religions, Caste, and Sub-caste and beliefs. Apart from that repressive colonial continuity would also play a crucial role in this divide and the perception created by the colonial period still influences the mindset of common people.

To explain the biases, we can take the example of enrollment of students in primary, upper primary and secondary schools. The financial year of 2022 saw an improvement in gross enrollment ratios in schools and an improvement in gender parity. GER (Gross Enrollment Ratio) shows that the school enrollment of both girls and boys students has improved in FY-2022.

This improvement has reversed the declining trends (b/w FY17 and FY19). However, if one assesses this trend on the basis of caste and religion, one may not find any reliable data to analyze how many children from the backward class would get enrolled in different levels of school. Hence, there is a high probability that if the policies are based on such inappropriate data the ultimate result would be altogether different as expected. The data itself shows that a lack of accuracy will violate the fundamental right of free education[21] of a marginalized population of the country.

[21] Article 21A of The Constitution of India

Table No.3
School Gross Enrollment Ratio (FY.2022-23)[22]

Years	Primary			Upper Primary			Secondary		
	Female	Male	Total	Female	Male	Total	Female	Male	Total
2013-14	107.7	106.5	107.2	88.6	85.0	86.7	73.5	74.2	73.8
2019-20	103.7	101.9	102.7	90.5	88.9	89.7	77.8	78.0	77.9
2020-21	104.5	102.2	103.3	92.7	91.6	92.2	79.5	80.1	79.8
2021-22	104.8	102.1	103.4	94.9	94.5	94.7	79.4	79.7	79.6

- Unified District Information System for Education
- GER greater than 100 per cent might represent the presence of over or under-age children in a particular level of education.

Even if the government wants to use Aadhaar data in machine learning, this Aadhar data will not solve the problem as it is deeply rooted in the history. Therefore, if we use this data in the social integration of a particular caste, or tribe, then we have to collect systematic data for that purpose. Obviously, biometrics and geographical identity are not sufficient in this case. Therefore, accurate data is necessary to collect if the government wants to spread its social security net to cover all sections of society. It can be seen that the integration of Aadhar with AI gives rise to various legal issues which are as follows:

Legal Issues due to Integration of 'Aadhaar' Data with AI:

i. Privacy Issues and Violation of Fundamental rights of the citizen.

ii. The Aadhaar Act does not support the idea of freedom and individual privacy.

iii. It may also violate the rights of minority and marginalized groups provided under the Right to Education Act, 2005 and Food Security Act, 2008.

iv. Over-reliance on the 'Aadhaar' would ultimately create a problem of inequality among different groups.

v. Social stigmatization would also lead to problems in front of policymakers. For example, in the case of **'Bachandda' and 'Sansi'** tribes in India due to the stigma associated with them, they even are not able to get their constitutionally protected right of reservation.

[22]UDISE (Ministry of Finance) reported in 30th January, 2023, available at, https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1894915#:~:text=School%20Gross%20Enrolment%20Ratios&text=At%20the%20Pre%2Dprimary%20level,2.9%20crore%20in%20Higher%20Secondary (last visited on 08.09.2023)

The Findings of this Research Paper after the Analyses of all the Relevant Factors are as Follows:

i. The purpose and objective of introducing UID (unique identification number) is to ensure direct cash transfer to beneficiary accounts. However, making it compulsory with a huge number of social security schemes i.e. 314 social security schemes could expose this data to vulnerabilities and raise significant concerns about privacy, especially if integrated with technology like AI.

ii. There is no centralized authority responsible for deciding the integration of Aadhaar with social security schemes. Consequently, government departments and ministries would make independent decisions on this matter.

iii. Inadequate rural infrastructure could be one of the reasons why the government might struggle to achieve its objectives.

iv. It led to violations of the National Rural Employment Guarantee Act, 2005, which guaranteed 100 days of work to those willing to work.

v. Inaccurate data could infringe upon the fundamental rights of communities to access government social security schemes. Data must cover all the necessary details about the individual like caste, socio-economic backwardness, and gender, only then they may be able to get sufficient coverage under important policies of the government. Simply relying upon "Aadhaar data would cause damage to vulnerable groups of society.

Suggestions:

Based on these findings, it is imperative to make some recommendations to improve adequacy and efficacy of integration of AI with Aadhar for social security schemes and policies. Hence, some of the important suggestions are as follows:

i. **Data Privacy Protection**: Strengthen data privacy regulations and ensure that any integration of 'Aadhaar' with AI is carried out in compliance with robust data protection laws.

ii. **Separate Authority to Monitor and Over-see:** There must be Separate Authority responsible for overseeing the integration of Aadhaar data with various government schemes so as to ensure consistency and adherence to legal standards.

iii. **Digital Infrastructure Development**: Invest in rural digital infrastructure to improve the reach and effectiveness of Aadhaar-linked programs.

iv. **Compliance with Existing Laws:** Ensure that 'Aadhaar' integration aligns with existing laws and regulations, avoiding any violations of individuals' rights and entitlements.

6. Conclusion

It is crucial for policymakers to carefully assess the legal implications of integrating 'Aadhaar' data with AI and take proactive steps to address the identified issues. This may involve amending existing laws; establishing clear decision-making processes; investing in rural infrastructure; and ensuring accurate data collection and management. Additionally, a balanced approach that safeguards individual privacy while achieving the intended socio-economic objectives should be prioritized. A thoughtful and balanced approach is essential to harness the benefits of technology while safeguarding citizens' fundamental rights and ensuring inclusive governance.

Anti-Competitive Agreements Concerning Indian Competition Law

V Suryanarayana Raju[*]

Anadi Tiwari [**]

1. Introduction

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law, which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary."[1]

This statement remains as true today as it did over two hundred years ago except to the extent that that we have moved to a more rational approach that meetings could be held but its outcome should not be against the public welfare.

Broadly, Competition Law is enacted with the object of ensuring and enhancing economic development of the country, for the establishment of a commission to restrict anti-competitive agreements in the market having adverse effect on competition, to promote and sustain competition in markets, to give freedom of trade carried by other participants in the market and, for protecting the interest of the consumers too. The present jurisprudence has evolved progressively, the present Act being enacted as recent as in the year 2002 and some of its provisions coming into force as late as in the year 2011.[2]Following the Independence of India, the country adopted the economic development policy of planned development. The main objectives of the policy were to achieve self-sufficiency and social justice. Subsequently, self-sufficiency became synonymous with import substitution. The government-imposed controls over the entry and exit of the market. The constitutional provisions were also supporting the development of competition in India.[3]

The new economic policies progressively widened the scope of competition and reduced the role of government in business. The

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[1] ADAM SMITH, *"An inquiry into the nature and causes of the wealth of nations"* (1776).

[2] Sections relating to combinations came into force from 1st day of June 2011.

[3] Article 19(1) (g) Constitution of India, 1950.

Monopolistic & Restrictive Trade Practices Act, 1969 only restricted the monopoly in the market but the Competition Act 2002 was enacted with the intention to promote the Competition in markets.

Chiefly, the Act under Section 3 of the Competition Act,2002 restricts Anti-Competitive agreements. The Act also prohibits Abuse of Dominance and regulates Mergers, amalgamations, and acquisitions.

2. Anti-Competitive Agreements

The first explicit legislation with regard toanti-competitive agreement can be traced back to the American legislation **Sherman Anti-trust Act, 1890**:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[4] The Act makes such activity a felony and provides for stringent punishment. In the year 1911 the United States Supreme Court restricting the anti-competitive agreements upheld the provisions of Sherman Anti-trust Act, 1890.[5]

The provisions of Article 101 of the 1957 Treaty of functioning of the European Union 1957further prohibited agreements between enterprises, decisions of associations of enterprises and concerted practices liable to impede, restrict or distort competition between Member States with the object or effect of preventing, restricting or distorting competition in the internal market automatically rendered those agreements void.

The Indian Competition Act, 2002 has this time under Section 3, after the MRTP Act 1969, included a wider definition of anti-competitive agreement, along with adding a substantive provision which enlarges its ambits to include any agreement tending to have an appreciable adverse effect on competition.

It must be noted that, to invoke the provisions of section 3 of the Competition Act, the existence of an 'agreement' is sine qua non.[6] Agreement is defined under Section 2(b) as 'agreement includes any arrangement, understanding or action in concert which need not be formal or in writing or which is not intended to be enforceable by legal proceedings. The definition covers every mode of behavior which has economic relevance, such as informal agreements and

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[4] Section 1 of the Sherman Antitrust Act, 1890.
[5] Standard Oil Co of New Jersey vs United States, 1911
[6] Under MRTP era: Steel Manufacture case RTPE No. 09 of 2008
Competition Act, 2002: Ashish Gupta v. PanchsheelBuildtech (P) Ltd Case No. 14 of 2018

agreements which are declared to be non-binding.[7]It seems to have structured from Section 6(3) of Restrictive Trade Practices Act 1976 of the United Kingdom which defines an agreement to include any agreement or arrangement whether or not it is intended to be enforceable by legal proceedings. Lord Denning in the case of RRTC v. W.H. Smith and Sons Ltd[8] had remarked that a nod or a wink between people who colludes may be sufficient to constitute an agreement.

Section 3 of the Act prohibits any agreement with respect to production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India[9].Under Section 3, any such agreement is considered void[10].

The CCI has noted, in the case of **Shri Neeraj Malhotra and Deutsche Bank and others**[11] stating that under the provisions of section 3, in an analysis of agreement under section 3 of the Competition Act, an agreement with an end consumer is not included. It is apposite to note the observations made by the CCI in the said case:

The basic requirement of any market is the existence of the forces of supply and demand. A good or service is supplied or demanded only because it has some utility. Elements or activities that go into creation of utility combine to form forces of supply while those that ultimately consume that utility represent forces of demand. The end consumer of any good or service is one who eventually consumes the utility of that product. Entities that produce, distribute, store or control goods or services are entities that constitute suppliers. Entities who consume are consumers. The words 'production', 'supply', 'distribution', 'storage', 'acquisition' or 'control of goods or provision of services' all describe activities relatable to the supply side of any market. 'Agreement' mentioned in Section 3 refers to any agreement entered into by parties in respect of activities as mentioned above. These activities being quintessentially on the supply side of a market, do not include "agreement" between a producer/service provider on the one hand and the end consumer on the other because no consumer can be said to be involved in activities such as production, distribution or control of any goods or services.

The term "appreciable adverse effect on competition" used in section 3, is not defined in the Act. However, the Act specifies a number of factors which the Commission must take into account

[7]D.P. Mittal, Competition Law, at p. 82 (2003).
[8] (1969) LR 7 RP 122
[9] Section 3(1) of the Competition Act, 2002.
[10] Section 3(2) of the Competition Act, 2002.
[11] Case No. 5/2009

when determining whether an agreement has an appreciable adverse effect on competition[12].

In the case of **Haridas Exports v. All India Float Glass Manufacturers Association [13]**, it has been determined that the concept of "adverse effects on competition" encompasses any act, contract, agreement or combination which has the effect of adversely affecting the public interest by restricting competition or obstructing the orderly conduct of trade. The public interest is the primary factor to be taken into account. It is not necessarily the interest of the industry that is taken into account.

3. Horizontal Agreements

Further anti-competitive agreements are divided into Horizontal agreements (Section 3 (3)) and vertical agreements (Section 3(4)). Section 3(3) of the Competition Act provides that agreements or a 'practice carried' on by enterprises or persons (including cartels) engaged in trade of identical or similar products are presumed to have AAEC in India if they:

(a) directly or indirectly determines purchase or sale prices.(Price fixation)

(b) limits or controls production, supply, markets, technical development, investment or provision of services;(Control of Supply)

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;(Sharing the market)

(d) directly *or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:*

Provided that nothing contained in this sub-section shall apply to anyagreement entered into by way of joint ventures if such agreementincreases efficiency in production, supply, distribution, storage,acquisition or control of goods or provision of services.

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[12] (a) creation of barriers to new entrants in the market;
(b) driving existing competitors out of the market;
(c) foreclosure of competition by hindering entry into the market;
(d) accrual of benefits to consumers;
(e) Improvements in production or distribution of goods or provision of services;
(f) Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

[13] (2002) 111 Comp. Cas. 617 (SC)

The first three types of agreements could be when alarge number of enterprises while coordinating their business with one another, whether it may be regard to price, geographic market, output of the product, to act like a monopoly in effect and then share the profits earned out of collusion. The other type of anticompetitive agreements may involve competitors collaborating in some way or the other to restrict competition in response to a bid/ tender invitation and it might also include combination of all the above practices. But it is also relevant to point out that there is an exception for joint venture agreements which is entered into to develop the efficiency of production, supply, distribution, storage, acquisition or control of goods or services.

In the case of **YogeshGaneshlajiSomani *v.* ZeeTurnerLtd**[14], the Commission came to the conclusion that based on the nature of the market structure and the circumstances under which the joint venture between Zee Turner Ltd. & Star Den Media Services Pvt. Ltd. was formed, efficiency reasons justify it in the facts of the case. Therefore the Commission allowed this transaction to happen relying on proviso to Section 3(3).

In the **Sera Sera Case**[15] It was alleged that the Informant and similarly placed other companies are not allowed by the Opposite Parties to exhibit/screen the movies produced by them and subsequently released in India.

In order to defeat competition in the digital cinema market, control the prices for cinema services and to prevent other market players, they have entered into anti-competitive agreement to restrict the rights to release the said movie digitally only through companies certified and accredited to their technologies thereby crushing the relatively small and technologically independent players in the market.

It was held by CCI that the Informant had not been able to show that the alleged conduct is likely to have AAEC and thus prima facie no infringement of section 3 of the Act was made out.

In the famous case of **Competition Commision of India vs WB Artists Association**[16]**,** the Supreme Court appears to have not only stressed the definition of a relevant market for an assessment under Section 3(3), but also widened the defining factors to include 'effected markets', a concept not explicitly present in the Competition Act.

[14] Case No. 31/2011
[15] Appeal No. 49 of 2015, Order dated March 31, 2015.
[16] Case of 6691 of 2014.

In the case of XYZ vs. M/s Penna Cements[17] the CCI held that the mere allegation of increasing the prices of a product would not make the transaction anti-competitive.

4. Vertical Agreements

The Anti-Competitive agreements are created with vertical agreements also. Section 3(4) [18] of the Act provides that any agreement among enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including:

(a) Tie-in arrangement;

(b) Exclusive supply agreement;

(c) Exclusive distribution agreement;

(d) Refusal to deal;

(e) Resale price maintenance

In **M/S Jasper Infotech Private Ltd. v. M/S Kaff Appliances (India) Private Ltd.[19],** the CCI while examining practices of online trading portals held that prescription of price by e-commerce companies to its dealers and insistence to follow a particular pricing regime is in violation of Section 3(4) (e) read with 3(1), which provides that there *shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.* The rule of reason must be applied in this determination.

Certain agreements, even though may be anti-competitive, comes under exceptions[20], hence saving the Intellectual Property Rights of a person and a person exporting goods from India.

In the **Automobile case** [21] there was complete restriction on availability of technological information, diagnostic tools and software programs required for servicing and repairing the automobiles, to the independent repair shops which was contrary to Sections 3(3)(a) and 3(3)(b) of the Act.

In this context, CCI observed that restrictive clauses imposed by car manufacturers on the suppliers was adversely affecting competition (i.e., causing AAEC) and consequently such clauses

[17] Ref. Case No. 7 of 2014 decided on 19.11.2014
[18] See Section 3(4) of the Competition Act, 2002.
[19] Case No. 61/2014
[20] Section 3(5) of the Competition Act, 2002.
[21] C-03/2011

which unreasonably affect supply of goods and services in the market would be held to be anti-competitive.

However, in the case of **Mohit Manglani v. M/s Flipkart India Pvt. Ltd. &Ors**[22] it was held that an exclusive arrangement between manufacturers and e-portals for selling of products, against the contention that it would lead to manipulation of prices by the sellers, is not against Section 3(4) of the Act. It is rather to help the consumer make an informed choice. This case provides an understanding as to how not every vertical arrangement is anti-competitive in nature.

Cartelization

Firms generally detest competition, as it drives away profits and takes away their freedom over market activities, such as pricing and output from their control. In any market therefore, competing firms have an incentive to coordinate their production and pricing activities so as to mimic like a monopoly, in order to increase their collective and individual profits by restricting market output and raising the market price. Collusion among independent firms in the same industry to co-ordinate pricing, production or marketing practices in order to limit competition, maximize market power and affect market prices is referred to as a "cartel"[23].

Cartels are the most egregious form of competition law violation and their deleterious effect on markets, competition and consumer interest are well established.[24]"Cartel" in the present Act includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services[25];

There are basically two types of cartels; domestic and international cartels. An international cartel consists of a group of producers of a certain commodity located in various countries, who agree to restrict competition among themselves in matters of markets, price, terms of sale etc.

A domestic cartel on the other hand involves an agreement among competing firms in a particular sector in the same country, regarding marketing strategies. Both domestic and international cartels can be further categorized as import cartels, export cartels, rebate cartels etc, depending on whether the agreement is between international or national companies. Import cartels involve agreements on common strategies for imports such as limiting the aggregate amount of

[22] Case No. 80 of 2014
[23]Canadian Economy definition of cartel
[24] CCI, Annual Report 2016-17, Pg.25
[25] See Section 2(c) of the Competition Act, 2002.

specified imported goods, determining the sources of supply for such imports and/or fix the prices and terms of purchase the cartel members will pay for such imports, etc. Export cartels are arrangements between competing firms relating primarily or exclusively to export activity, while a rebate cartel would involve members agreeing on rebate strategies and terms[26].

Basically three major factors are necessary to establish a cartel includes:

1) The cartel must be able to raise price above the non-cartel level without inducing substantial increased competition from non-member firms.

2) The expected punishment for forming a cartel must be low relative to the expected gains.

3) The cost of establishing and enforcing a cartel agreement must be low relative to its expected gains.[27]

Generally, in India, in various sectors the Cartels is very frequently happening in the sectors like Pharmaceutical, Cement etc.

Cartel agreements in Pharmaceutical sector:

In the study on "Option for using Competition Law/ policy tools in dealing with anti-competitive practices in the Pharmaceuticals Industry in the Health delivery System" prepared for WHO and the Ministry of Health and Family Welfare in 2006, it is quoted that anticompetitive practices in the pharmaceuticals sector and the health delivery system in India, includes, amongst others, price fixing, abuse of dominance, collusive agreements and tied selling.

In the case of **Bengal Chemist and Druggists Association,** BCDA, an association of wholesalers and retail sellers of drugs and affiliated to All India Organization of Chemist and Druggist was engaged in directly or indirectly determining the sale price of drugs and controlling the supply of drugs in a concerted manner and in issuing anti-competitive circulars directing the retailers not to give any discount to the consumers.

The CCI firstly, dealt with the question as to whether BCDA is covered under the category of 'entities' under Section 3(3) read with Section 2(h) of the Act and whether the alleged practices of BCDA

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[26] A rebate is a return or a reduction by a seller to a buyer of some part of the purchase price. It may be given: when the buyer has purchased a certain quantity (quantity rebate); when he has purchased exclusively from the seller or from a group of which the seller is a member (loyalty rebate); or when he has performed a particular function in the distribution of the product, for example wholesaling.

[27] https://www.cci.gov.in/sites/default/files/workshop_pdf/14udai.pdf

falls under "practice carried on" or decision taken by "an association of enterprises" under Section 3(3) of the Act.

The CCI concluded that BCDA, being an association of its constituent enterprises, is taking decisions relating to distribution and supply of pharma products on behalf of the members who are engaged in similar or identical trade of goods and that such practices carried on, or decisions taken, by BCDA as an association of enterprises are covered within the scope of Section 3(3) of the Act.

In another Case **M/s Arora Medical Hall, Ferozepur vs. Chemists &Druggists Association, Ferozepur,** the CCI directed CDAF to cease and desist from indulging in such anti-competitive practices which have been found to be anti-competitive in terms of the provisions of section 3(3)(b) read with Section 3(1) of the Act and imposed penalty accordingly. Further observed not sharing of technical Information and stopping of technical development also which comes under Cartel agreements.

Cartel agreements in Cement Industry:

In the case of**Builders Association of India vs. Cement Manufacturers Association &Ors** [28] The case originated from a complaint filed in 2010 by the Builders Association of India (BAI) against the Cement Manufacturers' Association (CMA) and 11 Indian cement manufacturing companies(collectively, the Opposite Parties). The Competition Commission of India (CCI) found the parties in violation of sections 3(3)a and 3(3)b of the Act on June 20, 2012. They imposed a monetary penalty and ordered them to stop any anti-competitive activity. They also banned CMA from collecting and passing on information about prices, production, and dispatches from cement companies to their members. The CCI used statistical data on prices, production, supply, CMA reports, facility utilization, and party testimonies to prove that the parties had colluded to cause a significant negative effect on competition in the cement industry between May 2009 and March 2011.

Based on this, the CCI ruled that the Respondents had violated section 3(3)(b) of the Act and ordered them to pay the specific penalty.

Single Economic Entity Doctrine:

Section 3 aims to prohibit anti-competitive agreements between competitors. However, when the entity controls another entity in such a manner that it takes that other entity's decisions by itself there seems to be no competition existing among those entities. Single Economic Entity Doctrine provides that agreements between entities forming part of the same entity cannot be anti-competitive.

[28] CCI Case no 29/2010; decided on June 20, 2012.

"The concept of horizontal cooperation was first introduced in the European Commission's Guidelines on horizontal cooperation, which states that companies that are members of the same "undertaking" as defined in Article 101(1), are not competitors for the purpose of the Guidelines. When a company has decisive influence on another company, they constitute a single economic unit and are therefore part of the same enterprise. The same applies to sister companies, i.e. companies over which the same parent company exercises decisive influence. Consequently, they are not considered competitors even if both companies are active on the same product and geographic markets."[29]

In **Exclusive Motors (P) Ltd. v. Automobili Lamborghini Spa**[30], the COMPAT held that:

"…so far as the contravention under Section 3 was concerned, there had to be a proved agreement between two or more enterprises. It held that the agreement between M/s. Lamborghini, the opposite party and its group company Volkswagen India could not be considered to be an agreement between the two enterprises as envisaged under Section 2(h) of the Act. …the agreements between entities constituting one enterprise, could not be assessed under the Act. In that the Commission relied on the internationally accepted doctrine of "single economic entity."

Therefore, what is decisive in the doctrine is the independence of the entity to take decisions by itself and it doesn't necessarily means that the entities having the same owner would also be exempted from examination from the Act.[31]

Procedure of Inquiry relating to Anti CompetitiveAgreements

Under Section 19 of the Competition Act, 2002 the commission may inquiry into certain agreements of enterprise.[32] The commission could receive information relating to agreements from various ways.

Examination under the stage of Section 26(1)

According to Section 26 (1) of the Act *"…if the Commission is of the opinion that there exists a prima facie case…."*,the Director General will be responsible for conducting an investigation into the

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[29] K Shiva, *"Curtailing cartelization through single economic entity doctrine"* (SCC OnLine, February 6, 2018) https://www.scconline.com/blog/post/2018/02/06/curtailing-cartelisation-single-economic-entity-doctrine/

[30] 2014 Comp LR 110

[31] "In re: cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for RashtriyaSwasthya Bima Yojna", Suo Moto Case No. 02 of 2014, Order dated 10.07.2015.

[32] Section 19 of the Competition Act, 2002.

matter. Although the concept of "prima facie" has not yet been established, it is generally accepted that a preliminary examination is limited to an examination of the material on record, without a thorough analysis of the evidence, or a thorough examination of the merits of the arguments.[33]

As a quasi-judicial authority, the Commission is obligated to adhere to constitutional principles and to provide reasons for its decisions. Consequently, the opinion issued by the Commission pursuant to Section 26(1) of the Law should not take into consideration the merits of the claims, be based on an initial examination of the evidence on record, and ultimately, the order passed should contain reasons.

Orders by Commission after inquiry into agreements under Section 27:

The commission could pass an order under this section after conclusion of the enterprise has committed the anti-competitive agreements with the opposite enterprise for affecting the competition in the relevant market. In contrast, when passing an order pursuant to Section 26(2) or (27) of the Act, the Commission conducts a more in-depth analysis, which includes a comprehensive review of the parties' evidence and submissions, and, after a thorough analysis, determines whether or not the agreement has anticompetitive elements. An interesting example of this is the Commission's observation in the **Automobiles Case[34]**, in which it stated that the criterion of balancing efficiency gains and foreclosure effects for vertical agreements is based on the principle that short-term efficiencies must not be exceeded by long-term losses resulting from the removal of competition.

Consequently, the Commission believes that, in cases where an agreement may contain certain efficiencies, it allows an undertaking to completely eliminate competition on the market.In conclusion, thus, an agreement may be designed for efficiency; however, if the effect of the agreement causes adverse effects in respect of factors stated in Section 19 (3) of the Act, and these effects are anti-competitive, the Commission would hold that the agreement violates Section 3 of the Act.

In its detailed analysis and review of agreements for the purpose of Section 3, the Commission therefore goes beyond the text of the relevant agreement and examines the effect in terms of clearly identified parameters in Section 19 of the Act. This approach would help identify contracting parties to identify clauses which may be challenged or struck down by the Commission.

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[33]"Shin-Etsu Chemical Co. Limited v. Aksh Optifibre Limited and Another, (2005) 7 SCC 234"

[34]C-03/2011

Conclusion and Steps to be taken:

The restriction of Anti Competitive Agreements is utmost importance for the competition law jurisprudence of any nation including India. These agreements are the real hurdles for the effective competition and economic growth of the country. In order to raise the healthy competition in relevant market it is to be prohibited the anti competitive agreements. The important steps to be taken including the strict implementation of the present laws and effective presence of the watch dog (Competition Commission of India) would prohibit these agreements and reduces in entering into these agreements.

An Analytical Study of LGBTQ in Present Scenario

Ms. Yogita Upadhayay*

Ms. Shubhangi Khandelwal**

1. Introduction

While many marriage regulations utilize inclusive language, the prevailing societal perception still associates marriage primarily with heterosexual unions. However, there is a growing acceptance of same-sex marriages in some segments of society, which has emerged more prominently in recent times due to increasing permissiveness towards such partnerships.

The shifting societal attitudes have led to an increasing number of jurisdictions decriminalizing certain behaviors that were previously considered illegal. However, the prohibition on homosexual marriages remains intact in many places, despite widespread opposition from individuals and groups advocating for the repeal of outdated sodomy legislation.

Consequently, same-sex relationships are not legally recognized in most countries, depriving homosexual partners of numerous economic and legal benefits associated with marriage. These benefits include job-related perks, the ability to file joint tax returns, and crucially, access to health benefits, particularly relevant in light of the AIDS epidemic. Furthermore, rights that arise upon the death of a spouse, such as interstate inheritance and other privileges, are unavailable to homosexual de facto couples, which contrasts with the accessibility of such privileges to heterosexual de facto partners in general society.

2. Definitions

Homosexuality, as a sexual orientation, pertains to individuals who experience romantic or sexual attraction towards others of the same gender. The term "homosexuals" can be broken down to its roots, where "homo" originates from Greek, meaning "same," and "sex" stems from Latin, referring to "gender." Those who identify as homosexual are commonly known as "gays" for males and "lesbians" for females. Homosexual marriages, often called gay marriages, are unions between two people of the same gender who share the same sexual orientation.

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3. History of LGBT Community in India

In ancient times, specifically during the era of Ancient Greece, there exists a significant record that touches upon relationships between individuals of the same gender. It should be noted that during this historical period, such connections were more widely accepted and considered the societal norm. This particular document stands as the earliest known example in the Western world that discusses same-sex unions. Certainly, same-sex marriages have been documented throughout history, spanning across various cultural and religious contexts. Extensive research indicates that even the Catholic Church, an institution often associated with strict opposition to homosexuality, has a historical record of tacitly endorsing same-sex unions for over a millennium, interrupted only briefly during the 19th century.

It is noteworthy that homosexual marriages have not been isolated to any particular civilization or belief system. Instead, they have manifested in diverse societies, including both Christian and non-Christian ones. This historical prevalence underscores the complexity and fluidity of human relationships and highlights that acceptance and recognition of same-sex unions have deeper roots than one might assume[1].

In the case of the Catholic Church, despite its outspoken stance against homosexuality in general, historical records indicate that it may have accommodated and sanctioned same-sex marriages for an extended period. This historical nuance challenges prevailing assumptions about the Church's stance on such unions. Moreover, it sheds light on the evolution of societal attitudes towards LGBTQ+ rights and serves as a reminder that the history of same-sex relationships is far more intricate than often portrayed.

Gender-neutral marriages, equal marriages, and gay marriages are all terms used to describe homosexual marriages. "The presence of same-sex love in various forms is also evidenced by the literature drawn from Hindu, Buddhist, Muslim, and modern fiction, among other sources. Homosexuality is mentioned in ancient works such as the Manu Smriti, the Arthashastra, the Kamasutra, the Upanishads, and the Puranas". Reports also suggest that celibate individuals, who cannot marry, have engaged in same-sex interactions regularly. Consequently, instances of homosexuality can be found in historical and mythological texts worldwide, including India. In contemporary times, in a small Gujarati town called Angaar, during the Holi festival, a ritualistic transgender marriage takes place among the Kutchi community, providing cultural evidence of past homosexuality.

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[1] Katherine Thomson, "George Clooney Slams Prop 8", HUFFPOST, Dec. 13, 2008, available at: <http://www.huffingtonpost.in/entry/george-clooney-slams-prop_n_143390> (last visited on Aug 31, 2023).

Over the past decade, there has been a notable transformation in legal efforts concerning the rights of individuals with different sexual orientations. Initially, the focus was on acknowledging the right to maintain private same-sex relationships, essentially granting the freedom to engage in such unions. However, this has evolved into a broader recognition of these individuals as civic subjects, affording them protection against discrimination in the workplace and access to various services. Moreover, there has been a recent push towards the acknowledgment of legally recognized relationships for these individuals. "Prior to the nineteenth century, these issues were confined to the society, but the rights of LGBT minorities began to raise concerns about the violation of their human rights in the nineteenth century. These severe challenges are brought to the attention of the public by a number of civil society organizations in India. Lesbian, gay, and bisexual issues were first expressed in a public forum in India in the late 1980s". In the latter part of the 20th century, the movements advocating for the rights of individuals facing discrimination due to their sexual orientation gained significant attention and entered public discourse. These movements encompassed the gay, lesbian, bisexual, and transgender communities, shedding light on their struggles for equality and acceptance[2].

4. Overview of LGBT Community

In matters concerning human sexuality, it is essential to acknowledge the vast cultural diversity that exists, leading to varied terminologies and identities. While the terms "lesbian," "gay," "bisexual," and "transgender" (LGBT) are commonly used in international human rights discussions due to their prevalence in English, it is crucial to recognize that these words may not encompass all identities and experiences. We must embrace the richness of different cultures and their unique associations with diverse terms without dismissing their significance.[3]

To enhance readability and maintain a rich vocabulary, this report employs various forms, often used interchangeably. For instance, the phrase "lesbian and gay human rights" encompasses the human rights of individuals who identify as lesbian, gay, bisexual, and transgender.

When an individual experiences emotional and sexual attraction to members of the same gender, it is referred to as having a "gay orientation." Likewise, an attraction towards the opposite gender is termed a "heterosexual orientation," while an attraction to both genders is known as a "bisexual orientation."

Gender identity refers to an individual's sense of self-expression concerning societal concepts of masculinity or femininity. It is possible

[2] Karl Heinrich Ulrichs, The riddle of "man-manly" love: The Pioneering Work on Male Homosexuality (Prometheus Books, Buffalo, NY, USA 1994)
[3] Rachel Sweeney, "Homosexuals and the Right to Privacy" 34 CUMB L REV 171 (2018)

for someone to identify with a particular gender while possessing physiological characteristics associated with the opposite sex.[4]

5. The Constitutional Rights of LGBT people in India

The Constitution of our country ensures that every individual is granted Fundamental Rights under Part III. Nowhere does it state that these basic rights are limited to specific genders, as they are available to all citizens. This inclusivity extends to the LGBT community as well, as they fall under the category of "every person." Despite the Supreme Court's landmark judgment in 2014, these individuals continue to face numerous challenges concerning employment, education, and societal acceptance.

While some progress has been made, there are still lingering prejudices in the minds of certain individuals. The Constitution guarantees these essential rights to every citizen without discrimination based on gender. The aim is to create a society that respects the rights and dignity of all its members. By fostering understanding and acceptance, we can ensure that these rights are upheld and protected for every individual in our diverse and vibrant nation. However, no one can take such rights from the LGBT as they are also the citizen and the part of this Country. Their rights are guaranteed under Article 14, 15, 16, 19 & 21.[5]

5.1 Article 14 – Equality before law

As per the Indian Constitution's Article 14, the most fundamental right is the "Right to Equality." This provision ensures that all individuals are treated impartially before the court of law, irrespective of their social status or position, without any preferential treatment. Additionally, it guarantees "equal protection of the laws," ensuring that all individuals within the country's jurisdiction enjoy their rights and privileges without facing any discriminatory practices. This constitutional guarantee upholds the principle of fairness and non-discrimination in the legal system.[6]

The lives of LGBT individuals can be a challenging journey due to the lack of widespread acceptance, which unfortunately leads to instances of ostracization, neglect, and exclusion from various aspects of society. This community faces an ongoing struggle as they encounter discrimination from multiple sources, including their own families, friends, and the broader society. They often have to fight for their rights at every stage of their lives, seeking equality and understanding.

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[4] Timothy Samuel Shah, Thomas F. Farr, et. al. (eds.), Religious Freedom and Gay Rights: Emerging Conflicts in the United States and Europe 29(Oxford University Press, New York, 2016).

[5] The Constitution of India, 1950, art. 14

[6] V.N. Shukla's Constitution of India, 219 (EBC Publication, New Delhi, 16th edn, 2020)

5.2 Article 15 – "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth"

"The Article 15 prohibits the State from discriminating against citizens on the grounds only on religion, race, caste, sex or place of birth". Both the clauses focus on the word 'only' which implies the differentiation on one or two grounds only then the law is invalid. The Indian Constitution grants certain fundamental rights to all citizens, but unfortunately, the LGBT community has faced discrimination in society when it comes to enjoying these rights. They have been unfairly treated based on their gender identity. Article 15 of the Constitution refers to the term 'sex,' which encompasses not only males or females but also individuals identifying as the third gender. Regrettably, these rights have not been equally upheld for all members of society, leading to the marginalization of the LGBT community.[7]

In "National Legal Services Authority v. Union of India", the court said that "TGs have been systematically denied the rights under Article 15(2) that is not to be subjected to any disability, liability, restriction or condition in regard to access to public places. The court also believed that TGs are extremely poor and shunned from the society and hence are legally entitled and eligible to get the benefits of SEBCs".[8]

5.3 Article 21 – Protection of life and personal liberty

The right to life stands as a fundamental and inalienable right, beyond the reach of any authority, even that of the State. Article 21 explicitly proclaims that no individual shall be deprived of their life or personal liberty. The term 'person' as used herein encompasses not only human beings but also extends to animals. However, they are gender neutral, i.e neither a male nor a female but they come under as a human. Their life and personal liberty should not be deprived just because of their gender identity. Our Constitution doesn't provide this right, subject to the gender identification.[9]

In "***Navtej Singh Johar v. Union of India***", that bench observed that in a "democractic Constitution founded on the rule of law, their rights are sacred as those conferred on others citizens to protect their freedoms and liberties. Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individuals. Equality demands that the sexual orientation of each individual in society must be protected on as even platform".[10]

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[7] The Constitution of India, 1950, art. 15
[8] AIR (2014) 5 SCC 438
[9] The Constitution of India, 1950, art. 21.
[10] AIR (2018) SC 468 (India)

6. Challenges Faced by The LGBT Community in the Society

The scope of "Section 377 of the Indian Penal Code is unclear. The extent of unnatural offences is defined under Section 377 of the Indian Penal Code. The lack of a clear demarcation between voluntary and coerced sex, against the natural order, and so forth Discrimination on the basis of sexual orientation Discrimination on the basis of sexual orientation is prohibited under the Indian Constitution as a basic right". Discrimination in the workplace is prohibited. Individuals who identify as gay or transgender experience socioeconomic inequities, which are exacerbated in part by discrimination in the job.[11]

Discrimination exerts a direct influence on individuals' professional paths, stability, and overall well-being, often resulting in financial hardship and joblessness. It is essential to recognize that human rights and fundamental freedoms are applicable universally, without exception. However, the absence of specific protective legislation for the LGBT minority community leaves them without proper recourse to seek justice. It is incumbent upon the state to extend equal care and consideration to all its citizens, including members of the LGBT community. Currently, many discriminatory and abusive behaviors directed at LGBT individuals remain inadequately addressed by the law, leaving them without sufficient legal protection.

7. Legal Status of LGBT Community in India

Unnatural acts are delineated in "Section 377 of the Indian Penal Code (1860), encompassing various forms of conduct, including the unjust discrimination based on sexual orientation." This legislation concerning same-sex relationships in India finds its origins in the British penal code of the 1800s. [12]

In a similar fashion, Section 292 of the IPC deals with matters related to obscenity, and there is an attempt to associate homosexuality with this particular category as well. Furthermore, Section 294 is deemed to be relevant in this context. According to the Indian Penal Code, any manifestation of "indecent conduct in public" carries severe penalties.[13]

It is crucial to emphasize that historically, England had criminalized same-sex relationships between consenting partners. However, over time, significant legal changes occurred in both the United Kingdom and India. The Sexual Offenders Act 1967 in the UK and the Indian Penal Code were eventually repealed, resulting in the decriminalization of homosexuality. These legal reforms marked important milestones in the recognition of LGBTQ+ rights in both countries.

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[11] M.P. Jain, Indian Constitutional Law 1271 (Lexis Nexis, Haryana, 13th edn. 2020).
[12] The Indian Penal Code, 1860, (Act 45 of 1860), sec 377.
[13] The Indian Penal Code, 1860, (Act 45 of 1860), sec 292.

For the purposes of committing an offence as described in this section, permission is essentially meaningless. As a result, in India, it is largely the Section 377 provides an explanation and definition of unnatural offences. It is this area that gives rise to the concept of homosexuality. The penalty for violating the law is life imprisonment or ten years imprisonment with a fine.

8. Judgements Contributing to LGBTQIA+ Rights

8.1 Naz Foundation vs. Government of NCT, Delhi[14]

The case under consideration was initiated by an organization named Naz Foundation, headquartered in Delhi, with a primary mission of addressing the issues related to HIV/AIDS. They submitted a writ petition, asserting that Section 377 of the Indian Constitution encroaches upon the fundamental rights outlined in Articles 14, 15, 19, and 21. According to their argument, this particular provision undermines equal treatment and restricts the rights to Life and Liberty. The NGO stressed that Article 15, which guarantees protection against discrimination based on sex, should be interpreted to include "sexual orientation" within its scope.

In a momentous verdict delivered in 2009, the Delhi High Court issued a groundbreaking judgment stating that Section 377 contravenes Articles 14, 15, and 21 of the Constitution. The court's decision was rooted in the fact that Section 377 does not differentiate between public and private actions or between consensual and non-consensual actions. It is important to note that this ruling was explicitly applicable to adults, even though Section 377 also extended to minors. Moreover, this provision had been utilized to subject members of the LGBT community to legal persecution and discrimination.

8.2 Suresh Kumar Koushal vs. Naz foundation

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[14] Naz Foundation v. Government of NCT of Delhi WP (C) No. 7455/2001.

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8.3 National Legal Services Authority vs. Union of India

In July 2014, a momentous judgment was handed down by a two-judge panel, officially acknowledging transgender individuals as the 'Third Gender' and upholding their inherent rights. This landmark ruling subsequently paved the way for the provision of affirmative action in the form of educational and employment opportunities for transgender people.

8.4 Navtej Singh Johar v, Union of India

On September 6, 2018, a momentous decision emerged from a five-judge panel of the Supreme Court of India. This ruling deemed Section 377 as unconstitutional, signifying a groundbreaking verdict. It effectively nullified the earlier Suresh Koushal case and drew inspiration from the K.S. Puttaswamy vs. Union of India case, which firmly established the Right to Privacy as an intrinsic element of the Right to Life and Personal Liberty safeguarded by Article 21 of the Constitution.[16]

9. Where India presently Stands

While several countries like Mexico, New Zealand, Portugal, South Africa, and Sweden have constitutional provisions safeguarding the rights of individuals based on their sexual orientation, India is yet to establish a comprehensive law that recognizes and protects the rights of the LGBTQIA+ community and addresses issues of discrimination and harassment they may face.

In contrast to various countries that have legalized same-sex marriages, adoption, surrogacy, and have enshrined equality for all citizens, including those of different sexual orientations and gender identities, within their constitutions, India lags behind in this regard. Unlike nations like Bolivia, Ecuador, Fiji, Malta, and the UK, India does not possess clear and protective legislation for the LGBTQ community in areas such as marriage, adoption, surrogacy, and healthcare.

Upon careful analysis of the political and legal landscape in more progressive and developed countries, it becomes evident that India still grapples with significant challenges in upholding the rights to equality,

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[15] Heather Kerrigan (ed.), Historic Documents of 2018 499(Sage, California, 2019).

[16] Justice K. S. Puttaswamy (Retd.) and Anr. v. Union of India And Ors, (2017) 10 SCC 1

life, and personal liberty for non-cis-gendered individuals. The prevailing lack of education and awareness within Indian society obstructs the development of an inclusive mindset towards people with diverse gender identities. Furthermore, the absence of comprehensive laws against discrimination has hindered substantial progress since the Supreme Court's Navtej Singh Johar ruling in 2018.[17]

9.1 What progress has there been on LGBT rights since you established Human Rights Watch's LGBT rights programme?

Significant progress has been evident on both a global and local scale when it comes to the advocacy for the rights of the LGBT community. It's important to recognize that the push for LGBT rights is not confined to Western nations. In fact, several governments in the developing world have played a prominent role in championing these rights. Notably, in September 2014, the United Nations Human Rights Council passed a groundbreaking resolution on LGBT rights. This resolution received strong support from governments in the global south, especially in Latin America, as well as from various countries worldwide, including South Africa. Interestingly, even governments that are usually seen as opposing the enforcement of human rights, like Cuba, Venezuela, and Vietnam, extended their support to this resolution.

9.2 Given the backlash, who should we be targeting to combat it?

In response to the blame placed on leaders and their policies that contributed to a hostile environment for the LGBTQ+ community at the Sochi Olympics, the International Olympic Committee (IOC) has taken significant actions. They have recently introduced new criteria for selecting host cities, placing a strong emphasis on the requirement for absolute non-discrimination. This implicitly conveys that any country fostering a discriminatory environment during the selection process would not be chosen as a host. This decision conveys a crucial and influential message.

In addition to the steps taken by the IOC, there is a need for a more comprehensive and well-coordinated educational campaign. It becomes imperative to enhance the visibility of LGBTQ+ individuals, dispel outdated stereotypes and ignorance, and showcase that LGBTQ+ individuals lead diverse lives just like anyone else. By highlighting the various roles and positions held by LGBTQ+ individuals in society, this educational initiative can effectively accelerate societal change.

[17] Raymond A Atuguba, "Homosexuality in Ghana: Morality, Law, Human Rights", 12 Journal of Politics and Law 117(2019)

9.3 The young are the core of societal change; what pressures do they face?

The younger generation exhibits greater acceptance compared to their elders, signalling a positive trend as they grow up in an environment where diverse sexual orientations are considered normal. However, this generation also faces challenges as it becomes a battleground for contrasting ideologies. Some leaders, who promote homophobia, may claim not to be anti-gay but rather aim to protect the impressionable youth from what they call 'gay propaganda.' Their actions reflect their attempt to resist the advancing LGBT rights movement, which they perceive as gaining momentum among the younger populace.

9.4 What role can non-governmental stakeholders play, such as businesses?

The role of business is of great importance in the ongoing conversation about the promotion of LGBT rights. A substantial number of consumers actively support the idea of respecting these rights. Consequently, large multinational corporations must refrain from tolerating workplace discrimination or endorsing prejudice against the LGBTQ+ community. These enterprises possess the capacity to establish safe spaces for LGBTQ+ rights, even in regions where government support for this cause is lacking.

However, one area where businesses currently need improvement is in promoting LGBT role models. Lord Browne, during his time as CEO of BP, expressed regret for not being more open about his sexuality, highlighting the unfortunate reality that many corporate leaders still feel compelled to hide their true selves. To expedite societal transformations, corporations should actively showcase LGBT individuals in leadership positions. Encouragingly, there has been notable progress in the number of business and political leaders who have come out in recent years compared to a decade ago.

9.5 What kind of challenges have civil rights groups faced over the past decade?

A decade ago, Human Rights Watch launched a formal LGBT program to underscore the importance of incorporating LGBT rights into the broader human rights agenda. Our initial significant involvement took place in Egypt, where a crackdown and raid on a gay establishment called the Queen Boat led to the arrest and severe mistreatment of its occupants by the authorities while the boat was on the Nile.

Human Rights Watch promptly expressed its objections to these actions. However, some of our Egyptian colleagues raised concerns, arguing that homosexuality was viewed as immoral behavior, and consequently, the repression of the LGBTQ+ community should not be

categorized as a human rights issue. They feared that supporting LGBT rights could potentially undermine their overall human rights efforts. Fortunately, times have changed, and such arguments are no longer prevalent. Instead, there is now a thriving movement in Egypt that embraces LGBT rights as an integral part of their broader human rights advocacy. This shift underscores the obstacles civil society groups may face when dealing with issues influenced by homophobia and regressive viewpoints.

9.6 Historically we've seen a lot of tension between religious movements and the LGBT community. Do you think this will continue, or is there a positive role religions could take on?

I view religion not exclusively in a negative light, though it has displayed unfavorable aspects on occasion. I hold a strong belief that enlightened leadership can emerge from various religious traditions. These traditions are not fixed; they continually evolve through interpretation, providing ample space for respecting essential elements like an individual's sexual orientation.

Take Christianity, for instance. On one side, there is the well-funded right-wing evangelical movement, which regrettably promotes discriminatory views toward the LGBTQ+ community. Conversely, the Catholic Church, even before its current leadership, has taken positions against violence and discrimination targeting the LGBT community. Pope Francis has taken it a step further, openly embracing an inclusive stance both in doctrine and in his personal views and statements. He stands as a shining example of enlightened leadership, even within a traditionally conservative institution.

10. Indian Society and its Tussle with Acceptance

The stereotypes and taboos surrounding homosexuality have historical roots dating back to the British Colonial rule in India. During that time, British insecurities were imposed on the colonized, leading to the stigmatization of same-gender relationships. The criminalization of homosexuality under section 377 of the Indian Penal Code in 1861 was a means for the colonizers to suppress India's medieval culture and folklore.

Thankfully, progress has been made over the years, and in 2018, the Supreme Court of India reversed this discriminatory law, though not without considerable resistance and international pressure. Despite this legal victory, homosexuality still faces opposition and is viewed by some as unnatural, challenging traditional familial and social norms.

Indian marriages are often bound by patriarchal structures, emphasizing the importance of family lineage. As a result, anything perceived as contrary to cultural norms is met with resistance. Within

the family unit, gender roles are rigidly defined, further complicating acceptance of non-traditional relationships.[18]

It is important to foster understanding and acceptance within society, moving away from outdated beliefs and embracing diversity in all its forms. Only then can we create an inclusive and compassionate environment for everyone, regardless of their sexual orientation or gender identity.

As a society, it is crucial for us to embrace and accept homosexuality as a natural part of human diversity. This aspect of human identity is prevalent and will continue to exist, regardless of our reluctance to acknowledge it.

Currently, India appears to be struggling with accepting this reality. There still exists a widespread confusion surrounding homosexuality, with some considering it a disease or merely a passing phase. Regrettably, many in Indian society mistakenly link homosexuality with femininity and perceive it as lacking the traditionally accepted norms of masculinity. This limited perspective hinders us from truly appreciating and celebrating love and personal choices.

Instead of embracing a wide spectrum of relationships, we tend to uphold heterosexual unions as the sole measure of acceptability in society. It is essential for us to move beyond these outdated views and foster an environment of understanding, inclusivity, and compassion for all individuals, regardless of their sexual orientation. By doing so, we can progress towards a more enlightened and accepting society that cherishes love and choice in all its forms.[19]

10.1 What are the usual problems of transgenders?

The major problem for every transgender is the outlook of their own family. The discrimination starts from within the family. They are compelled to leave their homes. The very reason Transwomen join the Hijra community as they can live like a women but for transmen, it is a bigger dilemma what should they do? The Transmen feel the pain of being in a wrong body as they attain their puberty, the menstrual cycle being one of the mental agonies for them.

The problem of being bullied at every stage of life in school or college and beyond still persists. The insistent and persistent bullying is one of the chief reasons why most of them leave their academic

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[18] Siddhaant Verma, "The Progressive Disillusionment of Pink Capitalism" 4(2) IJLMH 1851-1856 (2021) available at: http://doi.one/10.1732/IJLMH.26422 (last visited on Aug 28, 2023).

[19] Jonathan Alexander, "Bisexuality in the Media: A Digital Roundtable" 7 Journal of Bisexuality 113-124 (2007) available at: < https://doi.org/10.1300/J159v07n01_07> (last visited on Sep 15, 2023).

careers and indulge in *tolibadhai*, begging and many of them even join prostitution.

They are deprived of education, jobs, family and support of friend. There are no guidelines or financial help for Sex Reassignment Surgery except Bihar and a few states of South India.

10.2 What are the lacunas in the 'Transgender' Act 2019 and what are the alternatives for them?

The Act, takes into consideration, the offences and abuse against youth transgender persons which is rampant and criminalizes and punishes the same. However, if the provision is looked into in detail, it reveals that the offences of sexual abuse against transgender persons carry a maximum punishment of 2 years only. 'The Transgender Persons (Protection of Rights) Act, 2019' includes a deliberation on providing reservation to the transgender community in places of education, jobs and even in legislative bodies. The urgent need to take affirmative actions has time and again been printed out in several surveys which shows that the transgender persons lead a life in extreme deprivation and lack of resources.

The 2014 Bill had the provision for the reservation of the transgender persons in the educational and employment avenues. However, the 2019 Act lacks a provision in this regard and such a provision is needed otherwise some of the other rights like discrimination free employment and education tend to become meaningless when the intended beneficiaries people do not reach and are unable to have access to such places in the first place. The other things which need focus of the legislatures in equal measures are lack of institutional mehanisms and personal law rights, which include right to adopt children etc.

10.3 Will the Act suffice to solve the discrimination towards transgender?

The 2019 Act is a very ambitious piece of legislation both in its outreach and objectives. It legally recognizes the right of transgender persons to be identified with their self-perceived identity, along certain other rights which have, for the first time, being categorically recognized, including the right to residence and punishment to those who violate it, medical assistance, equal and discrimination free work environment etc.

Moreover, the Act also criminalizes contravention of several provisions which include abuse against transgender persons & forcing them into 'bonded labour'. However, those are still far from being realized as the Act itself has faced severe criticism from various sections of the society indulge the transgender community.

The Act seems to lay the basic ground work for the recognition of basic rights of the transgender person, but in no manner can the Act be said to be catering to all the needs of the community. As earlier stated, there is a strict need for provisions like reservations for which almost nothing has been done.

The Act is not sufficient and is merely a stepping stone on which the government, the executing agencies, and most of all the society needs to build on, if we truly want the transgender community, at large, to break the shackles of discrimination, biases, and abuse.

11. Conclusion

The LGBT minorities, who are defined by having a different sexual orientation than the majority of the population, are subjected to prejudice. However, on the surface, they appear to be human beings, and as such, they are subject to all human rights. In India, there are both civil and fundamental rights. The current Indian societal matrix strife in the country. The concept of marriage that is the demand for the legalization of homosexual marriage is strangely neglected and underappreciated. They would not only enable gay relationships, but they will also decriminalize the lives of those who engage in such conduct.

LGBT individuals have played significant roles in advocating for racial and socioeconomic equality and justice throughout history. Presently, LGBT organizations are placing growing importance on the convergence of efforts for marriage equality, civil rights, and the broader fight for economic, social, political, and racial justice. Safeguarding the rights of LGBT individuals is essential to ensure their rightful place as valued members of society.[20]

12. Recommendations

i. Protecting basic liberties for LGBT individuals without regard to race, faith, or nationality.

ii. An implementation of the legislation should be enacted with stringent provisions.

iii. Also, creating the chances for participation in social and economic activities.

iv. The government also should take steps so that they assist employers in improving the workplace environment and

[20] 2Murray Lipp, "Myths and Stereotypes That Dehumanize Gay Man Must Be Challenged: Start With These 10", HUFFPOST, Dec.06, 2017, available at <https://www.huffingtonpost.com/murraylipp/gay-men-myths-stereotypes_b_3463172.html> (last visited on Sep 30, 2023).

resulted that the LGBT people can also avail the job opportunities.

v. The health care facilities, including medical services, should be avail to them with free of cost by the State Governments.

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Doctrine Of Constitutional Morality: Unearthing Historical, Judicial and Philosophical Aspects

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1. Introduction

Judicially created tests are not uncommon in Indian Constitutional Law. Multifarious tests such as the "basic structure" concept, "intelligible differentia" test, the "classification test," the old "arbitrariness" and new "manifest arbitrariness" tests are all judicial innovations with no clear reference in formal constitutional language. Constitutional morality is a completely new evolutionary addition to this aforesaid collection of the judge-made inventions. It was heavily criticised following the *Sabarimala decision* by the Hon'ble Supreme Court of India.[1] It became the topic of intense scholarly debate, especially when the Attorney General of India, K.K. Venugopal, was widely quoted in the press as calling it a "*dangerous weapon.*"[2] Recently, the Hon'ble Apex Court appears to have grown sceptical of its application. "Constitutional morality" was conspicuously absent from the Supreme Court's succession of key judgements including issues as diverse as *Ayodhya case*,[3] *Rafale case*,[4] *the Right to Information Act judgement*,[5] and *the case relating to Finance Act.*[6]

The responsibility of defining Constitutional morality was recently delegated to a Supreme Court bench of seven judges by the Hon'ble Apex Court. At various moments in history, the constitutional morality has meant different things. It implied a "*culture of veneration for the constitution among the people*," according to George Grote, a 19th century British historian of Greece. Dr. B.R. Ambedkar used it as a rhetorical technique in the Constituent Assembly so as to defend the inclusion of "prosaic elements" in the Constitution of India – specifics about administrative affairs. In succeeding years, the Hon'ble Supreme Court made incidental allusions to "constitutional morality" in various

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[1] Indian Young Lawyers Association v. State of Kerala, (2018) SCC Online SC 1690.

[2] Apoorva Mandhani, "Constitutional Morality: A Dangerous Weapon, It Will Die With Its Birth, KK Venugopal," LIVE LAW (Dec. 09, 2018), https://www.livelaw.in/constitutional-morality-a-dangerous-weapon-it-will-die-with-its-birth-kk-venugopal/.

[3] M. Siddiq v. Mahant Suresh Das, CA Nos. 10866-10867/2010.

[4] Yashwant Sinha v. Central Bureau of Investigation, Review Petition (Crl.) No. 46 of 2019, judgment dated 14 November 2019.

[5] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, Civil Appeal No. 10044/2010.

[6] Rojer Mathew v. South Indian Bank, Civil Appeal No. 8588/2019.

settings in its decisions. Today, as per Dr. Abhinav Chandrachud, the constitutional morality refers to two things:

"*first, the polar opposite of popular morality, and second, the spirit or substance of the Constitution.*"[7]

Perhaps, it was the Hon'ble Delhi High Court's Chief Justice A.P. Shah who first utilised "constitutional morality" as a counterpoint to "popular morality." Constitutional morality in this form compels courts to reject social values when determining the legality of government action. For example, in determining the constitutionality of Section 377 of the Indian Penal Code,[8] which made "*carnal intercourse against the order of nature*" an offence of criminal nature, the Delhi High Court looked at the values of the Constitution rather than popular morals or whether homosexuality was desirable or not in Indian society.

In his decision in the *NCT of Delhi*,[9] the Chief Justice Dipak Misra equated constitutional morality with the Constitution's spirit, conscience, or soul. Constitutional morality is a second basic structural notion in this formulation. It allows courts to examine government behaviour not just in terms of the formal provisions of the Constitution, but also in terms of its undefined spirit or essence. For example, while the preamble to the Constitution refers to India as a secular republic, the Constitution lacks a "*establishment clause*" equivalent to the first amendment to the United States Constitution. In other words, there is no clause in the Indian Constitution that specifically prohibits an official state religion, as even countries with established religions, such as the United Kingdom, can be secular.

In a concurring opinion in *the NCT of Delhi case*,[10] one judge stated that secularism is a component of "constitutional morality." Theoretically, this would allow courts to use establishment-clause-like jurisprudence in Indian Constitutional Law. The basic structure concept allows constitutional courts to determine whether constitutional changes contradict the "basic structure" of the Constitution. Similarly, constitutional morality, in its spirit of the Constitution articulation, empowers "constitutional courts" to review the legitimacy of all the government activities, not only constitutional amendments, by looking at the Constitution's "spirit", "soul", or "conscience".

This study analyses the "constitutional morality" in the context of Indian constitutional law. It sheds light on the historical, moral,

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[7] Dr. Abhinav Chandrachud, "The Many Meanings of Constitutional Morality," https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521665 (last visited Jul. 04, 2023).
[8] The Indian Penal Code, 1860 § 377.
[9] (2018) 8 SCC 501.
[10] *Id.*

judicial and philosophical aspects that concern this doctrine and concludes with some author's viewpoints.

2. Historical Aspect Vis-À-Vis Grote's Understanding

Without ever visiting Greece, a British historian named George Grote authored an official 12-Volume history of the nation in the nineteenth century. We are mentioning of the period, when the British historians were not uncommon in doing so. For example, in the early nineteenth century, James Mill produced a three-volume history of India despite never having visited the country. Grote wrote about the "Cleisthenes of Athens," a statesman regarded as the father of Athenian democracy, in the fourth book of his dissertation on Greece. Grote claimed that "*the great Athenian nobles had yet to learn the lesson of respect for any Constitution*" during Cleisthenes' time.[11]

Contemporaries of Cleisthenes would follow their own merciless desires "*without regard to the limits imposed by law.*" Cleisthenes had to instill a "*passionate attachment*" to the Constitution among Athenians in order to maintain Athenian democracy. Grote stated that it was required to "*create in the multitude... that rare and difficult sentiment which we may call constitutional morality.*" According to Grote, "constitutional morality" is defined as follows: "*…paramount reverence for the forms of the constitution, enforcing obedience to the authorities acting under and within those forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts, - combined too with a perfect confidence in the bosom of every citizen, amidst the bitterness of party contest, that the forms of the constitution will be not less sacred in the eyes of his opponents than in his own.*"[12]

According to Grote, "constitutional morality" has existed in England since the 1688 Revolution and in the United States of America since the Civil War.[13] He emphasised that it was not a "*natural sentiment*" and that "*establishing and disseminating [it] among a community, judging by historical experience*," was exceedingly difficult.[14] He also stated that the constitutional morality was "*an unavoidable condition of a government that is both free and peaceful.*"[15] Importantly, the concept of "constitutional morality" was not intended to be exploited by institutions such to Cleisthenes' Athens' courts to nullify the will of the democratic majority. Grote said that it was a "sentiment" that had to be "established and diffused" in a society in order for a "free and peaceful" government to be created there.

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[11] George Grote Esq., Greece (New York: Peter Fenelon Collier, 1899), https://babel.hathitrust.org/cgi/pt?id=hvd.hw20pr&view=1up&seq=7 (last visited Jul. 04, 2023).
[12] *Id.* at p. 154.
[13] *Id.*
[14] *Id.* at p. 155.
[15] *Id.*

According to Grote's definition, constitutional morality entailed the following:

(i) All citizens shall have paramount reverence towards the Constitution.

(ii) All citizens would submit to authorities working in accordance with the Constitution.

(iii) All people would have unrestricted freedom to criticise public authorities doing their constitutionally mandated tasks.

(iv) Public authorities would be required to behave within the framework of the Constitution.

(v) Political candidates would respect the Constitution and so would be done by their opponenets.

Grote's concept of constitutional morality, at its core, included a "*coexistence of freedom and self-imposed restraint, - of obedience to authority with unmeasured censure of those who exercise it.*"[16] While citizens would respect the Constitution and obey Constitutional authorities, they would also be allowed to criticise those authorities, and Constitutional officials would be required to operate within the legal boundaries.

3. Historical Aspect Vis-À-Vis Ambedkar's Adoption

In 1913, Dr. Bhim Rao Ambedkar enrolled at the Columbia University in New York. Only a year ago, in June 1912, a prominent member of the New York Bar, William D. Guthrie, testified before the Pennsylvania Bar Association on Grote's "constitutional morality." Guthrie bemoaned the "*growing tendency throughout the country to disregard constitutional morality*" at the time, as well as "*impatience with constitutional restraints*" and "*criticism of the courts for refusing to enforce unconstitutional statutes.*" He argued that the "essence of constitutional morality" was "self-imposed restraint" that legislative bodies must practise.[17]

In brief, Guthrie examined the prevailing desire in the United States for unrestricted legislative power that remained unchecked by judicial review. He argued that such a sentiment went against the principles of constitutional morality. Guthrie's statement was quickly read aloud in the United States House of Representatives. In other words, "constitutional morality" was popular in the United States before Ambedkar came. Ambedkar studied "History 121" at Columbia

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[16] *Id.*

[17] "Extension of Remarks of Hon. Marlin E. Olmsted, of Pennsylvania, in the House of Representatives", Jul. 16, 1912, Congressional Record ID: CR-1912-0716 (available on Lexisnexis.com); "Bulletin of the New York County Lawyers Association", Bench and Bar, vol. 2(1), at pp. 31-32 (1912).

University during the academic year 1914-15, which contained parts of Greek history. It's also plausible that he got upon Grote's work in that course.

Decades later, on November 04, 1948, Ambedkar rose in India's Constituent Assembly to make a request for the draft constitution crafted by the drafting committee to be deliberated upon by the Constituent Assembly. In his statement in the support of the presented motion, he highlighted why apparently insignificant administrative issues had been inserted into India's Constitution rather than being left to India's parliament to hash out. He began by agreeing that "*administrative details have no place in the Constitution.*" However, he then recalled the above-mentioned line from Grote's dissertation on the history of Greece and stated that it was conceivable to change the Constitution without legally modifying it by changing the nature of its administration. This was due to the fact that "*the form of administration has a close connection with the form of the Constitution.*" "*It follows*", he added, "*that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature to prescribe them.*" He quoted Grote as saying that constitutional morality is not a "*natural sentiment*" and that Indians "*have yet to learn it.*"[18]

"*Democracy in India is only a top-dressing on an Indian soil that is essentially undemocratic*," he remarked.[19] "*It is wiser not to trust the Legislature to prescribe forms of administration in these circumstances,*" he concluded.[20] In other words, Ambedkar's notion of constitutional morality was not meant to serve as a litmus test for courts to nullify laws or government actions. Grote's concept of "constitutional morality" was a rhetorical tactic utilised by Ambedkar to argue why seemingly insignificant aspects of government management were included in India's Constitution.

Those who had suffered at the hands of corrupt public authorities, since doing so was "*consistent with constitutional morality.*" These allusions to constitutional morality were too brief and insignificant to constitute a serious explication of the law.

4. Judicial Aspect of Constitutional Morality

The Constitutional Morality has time and against used by the Hon'ble High Court and the Apex Court as a Rebuttal to "*Popular Morality*". In the *Naz Foundation v. Government of the National Capital*

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[18] "Dr. Ambedkar's Courses at Columbia", available at: http://www.columbia.edu/itc/mealac/pritchett/00ambedkar/timeline/graphics/courses.html (last visited Jul. 07, 2023).

[19] *Id.*

[20] *Id.*

Territory of Delhi,[21] a case in which the constitutionality of Section 377 of the Indian Penal Code, which made "*carnal intercourse against the order of nature*" a crime or a criminal offence, was called into question. The court posed an intriguing question to itself: "*could the impugned provision be sustained because it amounted to enforcing "public morality" which was a "compelling state interest*"?

The court cited a decision by the European Court of Human Rights (ECHR) in the landmark case of *Norris v. Republic of Ireland*, which stated that "*…though members of the public who regard homosexuality as immoral may be shocked, offended, or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.*"[22]

Based on this decision, the Hon'ble Chief Justice A.P. Shah of the Delhi High Court stated that "*popular morality or public disapproval of certain acts is not a valid justification for restriction of fundamental rights under Article 21.*"[23] The hon'ble court went on to say that, in contrast to the constitutional morality, the popular morality is "*based on shifting and [subjective] notions of right and wrong.*"[24] It concluded that the consideration of a legislation shall be justified for attaining a "compelling state interest," the court must examine constitutional morality rather than popular morality in these cases. "*[t]his aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly*,"[25] the court observed. In other words, Chief Justice Shah envisioned the court as a counter-majoritarian institution in his articulation of constitutional morality. Its goal was to ensure that the Constitution's ideals won out over the majority's flimsy morality. The hon'ble court could not support an otherwise unlawful statute by claiming that it pleased people's values. The Delhi High Court, however, may have erred in comparing this idea of constitutional morality with Ambedkar's vision of constitutional morality in the Constituent Assembly.

Grote's idea of "constitutional morality" was employed by Ambedkar as a "rhetorical technique" to defend the inclusion of "prosaic elements" in the Indian Constitution. Ambedkar's allusion to 'constitutional morality' did not imply that courts should ignore 'popular morality' when assessing the constitutionality of laws. Always acting against the popular morality is also likely to undermine the purpose of "constitutional morality" as well as the tenets of the Constitution of India. Ambedkar might have agreed with the Chief Justice Shah that the Constitution must take precedence over

[21] (2009) SCC Online Del 1762.
[22] 142 Eur. Ct. H.R. (ser. A) (1988) ¶ 46.
[23] (2009) SCC Online Del 1762 ¶ 79.
[24] *Id.*
[25] *Id.*

"popular morals," but the same is not meant by him when he used the word "*constitutional morality*."

Although the hon'ble Supreme Court overturned the Delhi High Court's decision in the landmark *Naz Foundation case*, it finally won favour with a bigger Supreme Court bench in *Navtej Singh Johar v. Union of India.*[26] Wherein, the Chief Justice Misra invoked "constitutional morality" in a different context, concluded that courts must not be "*remotely guided by majoritarian view or popular perception,*" but must instead be "*guided by the conception of constitutional morality and not by societal morality.*"[27]

According to Justice Nariman, it is "*not...open for a constitutional court to substitute societal morality for constitutional morality.*"[28] He believed that "social morality" was "inherently subjective" and that morality and crime were not mutually exclusive. "Public morality" was separated from "constitutional morality" by Justice Chandrachud. The former states that "*the conduct of society is determined by popular perceptions existing in society*," whilst the latter states that "*individual rights should not be prejudiced by popular notions of society.*" He discovered that "constitutional morality" "*reflects that the ideal of justice is an overriding factor in the struggle for existence over any other notion of social acceptance.*" Three Justices agreed that the court's objective is to reform society, or to turn public morality into constitutional morality.[29]

In the landmark case of *Joseph Shine v. Union of India*,[30] this notion of constitutional morality as a counterpoint to popular morality was used again. The concern of the court was "*whether Section 497 of the Indian Penal Code was constitutionally legitimate.*" The provision made it a crime for a male to have "*sexual relations with a married woman*," but the married woman cannot be prosecuted as an accomplice. The clause was overturned by the Hon'ble Court. The exception granted to every married women from being penalised as abettors in these matters assumed that every woman was a "*victim of being seduced into a sexual relationship*" and had "*no sexual agency.*"[31] He believed that a woman's "purity" and a man's "entitlement" to "her exclusive sexual possession" were "*reflective of the antiquated social and sexual mores of the nineteenth century,*" but that "*.... is constitutional morality, not the 'common morality' of the State at any time in history, which must guide the law.*"[32] He went on to say that the constitutionality of criminal legislation "*must not be determined by majoritarian notions of morality that contradict constitutional morality.*" He came to the conclusion that

[26] (2018) 10 SCC 1.
[27] *Id.* ¶ 131.
[28] *Id.* ¶ 351.
[29] *Id.* ¶ 598.
[30] (2019) 3 SCC 39.
[31] *Id.* ¶ 187.
[32] *Id.* ¶143.

Section 497 deprived a married woman of "*her agency and identity, using the force of law to preserve a patriarchal conception of marriage that is at odds with constitutional morality.*"[33] "Criminal law," he said, "*must be consistent with constitutional morality.*"[34]

The Supreme Court's judgement in *Navtej Singh Johar's* case was preceded by the verdict in *Independent Thought v. Union of India.*[35] The second provision under Section 375 of the Indian Penal Code specifies that consensual sexual relations between a husband and his wife, both of whom are at least fifteen years old, do not constitute rape. The court interpreted the law and determined that sexual intercourse between a man and his wife did not constitute rape if the wife was eighteen or older. The court concluded that "*constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 IPC that sanctifies a tradition or custom that is no longer sustainable.*"[36]

Nonetheless, in the Independent Thought case, the court did not completely invoke the concept of constitutional morality as a check against prevailing societal morals. Had it done so, it might have concluded that the exemption from rape prosecution granted to married men under the second clause of Section 375 of the Indian Penal Code was fundamentally at odds with constitutional principles of morality. After example, why should a man who sexually imposes himself on a woman not be called a rapist just because she is his adult wife? However, the court simply weakened the rule and deleted the exception insofar as it related to married males who had sexual relations with their wives under the age of eighteen.

In the Sabarimala case, the Supreme Court considered whether a restriction excluding women between the ages of 10 and 50 from accessing a Hindu shrine was unconstitutional. Articles 25 and 26 of the Constitution, which give the basic rights to profess, practise, and spread religion, to create and maintain religious organisations, and so on, are subject to "morality" among other things. The question was whether the temple access limitation could be justified on the basis of "morality." Chief Justice Misra (together with Justice Khanwilkar) decided that the word "morality" in Articles 25 and 26 of the Constitution must imply the constitutional morality and not just the popular morality.[37]

5. Philosophical Aspect by Justice Dy Chandrachud

In the case of State (NCT of Delhi) v. Union of India, the Hon'ble Supreme Court was tasked with establishing the allocation of powers between the central government and the Delhi provincial government

[33] *Id.* ¶ 218.
[34] *Id.* ¶ 219.
[35] (2017) 10 SCC 800.
[36] *Id.* ¶ 91.
[37] The Constitution of India, 1950, art. 25, 26.

as defined in the Constitution. Chief Justice Dipak Misra, while representing Justices Sikri, Khanwilkar, and himself, seemed to imply that "constitutional morality" equated to the essence of the Constitution itself, akin to the concept of the fundamental structure. "*In interpreting the provisions of the Constitution,*" Chief Justice Misra remarked, constitutional courts must read the language in the text "*in light of the spirit of the Constitution.*"[38] "*Constitutional morality in its strictest sense*," he claimed, "*implies strict and complete adherence to the constitutional principles as enshrined in various sections of the document.*"[39] It requires constitutional officials to "*cultivate and develop a spirit of constitutionalism in which every action they take is governed by and strictly adheres to the basic tenets of the Constitution.*"[40] "Constitutional morality," he said, "*means the morality that is inherent in constitutional norms and the conscience of the Constitution.*" In his concurring opinion, Justice D.Y. Chandrachud mentioned about constitutional morality in terms of the Constitution's spirit. "Constitutional morality", he argued, "*requires filling in constitutional silences to enhance and complete the spirit of the Constitution.*"[41] "*It specifies norms for institutions to survive*," he continued, "*as well as an expectation of behaviour that meets not just the text but the soul of the Constitution.*"[42] He pointed to the fundamental structure concept and said that secularism was part of the Constitution's basic structure as well as constitutional morality. Justice Chandrachud emphasised this formulation of constitutional morality in his concurring judgement in the *Sabarimala temple case*.[43] He discovered that constitutional morality was anchored in the "four precepts" listed in India's Constitution's Preamble: Justice, Liberty, Equality, and Fraternity. He added the notion of secularism to this. "*These founding principles must govern our constitutional notions of morality*," he argued.[44] He concluded that constitutional morality "*must have a value of permanence which is not subject to the fleeting fancies of every time and age.*"[45]

In '*Kantaru Rajeevaru v. Indian Young Lawyers Association'*,[46] the Supreme Court resolved to send the subject of how to interpret constitutional morality to a larger bench of at least seven Supreme Court justices. The term "constitutional morality" had not been defined in the Constitution, and the "*contours of that expression*" needed to be "delineated," according to the court, "*lest it becomes subjective*".[47]

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[38] (2018) 8 SCC 501.
[39] *Id.* ¶ 58.
[40] *Id.*
[41] *Id.* ¶ 63.
[42] *Id.* ¶ 302.
[43] Indian Young Lawyers Association v. State of Kerala, (2018) SCC Online SC 1690.
[44] *Id.* ¶ 189.
[45] *Id.*
[46] Review Petition (Civil) No. 3358 of 2018, majority judgment dated 14 November 2019.
[47] *Id.* ¶ 5(iii).

In his dissenting opinion, Justice Nariman, on the other hand, restated the spirit-of-the-Constitution concept of constitutional morality. He discovered that constitutional morality was "*nothing more than the values instilled by the Constitution, which are contained in the Preamble read with various other parts, particularly Parts III and IV thereof.*"[48] He said that it had been clarified in multiple Supreme Court Constitution Bench decisions and had reached the level of stare decisis. This view of constitutional morality is analogous to the fundamental structure doctrine.

In the text of India's Constitution, there is no explicit constraint on the constituent power of Parliament, allowing it to amend or nullify any provision. Nevertheless, in the landmark Fundamental Structure judgment, the Supreme Court established that there are implicit limitations on Parliament's authority to modify the Constitution. The court held that Parliament cannot undermine the "basic structure" of the Constitution. Of course, what comprises the essential framework is open to court judgement throughout time. Likewise, the idea of constitutional morality, as elucidated by the Supreme Court in the NCT of Delhi case and in Justice Chandrachud's concurring opinion in the Sabarimala case, suggests that a government's actions can be examined not solely through a scrutiny of the Constitution's explicit provisions but also by ensuring that they do not transgress the Constitution's "essence," "core principles," or "fundamental values." This definition of constitutional morality, like the fundamental structural test, puts implicit constitutional constraints on the government, anchored in constitutional ideals that judges see as vital to the government's existence.

6. Conclusion

Neither Grote nor Ambedkar envisaged that courts would utilize constitutional morality as a yardstick for assessing the legality of government actions. To them, it was an aspiration, a hope that citizens would nurture a deep affection for the Constitution, thereby rendering it impervious to erasure by contemporary political powers. Under this perspective, the electoral defeat of the Indira Gandhi government by the Janata Party at the end of the Emergency marked the emergence of constitutional morality within the Indian electorate. In the decades following Ambedkar's November 1948 speech, the concept of constitutional morality has taken on various meanings over time. It has been associated with constitutional traditions, anti-corruption efforts, principles of equality, and the rule of law. Nevertheless, two novel interpretations of constitutional morality hold particular intrigue.

To begin, constitutional morality is the adversary of popular morality, and it serves as a reminder that while determining

[48] *Id.* ¶ 19.

constitutional matters, courts must reject popular morals. This is an ordinary proposition in terms of constitutional doctrine. If you told a judge she had to resolve a case according to the law and the Constitution, not the talking heads on television, media commentators, and tabloids, she would answer, "but of course!" There is nothing "dangerous" about this articulation of constitutional morality, in the words of Attorney General Venugopal.

In a democratic system, it is evident that the unelected judiciary possesses institutional authority to make decisions that may contradict the will of the majority. The second aspect of constitutional morality, however, holds greater fascination. It empowers judges to consider the 'spirit,' 'essence,' or 'conscience' of the Constitution when assessing the legality of government actions. Under this perspective, constitutional morality represents another fundamental structural concept, which carries neither more nor less risk than the first aspect. Admittedly, this interpretation of constitutional morality introduces ambiguity and vulnerability to the subjective value preferences and personal inclinations of individual judges. One might question why a court couldn't declare that communism is in harmony with the elusive 'spirit' of the Constitution or that the Constitution's core necessitates the declaration of India as a Hindu state. Conversely, a substantial portion of constitutional jurisprudence remains open to interpretation. Terms like 'arbitrariness,' 'manifest arbitrariness,' and 'reasonableness' act as flexible concepts wherein judges inject their individual notions of what is just and unjust. To a certain extent, all constitutional theories lack a definitive underpinning, as judges' pronouncements occupy constitutional realms influenced by their own life experiences. Those who critique the problematic aspect of constitutional morality in this context should also challenge theories like the fundamental structure test, assessments of apparent arbitrariness and reasonableness, and other widely used catchphrases within constitutional law.

Exploring India's Places of Worship Act: Historical Significance, Constitutional Integrity, and Contemporary Controversies

Shree Shingade*

Abhijit Durunde**

"Note the problem of religion taken not in the confessional sense but in the secular sense of a unity of faith between a conception of the world and a corresponding norm of conduct. But why call this unity of faith, religion and not ideology, or even frankly politics?"

-Antonio Gramsci

1. Introduction: A Brief Religious History of the Indian Subcontinent:

India that is Bharat, our country's religious history is intricate and diverse, spanning millennia. It encompasses the indigenous Vedic traditions, which evolved into *Hinduism*[1] word used by Raja Rammohan Rao for the first time in 1816, and the emergence of *Buddhism*[2] which spread in the early fifth century BCE (Before Common Era) and *Jainism*[3] in around same seventh century BCE (Before Common Era) . The arrival of *Islam*[4] (Islam is considered to be among one of the most vulnerable groups in India according to United Nations Development Programme (UNDP) and the Oxford Poverty and

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[1] "Who Created The Term Hinduism? And Why Did The British Feel The Need To Defend Hinduism?, Devdutt Pattanaik, February 15th Of 2022, SCROLL. IN.Https://Scroll.In/Article/1017342/Who-Created-The-Term-Hinduism-And-Why-Did-The-British-Feel-The-Need-To-Defend-Hinduism#:~:Text=Raja%20rammohun%20roy%2c%20in%201816,Marriage%2c%20and%20encourage%20widow%20remarriage." (Last Visited On September 12th Of 2023)

[2] "Stanford Scholar Discusses Buddhism And Its Origins, Alex Shashkevich, August 20th Of 2023, STANFORD UNIVERSITY NEWS.Https://News.Stanford.Edu/2018/08/20/Stanford-Scholar-Discusses-Buddhism-Origins/#:~:Text=Buddhism%20itself%20started%20sometime%20in,Number%20of%20different%20schools%20emerged". (Last Visited On September 12th Of 2023)

[3] "Jainism, Paul Dundas (Senior Lecturer In Sanskrit, University Of Edinburgh, Edinburgh, Scotland, UK), Umakant Premchand Shah, G. Ralph Stroh, September 8th Of 2023, BRITANNICA.COM.Https://Www.Britannica.Com/Topic/Jainism" (Last Visited On September 12th Of 2023)

[4] "Time Line Of Islam, PSB.ORG,Https://Www.Pbs.Org/Wgbh/Pages/Frontline/Teach/Muslims/Timeline.Html".

Human Development Initiative (OPHI)'s Global Multidimensional Poverty Index (MPI), 2018,[5] in terms of Heath, Education, Poverty and considered most vulnerable in term of socio-economic aspect in contemporary India leading to violence and harassment in multidimensional aspects according to the United States 2022 report on International Religious Freedom: India[6], including SC's and ST's) in the 5th and 7th century and subsequent Mughal ruler *Babur*[7] in 1526 significantly impacted the landscape, giving rise to a rich blend of Hindu-Muslim syncretism.

The *Sikh* [8] faith also emerged in this context around 15th century in Sapta Sindhu (modern day Punjab). British colonialism introduced *Christianity*[9] (also leading to increase in attacks on Christianity from 2012 to 2022) and led to interfaith interactions. Today, India boasts a kaleidoscope of religious beliefs and practices, fostering both harmony and occasional tensions. This complex tapestry reflects the nation's enduring spiritual plurality and the interplay of numerous faiths throughout its history. "Total Population in 2011 is 121.09 crores considering Hindu 96.63 crores (79.8%); Muslim 17.22 crores (14.2%); Christian 2.78 crores (2.3%); Sikh 2.08 crores (1.7%); Buddhist 0.84 crores (0.7%); Jain 0.45 crores (0.4%), Other Religions & Persuasions (ORP) 0.79 crores (0.7%) and Religion Not Stated 0.29 crores (0.2%) data from 2011 Census[10] conducted by Home Ministry, Government of India."

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[5] "Every Second St, Every Third Dalit & Muslim In India Poor, Not Just Financially: Un Report, By Rushi Tewari And Abhishek Mishra, July 12th Of 2019, THE PRINT.Https://Theprint.In/India/Every-Second-St-Every-Third-Dalit-Muslim-In-India-Poor-Not-Just-Financially-Un-Report/262270/" (Last Visited On September 12th Of 2023)

[6] "2022 Report On International Religious Freedom: India, U.S. DEPARTMENT OF STATE.Https://Www.State.Gov/Reports/2022-Report-On-International-Religious-Freedom/India/" (Last Visited On September 12th Of 2023)

[7] "Babur: Mughal Emperor, By T.G. Percival Spear, BRIANNICA.ORG.Https://Www.Britannica.Com/Biography/Babur" (Last Visited On September 12th Of 2023)

[8] "Sikhism, By William Hewat Mcleod, September 5th Of 2023, BRITANNICA.COM.Https://Www.Britannica.Com/Topic/Sikhism" (Last Visited On September 12th Of 2023)

[9] "Data: Rise In Attacks On Christians In India, Up Four Times In 11 Years (2012-2022), By Jahnavi Sen, September 9th Of 2023, THE WIRE.Https://Thewire.In/Communalism/Data-Rise-In-Attacks-On-Christians-In-India-Up-Four-Times-In-11-Years-2012-2022" (Last Visted On September 12th Of 2023)

[10] "Rgi Releases Census 2011 Data On Population By Religious Communities, August 25th Of 2015, PRESS INFORMATION BUREAU, Ministry Of Home Affairs, Government Of IndiaHttps://Pib.Gov.In/Newsite/Printrelease.Aspx?Relid=126326#:~:Text=Total%20population%20in%202011%20is,Stated%200.29%20crores%20(0.2%25)". (Last Visited On September 12th Of 2023)

2. Constitutional Provisions Handling Diversity:

The founder of Super 30 Anand Kumar[11] quoted *'India's beauty lies in its diversity',* allowing each religion to practice-propagate and profession of religion in India guaranteed under Part III - Article 25[12] of the Constitution of India and to protect the interest of minorities under Article 29[13] of the Constitution of India. A very interesting Article comes into play, that is Article 26[14] of the Constitution of India which reads as follows:

"**Article 26. Freedom to manage religious affairs--** *Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—"*

"(a) to establish and maintain institutions for religious and charitable purposes;"

"(b) to manage its own affairs in matters of religion;"

"(c) to own and acquire movable and immovable property; and"

"(d) to administer such property in accordance with law."

Article 26 of the Constitution of India guarantees the religious denomination to 1. Establish; 2. Maintain; 3. Manage own affairs; 4. Own and Acquire movable or immovable property; 5. Administer such owned property, are the fundamental rights given to religious denominations in accordance with the law of the land.

3. Dispute Around The Mosques:

Using the rights provided by the Constitution, several boards and trust were established across the India to govern religious palaces such as Shri Saibaba Sansthan Trust, Shirdi governs Shri Saibaba Temple or the most famous Shri Mata Vaishno Devi Shrine Board governs Shri Mata Vaishnov Devi Temple or one of the resent controversial Gyanvapi Masjid (Mosque) governed by Management Committee of Anjuman Intezamia Masjid.

The Gyanvapi mosque (Sanskrit origin and the term is used for the "well of knowledge"[15]) and Kashi Vishwanath temple case came to the

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[11] "India's beauty lies in its diversity: Anand Kumar, TIMES OF INDIA,https://timesofindia.indiatimes.com/city/patna/indias-beauty-lies-in-its-diversity-anand/articleshow/73673893.cms"

[12]"Article 25,https://www.constitutionofindia.net/articles/article-25-freedom-of-conscience-and-free-profession-practice-and-propagation-of-religion/"

[13] "Article 29,https://www.constitutionofindia.net/articles/article-29-protection-of-interests-of-minorities/"

[14] "Article 26,https://www.constitutionofindia.net/articles/article-26-freedom-to-manage-religious-affairs/"

[15] "Aibak, Akbar, Aurangzeb—the Gyanvapi divide & why a controversial mosque has a Sanskrit name, THE PRINT.https://theprint.in/feature/aibak-akbar-aurangzeb-the-gyanvapi-divide-why-a-controversial-mosque-has-a-sanskrit-name/962129/"

debate after the demolition of Ayodhya-Babri Masjid incidence in the year 1992 leading to mass murder and riots across the country, initiated by Shri Lal Krishna Advani on 25 September 1990 by starting his most appreciated and ground-breaking campaign 'The Rath Yatra' from Somnath to Ayodhya also supported by Shivsena Supremo Balasaheb Thakre had claimed that his organisation had played a key role in the bringing down of the mosque. The Shiv-Sena founder/Supremo was known for his communal politics and had even praised[16] the demolition of the mosque, leading to mass destruction and Violence and Riots killing almost 2,000 people[17] across the country.

4. Time Line Of The Gyanvapi-Kashi Vishwanath Temple:

1991[18]: The freedom to worship in the Gyanvapi complex was claimed in a suit filed by Swayambhu Jyotirlinga Bhagwan Vishweshwar in Varanasi Court. First, he requested that the entire Gyanvapi complex be recognised as a part of the Kashi Vishwanath temple; second, he called for the expulsion of all Muslims from the complex area; and third, he called for the destruction of the mosque.

1998: Anjuman Intezamia Masjid Committee filed a new petition in the Allahabad High Court, arguing that the disagreement was illegal under the Places of Worship Act. The High Court granted a 22-year stay of the lower court's proceedings.

2019: Rastogi requested the Varanasi District Court on behalf of Swayambhu Jyotirlinga Bhagwan Vishweshwar, an ASI (Archaeological Survey of India) survey.

2020: As the High Court did not further prolong the stay, the Anjuman Intezamia Masjid Committee decided to intervene once more in opposition, and the aforementioned petitioner went to the district court to reopen the case.

March 2021: The act's legality was called into question by advocate Ashwini Kumar Upadhyay.

August 2021: When five Hindu ladies pleaded to worship Hanuman, Nandi, and Shringar Gauri inside the mosque's structure, the Gyanvapi case once more gained attention.

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[16] "1993 Balasaheb Bal Thackeray praising Babri masjid demolition, YOUTUBE.COM.https://www.youtube.com/watch?v=qlIozsYD2Dk"

[17] "Babri Masjid Demolition: The Events That Led To The Fall Of The Domes, OUTLOOK.COM.https://www.outlookindia.com/national/babri-masjid-demolition-the-events-that-led-to-the-fall-of-the-domes-news-242542"

[18] "Gyanvapi Mosque Case: Time Line, THE MINT (September 12th of 2022 1:52 PM IST),https://www.livemint.com/news/india/gyanvapi-mosque-case-the-timeline-11662963859288.html"

September 2021: Until the judgement is delivered, all additional ASI survey-related proceedings, according to Allahabad High Court Justice Prakash Padia, shall be suspended.

April 2022: An advocate commissioner was appointed by the Varanasi Court to undertake a video graphic survey and Anjuman Intezamia Masjid Committee objected and challenged in the High Court and Supreme Court.

8th August 2023: ASI survey resumes in Gyanvapi with heavy security.

5. Objectives And Jurisprudence of The Act:

The Congress' P.V. Narsimha Rao's government was at the centre, concerning the peace and to maintain harmony in the country and to avoid more such disputes to occur, Government introduced a small two page law THE PLACES OF WORSHIP (SPECIAL PROVISIONS) ACT, 1991[19], restricting any kind of demolition and change in any religious places before 15th August 1947 under section 3 of the act, except the Ram Janma Bhumi-Babri Masjid case cause its dispute started before 15th of August 1947 under section 5 of the act.

The Places of Worship Act, enacted in 1991, aimed to protect and maintain religious harmony in diverse India by upholding certain principles and constitutional provisions. During the 1990s, conflicts like the Babri Masjid-Ram Janmabhoomi case threatened societal relations and religious harmony. Issues surrounding conversions and claims on religious places added to the tension, leading to pressure on the government to ensure peace and harmony among religious groups. The Act, not only protects the status quo of the existing places of worship but also protects the faith of the people attached to these places.

The places of worship act, which forbids the conversion of any place of worship and ensures that they retain their religious identity, was passed to preserve the status of religious places of worship as they were on August 15, 1947. Section 3 of the legislation, which forbids the whole or partial conversion of places of worship, is one of its key clauses.[20] Section 4(1) focuses on maintaining the religious character of these places to preserve their identity.[21] Current legal actions relating to the loss of a place of worship's religious character before August 15, 1947 are addressed in Section 4(2), which states that they will be dismissed and new cases cannot be brought.[22]

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[19] "THE PLACES OF WORSHIP (SPECIAL PROVISIONS) ACT, 1991, Government of India." "https://www.indiacode.nic.in/bitstream/123456789/1922/1/a1991-42.pdf"
[20]" Section 3, Places of Worship Act,1991".
("https://www.indiacode.nic.in/handle/123456789/1922?sam_handle=123456789/1362")
[21] "Section 4, Places of Worship Act,1991".
[22] Ibid

Ancient and historical monuments, archaeological sites, and remains protected by the 1958 Ancient Monuments and Archaeological Sites and Remains Act are exempt from the provisions of Section 5 of the act, which lists exceptions.[23] Additionally, it does not apply to matters that have already been settled or resolved, nor does it apply to disagreements settled by consent or conversions that took place prior to the effective date of the act. Additionally, the Ram Janmabhoomi-Babri Masjid in Ayodhya, as well as any legal actions associated with it, are not covered by the statute.[24] Section 6 outlines the penalties for contravening the prohibition on converting the status of a place of worship.[25] Anyone found guilty faces a maximum three-year sentence in jail and a fine. Anyone who aids or assists in a criminal plot to commit this offence faces the same sentence.

As a diverse country with respect religion and culture we need to maintain the religious harmony for the country's growth and future developments. So, this place of worship act restricts the religious dispute which would affect the religious harmony and peace of the society. And it was hoped that the legislation would eventually contribute to the long-term preservation of social harmony.

> "*We see this Bill as a measure to provide and develop our glorious traditions of love, peace and harmony, it is believed that the implementation of these protections is required in light of the discussions that surface from time to time over the conversion of religious institutions, which tend to corrupt the environment of the community.*"[26]

Government wants to establish peace and maintain harmony between the religion through the implementation of the places of worship act. After analysing the jurisprudence and historical developments of the act we can understand the objective of the act, and so we can divide and summarised the objectives in three points, which says that the act preserves the religious character of the place as it was on 15th August 1947, the act also aims to restrict any claims on such place on the ground that such has different past status and

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[23] "Section 5, Places of Worship Act,1991".
[24] "K Venkataraman, what does the Places of Worship Act Protect, THE HINDU (Nov. 17, 2019)", available at: "https://www.thehindu.com/news/national/what-does-the-places-of-worship-actprotect/article29993190.ece" (Last Visited on 13 September, 2023)
[25] "Section 6, Places of Worship Act,1991"
[26] "Indian Parliamentary Debate, Lok Sabha No. 10, Session – I (Sep. 10, 1991) (remarks of Sri S.B. Chavan on continued discussion on the Places of Worship (Special Provisions) Bill) in Lok Sabha Secretariat, LOK SABHA DEBATES TENTH SERIES (VOL. 5, NO. 42) 448 (1991), available at":
"https://eparlib.nic.in/handle/123456789/3481?view_type=search" (Last visited 13 September, 2022).

ultimately the law preserves religious harmony between different religious groups.[27]

6. Contemporary Disputes And Challenges Within:

Disputes around the Hindu-Temple; Muslim-Mosque; Buddhist-Monastery and Cristian's-Churches does differs from the common understanding, like demolition of particular temples or monasteries to showcase suppression and victory over ruler from other ruler, like in Gyanvapi dispute, where Aurangzeb's army in 1669 defeated 40,000 Naga Sadhus according to local folklore and oral narrators[28]. The contemporary dispute around Gyanvapi as referred above is just to allow Hindu Women and Men to worship visible and invisible gods in the Mosque complex which is undoubtedly constructed over the remains of Hindu temple.

The very difference between Babri and Gyanvapi dispute is of what the petitioner are seeking for? As the in Babri have asked for Demolition of entire complex and construct a new temple for Lord Rama for the estimated cost of 18,000 Crores[29], which they are after the land mark judgment of 5 judge bench in 2019 on *M Siddiq (D) Thr Lrs vs. Mahant Suresh Das & Ors*[30] or Ayodhya Ram mandir dispute, while petitioner in Gyanvapi could also in future could seek to ask court, to demolish the Gyanvapi complex and made another 20,000-25,000 crores of temple complex, the process can be turnup into violent riots. Such disputes are not restricted currently to two or three such issues like the Shri Krishna Janmabhoomi-Shahi Idgah[31] Case Mathura same around the same dispute of A Muslim ruler destroyed a prominent Hindu pilgrimage, or the Puneshwar and Narayaneshwar temples[32] located in Pune where the Maharashtra Navnirman Sena[33]

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[27] "https://www.thehindu.com/news/national/explained-gyanvapi-and-the-places-of-worship-act/article65423048.ece" (Last visited on 13 September, 2023.)

[28] "Aurangzeb Tolerant? His Razing of Kashi Vishwanath; Rebuild by Ahilyabai Holkar, My India-My Glory", "https://www.myindiamyglory.com/2019/11/05/aurangzeb-tolerant-razing-kashi-vishwanath-rebuilt-by-ahilyabai-holkar/"

[29] "As Ram Mandir Nears Completion, Ayodhya's Traders Bear Hidden Costs, THE WIRE". https://thewire.in/rights/as-ram-mandir-nears-completion-ayodhyas-traders-bear-hidden-costs

[30] "Supreme Court of India judgement". "https://www.sci.gov.in/pdf/JUD_2.pdf"

[31] "Mathura Krishna Janmabhoomi-Shahi Idgah Case: The Dispute And A Forgotten Compromise, OUTLOOK.COM". "https://www.outlookindia.com/national/krishna-janmabhoomi-shahi-idgah-the-dispute-and-a-forgotten-compromise-news-197516"

[32] "Dargah Rest Room Over Punyeswar Narayana Temple Pune, RAMANISBLOG". "https://ramanisblog.in/2022/03/10/dargah-rest-room-over-punyeswar-narayana-temple-pune/"

[33] "Amid Gyanvapi row, MNS raises issue of 2 Pune temples, THE ECONOMIC TIMES OF INDIA". "https://economictimes.indiatimes.com/news/politics-and-nation/amid-gyanvapi-row-raj-thackeray-led-mns-claims-2-dargahs-in-pune-built-on-temple-land/articleshow/91739107.cms?from=mdr"

have raised the issues in the same line, while historian and writer Sanja Sonawani[34] have opposite views on the same issue.

The dispute could not be just of religion vs. religion, but could be also of religion vs. state, where in the case of Yusuf Ajij Shaikh and Others vs. Special Land Acquisition Officer No. 2, Pune and Others 1994 SCC Online Bom 246 where the municipal corporation of Pune ordered to demolish some of the portion of Subhansha Durgah which holds an archaeological significance having a history of around 200 years old to expand the road which originally was estimated to be required about 764 sq. ft., ultimately demolishing the entire historic structure of the Subhansha Durgah, where the court intervened and order not to demolish the Subhansha Durgah rather restricting them to 274 sq. ft. and to study the effect of expansion after widening the road from the north side which land was acquired.

Rather there are multiple cases such where the dispute are going, one of such interesting dispute arose around Taj Mahal[35], where the Rajasthan's MP Kumari stated that the land belongs to Rajput and Shahjahan have acquired and plead to open the twenty doors of Taj Mahal. There are almost 1800 (approx.) sights (including Muslim, Hindu, Buddhist and Jain) where such disputes could occur as mentioned in Chapter Six, 'Historians Versus History', Ram Swarup[36]. 142 sites were recognized by the author from Andhra Pradesh alone, including Jami Masjid in Kadiri, Anantpur, Sher Khan Masjid in district Penukonda, Babayya Dargahin Penukonda in Andra Pradesh; In Delhi a total of 72 sites were recognized in the book in Delhi. The Islamic invaders destroyed Indrapat and Dhillika along with their suburbs to build seven cities, including Qutab Minar, Quwwatul Islam Masjid (1198) and almost whole of the India.

7. Constitutional Validity of The Act?

The places of worship act's guiding concept are that no place of worship may be converted, along with its associated religious identity, can disrupt the peaceful coexistence, harmony, and tolerance among different religious communities. The provisions of act undermining the principles of constitution so recently in supreme court many writ petitions are pending related to the constitutional validity of the act.

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[34] "Was Pune's Punyeshwar temple destroyed to build a Muslim shrine? Historian disagrees, INDIA TODAY". "https://www.indiatoday.in/india/story/was-pune-punyeshwar-temple-destroyed-build-muslim-dargah-historian-disagrees-1953716-2022-05-24"

[35] "Taj Mahal land belongs to Jaipur's ruler, was acquired by Shah Jahan: BJP MP, THE MINT". "https://www.livemint.com/news/india/taj-mahal-land-belonged-to-jaipur-s-ruler-was-acquired-by-shah-jahan-bjp-mp-11652271906259.html"

[36] "Scratch a 'vivadit dhancha', find a Mandir: A list of Hindu temples destroyed over centuries of Islamic rule where masjids and dargahs stand now, OPINDIA.COM". "https://www.opindia.com/2022/05/sita-ram-goel-book-list-of-mosques-dargahs-built-over-hindu-jain-buddhist-temples-india/"

M Siddiq (D) Thr Lrs v. Mahant Suresh Das & Ors., "*The Supreme Court had noted that the Act is intrinsically related to the obligation of a secular state.*"[37] However these seen to be contradiction between the execution of the state's constitutional duty to uphold secularism and the lawfulness of the conduct itself.

The two most significant sections of the law are sections 3 and section 4. The conversion of a places of worship is prohibited under Section 3 of places of worships act.[38] According to the supreme court, this clause forbids the forcible conversion of places of worship. [39]But the act's text does not qualify the word "conversion" with forced. This enables us to see that the act's framers may have thought that any conversion under it would be coercive in nature. Forced action refers to a decision made against the will of the subject.[40]

So by this we can understand that section invariable and indiscriminately bans all kinds of conversion whether they occur through voluntary agreement or legal settlement. While the Constitution's Article 25 does not address property, it does safeguard the act of praying at a place of worship because it is a crucial aspect of religion. Therefore, it could be argued that Article 25 is violated by any law, such as Section 3, that limits or outlaws such conversions. Article 25 ensures the freedom to practise and follow one's religion, therefore a conversion ban can violate this fundamental right if it prevents a person from praying at their place of worship.[41]

Section 4 (1) talks about the maintenance of religious character as it was on August 15,1947. And section 4(2), talks about the abatement of pending cases, which will be terminated and no new cases will be filed.[42] For this context we need to look into the similar act, it named as 'The Acquisition of certain area at Ayodhya Verdict,1993.'[43] This act had similar provision like section 4 of the places of worship act,1991. In the case of *M. Ismail Faruqui v. Union of India & Ors.*[44] Supreme court in this case found that a part of the law section 4(3), which says that cancelled the all-ongoing lawsuits and legal proceedings related to a property dispute without giving an alternative remedy to solve the dispute. In the same vein, the section 4(2) in the places of worship act which talking the similar and it talks about the abatement of pending

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[37] (2020) 1 SCC 1.
[38]"Section 3, Places of Worship Act,1991",
("https://www.indiacode.nic.in/bitstream/123456789/15329/1/places_of_worship_%28special_provisions%29_act%2C_1991.pdf") Last visited on 13th September 2023.
[39](2020) 1 SCC 1.
[40] "Black's Law Dictionary 774, (4th ed., 1968)".
[41] "https://wbnujscls.wordpress.com/2020/09/08/a-constitutional-critique-of-the-places-of-worship-act-1991/" (Last visited 14th September,2023)
[42] Section 4(2)(3), Places of Worship Act,1991,
("https://www.indiacode.nic.in/bitstream/123456789/15329/1/places_of_worship_%28special_provisions%29_act%2C_1991.pdf") Last visited on 13th September 2023.
[43] The Acquisition of certain area at Ayodhya Verdict,1993
[44] 1994) 6 SCC 360.

cases, so this section might also be considered unconstitutional for the same reason as section 4(3) in 1993 in the act.[45]

In specifically, the Ayodhya conflict is covered in Section 5's discussion of the act's exception and list of circumstances in which it does not apply. Sections 6 and 7 describe the consequences for those who break the law and the overriding impact, respectively.[46] As a result, the remaining portions of the legislation might become ineffective if portions 3 and 4 are ruled to be unconstitutional. It would be difficult to prove the act's constitutionality as a result.

Concerning the constitutional validity of the act numerous petitions have been filed before the Supreme Court which are pending, claiming that this act violates the provisions of the constitution of India.[47] In this petition on the various grounds the act has challenged. Such as the act creates a statutory bar against the judicial remedy. This act prohibits people from approaching the court of law to claim their places of worship, which were encroached on forcefully and so, citizens are deprived of the fundamental right to access to justice. And also, abatement of pending proceedings, without giving an alternative way to resolve the dispute. The act imposes an arbitrary and irrational cut-off date of August 15, 1947.

Another ground of challenge to the act is an exception under section 5 for Ram Janmabhoomi from its application. The challenge is based on the law's violation of Art 14, why is this discrimination between religion or dispute-wise? So, it violates the Article 14 of the constitution of India.[48]

We have seen the application of the act in Ayodhya Dispute exempted, and act does not apply in the Gyan Vapi case because court noted that, "*ascertainment of the religious character of a place is not barred by the 1991 Act*" [49] It suggests that identification of religious character isn't prohibited in this act. However, section 3 says that the act prohibits the conversion of the place of worship. When the religious character of place is ascertained, it leads to conflicts or attempts to change the character of the place, which is prohibited under section 3 of the act and it goes against the motive of the act, to

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[45] "https://wbnujscls.wordpress.com/2020/09/08/a-constitutional-critique-of-the-places-of-worship-act-1991/" (Last visited 14th September,2023)

[46] Section 5,6,7, Places of Worship act,1991. ("https://www.indiacode.nic.in/bitstream/123456789/15329/1/places_of_worship_%28special_provisions%29_act%2C_1991.pdf")

[47] "https://www.scobserver.in/cases/ashwini-kumar-upadhyay-union-of-india-constitutionality-of-the-places-of-worship-act-case-background/" (Last visited on 13 September 2023)

[48] "https://www.barandbench.com/columns/is-the-places-of-worship-special-provisions-act-1991-constitutional" (Last Visited 14th September, 2023)

[49] "https://www.thehindu.com/news/national/legal-battle-over-validity-of-places-of-worship-act-gains-momentum/article65518413.ece" (Last visited 14th September 2023)

maintain religious harmony and peace in the society. From this observation, we can understand that the application of the act varies and creates confusion making this act weak and incapable of resolving the dispute.

Overall, it can be understood that the act is currently facing challenges in the Supreme Court on various grounds because it violates several constitutional provisions. As a result, the act appears to be weak and not sufficiently robust to address contemporary and purely religious aspects. This perception of weakness arises from the critiques regarding the constitutionality of the act.

8. Criticism About The Act In Connection With The Current Disputes:

The criticisms of this act have been present since its enactment. During a parliamentary debate,[50] the BJP opposed a bill, referring to it as an example of "pseudo-secularism" being practiced in the country. Though the government intended for this bill to please minorities, the BJP also questioned the law's ability to be passed because it covered burial grounds or places of worship that were on a state list. However, in order to pass the bill, the central government included defence to its list of residuary powers in entry 97.[51] Another criticism of this act that Hindus raises concerns to saying through this act we are perpetuating the "crimes of the barbaric invaders" who destroyed the temples and built mosques over them centuries ago.[52] There are some other criticisms of the act on this basis petitions filed in supreme court for examine the constitutional validity of the act. In these cases, critics argue that act prevents judicial review, and weakens the system of checks and balances and restricts the judiciary's ability to uphold constitutional rights. The Act imposes the arbitrary or irrational cut-off date, disregarding historical injustices and denying alternative dispute resolution for encroachments before the date. Critics argue that act violates the right to religion and is a violation of secularism, which is basic structure of constitution. The act Favours one community over others, giving unequal treatment of religions.[53] Another critique is that exception for Ayodhya dispute leads to concerns about the different treatment of religious sites,

[50] "https://eparlib.nic.in/handle/123456789/3481?view_type=search" (Last visited on 14th September,2023)

[51] "K Venkataraman, what does the Places of Worship Act Protect, THE HINDU" (Nov. 17, 2019), available at: "https://www.thehindu.com/news/national/what-does-the-places-of-worship-actprotect/article29993190.ece" (Last Visited on 14 September, 2023)

[52] "https://www.thehindu.com/news/national/legal-battle-over-validity-of-places-of-worship-act-gains-momentum/article65518413.ece" (Last visited 14th September,2023)

[53] "https://wbnujscls.wordpress.com/2020/09/08/a-constitutional-critique-of-the-places-of-worship-act-1991/" (Last Visited on 14th September, 2023)

violating Article 14 which guarantees right to equality.[54] In this way critique, critics criticize the act on different basis.

In the Ayodhya dispute judgement supreme court has taken a stance over this act. In the case of *M Siddiq (D) Thr Lrs v. Mahant Suresh Das & Ors* [55] while taking The court's position on the statute emphasised that legislation protecting places of worship promotes secularism and guarantees respect for all religions. The state has the constitutional obligation to preserve places of worship for every religious community, an obligation enforced by this act.

9. Way Forward Which Addresses The Critics:

There are important criticisms to this act. To address these criticisms, the government needs to conduct a comprehensive review of the act, ensuring that it does not limit judicial review. The government should strike a balance between upholding the rights of various populations and preserving the religious nature of houses of worship. To address the shortcomings and criticisms and ensure the trust people's trust in the law, the government needs to promote transparency and inclusivity through public consultation for different perspective on the act. Revaluation of religious sites should be done with fairness, consistency and focus should be on the principle of equality. Through these mechanisms we can ensure people's trust and respect for the law, making it a good law that addresses all criticisms.

10. Secularism:

As mentioned prior Advocate Ashwini Upadhyay have challenged the constitutional validity[56] of the Places of Worship act, The petition was filed to set aside sections 2, 3, and 4 of the Act. The petitioners dispute the idea that this act justifies the barbarian invaders' illegitimate possession of places of worship. The Supreme Court's decision to request a response from the centre is quite troubling on several levels. It leaves a permanent stain on the secularism that is a cornerstone of our Constitution. '*Sarva dharma sambhava*[57]*,'* an

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[54] Art. 14, Constitution of India,1947. ("https://www.indiacode.nic.in/bitstream/123456789/16124/1/the_constitution_of_india.pdf") Last visited on 15th September, 2023

[55] (2020) 1 SCC 1.

[56] "Places of Worship Act continues to be operational despite challenge to its constitutional validity, says Supreme Court, THE LEAFLET". "https://theleaflet.in/places-of-worship-act-continues-to-be-operational-despite-challenge-to-its-constitutional-validity-says-supreme-court/#:~:text=In%20March%202021%2C%20a%20Bench,validity%20of%20the%201991%20Act".

[57] "Sanatana row | Congress says Sarva Dharma Sambhava is the party's position, Kamal Nath is categorical in rejecting Udhayanidhi Stalin's comment, THE HINDU". "https://www.thehindu.com/news/national/sanatana-row-congress-says-sarva-dharma-sambhava-is-the-partys-position-kamal-nath-is-categorical-in-rejecting-udhayanidhi-stalins-comment/article67270041.ece"

ancient Sanskrit sloka that articulates the idea of secularism as the tolerance of all religions, has long been a part of Indian heritage. The "Yajur Veda, Athrava Veda, Rig Veda, and Akbar's '*Dine-elahi*' are its ancestors." Since ancient times, India has nurtured the ideals of tolerance and respect for all religions on an equal footing. The fundamental tenet of it is mutual respect. Later, this tolerant attitude became known as secularism.

Neither in 1950 nor in 1976, when it was added to the Preamble, was the term 'secular' defined or explained in the Constitution. According to D.E. Smith,[58] one of the finest scholars of secularism:

'A secular state is one that guarantees individual and corporate freedom of religion; deals with individuals as citizens irrespective of their religion; is not institutionally connected to a particular religion; nor seeks either to promote or interfere with religion'

The definition of 'essential practises' established in the famous case of *Sri Lakshmindra Thirtha Swamiar v. The Commissioner, Hindu Religious Endowments, Madras.*[59] In this instance, it was decided that the beliefs of the religion in issue itself must be considered when determining what constitutes an important religious practise. However, this was not the case in this instance since mosque placement and the identification of 'essential religious practises' in the Islamic scriptures were not taken into consideration.

Around 26 countries around the world consider Islam as there official religion[60], including India, where as in the land mark case of Vishwas Bhadra Pujari Purohit Mahasangh vs. Union of India[61] the debate between Secularism and the Places of Worship act was discussed. The Preamble was amended to assure that India is and will remain a secular nation. In protecting minority rights, is it acceptable to ignore the rights of the majority? Swami Prabodhanadh Giri chief of Dharam Sansad[62] core committee on January 2nd of 2022 said during one of his series of hate speech that Jihadis/Muslims (*who have understood the Quran*) should be terminated and Hindu should carry arms to protect them self-aired on The Quint. Few of the Indian thinkers considered Secularism to be a by-product of foreign jurisprudence, rather Indian culture itself a secular in nature as stated above *Sarva dharma sambhava* in our antient texts, also quoting

[58] "Rajeev Bhargava, SECULARISM AND ITS CRITICS 178 (1st ed., 1999)".
[59] 1951 S.C.C. OnLine Mad. 384.
[60] "Muslim Countries around the World, ISLAMIC WORLD NATIONS ONLINE". "https://www.nationsonline.org/oneworld/muslim-countries.htm"
[61] "Vishwas Bhadra Pujari Purohit Mahasangh vs. Union of India, LIVE LAW". "https://www.livelaw.in/pdf_upload/pdf_upload-376402.pdf"
[62] "Clean India of Jihadis, Whoever Understands Quran is One': Hindutva Hate Speech in UP | THE QUINT", "https://www.youtube.com/watch?v=mdXuqbbKSZQ"

Mahatma Gandhi in the famous hymn *'Ishwar Allah Terey Naam'*[63] (Ishwar and Allah are but the two names of the same god).

11. Are Such Religious Disputes Important For The Developing Country Like India?

In the rich or developed countries like the USA, UK people place less importance on religion rather they give importance to economic growth and vice versa situation have there in developing countries. So, we can conclude that 'religion holds back the economic growth of country.'[64] So we can understand that religion influences economic growth of society.[65] Religion and economic growth have some relation. Increasing religious beliefs would affect the country's economic growth. As increase importance of religion, as a result, religious beliefs increase, so people start using the resources in religious sector which resources might be useful in some other developmental purpose.[66] So, through this observation we can conclude that religious beliefs affect economic growth.

When we talk about developing countries, we understand that there are many significant issues that need to be addressed. India, also falling under the category of a developing country, faces numerous problems such as unemployment, per capita inequality, infrastructure, and fulfilling the basic needs of its citizens, including poverty. Given this, it's important to note that India is a diverse country, and as a result, religious issues hold significant importance. This emphasis on religion can impact the country's economic growth

The places of worship act prohibit the conversion of places of worship and it intends to maintain the secularism in country. In developing country like India, we tend to focus more on religious issues and give them considerable attention, often elevating them in public eye. This can lead to increased community involvement and

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[63] '"Ishwar Allah Tero Naam Sabko Sanmati De Bhagwan', THE OUTLOOK". "https://www.outlookindia.com/website/story/ishwar-allah-tero-naam-sabko-sanmati-de-bhagwan/267283"

[64] "https://knowledge.skema.edu/the-unexpected-relationship-between-religion-and-economic-development/" last visited on 15th September,2023.

[65] "Wonsub Eum, April 29, 2011 , RELIGION AND ECONOMIC DEVELOPMENT - A STUDY ON RELIGIOUS VARIABLES INFLUENCING GDP GROWTH OVER COUNTRIES, University of California, Berkeley". ("https://www.econ.berkeley.edu/sites/default/files/eum_wonsub.pdf") Last visited on 15th September, 2023.

[66] "Barro, Robert J., and Rachel M. McCleary. "Religion and Economic Growth across Countries." *American Sociological Review*, vol. 68, no. 5, 2003, pp. 760–81. *JSTOR*, https://doi.org/10.2307/1519761". Last visited on 15 Sept. 2023

religious favour among the people. Such an increase in religiosity can impact economic development. Therefore, 'India's growing religiosity is economic challenge.'[67] We can observe that 'Religious beliefs can pave road to a nation's growth.'[68] From the observations we can conclude that, 'India's religious beliefs are holding back its economic growth.'

Now, we need to consider whether religious incidents related to places of worship are truly important for a developing country like India, given the numerous developmental and basic issues we face. The significance of such incidents can impact the socio-economic growth of a developing country like India.

12. The Difference Between Opinion/Motive Of Government Of India And Party Governing Government Of India:

The known fact is religious matters does produces a huge chunk of divide in voters particularly during elections, which is also prohibited by The Religious Institution (Prevention and Misuse) Act, 1988[69], which clearly under section 3 (a) states Prohibition of use of religious institutions for certain purposes for the promotion or propagation of any political activity. But the political parties across the country have used religion to campaign or entire campaign is surrounded by religion. During the 2019 General Election[70] the long running Ayodhya Ram-Mandir dispute was used to gain vote shares which helped Bhartiya Janta Party came into power, also during Uttar Pradesh State Election, the case of Krishna Janma Bhoomi, Ram-Mandir and on the basis of Hindu Rashtra was fought by Bhartiya Janta Party leading to their victory.

Now the 2024 General Elections are around the corners, the BJP again is using Gyanvapi and Uniform Civil Code to collect more votes as much as possible, the Congress used the minorities as there vote share as alleged by Jitendra Singh[71]. Bahujan Samaj Party used the

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[67] "https://www.livemint.com/Politics/OLVG9AuN5b2DWoN0127RCL/Why-Indias-growing-religiosity-is-an-economic-challenge.html" (Last visited on 1th September, 2023)

[68] "https://www.livemint.com/news/india/religious-beliefs-can-pave-road-to-a-nation-s-growth-11573496024503.html" (Last visited on 15th September, 2023)

[69] "THE RELIGIOUS INSTITUTIONS (PREVENTION OF MISUSE) ACT, 1988, Government of India".
"https://www.indiacode.nic.in/bitstream/123456789/15336/1/religious_institutions_%28prevention_of_misuse%29_act%2C_1988.pdf"

[70] "How temple movement helped BJP, HINDUSTAN TIMES".
"https://www.hindustantimes.com/india-news/how-temple-movement-helped-bjp/story-VXQd0EgOAwvY4RStFndbVN.html"

[71] "Congress used minorities as commodity, exploited their sentiments for vote bank politics: Jitendra Singh, TIMES OF INDIA".
"https://timesofindia.indiatimes.com/elections/assembly-elections/assam/congress-used-minorities-as-commodity-exploited-their-sentiments-for-vote-bank-politics-jitendra-singh/articleshow/81747416.cms"

Dalit vote share as its political gain[72], while the Shiv-Sena used Marathi and Hindu propaganda during its early days, while All India Majlis-e-Ittehadul Muslimeen (AIMIM) used Muslims as there vote bank for almost a decade. While parties have always used religion and caste as a weapon of mass vote gain. And places where all these religions are propagated can always become a hot box for religious politics, it raises concern about the motive of the motive of the Government or are they affected by party governing Government.

13. The Conclusion:

Indian as a state has diversity which allows itself to hold according to the contemporary society, maintain peace and harmony as the fundamental nature including different religions, cultures and races. But few at times diversity itself is used to divide the nation on the same fundamental issues like religion. The current research deals with the same issue trying to elaborate and understand The Places of Worship Act 1991 dealing with a positive and comprehending its future aspects.

The places of worship act were enacted to freeze the status of religious places of worship and prohibits the conversion under section 3 of the 1991 act to make sures that they maintain their religious character.

`The acts prohibit any kind of conversion rather religious or for public purpose (this is not widely discussed by the Hon'ble Court), few such disputes as mentioned in the paper was Ayodya Ram-Mandir dispute, Gyanvapi Masjid or the Mathura Janma Bhoomi dispute and other 1,800 (approx.) disputed lands which are and could be used to gain popular votes in the General or state elections.

Section 3 prohibits the conversion of places of worship, which may potentially violate Article 25 of the Constitution by restricting the freedom to practice one's religion through prayer at their place of worship. Section 4(2) terminating pending cases could be constitutionally questionable, akin to a provision in the 1993 Ayodhya act. Numerous pending petitions in the Supreme Court argue that this act violates the provisions of the Indian Constitution. The criticisms of this act have been present since its enactment.

As stated in our Vedic texts 'sarva dharma sambhava', India and its citizens (including politicians and extremist from all religions) should follow the secularism.

India'0s religious beliefs are holding back its economic growth. So, we need to consider whether, religious disputes are truly important in

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[72] "Behind the BSP Victory, ECONOMIC AND POLITICAL WEEKLY". "https://www.epw.in/journal/2007/24/commentary/behind-bsp-victory.html?0=ip_login_no_cache%3Df8bf72e408f70f83458209061ad12a62"

developing countries like India, is questionable. It can be concluded that short Commings and criticism related to this act needs to addressed in comprehensive way, which would lead to making this law a preferred dispute settling laws in the future of India without hampering peace and religious harmony.

Unravelling the Untapped Aspects: UP's Population Control Bill Analysis

Miss Kashish Singhal*

1. Introduction

As per the census of 2011[1], the population of Uttar Pradesh was calculated to be 199,812,341, and as of 2021, it is estimated to have increased to 231,502,578. The growing population of the state coupled with its limited resources account for the urgent need to promote family planning and healthy birth spacing. The State Law Commission of Uttar Pradesh, with an intention to design and implement two-child policy thereby counter the ill effects of growing population of the state, unveiled the "*Uttar Pradesh Population (Control, Stabilization and Welfare) Bill, 2021*"[2] (hereinafter referred to as 'Draft Bill' or 'Bill') on 7 July 2021. The Bill has been drafted with an objective of facilitating the sustainable use of the limited resources, stabilising the increasing population, and ensuring healthy population.

2. Overview of the Bill

Uttar Pradesh is not the first state that has introduced a two-child policy norm to regulate population growth. States like Rajasthan,[3] Maharashtra,[4] Karnataka[5] etc. have introduced two-child policy norm decades before. However, unlike these states that have implemented this policy under various provisions of different acts, Uttar Pradesh has drafted a separate Bill specifically containing the various measures, disincentives and incentives to promote the two-child policy and enforce the same.

i. Incentives and Disincentives

Some of the incentives for complying with the two-child policy norm include additional increments in state government jobs, subsidies for purchasing house site, plot or building house, rebate on charges of utilities, maternity or paternity leaves, a 3% increase in employers'

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[1] INDIA CENSUS.NET, https://www.indiacensus.net/states/uttar-pradesh (last visited Oct. 4, 2021).

[2] The Uttar Pradesh Population (Control, Stabilization and Welfare) Bill, 2021 (July 19, 2021) [hereinafter *Population Control Bill*].

[3] The Rajasthan Panchayati Raj Act, 1994, No. 13, Acts of Rajasthan State Legislature, 1994 (India).

[4] The Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, No. 5, Acts of Maharashtra State Legislature, 1961 (India).

[5] The Karnataka (Gram Swaraj and Panchayat Raj) Act, 1993, No. 14, Acts of Karnataka State Legislature, 1993 (India).

contribution fund, free health care facilities and other benefits as may be prescribed from time to time.[6] Further incentives shall be provided to those public servants who get sterilized after two children.[7] These include increments, soft loans, promotions, and other benefits.[8] The Government shall provide further incentives to those who shall get sterilized after having one child.[9]

On the other hand, on not following the provisions, the non-compliant shall be disqualified from applying for or getting promoted in any state government job, will not be provided with the benefits of state government schemes and subsidies, barred from contesting local bodies elections, barred from being nominated in local authority and the ration card unit for the same will be limited to four members of the family.[10] Moreover, the state government is given the power to notify any other disincentives as they deem fit.[11]

ii. Application and Non-application of the Bill

The proposed bill provides that the Population Control Act shall only apply to married couples provided that the age of the husband and wife is equal to or above 21 and 18 years, respectively.[12] Further, adoption of children would now be restrained by the two-child policy so that if adoption makes the total number of children more than the specified number, it would be contemplated as an infringement of the act.[13]

Although the act envisions a modern and necessary approach of family planning by introduction of compulsory subjects on population control in government schools[14], promoting use of contraceptives[15], compulsory insurance for failure of tubectomy[16], awareness campaigns and massive vaccination drives and other significant measures[17], the legislature has overlooked other relationships impacting the population control. But before delving into these aspects, it is of utmost significance to understand and appreciate the validity of the two-child policy and its recognition by law.

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[6] *Population Control Bill*, § 4.
[7] *Population Control Bill*, § 5.
[8] *Population Control Bill*, §§ 4,5,6,7.
[9] *Id.*
[10] *Population Control Bill*, §§ 8,9,10,11,12.
[11] *Id.*
[12] *Population Control Bill*, § 2.
[13] *Population Control Bill*, §14.
[14] *Population Control Bill*, §24.
[15] *Population Control Bill*, §25.
[16] *Population Control Bill*, §26.
[17] *Population Control Bill*, §23.

3. Validity of Two-Child Policy

i. Constitutionality of Implementation and Enforcement of Two-child Policy

Under Schedule Seven of the Constitution, the concurrent list consists of various subjects over which both the union and state legislatures enjoy jurisdiction. In 1976, Entry 20A was added to the concurrent list of the schedule, to include 'Population control and family planning'.[18] This Entry establishes the power of the Centre as well as State to make legislations controlling the population via two-child policy provided that it is for the welfare of the society.

ii. Judicial Review of the Policy

Indian courts have not had the opportunity to analyse, examine and settle the validity of a nationalised two-child policy norm due to the fact that India has not yet passed the Population Control Bill, 2019 that implements similar two-child policy at a national level with a goal to achieve stabilized population, to alleviate and enhance the potential of the population in a sustainable manner and provide equal opportunities irrespective of gender, age, caste, religion, race, language, residence, etc.[19]

One of the first two-child policies was implemented by Air India, corporation governed by Central Government, where as per the Air India Employees Service Regulations, Air Hostesses were retired on their first pregnancy under contingency. The highest court after hearing the appeal amended the provision to mean "*third pregnancy*" instead of "*first pregnancy*" acknowledging the two-child policy and its necessity in India and observed,

"*When the entire world is faced with the problem of population explosion, it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of overpopulation which, if not controlled, may lead to serious social and economic problems throughout the world.*" [20]

Similarly, various states by virtue of their power under concurrent list have implemented two-child policy in the state government appointments. However, these policies have not gone unchallenged. For instance, in 2003, the question of legality of two-child policy implemented by the Haryana legislature was challenged in the Apex Court.[21] The court after extensive discussion and deeper study of

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[18]INDIA CONST. sch. VII, *amended by* The Constitution (Forty-second Amendment) Act, 1976.
[19]The Population Regulation Bill, 2019, Bill No. 18 of 2019 (July 12, 2019).
[20]Air India v. Nergesh Meerza and Ors., (1981) 4 SCC 335.
[21]Javed and Ors. v. State of Haryana, 2003 SCC OnLine SC 771.

fundamental right upheld held the validity of the two-child policy in India. The case revolved around Haryana Panchayati Raj Act, 1994 that implemented violation of two-child policy as a ground for disqualification from participating in the elections of Panchayat Samiti, Gram Panchayat, or Zila Parishad. The Court observed that the classification proposed by the Act of 1994, differentiating between candidates having upto two children and candidates with more than two children is founded on intelligible differentia. Additionally, the court stressed upon the need to educate the people to recognize family welfare and family planning programmes for better population growth, which was indeed promoted by the 1994 Act. Moreover, the disqualification enacted by the Act of 1994 is merely a disincentive to bar the non-compliant from contesting the elections which is only a statutory right and not a fundamental right.[22] Hence, the Court denied the violation of Article 14 on the grounds of non-arbitrariness.

Furthermore, the Court ascertained that right to progenerate or reproduce as many children as one desires shall not be inferred under article 21, thus constituting a two-child policy with certain dis-incentives would not contravene with the natural right to life. Simultaneously, it is the duty of the state to aid & assist the interest and well-being of the society and equitable distribution of the resources it is vital to limit the population growth and administer the resources amongst the proportional population.[23]

Subsequently, the Court analysed the "*subject to*" condition prefixed to article 25 that reads as, "*25. Freedom of conscience and free profession, practice and propagation of religion — (1)* ***Subject to public order, morality and health and to the other provisions of this Part,*** *all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.*"[24]

After examining the same, the court weighed that since the objectives and intent of the given policy include social welfare, stabilizing population, promoting healthy child-birth etc. which altogether forms an essential part of public order in the society, morality of the nation and aggregate health of the people, the two-child policy cannot be said to be violative of Article 25.

4. Limitations of the UP's Population Control Bill

i. Children born to partners in live-in relationship

Indian society is developing towards a new culture by implementing progressive norms and beliefs. One of the prevalent ideas in Indian society is the unique pattern of living where two individuals who are involved romantically or sexually cohabit together

[22] *Id.*
[23] INDIA CONST. art. 38, 39.
[24] INDIA CONST. art. 25.

under one roof without marriage, infamously known as live-in relationships. Gradually and slowly, people are broadening their mindsets and are accepting the culture of live-in relationships and the idea of pre-marital sexual relationships. This is evident from the various judicial decisions which have legalised the concept of such relationships for social acceptance.

i. Legality of live-in relationships

The observance made in the case of *Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Blahamy*[25] by Privy Council can be interpreted to be the first judgment validating live-in relationships where the council stated that an arrangement between two adults for an extended period shall have the same status as that of a legitimate married couple. Later in 2006, the Supreme Court conclusively upheld the lawfulness and validity of Live-in Relationships by observing that an adult female is free and independent and can choose to reside or live with anyone she likes. [26] Such relationships between two adults who consent to live with each other does not amount to any offence despite being perceived as immoral.[27] Further, in another judgment, the Apex Court while dealing with live-in relationships where two consenting adults were residing together for a longer period, the court concluded,

"*The live-in- relationship if continued for such a long time, cannot be termed in as "walk in and walk out" relationship and there is a presumption of marriage between them.*" [28]

ii. Legitimacy of child/children born to partners in live-in relationship

Despite the lawfulness of such relationships conclusively established by Indian courts, there is no statute that regulates the matters arising from live-in relationships. In the absence of a legislation, the Indian judiciary has time and again come to the rescue of children born out of such relationships to ensure that no child is disregarded for being born out of live-in relationships. While accepting and legitimising the position of such children, Indian Courts have reasoned that once a presumption is made with regards to the marriage of two individuals living together, unless such presumption is rebutted, every child begotten to aforesaid partners shall be recognized as legitimate.[29] The court re-affirmed this ratio in *Challamma v. Tilaga & Ors*[30] that children progenerated during

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[25]Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Balahamy, 1927 SCC OnLine PC 51.
[26]Lata Singh v. State of U.P. and Anr., (2006) 2 SCC (Cri) 478.
[27]*Id.*
[28]Madan Mohan Singh and Ors. v. Rajni Kant and Ors., (2010) 9 SCC 209.
[29]S.P.S. Balasubramanyam v. Suruttayan, (1994) 1 SCC 460.
[30]Challamma v. Tilaga and Ors., 2009 SCC OnLine SC 1406.

relationships in the nature of marriage are to be considered as legal heirs under Indian Succession Act, 1925.

Thence, as stated in various judicial decisions every child born to a couple living together but not in a "*walk in and walk out relationship*"[31], shall be legitimate and will be granted rights and duties as that of a legitimate child. Despite the settled law, the state legislature of Uttar Pradesh has failed to consider these couples under the ambit of the population control Bill.

Moreover, as per a 2018 survey on live-in relationships, more than 80% of the surveyed Indians support the notion of live-in relationship and among these 26% would choose to live-in instead of marriage if they could.[32] Therefore, considering that a significant percentage of population will choose to live in such relationships, it is extremely crucial to anticipate children born out of such relationships and its effect on population control.

ii. Children Born Out of Rape, Marital Rape, Accidental Pregnancy

The Bill fails to comprehend the possibility of children born out of marital rape or rape, thereby excluding eligible women from being a part of government jobs and contesting the elections. Recently, the Supreme Court has interpreted the pregnancy termination rules[33] that provides termination of pregnancy right to "*survivors of sexual assault or rape or incest*" to include married woman within the scope of survivors thereby making marital rape a ground for abortion similar to that of rape under the Act.[34] Although sensitive, but the circumstances of rape and marital rape are also probabilities for child birth.[35] Therefore, a third child born out of rape or marital rape should be excluded from the two-child policy and an exemption from disincentives should be granted to such women in order to not protect these women from undesired disqualifications. This has to be critically contemplated with the statistics published by National Crime Records Bureau that reveals Uttar Pradesh as the third state with highest rape cases in India with 2,845 cases reported in year 2021 alone and they are increasing.[36]

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[31]*Id.* at 28.
[32]Bulbul Dhawan, *80% Indian women support live-in relationship:Inshorts Poll*, INSHORTS (May 22, 2018, 8:37 PM), https://inshorts.com/en/news/80-indian-women-support-livein-relationship-inshorts-poll-1527001664458.
[33]Medical Termination of Pregnancy Rules, 2003, G.S.R. 485(E), r. 3B(a) (India).
[34]X v. Health and Family Welfare Department, 2022 SCC OnLine SC 1321.
[35]*Id.*
[36]Ministry of Home Affairs, National Crime Records Bureau, *Crime in India 2021,* (Aug. 2021), https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1696831798CII2021Volume1.pdf.

Consequently, child born out of rape, marital rape, or accidental pregnancy who were persuaded by doctors to not abort their children after 24 weeks' gestation period due to medical risks should be excluded from such a policy. These medical risks have serious implications on woman like uterine rupture, incomplete abortion which leads to need of surgical intervention, haemorrhage and blood loss, infection and many more and hence they should be exempted from the dis-incentivisation.[37] The objective of the act is to provide for a healthy population growth and excluding these scenarios will ensure well-being of women in the state of Uttar Pradesh.

iii. Procreation by Minor Husband and Major Wife

Except as provided by personal laws, the ages of consenting male and female to constitute a valid marriage should be 21 years and 18 years respectively.[38] However, if a minor (male below 21 years and female below 18 years of age) is permitted to contract a marriage as per his/her personal laws then such marriage is considered as a valid marriage.[39] Moreover, in India a child born to a couple with minor husband and major wife or otherwise out of child marriage is regarded as a legitimate child.[40] Furthermore, since the majority age under Indian Penal Code, 1860 is 18 years for male , the act of sexual intercourse shall not be accounted for the offence of rape.

Considering the validity and legitimacy of children born out of marriages between a female above 18 years and male below 21 years, the legislature should have anticipated the impact of such children on population control.

Illustration: Q, a man of 18 years of age, marries P, a woman of 18 years. Although the marriage between Q and P will be considered as child marriage/void & illegal marriage as per the law but a child born to Q and P out of consensual sexual intercourse will be considered legitimate by virtue of section 6 of Act of 2006.[41] And the present case will not be covered under section 375 of IPC because the sexual intercourse was between two consensual adults. Considering, if the couple gives birth to more than two children they would not be in violation until the husband turns 21 as per the proposed Bill.

After scrutinizing the above illustration, it can be stated that it is crucial to administer children born out of child marriage via the population control Bill for the statistics show that one in every five boys

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[37]National Guideline Alliance (UK), *Medical Abortion after 24 weeks' Gestation*, NATIONAL LIBRARY OF MEDICINE (Sept., 2019), https://www.ncbi.nlm.nih.gov/books/NBK561113/pdf/Bookshelf_NBK561113.pdf.
[38]Shoukat Hussian v. State of Punjab, 2021 SCC OnLine P&H 333.
[39]*Id.*
[40]Prohibition of Child Marriage Act, 2006, § 6, No. 6, Acts of Parliament, 2007 (India).
[41]*Id.*

is married before the legal age of 21 years in India.[42] Hence, there are equal chances of violation of such policy by those who are not 21 years old as by those who are 21 years of age.

iv. Restraints to Adoption

In 2014, the Supreme Court recognized the legal right to adopt of every person irrespective of their religion.[43] The ratio of the judgment allows every person irrespective of being a Muslim, Parsi, Christian, Jew or of any other faith to adopt under the secular law of adoption of India[44] with the help of the Child Adoption Resource Authority established by the Central Government.[45] Likewise, some personal laws like Hindu personal laws[46] permit customary adoption where every Hindu has a right to adopt and give a child in adoption if they are competent and follow the recognized custom.

The Bill contravenes, infringes and restrains this legal right of adoption by bringing the adoption of two or more children under the ambit of the violation of two-child policy.

S. No.	Number of Child/Children from 1st Pregnancy	Number of Child/Children from 2nd Pregnancy	No. of Children Adopted	Whether the couple is in contravention of the act
1.	0	0	2	Not in Contravention
2.	0	0	3	In Contravention
3.	1	0	2	In Contravention
4.	1	1	1	Not in Contravention
5.	1	1	2	In Contravention

Table 1: Table representation of illustrations given in the draft Bill

Consider scenario no. 2 and 4 of the aforementioned table. The total number of children in both the cases violates two-child policy however, in scenario number 2 all three children are being adopted and in scenario no. 4 only one child is being adopted. The provision for restricting the adoption to one child in case the couple already has two

[42]UNICEF, *Ending Child Marriage - A profile of progress in India*, UNICEF (2017), https://www.unicef.org/india/media/1176/file/Ending-Child-Marriage.pdf. https://www.unicef.org/india/media/1176/file/Ending-Child-Marriage.pdf.
[43]Shabnam Hashmi v. Union of India & Ors, (2014) 4 SCC 1.
[44]Juvenile Justice (Care and Protection of Children) Act, 2015, No.2, Acts of Parliament, 2016 (India); Adoption Regulations, 2017, G.S.R. 3(E) (India).
[45]CENTRAL ADOPTION RESOURCE AUTHORITY, http://cara.nic.in/ (last visited Aug. 27, 2021).
[46]Hindu Adoption and Maintenance Act, 1956, No.78, Acts of Parliament, 1956 (India).

children, and for the adoption of two children in case the couple does not have any children is unreasonable, irrational, and arbitrary and abuses article 14.

One has to give due regard to the objectives of the population control Bill which is to limit and stabilize the growing population and advance the welfare of the people. However, adoption of child/children neither increases the population nor does it destabilize the population. It rather promotes the de-accumulation and de-concentration of resources[47] and helps in the development and welfare of the society.[48] Therefore, the disincentive imposed on adoption should be removed, and the process of adoption must be supported by excluding any number of children from adoption.

In 2016, a report by UNICEF calculated the number of orphans in various countries.[49] The statistics showed that India alone has approximately 29.6 million orphans living in 2014. The number has been increasing since then and has risen much due to the pandemic. During the years of pandemic, the number of orphans and abandoned children has increased by 30,071 as per data submitted by different states.[50] The most affected states include Uttar Pradesh, where approximately 3,172 children either lost both of his/her parents or one parent, or were deserted/dumped owed to the COVID-19 pandemic.[51] Despite the increasing number, the Uttar Pradesh government plans to pass and enforce a Bill that would punish those who were protecting children's right to life and family. Such people would not only be barred from government jobs but would also not be allowed to contest elections. An elective representative is believed to help develop the nation and benefit society. Benefiting the children of society by adopting them and providing them with the essentials of life is the greatest help in the country's development. It is a mockery of not just law but also morality that it restrains a good deed like adoption.

5. Conclusion

Various countries have adopted two-child policy to decrease the growth rate of their population including Singapore, China, Vietnam, Iran, etc. With the help of various family planning measures and disincentives to establish, implement and enforce a two-child family norm in the country, these countries have successfully stabilized and decreased their population growth. For instance, after Singapore

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[47] *Id* at 23.
[48] *Id.*
[49] UNICEF, The State of the World's Children 2016, UNICEF (2016), https://www.unicef.org/media/50076/file/UNICEF_SOWC_2016-ENG.pdf.
[50] *Over 30,000 children orphaned, lost a parent or abandoned due to COVID-19, NCPCR tells SC*, THE ECONOMIC TIMES, Jun. 7, 2021, https://economictimes.indiatimes.com/news/india/over-30000-children-orphaned-lost-a-parent-or-abandoned-due-to-covid-19-ncpcr-tells-sc/articleshow/83308281.cms.
[51] *Id.*

implemented two-child policy in the year 1972, the state's fertility rate effectively reduced to 14.8 births from 23.1 births per 1,000 residents from the year 1972 to 1986.[52] Likewise in Vietnam, the two-child policy norm assisted in reduction of the number of average births per woman by 0.2 births from 1989 to 2009.[53] Therefore, it is evident that the two-child policy is an efficient instrument to control and stabilize population. However, the law commission of the state has patently failed to adopt a plausible and justifiable approach towards drafting this paramount law for the evolving Indian culture and social settings.

The laws of a country depict what society follows and believes in, and not adopting laws appropriate to the societal changes is an approach a legislature should refrain for effective functioning and proper justice delivery. Population Control Bill is a step forward that should be implemented with a realistic vision and reasonable provisions as evolving laws assist in ensuring the peaceful existence of new norms in the long run.

[52]Lim Tin Seng, *Two Child Policy*, SINGAPORE INFOPEDIA (Nov. 22, 2016), https://www.nlb.gov.sg/main/article-detail?cmsuuid=0613c852-aed1-4b29-81fb-faf7de447092.

[53]Anh P. Ngo, *Effects of Vietnam's two-child policy on fertility, son preference, and female labour supply*, 33(3) JOURNAL OF POPULATION CONTROL 751 (2020), https://doi.org/10.1007/s00148-019-00766-1.

Election Laws and Information Technology Law: Testing the Sufficiency of the Legislative Framework for Free and Fair Elections in India

Sarath Mohan*

1. Introduction

The use of digital technology for elections has various complexities which need to be addressed. Technology and its complexity are one thing, and the applicability of legal principles to this technology is another issue. The legal framework to address the technological aspect of the conduct of elections is a major issue that needs to be researched and studied. For instance, in India, elections rely on Electronic Voting Machines (EVMs) for casting and counting votes. The digitalisation of elections could bring various difficulties about the fairness and freeness of elections and their conduct. How far is the legal framework capable of addressing the use of technology in the conduct of elections is a moot question addressed in this article.[1]

The quintessential question in the conduct of elections is whether the voters trust the polling process. This question transpires about whether the voters trust the technology used in elections. Even if the voters trust the technology, what are the legal safeguards placed by the law of the land to ensure the conduct of free and fair elections, especially when digitalisation of elections is the norm. This is the focus of this article. This paper aims at the digital technology used in elections, its legal framework and how far the existing laws can accommodate the technology and digitalisation and yet deliver a free and fair electoral process.

The use of technology can also be more susceptible to corruption if not properly implemented. The technology could break down in the long run as it relies upon complex procedures that could be manipulated, which could increase suspicion or loss of trust from the general public. So, the digitalisation of the electoral process, which includes voter registration, verification, the conduct of the poll and the declaration of results, should be done with proper care and sufficient research to ensure that the process can be monitored. Checks and

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[1] *Id.*

balances are to be introduced to ensure free and fair elections. [2]The quality of democracy in India and the independence of the Election Commission of India (ECI) is also a factor that needs to be identified to go for a full-fledged digital election in India.[3]

There is research on the electoral process which illustrates that digitalisation of the electoral process could bring more freeness and fairness to the electoral process.[4] This being true, technology also brings other problems amid the electoral cycle. For instance, technology is possible at a cost, including the cost of writing a code, programming the software, procuring the hardware, maintaining and protecting the servers, maintaining digital registers and the ease of use among the election officials and the voters. These concerns must be addressed to inculcate the digitalisation of elections in India.[5]

Transparency of elections is another advantage of the digitalisation of elections. However, this must be critically studied before implementing a full-fledged digital election in India. The independence of Electoral bodies and the supervisory power of the body to ensure free and fair elections are crucial when it comes to digitalising elections. As with digitalisation, there also arises possibilities of manipulations.

Voters' trust is another concern when discussing digitalising elections and the electoral process. There is always a threat of rigging due to potential political involvement in submerging technology and digital processes. These concerns, along with the high cost of conducting elections, are factors which need to be addressed before the digitalisation of elections. However, looking into the possibilities of new technological additions and reforms in elections is pertinent and desirable. This has to be tested along with the legal framework regarding the same. This paper focuses on the possibilities of digital elections and the reforms needed in the legal framework to ensure digital elections in the Indian context.

2. International Standards in Digitalising Elections

E-Voting

E-voting has raised many concerns.[6] These include the claim of the Election Commission of India that EVMs are tamperproof. To address the issue of E-voting, let us look at the international standards present to use E-voting freely and fairly. The Council of Europe prescribes

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[2] Nic Cheeseman, Gabrielle Lynch & Justin Willis, *Digital Dilemmas: The Unintended Consequences of Election Technology*, 25 DEMOCRATISATION 1397, 10 (2018).
[3] See *infra* note 18.
[4] See, CERTIFICATION OF ICTS IN ELECTIONS, See, (2019); Uzma Jafar, Mohd Juzaiddin Ab Aziz & Zarina Shukur, *Blockchain for Electronic Voting System—Review and Open Research Challenges*, 21 SENSORS 5874 (2021).
[5] WILLIS et al. *supra* note 7.
[6] Dr. Subramanian Swamy v. Election Commission of India (2013) 10 SCC 500(India).

certain international E-voting standards, including electronic voting machines, ballot imprints, digital markers, etc.[7] The recommendation is based on the importance of the right to vote in a democracy, and all election processes should confirm the universally accepted principles of democracy and democratic elections.[8] Some of the areas addressed by this recommendation are enabling voters to cast a vote from a place other than the polling station.[9] This facilitates the participation in elections of citizens eligible to vote and residing abroad during elections. This can increase voter turnout. Using new technologies as a medium for communication and furthering the cause of democracy could reduce the cost of elections and electoral management, delivering reliable voting results effectively.[10]

If the implementation and use of technologies in elections are proper, it could advance democratic principles, adding credibility to elections and building trust in electoral management. Also, the technology could further improve the methodologies of election management bodies, election observers, international organisations and standardising bodies to apply reform to the electoral process.[11]

The Complexity in Use of Technology in Elections

Self-verification and re-verification are the inherent nature of Information and Communication Technology. However, elections and E-voting are different because it is difficult to track and monitor the transactions on EVMs. End-to-end verifiable E-voting systems can be quite complicated and costly. This highlights the importance of paper trails for the voter to ensure the vote is cast for the intended candidate in the election.[12] The technology generally aims at transparency, but the very nature of E-voting and the necessity to maintain secrecy of voting has put serious hurdles to transparency. Another issue concerns the non-availability of certification agencies or agreed international standards or certification concerning the standardisation of EVMs.

Some of the E-Voting standards can be classified as[13]

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[7] See Recommendation CM/Rec (2017)5 of the Committee of Ministers to member States on standards for E-voting, https://rm.coe.int/0900001680726f6f (adopted by the Committee of Ministers, on Jun. 14 2017, the 1289th meeting of the Ministers' Deputies).

[8] See PETER WOLF, RUSHDI NACKERDIEN & DOMENICO TUCCINARDI, INTRODUCING ELECTRONIC VOTING: ESSENTIAL CONSIDERATIONS (2011).

[9] WILLIS et al. *supra* note 7.

[10] *Id.*

[11] *Supra* note 13.

[12] *Id.*

[13] *Supra* note 12.

a) Universal Suffrage

E-voting standards emphasise the need for the interface to be easy to understand. Also, it stresses a person's ease of use of the machine. It should be designed considering the practicality of use by all, including people with special needs. The voters should feel they are voting in a real election using E-voting.

b) Equal Suffrage

There should be equal dissemination of voting information, which should be presented to all voters and equally accessible to all. When electronic and non-electronic voting methods conduct the election, the aggregation of votes shall be done with a reliable method. There should be a unique identification system for voters to distinguish one person from another. The voter should only be given access to the E-voting system after confirming the right to vote of the person. The E-voting system should ensure that only one vote is cast for a particular candidate. There should be enough safeguards to ensure that the E-vote cast is stored in an electronic ballot and, without manipulation, is counted and included in the election result.

c) Free Suffrage

The E-voting system should provide sufficient information to the voter and ensure the Ballot is authentic and tamperproof. E-voting systems should provide authentic information to the voter and should guide the voter to vote with adequate confidence. The voter should not feel that the exercise of voting was precipitately done. There should be a mechanism to ensure that the vote cast by the voter is valid. There should be a confirmation given to the voter concerning the vote cast by the voter. The E-voting system should provide evidence that the vote is accurately included in the election result, and this evidence should be verifiable by a system independent of the E-voting system.

d) Secret Suffrage

E-voting should be arranged so that the the secrecy of the vote can be ensured. The E-voting system shall store only the personal data for the conduct of E-election. Special care should be taken to ensure no unauthorised access to EVMs or electoral data occurs. Since data is vulnerable when placed electronically, the election management bodies must ensure that the data is protected and that no unauthorised use or misuse of this data occurs. The E-voting system, should take special care to ensure that there is non-disclosure of the number of votes cast until after the closure of the electronic ballot box. The information regarding the number of votes shall be disclosed to the public only after the end of the voting period. Votes should remain anonymous, and there should be a mechanism to check that reconstructing a link between the unsealed vote and the voter is impossible.

e) Transparency

All stages of the election should be transparent, and the voters should be informed about the steps that need to be taken by the voter to participate in the election, the functioning of the electronic voting system, and other modalities necessary for the voter to take part in the election process. The elements used in the E-voting system, like the EVMs and other electrical and mechanical components used, shall be disclosed for verification and certification if necessary. Any observer within the framework of the nation's election laws shall be permitted to observe and comment on the election.

f) Accountability

It shall be the national government's duty to ensure that technical evaluation and certification requirements are done keeping in mind the international standards of election and democratic principles. The access to data from E-voting shall only be to the election management bodies, which should be well regulated. The standards also prescribe that an independent body shall be responsible for constantly evaluating the E-voting system and testing and validating any technological component introduced into the system. The E-voting system should be auditable, and the audit system should be transparent and should constantly report on potential threats and issues.

g) Reliability

It is the responsibility of the election management body to ensure that the elections are conducted in compliance with the international standards recognised and necessary for free and fair elections. The election management body must ensure that the elections are reliable and secure. There should be clear regulations regarding who could access the data and the critical infrastructure of elections. The E-voting system must identify the irregularity and inform the electoral management body immediately.

These are some standards the Council of Europe issued to its members while conducting elections. These standards also consider the possibility of encrypting the votes and storing them along with the requirements of I-voting. For this paper, these standards are examined by confining to the standards of conduct of elections in India, the legal framework in India for the conduct of elections and the use of Information technology and the law regarding the same. These standards, however, are based on internationally accepted principles of democracy and elections and, therefore, become quintessential for reference towards reform of the electoral process in India.

3. Some Guidelines and Organisational Commitments [14]

The legal framework for the conduct of an election should include procedures for implementing E-voting from its inception and operation to the counting of votes and the declaration of results. The legal framework should include rules for determining the validity of E-voting. It is also necessary that the law provides for the rules dealing with issues and discrepancies that could happen from using Electronic devices in the conduct of elections. This is crucial for ensuring the fairness of elections. When the vote is cast electronically and a subsequent paper trial like the VVPAT[15] System in India is used, then it should be made clear by rules and regulations as to which vote would be used if there is a discrepancy, and a recounting should be done. The legal framework should also include storing and destroying data with proper legislation. Further, provisions should be provided for international and domestic observers during the electoral process.

4. E-voting in India

The Election Commission of India is working with IITs in India to develop a new technology that focuses on mobile voting.[16] This works on the principle of blockchain technology, where voter identification and its authorisation are done using a multi-layered IT-enabled system using biometrics and web cameras. This is envisaged to bring more voters to the electoral process, thereby bringing meaning to the elections in a democracy. This process involves the generation of a blockchain-enabled personalised e-ballot paper after establishing the voter identity. When the voter casts the vote , the Ballot will be securely encrypted by generating a blockchain hashtag. This hashtag will be stored and sent to the stakeholders of election, including the political parties, candidates, etc.[17] The encrypted, remote vote could be validated again at the counting stage to ensure it was not decrypted or tampered with. The voter would have to reach a predesignated centre for voting, which the Election Commission of India would regulate. This would enable voters across India and abroad to vote from any place to any constituency in India.[18] There needs to be changes in the electoral laws to accommodate this type of election, and this paper looks at the

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[14] Ad hoc Committee of Experts on Legal, Operational and Technical Standards for E-voting, 1289th meeting, Jun. 14 2017, Democracy and political questions, Council of Europe, https://rm.coe.int/168071bc84.

[15] As per the direction of the Election Commission of India, a Verifiable Paper Audit Trial has been used in all polling stations from the 2019 General Elections onwards, giving 99 per cent accuracy with the EVM data.

[16] ET Government, *Election Commission of India looks to develop mobile E-voting technology to track down 'lost votes'* ECONOMIC TIMES (Feb. 18, 2020), https://government.economictimes.indiatimes.com/news/digital-india/election-commission-looks-to-develop-mobile-voting-technology-to-track-down-lost-votes/74171792.

[17] *Id.*

[18] *Id.*

adequacy and inadequacy of both the Representation of the Peoples Act and the Information Technology Act in this regard.

5. Indian legal framework on the conduct of digital elections

"Supporters believe technology can solve most elections-related problems. Critics believe it can dilute the essence of democracy. The challenge is to find an answer that lies in between—one that aims to apply appropriate technology to promote free, fair and credible elections."[19]

The legal framework concerning elections and the electoral process in India was formulated more than seven decades ago. The intent of the Parliament is reflected in the statutes.[20], which attunes to the conduct of elections in a fair manner. The constitutional provisions[21], authorises the superintendence and management of election to the Election Commission of India.[22]The Constitution guarantees the inclusion of all eligible voters in the electoral roll.[23]and stresses the election to the House of People and the legislative assemblies of States.[24] The Constitution also empowers the Parliament and the Legislature of a State to make provisions concerning elections.[25] The constitutional provisions also ensure the independence of the Election Commission of India.[26]

The allocation of seats in the House of People and state assemblies, delimitation of Parliamentary and Assembly Constituencies, and the preparation of electoral rolls and their procedures are provided through the Statute.[27] Statutory provisions are also made for qualification and disqualifications[28], notification for general elections[29] and the registration and conduct of political parties[30] in India.

The Statutory provisions concerning the conduct of elections deal with the nomination of candidates, election agents and their appointment, the general procedure at elections, the processes and behaviour during the poll, the counting of votes, publication of election results, declaration of assets and liabilities and election expenses.[31]

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[19] Mr Aneas C. Chuma, UNDP Resident Representative, Kenya, addressing the opening session of the ICT thematic workshop,(Mar. 5, 2012), https://www.ec-undp-electoralassistance.org/wp content/uploads/2018/08/undp-contents-publications-thematic-workshop-ICT-elections-management-English.pdf, also see *infra* note 39.
[20] See, Representation of People's Act 1950 and Representation of People's Act 1951.
[21] Constitution of India, Part XV.
[22] *Id.* Art 324.
[23] *Id.* Art 325.
[24] *Id.* Art 326.
[25] *Id.* Art 327.
[26] See, Anoop Baranwal v. Union of India (2023) SCC ONLINE SC 216. (India)
[27] Representation of People's Act 1950.
[28] Id. Part II, Qualifications and Disqualifications.
[29] Id. Part III, Notification of General Elections.
[30] Id. Part IV A, Registration of Political Parties.
[31] Id. Part V, Conduct of Elections.

The disputes regarding elections and the manner of resolution of election petitions are also detailed in the Statute. The statutes also elaborate on the details of corrupt practices and electoral offences.[32]

6. Electronic Voter Registry

India, at present, does have an electoral roll, and it can be found in the National Voter's Services Portal, where a citizen can register as a new voter or register as an overseas voter, edit the details in the electoral roll and migrate or transport from one assembly constituency to another.[33] However, this is independently managed by the Election Commission of India, and since India still needs a national citizen database, actively registering voters becomes cumbersome. The voter register data and the process could be the most controversial segment in carrying out elections.[34] The voter registry should be transparent and take into confidence all the stakeholders of democracy and election.

The voter registry should be continuous; otherwise, for each major election, voter registration should be continuous, which is a tedious process. It is better for transparency and legitimacy to have a national registry for all major life events such as name, date of birth, date of death and citizenship status, which could give a national identity to the voter, and this data can be sourced to the voter's register. Getting information from the voter's registry could be cost-effective for the Election Commission. However, the Election Commission should ensure that the voters' lists are open to scrutiny by the stakeholders and that claims and objections are addressed satisfactorily. In the Indian context, the Election Commission does the voter registration exercise through its mechanism and institutional arrangements with the state.

7. Legal Framework of Voter-Registration

a) Constitution of India 1950

The superintendence of elections, its control and the regulation of the preparation of the electoral rolls and the conduct of all elections is vested under the Election Commission of India.[35] Even though the Constitution has stipulated for a law to be made by the Parliament to ascertain how the Election Commissioners are appointed, the Parliament has yet to make a law. The Constitution prohibits discrimination on the grounds only of religion, caste, sex, race or any

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[32] Id. Part VII. Also See, Indian Penal Code, Chapter IX A, Offences Relating to Elections.
[33] See https://voters.eci.gov.in/ for registration of voters and related services of the Election Commission of India.
[34] See Summary Report, Thematic Workshop on Information Technology and Elections Management: Informed Decisions for Sustainable Outcomes, Joint Task Force on Electoral Assistance, European Commission United Nations Development Programme, Mombasa, 5-9 March 2012.
[35] Constitution of India 1950, Art. 324.

of them.[36] The Constitution puts the matter of election in the Union List, thereby giving the Central government the authority to conduct elections.[37]

b) Representation of Peoples Act 1950

The Representation of Peoples Act provides an electoral roll and does not represent a digital voters register. The Statute provides for the regulation of the electoral roll for every parliamentary constituency vested with the Election Commission of India. The electoral roll shall consist of the electoral rolls for all the assembly constituencies comprised within that parliamentary constituency, and it shall not be necessary to prepare or revise separately the electoral roll for any such constituency.[38] The latest amendment act, [39] provides for the inclusion of the power for the electoral registration officer to require any person to furnish the Aadhaar number given by the Unique Identification Authority of India as per the provisions of the Aadhaar(Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016.[40] Thus, there is a provision, now included in the Election laws of India, to include or use the database of Aadhar for the voter registry and simultaneously the data in Aadhar to be used for the Electoral roll.

The electoral roll for the parliamentary constituency is now drawn from the electoral rolls of the assembly constituencies, and no separate preparation for the parliamentary constituency is needed.[41] A diligent reading of the Representation of Peoples Act 1950 makes it clear that the mode of electoral roll is within the purview of the Election Commission of India.[42]The Act provides that there shall be an electoral roll and thus leaves it to the discretion of the Election Commission of India to frame rules regarding Elections.[43] The qualifications for enrolment in the electoral roll can be understood from the disqualification provisions given in the Act.[44] Further, the Act provides that no person shall be registered in multiple constituencies.[45] Furthermore, no person shall be entitled to be registered in the electoral roll for any constituency more than once.[46] The availability of a digital voter registry could ensure that these provisions are strictly adhered to.

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[36] *Id.* Art. 325.
[37] *Id.* Entry 72, List I, Seventh Schedule.
[38] Representation of Peoples Act 1950, See Section 13 D.
[39] See generally, The Election Laws(Amendment) Act, 2021.
[40] The Election Laws(Amendment) Act, 2021, Section 4.
[41] Representation of Peoples Act, 1950, Section 13D
[42]*Id.* Section 15.
[43] *Id.*
[44] Representation of Peoples Act, 1950, Section 16.
[45] *Id.* Section 17.
[46] *Id.* Section 18.

c) Representation of Peoples Act, 1951

The Representation of Peoples Act provides the right to vote only to those whose names are entered in the constituency's electoral roll in which the person is entitled to vote.[47] This brings in the significance of a voter registry and the use of the voter registry in determining the right to vote. The electoral roll is to be considered the starting point of the right to vote for a person. If the voter registry forbids a person to enrol in the registry, that person, by default, would not be eligible to vote. Therefore, the matters concerning entry to the electoral roll biometrics are a significant element of the right to vote.

d) The Conduct of Election Rules, 1961

The electoral roll of a person is the serial number which is assigned to that person in the entry in the Electoral roll, which contains the person's identity and the constituency in which the person is entitled to vote. The provisions concerning the conduct of elections and the procedural aspects are well laid down in the rules.

Thus, it is up to the Election Commission to ascertain how the electoral rolls will be prepared. This is a crucial and very important document in the conduct of elections, and its significance is heightened by the fact that only a person who has enrolled in the electoral roll would be eligible to vote in an election. Thus, only a person enrolled in the electoral roll could exercise the democratic right and participate in the democratic process.

Now, let us look at the legal framework for preparing a digital voter registry and its challenges by examining the provisions of the Information Technology Act 2000 and how it could override some of the Representation of Peoples Act provisions in the conduct of digital elections.

e) Information Technology Act 2000

Let us now look at the scope and ambit of the Information Technology Act[48] Moreover, the author feels that the provisions of this Act would have overriding effects when it comes to electronic data and electronic records relating to elections. First, let us look at the effect of the Information Technology Act on Voters' Registration.

The new amendment to the Representation of the Peoples Act[49] provides for the inclusion of Aadhar, and the provisions of the Aadhar Act thus become relevant to the Representation of Peoples Act 1951. For instance, the Aadhar number, which is used for identifying and

[47] *Id.* Section 62.
[48] See, generally, the Information Technology Act 2000.
[49] See *supra* note 44 and 45.

linking with the electoral roll, if stored in electronic form[50], then it has the same meaning of "electronic form" as assigned to in the Information Technology Act.[51] The Information Technology Act was drafted to provide for and promote the efficient delivery of Government services using reliable electronic records.[52] This is the only legislation that caters to information technology and its practical use in the Indian Context. The Act provides for the definition of "electronic form" concerning information. It defines it as any information generated, sent, stored or received in media, magnetic, optical, computer memory, microfilm, computer generated micro fiche or similar device.[53] This includes the data or information which is stored while collecting information about the electoral roll and its data entry. This also could be read into the use of EVMs and other units used during the poll and at the counting of results, which will be addressed in the later paragraphs below. Information includes images, sound, voice, codes, computer programs, software, etc.[54] Another possibility of transforming the present data to a digital voter registry could be inferred from the Information Technology Act, which provides for the legal recognition of electronic records.[55] A non-obstante clause in the section provides for overriding any other law that seeks a written, typewritten or printed form. The author feels that this provision in Information Technology is sufficient to incorporate and maintain a digital voter register. The Act further provides for filing any form, application or any other document with any office, authority, body or agency owned and controlled by the government in digital form.[56] The Act is also sufficient to address the International Standards of E-voting, as described in the initial part of this paper, by incorporating provisions for digitalising elections in India.[57] An exclusive provision under the Information Technology Act ascertaining its overriding clause exists.[58]

8. Digital voting and result management

The use of technology in digitalising the voting and counting of votes does come with many complexities, as it touches the core of the electoral cycle. Here, the emphasis should be on building trust in the voters and ensuring that the digital technology is reliable. E-voting, as discussed in the introduction of this paper, is considered a tool for advancing democratic principles and trust in the electoral management system. It adds credibility to election results and

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[50] Aadhaar(Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016, Section 4.
[51] Information Technology Act 2000, Section 2(1)(r).
[52] See, Information Technology Act 2000, Preamble.
[53] *Supra* note 56.
[54] Information Technology Act 2000, Section 2(v)
[55] *Id.* Section 4.
[56] *Id.* Section 6.
[57] *Id.* Section 7 and 8.
[58] *Id.* Section 81

increases the overall efficiency of the process. [59]Electronic voting systems have complex functionalities, including encryption, data exchange, security measures, etc. [60] The first part would be an electronic voter registry enabling or authenticating eligible voters to record and cast their votes.[61] There is also a poll interface, which is available only to the election managing bodies, which includes resetting the vote count before the poll, closing the poll and printing or transmitting the results. Special and additional features like braille or audio input-output devices could also be inculcated for people with special needs. In E-voting, interfaces exist for the resulting output, where the results are counted and tabulated in the presence of the stakeholders of democracy. There can be additional usage of printers that print a voter-verified paper audit trail (VVPAT), which gives the voter a sense of assurance that the vote is cast for the right candidate. The voting machines could also provide for the result transmission system, tabulation of results and finally, the publishing of election results on websites and other electronic and traditional modes.[62]

E-voting, as discussed in the introduction of this paper, is fast, efficient, and accurate. E-voting reduces human intervention and fraud in polling stations and during the transmission. E-voting also provides for long-term cost savings by using I-voting.[63]

E-voting also has some disadvantages, like lack of transparency, certifications, and a potential violation of the secrecy of the vote when the same system performs both voter authentication and vote casting. The risk of hacking and insider manipulation is high—reduced level of control by the election management bodies due to high technology dependence. In E-voting, there is no possibility of recounting. The possibility of conflict with the existing legal framework is also there when implementing and executing E-voting. There is also the possible loss of trust, which is crucial regarding voting and democratic principles.[64]

The typologies of E-voting also differ from place to place. It can be a Direct Recording Electronic (DRE) voting machine with or without the use of VVPAT, providing physical evidence of the vote cast. OMR systems scan the ballot papers with a centralised scanning system or scanning from polling stations. There are also internet voting systems that are sparingly used because of the possibility of manipulation from the voter's end and the lack of security measures to ensure the secrecy of votes cast.[65]

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[59] See WOLF, NACKERDIEN, AND TUCCINARDI, *supra* note 14.
[60] *Id.*
[61] *Supra* note 64.
[62] *Id.*
[63] WOLF, NACKERDIEN, AND TUCCINARDI, *supra* note 14 at 10.
[64] *Id.* at p 11.
[65] *Id.*

In the Indian Context, E-voting takes place in a controlled environment, which means that it is an electronic equivalent of traditional paper-based voting system in polling stations. This eliminates the concerns about the secrecy of the vote, intimidation to vote, family voting, vote-buying, voter identity and ballot paper. India also uses VVPAT. Adding VVPAT is complex and expensive. The efficacy of VVPAT could be a better way to ensure that the elections are accurate and transparent, but it goes a long way in building the trust of the stakeholders. If audited properly, paper trials allow verification of electronic election results and make it possible to identify any faults or manipulation.[66]

9. Legal Framework in India Concerning the Use of EVMs.

a) The Representation of Peoples Act 1951

On the notification of election day and on receiving the nominations for election, the election process is set into motion.[67] During the poll, there is an option to use both EVMs and Ballot papers to cast votes.[68], and if the E-voting machine develops a mechanical failure during the recording of the vote, the returning officer shall forward the matter to the Election Commissioner and the Election Commissioner, after taking into consideration all material circumstances, may declare the poll at that polling station to be void and appoint another day and fix the hours for a fresh poll.[69] If the Election Commission believes that the mechanical error of the E-voting machine or the result of a fresh poll will not affect the result, issue directions to the returning officer as it may deem fit for further conduct and completion of the election. Further, booth capturing takes place either at the polling station or at the place of counting of votes. The Act explicitly provides for the use of voting machines at elections.[70] The explanation for the voting machine in the Act gives the meaning of voting machine as any machine or apparatus operated electronically or otherwise used for giving or recording votes.[71] The Act also further provides that any reference to a ballot box or paper shall be construed as including a reference to a voting machine wherever the voting machine is used at any election.[72]This brings into the purview of the Information Technology Act and its provision for interpreting the E-voting machine and the data interchange and communication within the purview of the vote cast. The Act also provides for counting votes under the supervision of the returning officer, contesting candidate, election agents and counting agents.[73] If there is any loss or destruction of voting

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[66] *Id.* at p 14.
[67] Representation of Peoples Act 1951, Section 30.
[68] *Id.* Section 58.
[69] *Id.* Section 58(aa), Section 58(2)(a) and Section 58(2)(b).
[70] *Id.* Section 61 A.
[71] *Id.* See explanation to Section 61A.
[72] *Id.*
[73] Representation of Peoples Act 1951, Section 64.

machines, or if the voting machines are accidentally or intentionally destroyed or tampered with, then there can be two outcomes. Either the Election Commission, on the report by the returning officer, could call for stopping the counting of votes and declare the poll at the polling station to which the machine belongs to be void and declare fresh elections, or if the Election Commission is satisfied that the result of a fresh poll would not in any way declare the result of the election, then Election Commission can provide for the completion of counting and further conduct and completion of the election concerning which the votes have been counted.[74]

b) Conduct of Election Rules, 1961

The Conduct of Election Rules, 1961 provides for the procedure to be followed for conducting the election using an Electronic Voting Machines (EVMs)[75]. The role of the Election Commission in ascertaining the design and preparation of the voting machines is crucial. The independence of the Election Commission, as well as the trustworthiness of election officials, are detrimental to the trust of the process of election as well as to the conduct of free and fair elections. [76]The design is approved by the Election Commission and prepared by the Election Commission for the poll. This puts the burden on the Election Commission to ensure that there is no tampering with the control unit and the ballot unit of the EVMs.[77] The presiding officer of the election is duty-bound to ensure that the EVMs has zero votes recorded and bears all the serial number and label.[78]A paper seal is used to secure the control unit of the E-voting machine, and the presiding officer shall affix the signature on the paper seal. It is only possible to press the result button by breaking the seal. The control unit will be placed in the full view of the presiding officer and the polling agents.

c) Information Technology Act, 2000

As discussed above, the Information Technology Act 2000 provides for the legal recognition of all electronic transactions.[79] The Act gives a framework to the legal recognition of electronic records, and any information made available in an electronic form can be brought within the framework of the Information Technology Act. Thus, if the Election Commission of India creates a digital electoral roll and a voter's registry, the present legal framework can inculcate those changes. It is up to the discretion of the Election Commission to use digital voting or internet voting, as the case may be. Sufficient provisions inculcated in the Information Technology Act could aid in conducting elections, even

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[74] *Id.* Section 64A.
[75] The Conduct of Election Rules 1961, See, Chapter II.
[76] WOLF, NACKERDIEN, AND TUCCINARDI, *supra* note 14.
[77] The Conduct of Election Rules 1961, Section 49 A & Section 49 B.
[78] *Id.* Section 49E.
[79] *Supra* note 80.

if fully conducted digitally. Thus, the Election Commission can conduct a full-fledged digital election in India if they intend to do so. In a digital election, the Information Technology Act provides for the retention of electronic records, and the information can be retained in the format it was originally generated, sent or received. Retaining electronic records could provide more credible data than the present EVMs and their use. Also, the legal framework facilitates the identification of the origin, date, destination and time of dispatch or receipt of the electronic record.[80] Election auditing would be hassle-free and less corrupt due to minimum human interference, and the Information Technology Act applies to any law which provides for the audit of documents, records of information, etc.[81]

d) Judicial Precedents

The challenge to the electronic voting process in India has been successful so far, and the High Courts and the Supreme Court have validated the Use of EVMs in various judgements.[82]

10. Vulnerabilities in the Use of EVMs and VVPATs

"The ECI should ask itself what the voters would prefer: the correct candidate declared elected a day later or a wrong candidate declared elected a day earlier."[83]

The election process and the use of EVMs in the Indian context are only to the extent of casting the vote and counting it. In the Indian Context, there is no further digitalisation of Elections. The legal framework examined has clearly indicated that the digital elections in India are in the toddler stage. However, the use of EVMs for casting votes and counting has raised serious concerns concerning the efficiency and effectiveness of Voting machines. The election process in India uses EVMs for two purposes: one for casting votes, which has serious disadvantages over using ballot boxes. When the ballot box is used, it is more reliable and easier for the stakeholders to verify the votes cast and ensure that there is a free and fair election. The use of EVMs has cast problems concerning the election's fairness as the data stored in the EVMs are to be relied on without any physical proof. This also brings in the difficulty of storing sensitive data. There is no physical mechanism to ensure that the data is not manipulated as

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[80] Information Technology Act 2000, Section 7(c).
[81] Id. Section 7A.
[82] Prabhu Lal Bahuguna v. Umesh Sharma Kau (2020) SCC ONLINE UTT 1335 (India), Dr. Ramesh Pandey v. Election Commission of India (2017) SCC ONLINE UTT 676 (India).
[83] See, Kannan Gopinathan, *Vulnerabilities in the EVM-VVPAT process*, THE INDIA FORUM,(Apr. 13, 2021), https://www.theindiaforum.in/article/vulnerabilities-evm-vvpat-process-and-potential-threat-integrity-elections.

there is no data encryption, and the safety of the EVMs depends on the efficiency of the Election Commission and its Officials.[84] In India, certainly, the digitalisation of elections has only happened in the casting of votes and, more importantly, in the counting of votes, which has reduced the burden on the election officials and counting agents; other than this benefit, there is no seemingly assured benefit by the use of EVMs and the opaqueness of the votes cast and the vote counted using EVMs brings in a shadow to the freeness and fairness in the conduct of the election. The use of technology is thus limiting the election process about the general public's transparency and trust in elections.

The ECI claims that the EVMs are tamperproof, and their logic is that the electronic voting machines are like calculators, which are one-time programmable devices. ECI argues that the process security aspects of our electronic voting process relied on a combination of process checks, namely, (i) the candidate-agnostic nature of the EVMs, which negated any partiality to any voters, (ii) double stage randomisation of EVMs and (iii) multiple mock polls in the presence of representatives of the political parties or their candidates.

These process security aspects were considered impenetrable armour of our electronic voting process.[85] The ECI asserts that the EVMs are tamperproof. EVMs are candidate-agnostic[86], in the sense that the voting machines are unaware of the names of the candidates, party or candidate symbols or their sequence. The sequence of candidates is as per form 7A, which is finalised close to the elections, and by this time, the EVMs are in the safer room. As per the ECI, this prevents any manipulation of the election process, as the EVM cannot electronically know the candidate number. There is a further randomisation process, which helps ensure that the EVMs are not manipulated. This is done in the presence of all the stakeholders.[87]

The randomisation test is done immediately after the officials of Bharat Electronics Limited or Electronics Corporation of India Ltd complete the inspection of the electronic machines. The Mock poll is done on the EVMs cleared by the Officials, and if there are any further discrepancies found in the EVMs, then it is marked as defective and rejected for the election. A second mock poll is conducted after the EVMs are commissioned with the names of the candidates in the EVMs. The third mock poll is done on the day of the poll. This is the weakest of the mock poll, as there is a potential hack possible and bypassing the first few votes, thereby preventing foul play. Thus, the Election Commission argues that the safeguard in the conduct of the

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[84] *Supra* note 88

[85] See Manual on Electronic Voting Machine and VVPAT, Edition 8 , August 2023, https://eci.gov.in/files/category/4-manuals.

[86] *Id.*

[87] Supra note 88

election lies in the combination of participation of the stakeholders, opening and closure of strong rooms, secured transportation, etc.[88]

The VVPAT and its use bring in many vulnerabilities, compromising the "stand-alone device" argument of the ECI. VVPAT would print the name and symbol of the chosen candidate as and when the voter pressed the button in the Ballot Unit(BU) as proof for the voters that their vote has been cast to the intended person. Here, the crucial question is how the VVPAT know which candidate's name to be printed if the EVMs are designed to be stand-alone machinery. Does this mean that the names of the candidates and symbols are already uploaded in the EVMs as a part of commissioning?

Here, we can ask many questions which need to be addressed, as this is detrimental to the election process and could endanger the very roots of democracy- free and fair elections. There is no clarity or transparency regarding how the data is uploaded to the EVMs and whether EVMs are connected to external devices for data inputs, which could substantially hack the EVMs. Further, there needs to be more clarity about the communication protocol, which makes the software for these inputs, the device to which EVMs are connected to input the data, the information about the names and symbols and its storage. Another important question is the memory of the EVMs and whether it is programmable. The ECI is silent on these questions and has refused to reveal the design, code or any other information related to VVPAT, and this questions the integrity of the elections itself.

The introduction of VVPAT provides for a serious vulnerability in the design of the EVMs. VVPAT comes between the Balloting Unit(BU) and the Control Unit(CU). Thus, the vote cast in the Ballot flows through the VVPAT to the Control Unit. VVPAT must be programmable to communicate the vote cast and thereby introduce a vulnerability. Thus, the key principle in the Election Process- "cast as intended, recorded as cast and counted as recorded" is compromised. Any vulnerability in VVPAT is a vulnerability in the entire election process itself. The new BU-VVPAT-CU combination is not a stand-alone or rudimentary calculator but an electronic device with programmable memory. Thus, physical access is granted to the EVMs, and there is every possibility of the data being corrupted and vulnerabilities creeping in in one form or another.

VVPAT must be verifiable and auditable because the voter cannot cancel the vote once cast. Cancelling the vote is cumbersome, and the voter has to interact with the officials to express dissatisfaction. Thus making the Election Commission an important factor in the process of verification. The individual verification of the slips and the public audit need to be improved in the new design of ECI incorporating BU-VVPAT-CU design.

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[88] *Supra* note 88

As described earlier, the legal provision concerning the use of EVMs and VVPATs does not have details to consider the technological vulnerabilities that may creep in as a part of the use of Electronic Voting. While there is a legal provision to protect EVMs from physical interference[89], there is no digital or technological security assured by the legal process, which looks at the tampering of EVMs by means other than physical. For instance, when an external device is connected to the EVMs, what is the possibility of vulnerability that could creep into the Election Process? The law must be reformed, and adequate safeguards must be placed to ensure free and fair elections.

The present guidelines provide for viewing the paper trail if the voter alleges that the paper slip generated has shown the name or symbol of a candidate other than the one voted for. The presiding officer shall, then, obtain a written declaration from the elector as to the allegation made by the voter. A warning is given to the elector about the consequences of making a false declaration.[90] The legal framework mistrusts the voter and takes a written declaration from the voter, makes the entry, and permits the elector to record a test vote in the voting machine in his presence and the presence of the candidates or in the presence of polling agents who may be present in the polling station, and observe the paper slip.[91] Here, the allegation of a previously cast vote is checked using the next test vote, which is unfair to the voter who has taken up an allegation. Thus, if the allegation is false, then the voter who has made the allegation is noted and remarked, obtains the signature and thumb impression of the voter and makes entries concerning the test vote. This allows only the next vote to be tested and checks only if the very next vote has been manipulated the same way as the one which was cast. Here, the law assumes that the manipulation would be continuous and consecutive. Unfortunately, the Supreme Court of India could not find the technical glitches of using VVPAT and has lauded the efforts of ECI and has concluded that the paper trail is an indispensable and quintessential requirement of free and fair elections. The trust of the stakeholders can be obtained with the introduction of paper trials.[92]

The auditing strategy also questions the fairness of the election process, whereby it chooses to use five polling stations per assembly constituency for auditing the votes with no publicly available statistical backing, and this fails the fundamental sampling principles and may lead to high margins of error.

The correctness of an election is equally important or even more important than the speed with which the election is conducted and

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[89] The Conduct of Election Rules 1961, Section 49E.
[90] *Id.*
[91] See, *supra* note 90 , Rule 49MA Section 49E.
[92] See, *supra* note *11.*

concluded. The ECI conducts elections in a phased manner but makes haste when it comes to the counting of votes. The only practicality concerning using EVMs is that the result can be declared quickly or the counting process is swift. This leads to the question of vulnerabilities and the risk of manipulating elections. Ballot boxes could be much better than the present system, which uses voting machines to cast and count votes, whereas a simple, verifiable Ballot could be an alternate solution. The ballot paper is simple, trustworthy for the voter and easy to audit and check. Offences like booth capturing or ballot paper tampering can be curtailed by the participation of all stakeholders in counting the ballots and installing CCTVs in strongrooms and polling booths.

11. Electoral Offences And IT Act 2000

Let us look at some of the possible electoral offences relating to digital elections in India. The Representation of Peoples Act 1951 provides for corrupt practices and their application.[93] It is true that if the voter registry and election are fully digitalised, the majority of the corrupt practices can be vitiated. For instance, in a digital election, the chance of inducing any person is minimised as it could provide for voting from anywhere, not within the constituency. This could ensure that the voter cast a meaningful vote, free of any inducement. Undue Influence could be reduced as there is no need for any external agency like the election commission or the election agents for electoral assistance. This could pave the way for a free and fair election with minimum human interference and thus free from intimidation or incitement.

Digital elections could further eliminate the issue of booth capturing as the data can be encrypted and stored, which could not be destroyed by physical force. The Information Technology Act has sufficient provisions to cover the possible electoral offences if the Election Commission has decided to conduct digital elections in India. For instance, tampering with computer source code which is written for election could give a punishment of imprisonment up to three years or a fine which may extend up to two lakh rupees.[94] The offences under the Representation of Peoples Act could fall under the Information Technology Act. Section 136 provides for certain electoral offences, which could be fraudulently destroying any nomination paper, removing the notice by a returning officer, destroying any ballot paper, tampering with the ballot box, etc., the punishment is only up to two years for electoral officials and only up to six months for any other person. Applying the Information Technology Act provisions could bring harsher punishment to the culprits. Again, for hacking into any critical infrastructure concerning elections, the Information

[93] Representation of Peoples Act 1951, Section 123.
[94] Information Technology Act 2000, Section 665.

Technology Act could squarely cover any electoral offences in this regard that may be digitally perpetrated.

The Election Commission is Constitutionally obligated for maintaining the sanctity of the elections in India. ECI has taken steps to ensure that cyber threats are addressed and defeated. The Election Commission has created a new post of the Chief Information Security Officer whose job is to supervise various measures to ensure cyber security.[95]

The Information Technology Act provides for Critical Infrastructures, and it is high time that the ECI makes the Election Infrastructure a 'critical infrastructure'.[96] This could enable regular coordination with the national security establishment and benefit from the cyber security advisories of the National Critical Information Infrastructure. International standards of cybersecurity aim to protect and secure election processes from cyber threats.[97]

Technological safeguards like the Holistic Exposure and Adaptation Testing (HEAT) process could be used to identify and test the potential exploitation of vulnerabilities. This can be achieved using election data management technology. These technologies could be used to examine the elements of election technology development before the election, and they can be effective in ensuring that the digital election process is fully functional and free from mechanical problems—testing like pen tests, port scanning, vulnerability scanning, packet sniffing, audit checks, etc. The HEAT process could also help the Election Management Bodies correct system vulnerabilities that could lead to known or unknown potential vulnerabilities.[98]

12. Conclusion

The use of digital technology in the conduct of elections has prompted the stakeholders of democracy to bring in the necessary legal framework for the conduct of elections. This has been primarily done by the Election Commission of India, with the delegated power sourced from the Constitution of India and the Representation of Peoples Act. While technology brings ease in elections, it also brings various challenges. Some international standards are available in the conduct of digital elections, which have been illustrated in the introductory part of this paper. The prescribed standards of digital elections about universal adult suffrage, equal suffrage, free suffrage, secret suffrage,

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[95] Election Commission of India, *Cyber Security Newsletter* (May 2018), https://eci.gov.in/files/file/5685-cyber-security-newsletter-may2018/.

[96] Information Technology Act 2000, Section 70.

[97] See, Cybersecurity in Elections, Developing a Holistic Exposure and Adaptation Testing (HEAT) process for Election Management ent Bodies, International Foundation for Electoral Systems, 2018, https://www.ifes.org/publications/cybersecurity-elections.

[98] *Id.*

transparency, accountability and reliability are in the Indian legal standards examined above. However, the standards in themselves need to be revised for the conduct of free and fair digital elections, as there are many concerns in the conduct of digital elections.

There is no proper legal framework for conducting full-fledged digital elections apart from the provisions for using EVMs. The use of VVPATs is enabled using the delegated powers of the Election Commission. Even though one can find traces of legal framework in the Constitution of India, the Representation of Peoples Act, The Conduct of Election Rules, and many other delegated rules and regulations issued by the Election Commission from time to time, there is no proper law regarding the conduct of digital elections in India.[99] No specific provisions could protect the election data from cyber threats. Also, there are no specific provisions concerning protecting the voting system, cybersecurity guidelines, streamlining dates concerning digital electoral information, etc. There is inadequacy in law which provides for the paper ballot and EVMs, as the provisions currently do not take care of the various options available and used internationally for the conduct of digital elections. For example, no clear and defined legal provisions exist for online voting paper-based electronic voting systems using optical scanning. The present system also needs to be amended to include a detailed provision for the use of VVPATs, inculcating the standards of manufacturing, design, storage, chain of custody, auditing details, use of paper trail, reliability and authenticity of paper trial, etc. should be included in the proposed legislation.

The legal framework for voter registry should be amended to include an electronic voter registry. The Election Laws Amendment Act is a step in this direction, which calls for linking Aadhar data with the electoral registry. This needs to be further detailed to include the use of data, which also should be adequate to take care of the privacy aspects in this regard. The Information Technology Act, even though it provides for an overriding provision and squarely EVMs and VVPATs can be inculcated within the purview of the Act, lacks teeth as there are no specific provisions concerning the use of EVMs and VVPATs. As observed above, the provisions are sufficient to deal with the conduct of digital elections. It needs to catch up when making the electoral data and its management a critical infrastructure under the Act. Further, for the conduct of digital elections, even though there are sufficient provisions in the Act in tune with provisions for encryption and decryption of election data, in preserving and destroying digital data, there need to be more specific provisions concerning election data and its preservation.

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[99] See, for instance, Securing America's Federal Elections Act(SAFE), which is an exclusive act designed to protect elections for public office by providing financial and technological support and enhanced security for the infrastructure used to carry out elections.

As with the analysis of the judicial pronouncement, it is clear that the courts have yet to look into the security aspect of digital elections in detail, as the case laws have been pertinently on the use of EVMs and VVPATs and their tamperproofness. The Judgements have most often favoured the Election Commission of India. This is primarily because the Apex Court believes in the efficiency of the Election Commission of India and trusts the tamper-proofness of VVPATs and their tally with the EVMs. This again brings further challenges to the adequacy of law in conducting free and fair elections. The paper points out some of the vulnerabilities of EVMs and VVPATs and their use in elections. These are mere apprehensions on the use of technology but apprehensions founded on goodwill and good faith to ensure that the election process is free and fair and to preserve the most cherished form of government, i.e. democracy.

The defect with the present system of using EVMs is that it makes all other physical observations redundant. For instance, when the guidelines provide for GPS tracking[100], for the movement of EVMs and VVPATs, there is no safeguard against the possible hacking of these machines, especially before elections. Another such instance is the use of videography, webcasting or the use of CCTV in polling stations, which cannot detect hacking of these machines.[101] While it is undoubtedly true that the Election Commission of India has taken measures to ensure the physical safety of these machines, the electronic health and safety of machines remain dubious.

It is a fact that there is no explicit evidence to prove the non-hackability of the EVMs and VVPATs. Still, the opaqueness in the use of technology by the Election Commission has cast doubt on the minds of the people concerned about the credibility of elections in India and the freeness and fairness in the conduct of elections. Moreover, the Election Commission needs to be fully transparent on the use of technology and its source. The overemphasis on VVPATs as the ultimate source for verifying the EVMs must be re-looked. The overemphasis on using EVMs and VVPATs should not be made with the compromise of the necessary pre-conditions for free and fair elections.

[100]See, Election Commission of India, Announcement of Schedule for General Elections to Lok Sabha and Legislative Assemblies in Andhra Pradesh (Mar. 10, 2019), https://eci.gov.in/files/file/9396-announcement-of-schedule-for-general-elections-to-lok-sabha-and-legislative-assemblies-in-andhra-pradesh-arunachal-pradesh-odisha-sikkim-2019/

[101] *Id.*

Amelioration Of Solid Waste Management Policies in India: An Assessment in Light of Germany's Circular Economy Action Plan

Vaishali Singh*

1. Introduction

Solid waste management is a multifaceted endeavor, showcasing intricate variations across states, cities, towns, and villages, depending upon factors such as population density, transient populations, geographical landscapes, and more. India's increasing population[1] and growing population density[2] pose a challenge for the authorities to ensure the use of effective technologies in handling solid waste in urban areas. India has been facing mismanagement of solid waste starting from the Surat plague, thereafter the famous Ratlam municipality case[3] and the frequent reporting of the overburdened landfills/dumping areas. The lack of urban planning by the government to manage the population growth and less attention paid to the area of solid waste management had resulted in poor solid waste management. To minimize the environmental and health risk resulting from mismanaged solid waste in the country, legislative actions were taken by introducing rules such as the solid waste management rules, plastic waste rules, e-waste, bio-medical waste, etc. Apart from the stated rules, that provides a legislative approach there are statutory organisations that overlooks environmental activities including The Central Pollution Control Board (CPCB) and State Pollution Control Board/Pollution Control Committees. These statutory organizations has been given the responsibility of providing guidelines to help the

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[1] *See*, National Commission of Population report on Population Projections for India and States 2011-2036. Over the span of 25 years, between 2011 and 2036, India's population is projected to grow significantly, rising from 1.211 billion to 1.522 billion, indicating a 25.7 percent increase. This growth is equivalent to an annual rate of 1.0 percent. Consequently, the population density is anticipated to surge from 368 individuals to 463 individuals per square kilometre.
National Commission of Population, *Population Projections for India and States 2011-2036,* 3, 2020, https://main.mohfw.gov.in/sites/default/files/Population%20Projection%20Report%202011-2036%20-%20upload_compressed_0.pdf.

[2] *See,* The World Bank data reveal that in the year 2020 the population density is 464 per sq. km of the land area. WORLD BANK GROUP, *available at:* https://data.worldbank.org/indicator/EN.POP.DNST?end=2020&locations=IN&start=1961&view=chart (last visited May. 27, 2022).

[3] 1980 AIR 1622, 1981 SCR (1) 97.

state governments and local bodies to curb the issue of solid waste. Pollution from solid waste is a cause of concern for climate change. Earlier in India solid waste was simply dumped at one place that was releasing harmful toxic gases polluting the air, land and waste. However, this practice is slowly changing into a more organized management of solid waste through collection, segregation, transportation, treatment and disposal. The government is investing in waste processing technologies and shifting the old practice of solid waste dumping by constructing scientific landfills. Yet, India needs to improve in areas of waste segregation which is still a major reason to achieve the agenda of a clean India. Due to lack of solid waste segregation, it is difficult to get the best value out of resource recovery.

2. Swachh Bharat Abhiyan: Clean India Initiative

A country-wide initiative to keep India clean and garbage-free started with the launch of Swachh Bharat Mission programme. The Mission accomplished to achieve volunteering acts of citizens in solid waste management by way of cleanliness drives.[4] Participation in numerous waste collection and awareness drives across India is witnessed. The programme known for its success in achieving 100 percent open defecation free objective, is at present in full swing to make India garbage-free.

The mission aims to collaborate with stakeholders to achieve 100 percent waste segregation and 100 percent door-to-door collection across 86,284 wards.[5] The task of managing solid waste is delegated to the local bodies as per the 74th constitutional amendment.[6] Urban Local Bodies have proactively addressed gaps in solid waste management, as evidenced by their performance in the Swachh Survekshan score, which comprises various parameters and indicators for evaluating state performance in this area. The implementation of the Swachh Survekshan practice has effectively facilitated significant

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[4] The Swachh Bharat Abhiyan has transcended its initial status as a government initiative and evolved into a 'Jan Andolan,' garnering remarkable backing from the populace. A surge in citizen involvement has been witnessed, as individuals actively engage in mass clean-up efforts, wholeheartedly committing themselves to the cause of a tidier and more pristine India. Embracing the act of sweeping the streets, addressing waste disposal, prioritizing sanitation, and upholding a hygienic ecosystem, have all become entrenched habits post the introduction of the Swachh Bharat Abhiyan. Notably, the populace has begun to actively champion the message that 'Cleanliness is next to Godliness.' The inclusive approach adopted by the Swachhta Abhiyan has effectively transformed it into a nationwide campaign, instilling a deep sense of duty and accountability within the hearts of the people, as part of the Clean India Movement. NATIONAL INFORMATICS CENTRE, https://www.pmindia.gov.in/en/major_initiatives/swachh-bharat-abhiyan/#:~:text=Shri%20Narendra%20Modi%20himself%20initiated,litter%2C%20nor%20let%20others%20litter (last visited May, 2022).

[5] Ministry of Housing and Urban Affairs, *Annual Report 2020-2021*, 24, https://mohua.gov.in/upload/uploadfiles/files/Annual_Report_2020_21_MoHUA_EnglishVersion%20(Final).pdf.

[6] The Constitution (74th Amendment) Act, 1992.

enhancements in solid waste management within these entities. The example of the Municipal Corporation Chandigarh provides a notable case in point, showcasing substantial progress in solid waste management practices, thus serving as a beacon of success within the framework of the Swachh Survekshan initiative.

The Municipal Corporation Chandigarh's ranking in the 2021 city's Swachh Survekshan experienced a significant drop, shifting from the 16th position last year to the 66th position among 4320 cities. A major cause for the dip has been poor solid waste management concerning segregation and lack of safe disposal. The solid waste processing plant is currently operating below it's standards, resulting in inefficiencies and subpar performance. Daily fresh waste is being dumped at Dadu Majra landfill.[7] As part of a private partnership with M/S Jai Prakash Associates Ltd. with Municipal Corporation Chandigarh for processing the solid waste by installing a refuse-derived fuel plant. The processed solid waste was to be utilized by the company in their cement plant located near Solan, Himachal Pradesh. The cement plant became in-operational due to environmental concerns, resulting in no utilization of Refuse Derived Fuel (RDF). The processing plant faced another concern about its efficiency as it was not able to process all types of waste, the plant was not able to process the organic waste containing high moisture content.[8] The city's daily waste production ranges from 550 to 660 metric tons (MT), while the waste processing plant has a capacity of only 70 to 80 (MT) per day.[9] Additionally, the city municipality faces a significant hurdle in waste segregation, despite achieving an impressive 85 percent coverage through the use of twin door-to-door garbage collection vehicles.[10] Since the plant is not operational at its full capacity, it is making the corporation incur additional costs. The waste that is not being processed by the plant is sent to the landfill along with the inert waste. As a result, Municipal Corporation Chandigarh is incurring the additional cost of the extra waste that is not being processed by the plant and has to be sent to the dumpsite. Recently in 2020, the Municipal Corporation Chandigarh took over the plant because of a legal conflict between

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[7]Sandeep Rana, *Chandigarh City not so beautiful*, THE TRIBUNE (Nov. 21, 2021,09:24 AM), https://www.tribuneindia.com/news/chandigarh/chandigarh-city-not-so-beautiful-340859.

[8] Namita Gupta and Rajiv Gupta, *Solid Waste Management and Sustainable Cities In India: The Case of Chandigarh*, 27 (2) E & U, 573-588 (2015), https://journals.sagepub.com/doi/pdf/10.1177/0956247815581747#:~:text=Chandigarh%20Municipal%20Corporation%20has%20constructed,each%20month%20by%20the%20residents.

[9] *Swachh Survekshan 2021: Chandigarh sees big fall in ranking; dumped at 66th position*, INDIA TODAY (Nov 21, 2021, 12:31 PM), https://www.indiatoday.in/cities/chandigarh/story/swachh-survekshan-2021-chandigarh-sees-big-fall-in-ranking-dumped-at-66th-position-1879137-2021-11-21.

[10]*Swachh Survekshan 2021: Chandigarh sees big fall in ranking; dumped at 66th position*, INDIA TODAY (Nov 21, 2021, 12:31 PM), https://www.indiatoday.in/cities/chandigarh/story/swachh-survekshan-2021-chandigarh-sees-big-fall-in-ranking-dumped-at-66th-position-1879137-2021-11-21.

Municipal Corporation Chandigarh and Jai Prakash associates.[11] The dumping ground has been a cause of widespread health problems in the areas due to stinking surroundings, waste lying outside the boundary of the dumpsite, stray cattle roaming inside the dump yard, and fire in the dump yard causing air pollution.[12] The issue of treating legacy waste has been another concern of the Municipal Corporation Chandigarh as only 2.7 lakh MT which is 55 percent has been treated by bio-remediation. The non-efficient use of the Refuse Derived Fuel (RDF) plant has made fresh waste dumped in landfills. This reason has slowed the pace of clearing the legacy waste and the timeline has been extended till 2023 of clearing up the legacy waste.[13]

It is important to note that after the Swachh Survekshan Survey results, Municipal Corporation has taken steps in the direction of improving the status of solid waste in Chandigarh. Steps have been taken to procure new technology and set up a new processing plant. Bid process to invite applications for private participation in integrated solid waste management. However, there is a requirement for strict enforcement of bye-laws in the city.[14]

3. Enhancing policy measures towards better solid waste management

The various urban local bodies face the issue of land procurement for landfill sites and difficulty in reclaiming the old dump sites. It causes a burden on the existing landfills that pose threat as result of the frequent fires caused from anerobic decompostion. India's solid waste management system faces a gap in achieving the clean India objective due to lack of financial, administrative, citizens participation, inadequate administrative planning, and weak governance. However, India has taken steps in addressing the concern by way of institutional, policy legislative framework. The Swachh Bharat Mission has created an incentive-based system by way of ratings[15], certifications[16] and the

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[11] *Swachh Survekshan 2021: Chandigarh sees big fall in ranking; dumped at 66th position*, INDIA TODAY (Nov 21, 2021, 12:31 PM), https://www.indiatoday.in/cities/chandigarh/story/swachh-survekshan-2021-chandigarh-sees-big-fall-in-ranking-dumped-at-66th-position-1879137-2021-11-21.

[12] Munieshwar A Sagar, *Chandigarh MC proposes new project to clear Dadumajra landfill*, HINDUSTAN TIMES, (Jan. 13, 2022, 12:32 AM) https://www.hindustantimes.com/cities/chandigarh-news/chandigarh-mc-proposes-new-project-to-clear-dadumajra-landfill-101642014176621.html.

[13]Chandigarh Administration, *District Environment Plan for U.T. Chandigarh*, https://chandigarh.gov.in/sites/default/files/August21/dc21-dep20.pdf.

[14] Municipal Corporation Chandigarh has 'Solid waste management Byelaws, 2018'.

[15] Swachh Survekshan Monitoring Tool, Garbage free city for star rating based on-
a. 7 star
b. 5 star
c. 3 star
d. 1 star

[16] Swachh Survekshan Monitoring Tool, Open Defecation Free-
a. Water Plus
b. ODF++

award system.[17] The rating system gives an incentive and scope for improvement to the city/towns for improving their system because of the competition. Yet, the steps are required to improve the area of solid waste management.

The government can promote the system of waste minimization by setting targets for each year when the survey collects information for the ratings. The urban local bodies can establish annual targets under the Swachh Survekshan survey to manage municipal solid waste through efficient reuse and recycling techniques. This strategic approach seeks to minimize the volume of solid waste directed to landfills, thereby promoting a more sustainable waste management system.[18] This target system has been included in Germany's circular economy action plan that aims at waste minimization by incorporating resource recovery methods in solid waste.[19] This new parameter will help in creating a secondary market for raw material generated from reuse and recycling and open opportunities for small entrepreneurs that will ultimately develop the circular market. It will encourage innovation, new practices and up-to-date technology use in waste minimization and turn reduce the amount of waste going to the landfills by setting a target for landfill dumping.[20]

India can apply Germany's Eco-design and Ecolabel directives to enhance the circular economy. The eco-design framework helps to sort the waste by identifying the waste as value products such as electronics, textiles and plastic packaging. According to reports, the textile industry is responsible for producing 1 million tons of waste annually, making it the third-largest contributor to India's municipal solid waste.[21] Textile decomposes and releases greenhouse gases such as methane, the dyes release leachate causing water and land

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c. ODF+
d. ODF

[17] Swachh Survekshan 2021 Awards category based on % of cities in state falling under the respective category-
a. Platinum (Divya)
b. Gold (Anupam)
c. Silver (Ujjwal)
d. Bronze (Udit)
e. Aspiring (Arohi)

[18] Guidelines on Extended Producer Responsibility for Plastic Packaging, specifies the obligation for recycling. The producer has to achieve minimum level of recycling target percentage of plastic packaging waste as per the category and year wise.
Didier Bourguignon, *Closing the Loop- New Circular Economy Package*, EPRS, (2016) https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573899/EPRS_BRI(2016)573899_EN.pdf (last visited May 27, 2022).

[19] European Commission, *Circular Economy Action Plan: For A Cleaner and More Competitive Europe*, PUBLICATIONS OFFICE (2020) https://data.europa.eu/doi/10.2779/05068 (last visited May 27, 2022).

[20] *The Circular Cities and Regions Initiative*, EUROPEAN COMMISSION, https://circular-cities-and-regions.eu/about (last visited May 27, 2022).

[21]Anupriya Aggarwal, *Circular Economy for Textiles as Engrained in The Traditional Indian Life*, 17(1) J. ENVIRON SCI. (2021) https://www.tsijournals.com/articles/circular-economy-for-textiles-as-engrained-in-the-traditional-indian-life.pdf.

pollution.[22] Unlike plastic and electronic waste, textile waste requires to be streamlined by way of separate collection and taking legislative action concerning its safe handling by diverting the textile waste from being sent to the landfills and rather opting for reuse and recycling post-consumer. There is a need to streamline the Ecolabel before its effective use in the Indian market. Guidance can be taken from the EU Ecolabel logo functioning where the whole product life cycle is taken into account. The step right from raw material extraction, production, packaging, transportation, its use and last one to the recycling bin is a well-articulated system based on environmental criteria set by the experts to provide environmentally friendly and good quality products.[23] The system is made user-friendly by way of easy identification, this system works well for easy dissemination of information and awareness among huge consumers. Apart from the steps taken to formulate a good structure for Ecolabel, the Eco-design directive must emphasize the need for consumer protection, and develop an action plan against greenwashing from high products/clothing brands.

The concept of less waste, more value Germany's Circular Economy Action Plan aims to reduce solid waste. Its method can be inculcated in India to reduce the amount of municipal solid waste being generated in our country considering we generate 189.75 million TPA and are among the top three largest generators of Municipal Solid Waste after China and the USA.[24] The method works well in an inclusive manner by involving the consumers in this case residents to separate the waste. Having defined targets gives a set goal for the authorities in charge of the solid waste management to be achieved. In achieving the various targets technology plays an aided role that can be used in tracking, tracing and mapping resources.

The method aims to create a transition in the management of solid waste by introducing the method of giving back to the planet in comparison to what it takes from it. The concept crystallizes the circular economy in solid waste management by adopting regenerative growth as the principle of restoring the environment.[25]

4. Solid Waste in the Context of Climate Change

Pollution has been a major concern for climate change. At the international level, the cause of climate concern has led to numerous

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[22] Sarah Coles, *Mottainai V Methane: The Case of Textile Recycling* 136, RENEW: TECHNOLOGY FOR A SUSTAINABLE 34-37 (2016), https://www.jstor.org/stable/renetechsustfutu.136.34 (last visited May 21, 2022).

[23] EUROPEAN COMMISSION, https://ec.europa.eu/environment/ecolabel/eu-ecolabel-for-consumers.html (last visited May 27, 2022).

[24] Central Pollution Control Board, *Annual Report 2019-2020 on Implementation of Solid Waste Management Rules*, 2016, 155 (2022).

[25] ELLEN MACARTHUR FOUNDATION, https://ellenmacarthurfoundation.org/regenerate-nature (last visited May 27, 2022).

deliberations and the formation of treaties.[26] The Paris agreement acknowledges the common concern of climate change and its negative impact on the environment and health of the people and is a legally binding agreement on climate change.[27] The crucial relationship between human health and the environment underscores the significance of managing solid waste, as its improper disposal contributes to environmental degradation and poses risks to human well-being.[28] Solid waste produces pollution harmful to the environment and human health, mismanagement and indiscriminate dumping lead to unsafe disposal methods. Improper dumping of solid waste leads to land, air, and water pollution. Lack of segregation practices led to less resource recovery from waste and adds up to the burden of mixed waste dumping for disposal. Due to the mixing of wet and dry waste in the dumpsites problem of leachate contaminating the land and water resources increases, in addition it adds to anaerobic decomposition releasing methane gases and other toxic gases. The burning of waste releases harmful greenhouse gases that contain gases like methane, carbon dioxide and also particulate matter that are extremely harmful to human health.[29]

For India to achieve zero-landfill and dumping sites in disposing of solid waste. Strategies to channel solid waste for maximum processing and treatment are required. Cape town followed the "think twice campaign" wherein green waste generated in households were diverted from getting mixed with other dry waste by maintaining designated drop-off facilities also called transfer station.[30] India generates more than 50 percent of the organic waste,[31] to get the best value out of the wet waste mixing it with dry waste should be avoided. Building community-based transfer stations for wet waste will help residents identify the designated disposal destination for wet waste reducing waste littering and dumping in the open. It will also build an environment for citizens' participation wherein they will generate a

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[26] UNFCCC is the main international treaty to fight climate change came into force in 1994. The convention addressed the concern of greenhouse gases on environment and ecosystem due to human activities.

[27] UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (last visited May 27, 2022).

[28] Report of the United Nations Conference on The Human Environment, Principle 2, The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

[29] Alexander Cougt, *Open Burning of Waste: A Global Health Disaster*, R20 REGIONS OF CLIMATE ACTION (2016) https://regions20.org/wp-content/uploads/2016/08/OPEN-BURNING-OF-WASTE-A-GLOBAL-HEALTH-DISASTER_R20-Research-Paper_Final_29.05.2017.pdf.

[30]Sally-Anne Engeldow, *Sustainable Integrated Solid Waste Management*, SUSTAINING CAPE TOWN: IMAGINING A LIVABLE CITY, 159-182 (African sun media 2010).

[31]Mathangi Swaminathan, *How Can India's Waste Problem See a Systematic Change*? 53(16) EPW (2018), https://www.epw.in/node/151565/pdf.

sense of responsibility.[32] This will help local bodies to better channel the wet waste from being dumped in the landfills and be less of a reason for landfill fires and less waste being dumped. The local bodies can further use the compost by selling it to the farmers or the residents and use the extra in public parks and green areas maintained by the local bodies.

To meet the criteria in maintaining a sustainable approach for solid waste it is equally important for the industry to participate such as the manufacturers or producers of products being sold in the market for consumer goods. They can adopt the strategy of "pull and push" for creating a market of recyclable goods in their packaging.[33] Using packaging of recycled materials made from post-consumer goods. This is a pull strategy wherein companies use recycled packaging that generates the demand for more recycled packaging and increases its supply in the market. Increasing the demand and supply for packaging material out of recycled materials will eventually reduce the price in the market. When companies introduce recycled packaging materials in the market it developed a push strategy. Consumers are made to realize the importance of recycling in preserving environmental resources. That further encourages the consumers to opt for the option which is more environmentally friendly. Further, the companies can maintain a buyback strategy for their post-consumer products to be utilized in the recycling chain.

Since the companies are functioning in the society, they cannot neglect the need to protect their interests and, thus, corporate social responsibility comes into the picture. The above strategies are a step towards corporate social responsibility[34] of the companies wherein the companies are required to undertake activities in this direction out of the profits earned by them in the given period. This will ultimately lead to the growth of the society and is a means of giving back to the society.

This will help the companies in building their social responsibility by showing their concern for the environment and implementing strategies that are

Keeping the international requirement of addressing the concern of climate change in consideration. Solid waste is emphasized when sustainable development goals are considered. As per Sustainable Development Goal no. 12 indicator 12.5, it aims to substantially reduce waste generation through prevention, reduction, recycling, and

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[32] INDIA CONST. art 51-A (g) "it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures."

[33] Deborah D. Anderson and Laurie Burnham, *Towards Sustainable Waste Management*, 9(1) ISSUES SCI TECHNOL, 65-72 (1992).

[34] Companies Act, 2013, § 135. Corporate Social Responsibility.

reuse.[35]Solid waste management has been mentioned in Agenda 21 emphasizes the 3R principle of reduce, reuse, recycle.[36]

5. Conclusion

India has taken steps in the direction of solid waste management by way of passing specific legislations and guideline documents that are in line with the international norms. However, few gap areas that need to be addressed is to adopt more methods for waste minimization to avoid burdening the landfills. India requires effective and well-functioning resource recovery mechanisms. Developing a circular economy helps in achieving the objective of waste minimization. In order to achieve this it is crucial to have more empowered local bodies who can effectively carry out source segregation and be active about imposing fine as mentioned in various solid waste management bye laws to change correct the actions of people. Additionally, local authorities should have provisions to incentivize people for adopting more sustainable solid waste management practices such as recycling of solid waste, home composting and avoiding littering of waste.

It is important for creating a more sustainable environment to reduce the risk to our environment and public health. The paramount interest of sustainability and integrated solid waste management aims at optimizing recyclable materials from the waste generation source, to encourage the recyclable market for increased demand for its use as secondary material. The collaboration provides more informed citizens and consumers who are aware of environmental issues, safety issues and put their efforts towards waste minimization, recycling, and resource recovery. This shows affirmative action through behavioral change, which is more in line with Germany's circular economy plan in achieving waste minimization and resource recovery.

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[35] UNITED NATIONS, https://sdgs.un.org/goals/goal12 (last visited May 27, 2022).
[36] *See,* United Nations Conference on Environment & Development Rio De Janerio (AGENDA 21)
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The Rise of a Troubling Trend: Religious Freedom in India

Dr. Mohammad Atif Khan*

1. Introduction

After independence, India has always advocated a liberal approach towards every section of the society. It was the vision of freedom fighters and the aim of constituent assembly to make India as a democratic country for all irrespective of religion. Being the largest democracy, India has always advocated for various fundamental freedoms including 'religious freedom'. 'Religious Freedom' has a special place in Indian democracy secured under the fundamental rights guaranteed under Article 25-28 of Indian Constitution.

Religious freedom is not solely a matter of national significance but also serves as a crucial yardstick for assessing the strength of democratic values within countries. A nation's ranking in religious freedom often reflects its commitment to principles of liberalism and democracy. Notably, in this ranking, India occupies a position that is worth mentioning. India's ranking is moderately favorable, surpassing that of neighbouring countries such as Pakistan and Bangladesh, albeit by a small margin. This ranking underscores India's commitment to upholding democratic values and fostering an environment of tolerance and inclusivity.

Many international organisations like United Nations (UN), US Commission on International Religious Freedom (USCIRF) and many others, have highlighted that India is going down in the world ranking for religious freedom. According to USCIRF 2022 report *"Religious freedom in India has declined in recent years, marked by the promotion and enforcement of discriminatory laws and practices that negatively impact the country's minority Muslim, Christian, Sikh, and Adivasis populations."* The same trend has continued in the consecutive year 2023 as highlighted by USCIRF 2023 report.

Recent violence in Manipur (one of the northeast Indian State), in May 2023, has added the fuel to fire. The clash has witnessed the threat to the Christian Kuki population and reached to level where religious symbols and places of worship and refuge has been targeted. These incidents raise the genuine concern of international community about the actual condition of religious freedom in India. Ironically, all these incidents have taken place when India is trying to

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hold its international importance as a peace loving and the oldest democracy.

2. Concept of Freedom

Freedom is a fundamental and cherished concept that lies at the core of human existence. It includes the inherent right of individuals' freedom to live their lives unshackled, to express their thoughts and beliefs, and to make choices without undue coercion or restraint. Cambridge dictionary defines the freedom as "the condition or right of being able or allowed to do, say, think etc., whatever someone wants to, without being controlled or limited."[1] In the generic sense, freedom is understood as "the right or ability to do or say what you want".[2] For example, being able to vote as you want to, is an important political/democratic freedom.

The Geneva-born political philosopher, Jean-Jacques Rousseau, had strongly advocated for human freedom. He asks a question that how can humans live freely within society? He observes that *"man is born free but everywhere is in chains"*.[3] This is not the first time when society wanted to address this crucial issue of freedom. From the earlier Greek times the idea of democratic liberty was considered as the ideal, which means *"everybody had a right to live as he pleased without being oppressed by other persons or by the authorities"*[4].

The modern way of defining freedom has started in the late 18th century. From the 1770s onward, the entire world had gone in much depth of the concept freedom. This is reflected in the academic work of contemporary scholars. This was the most important phase in the human history when revolutionaries on both sides of the Atlantic rebelled in the name of liberty. Newspapers were flooded with articles focusing the need of various freedoms including the most important freedom of speech, expression, and religion. The society was asking for liberty at different fronts which is reflected in number of pamphlets, treatises and articles published that time having titles such as '*Some Observations On Liberty*, *Civil Liberty Asserted* or *On the Liberty of the Citizen'*.[5]

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[1] https://dictionary.cambridge.org/dictionary/english/freedom
[2] Definition of freedom, https://www.google.com/search?q=Definition+of+freedom
[3] Rachel Humphris, 'The relevance of Jean-Jacques Rousseau 300 years after his birth', [2012],
available at https://www.unhcr.org/tr/en/11915-the-relevance-of-jean-jacques-rousseau-300-years-after-his-birth.html
[4] M.H. Hansen, 'Ancient Democratic Eleutheria and Modern Liberal Democrats' Conception of Freedom' in M.H. Hansen (ed.), *Athenian Demokratia - Modern Democracy: Tradition and Inspiration (Entr. Foundation Hart).*
[5] Annelien de Dijn, 'Freedom' Means Something Different to Liberals and Conservatives, [2020].

3. Religious Freedom and Its Various Aspects

The Concept of religious freedom

There is no unified definition answering the question, what does *religious freedom* mean? There are numerous definitions prevalent fulfilling the specific requirement and for a particular situation, but this list is not meant to be inclusive.[6] In United States Religious freedom is a fundamental human right and the first among rights guaranteed by its Constitution.[7] Mentioning its importance, James Madison described religious freedom as an unalienable right."[8] In United States, the Declaration of Independence recognizes fundamental rights as "endowed by God."[9] In India, the similar trend has been observed where religious freedom is declared as a fundamental right under part three of the Indian Constitution.[10]

The term '*free exercise of religion'* comes from the first amendment of the US constitution. Basically, it means that the government must not limit the ability to practice one's religion. This generally includes the right to set up and manage independent religious institutions but does not include restrictions placed on religious minorities or the country as a whole that do not interfere with the free exercise of religion.[11]

Moreover, in India, there is a long tradition of tolerance and respect for religious differences. Enshrined in the constitution and embodied by early national leaders such as Mahatma Gandhi, Jawaharlal Nehru, and Maulana Azad, this tradition of religious tolerance, inflected as it was in Hindu ways (particularly for Gandhi), has always coexisted and had to contend with the more nativist views of politicians who feared such tolerance might lead to the displacement of the Hindu religion and culture from the centre of Indian society.[12]

Who benefits from religious freedom?

Christos Makridis, a Stanford University researcher, mentions that *"Countries cannot have long-run economic prosperity and freedom without actively allowing for and promoting religious liberty."*[13] The

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[6] Jonathan Fox, *'What is religious freedom and who has it?,* Social compass, 68(3), [2021], 321-41.

[7] https://newsroom.churchofjesuschrist.org/official-statement/religious-freedom, last visited on Aug. 30, 2023.

[8] https://www.heritage.org/what-you-need-know-about-religious-freedom/what-you-need know-about-religious -freedom

[9] Ibid.

[10] Guaranteed to all persons by the Constitution under Articles 25 to 28.

[11] Jonathan (n 6), 325.

[12] https://providencemag.com/2020/05/key-challenges-freedom-religious-institutions-india/

[13] C.A. Makridis, *'Civil, and Economic Freedoms: What's the Chicken and What's the Egg?' Journal of Economics, Management and Religion*, *2*(02), 21.

sole statement is enough to understand the importance of religious freedom. Religious freedom benefits everyone. It treats all people equally – Hindus, Muslims, Christians, Jews, agnostics, and atheists.[14] It is not only mentioned in the Constitution of India but is available in the spirit of every Indian following the ancient tradition of *'वसुधैव कुटुम्बकम् '*.

India is a diverse country with a rich tapestry of religions. The legal framework ensures that every citizen has the right to practice, profess, and propagate their religion freely. Particularly, Article 25-28 of the Indian Constitution ensure the religious freedom. Article 25 (1) clearly mandates for all persons, 'freedom of conscience' and 'the right freely to profess, practice and propagate religion'.[15] It is not only available to a particular section of the society but available to all. Article 25 covers religious beliefs (doctrines) as well as religious practices (rituals). In this row, Article 29 of the constitution goes further while ensuring the interests of minorities.[16]

The principle of secularism is enshrined in the Indian Constitution, emphasizing the state's neutrality in religious matters, and promoting religious tolerance and coexistence.[17] However, India has faced challenges in ensuring religious harmony at few instances starting from the post-independence division of India to Babri mosque demolition and from Godhra train incident to a massive riot in Gujarat.[18] Recent violence in Manipur (one of the northeast Indian State), in May 2023, has again proved to be a nightmare. Despite these challenges, the country continues to strive towards upholding

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[14] heritage.org (n 8).

[15] "Article 25 of the Constitution of India – (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.
Explanation I. - The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.
Explanation II. - In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."

[16] "Article 29 of the Constitution of India- (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language, or any of them."

[17] Deepa Das Acevedo, *'Secularism in the Indian Context'*, Law & Social Inquiry, vol. 38 (1), 2013, 138., http://www.jstor.org/stable/23357741, last visited on Aug. 15, 2023.

[18] https://www.indiatoday.in/india/gujarat/story/when-gujarat-fell-to-rioters-after-sabarmati-express-was-set-on-fire-in-godhra-1179293-2018-02-28.

religious freedom and fostering an inclusive society that respects the rights and beliefs of all its citizens.

4. To What Extent can the State Restrict One's Religious Freedom

In India, the right to practice, profess, and propagate religion is not absolute. Although Indian Constitution guarantees the right to freedom of religion under article 25, it also allows the state to impose reasonable restrictions on this right in the interest of public order, morality, and health. Apart from the mentioned restrictions, article 25 of the constitution uses a wide term named public order, morality which widens up the scope of the provision exceptionally.

Some instances where the state can restrict religious practices mentioned as: If a religious practice is likely to disrupt public order or lead to communal tensions, the state may intervene to maintain peace and harmony. Health and Morality is another aspect where state can intervene and regulate or restrict certain religious practices that may pose health risks or are considered morally offensive. Social Welfare is another aspect which is considered the most contemporary where the state can pass laws to ban those religious practices that are exploitative or harmful, particularly towards vulnerable groups. And finally, if a religious practice violates the fundamental rights of others, such as their right to life, liberty, or equality, it may be subject to restriction.

However, any restrictions imposed by the state must be reasonable and not discriminatory. The Indian judiciary plays a crucial role in ensuring that the state's actions adhere to constitutional principles and protect the fundamental rights of all citizens, including the right to freedom of religion.

Undoubtedly, India, being the largest democracy has tried a lot to bring religious parity since its independence. But due to certain extremist religious groups (from all religion), the efforts have not achieved its intended result of the highest harmony. According to various scholars in the field, India is far from perfect when it comes to religious freedom.[19] USCIRF Annual Report 2023 mentioned that the religious freedom conditions in India continued to worsen.[20] USCIRF Annual Report 2023 specifically quotes *"[t]hroughout the year, the Indian government at the national, state, and local levels promoted and enforced religiously dis-criminatory policies, including laws targeting religious conversion, interfaith relationships, the wearing of hijabs, and cow slaughter, which negatively impact*

[19] Timothy S. Shah, '*India's Other Religious Freedom Problems'*, 2021 (75), available at https://doi.org/10.3390/rel12070490

[20] *See,* USCIRF Annual Report 2023, United States Commission on International Religious Freedom, available at https://www.uscirf.gov/publication/2023-annual-report

Muslims, Christians, Sikhs, Dalits, and Adivasis (indigenous peoples and scheduled tribes)".[21]

The issue of religious freedom is very important for a diverse country like India. Although the government of India has denied all the allegations raised in the USCIRF Annual Report 2023, but the recent terrifying video from Manipur where two women were forced to parade naked tells a different story altogether.

5. What are the consequences of restricting religious freedom?

Having the US experience, restricting religious freedom forced citizens out of jobs and blocks organizations from providing social services desperately needed by their communities.[22] It also endangers other civil liberties, including free speech, free association, and even economic freedom. Faith-based social service providers and educational institutions often have core beliefs about issues like marriage, family, and sexuality. Forcing them to compromise their religious commitments would cripple their ability to serve their communities.[23]

According to a research conducted by Religious Freedom & Business Foundation (RFBF) in 2019, *"the dramatic decline in religious freedom impacts not only peace and stability but also slows global economic growth."*[24] Pew Research published in 2019 found 52 governments out of 198 had high or very high restrictions on religion. In 2014, a study conducted by Georgetown University and Brigham Young University, highlighted that *"Economies of populous countries where religious restrictions and hostilities decreased grew at double the rate as economies where religious restrictions and hostilities substantially increased."*[25] The similar trend has also been reflected for social hostilities involving religion which is an alarming trend. Since the present federal government highlights the developments took place post 2014 general election and specifically during present regime, it should be analysed in totality taking into consideration the rights of minorities and marginalised.

6. Multiple Benefits of Religious Freedom

It is very significant that why someone so strongly advocates the religious freedom. Religious freedom benefits both individuals and

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[21] USCIRF Annual Report (n 20)
[22] https://www.bellinghampubliclibrary.org/wp-content/uploads/2019/09/Community-Conversations-Report_FINAL_appendix.pdf
[23] heritage.org (n 8).
[24] Brian J. Grim, *'Economic Growth Slowed by Decline in Religious Freedom'*, last visited on Aug. 18, 2023. https://religiousfreedomandbusiness.org/economic-growth-slowed-by-decline-in-religious-freedom, accessed on August 25, 2023.
[25] https://religiousfreedomandbusiness.org/2/post/2014/05/religious-freedom-linked-to-economic-growth-finds-global-study.html, last visited on August 25, 2023.

communities. A robust protection of religious freedom is the hallmark of *'Democracy and Rule of Law'* which ensures that the rights of all citizens are respected.[26] Religious freedom is a fundamental human right, enshrined in various international treaties and constitutions. It is essential for upholding the broader framework of human rights and promoting a just and equitable society.[27] Religious freedom recognizes the inherent dignity and autonomy of individuals, allowing them to choose, practice, or change their beliefs according to their conscience. It empowers individuals to define their spiritual journey and identity freely.[28]

In a huge and diverse country like India respect for every religion is undeniable. Religious freedom fosters a diverse and inclusive society, encouraging tolerance and understanding among people from different religious backgrounds.[29] It also prevents religious tensions and conflicts, promoting social cohesion and peaceful coexistence.[30]

Religious freedom safeguards cultural heritage, allowing traditions and practices to thrive and enrich the cultural fabric of a society.[31] It also impacts positively on innovation and progress, by allowing diverse perspectives and beliefs, religious freedom can foster an environment that encourages creativity, critical thinking, and intellectual development.[32] When individuals are free to practice their beliefs without fear of persecution, they can lead more fulfilling lives and contributing positively to society.[33] At the same time religious freedom is found fragile and must be safeguarded vigilantly. It requires a collective commitment to upholding democratic values, promoting social justice, and safeguarding human rights.

7. The Present Status of Religious Freedom in India

Religious freedom is very important because it is posited to be a central element of liberal democracy and as having multiple additional benefits including increased security and economic prosperity.[34] It is unfortunate that even democracies regularly discriminate against religious minorities and regulate the majority religion.[35] An empirical study conducted by Fox, 2020 presents that

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[26] heritage.org (n 8)
[27] https://www.ohchr.org/Documents/Publications/Compilation1.1en.pdf
[28] https://www.bbau.ac.in/dept/HR/TM/Freedom%20of%20religion%20under%20Indian%20Constitution.pdf
[29] https://plato.stanford.edu/entries/religious-pluralism/
[30] https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/social-well-being/social-reconst
[31] https://www.ohchr.org/Documents/Publications/HR-PUB-12-07_en.pdf
[32] https://www.emerald.com/insight/content/doi/10.1108/JIABR-10-2022-0258/full/html
[33] ohchr.org (n 27)
[34] Fox (n 6).
[35] Ibid.

state support for religion is an important reason for low levels of religious freedom even in democracies. The similar (although very low in proportion) trend can also be seen in India and other neighbouring countries as well.

India is the world's most populous democracy, with an estimated 1.4 billion people, 79.8 percent of whom are Hindu, 14.2 percent Muslim, 2.3 percent Christian, and 1.7 percent Sikh.[36] There are smaller religious groups as well including Buddhists, Jains, Baha'is, Jews, Zoroastrians (Parsis), and nonreligious persons.[37] India's constitution establishes the nation as a secular, democratic republic, and Article 25[38] grants all individuals, freedom of conscience, including the right to practice, profess, and propagate religion.[39]

The constitution mandates India as a secular state and provides for freedom of conscience and the right of all individuals to profess, practice, and propagate religion freely, subject to considerations of public order, morality, and health.[40] The Report on International Religious Freedom 2022 mentions that Federal law empowers the government to ban religious organizations that provoke intercommunal tensions, are involved in terrorism or sedition, or violate laws governing foreign contributions.[41] Although religious freedom in India is constitutionally guaranteed and protected under Articles 25 to 28 of the Constitution of India, but, certain international studies have shown its concern for undermining the minority rights.[42]

Although, there is a disagreement between the US and Indian government on the issue, we have to accept few untoward incidents in the name of religion. Recent violence in Manipur (one of the northeast Indian State), in May 2023, has added the fuel to fire. The clash has witnessed the threat to the Christian Kuki population and reached to level where religious symbols and places of worship and refuge has been targeted. Ironically, all these incidents have taken place when India is trying to regain its international importance as a peace loving and the oldest democracy. Even the International Religious Freedom's latest report 2023 has expressed its concern and conveyed that India must review its religious rights records.[43] In

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[36] USCIRF Annual Report (n 20)
[37] Ibid.
[38] Constitution of India (n 15)
[39] USCIRF Annual Report (n 20)
[40] *See,* Section II, International Religious Freedom Report for 2022 United States Department of State, Office of International Religious Freedom.
[41] https://www.state.gov/reports/2022-report-on-international-religious-freedom/india/
[42] *See,* https://www.thehindu.com/opinion/editorial/present-imperfect-on-the-us-commission-on-international-religious-freedoms-latest-report-and-india/article66808412.ece
[43] The Hindu report (n 42).

2022, also similar reports came out mentioning certain violations on the basis of religion.

8. International Obligation to Ensure Religious Freedom

Freedom is a core principle upheld in various international treaties and agreements. The Universal Declaration of Human Rights (UDHR), adopted by the United Nations in 1948, recognizes freedom as a fundamental human right. Article 18[44] of the UDHR specifically protects the "right to freedom of thought, conscience, and religion". Additionally, the International Covenant on Civil and Political Rights (ICCPR) further elaborates on the right to freedom of religion or belief under Article 18. These treaties aim to safeguard individuals' freedom from persecution, discrimination, and coercion based on their beliefs, promoting a global commitment to uphold and protect the inherent dignity and autonomy of every person.

It is the US president Roosevelt Franklin D. Roosevelt who initially voiced for religious liberty which ultimately culminated in the Universal Declaration of Human Rights. It is inspired by the "four freedoms" identified by Roosevelt, but does not define the religious liberty in the specific terms that is the birthright of all people.[45] The Universal Declaration of Human Rights (UDHR)[46], adopted by the United Nations General Assembly on December 10, 1948, is indeed a landmark document in the history of human rights which specifically highlighted recognition of religious freedoms.[47] It was created in response to the atrocities of World War II and aimed to set out fundamental rights of religion[48] to be universally protected, thereby preventing such atrocities from happening in the future.

The freedom of religion today is regarded as a basic human right, not merely a boundary area for tolerance that is ceded by civil authority.[49] But, it was not always so. The concept of freedom of religion has evolved significantly over time. In the past, as exemplified by the 1555 Religious Peace of Augsburg, the prevailing belief was "cuius regio, eius religio," meaning that each ruler

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[44] "Everyone has the right to freedom of thought, conscience and religion; this right includes the right to change his religion or belief, and freedom, either alone or in community with others in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

[45] Anthony Peirson Xavier Bothwell, *'International Standards for Protection of Religious Freedom,'* Annual Survey of International & Comparative Law, 23 (1), (2019).

[46] Article 25 of Universal Declaration of Human Rights, 1948.

[47] Derek H. Davis, *'The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief'*, BYU L. REV., 227 (2002)

[48] UDHR, Art. 2.

[49] Louis Henkin, et.al., Human Rights 639 (2d ed. 1999).

determined the religion of their subjects.[50] This implied that only the ruler enjoyed religious freedom.

Today, freedom of religion is considered a fundamental human right, not just a matter of tolerance granted by authorities. This transformation reflects the shift from a historical model where rulers dictated religious beliefs to a modern understanding that emphasizes individual and collective religious freedoms. The UN Charter[51] symbolizes this transition by prioritizing international peace and security while acknowledging the significance of human rights, including freedom of religion, in building a just and peaceful world.

President Harry S. Truman's words, spoken at the closing session of the San Francisco conference where the United Nations Charter was signed, resonate as a powerful reminder of the foundational principles upon which the United Nations was established.[52] Truman's unwavering commitment to human rights and fundamental freedoms, regardless of one's race, language, or religion, reflects a profound understanding of the essential link between these rights and lasting global peace and security. He emphasized the dedication of the Charter to achieving and upholding human rights and fundamental freedoms for all, regardless of factors such as race, language, or religion. Truman's words highlighted the vital connection between universal human rights and lasting peace and security on a global scale.

Furthermore, the post-World War II era saw the development of other critical international agreements aimed at safeguarding human rights and ensuring the dignity and well-being of individuals, particularly in times of conflict.

The international human rights provisions within the UN Charter indeed hold significant importance. These provisions, including the guarantee of freedom of religion, are considered legally binding international obligations for all Member States.[53] This means that countries that are part of the United Nations are bound by these commitments to protect and uphold the human rights outlined in the Charter. The Genocide Convention, established shortly after the UN Charter, addressed the prevention and punishment of genocide. Additionally, the Geneva Conventions, initiated a year later, set standards for the treatment of civilians during wartime, including the protection of their religious convictions and practices. These conventions reflect the global commitment to respect the rights and

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[50] Ibid.
[51] U.N. Charter, which is signed by US on June 26, 1945 and entered into on force Oct. 24, 1945, ratified by U.S. Aug. 8, 1945.
[52] Harry S Truman, Address at the Closing Session of the United Nations Conference (June 26, 1945), available at http://www.presidency.ucsb.edu/ws/?pid=12188.
[53] *See*, Art. 18 of International Covenant on Civil and Political Rights, 1966.

dignity of individuals even in the most challenging and turbulent times, reinforcing the idea that human rights are essential to maintaining peace and security worldwide.

The adoption of the International Covenant on Civil and Political Rights (ICCPR) in 1966 marked a significant milestone in the protection of religious and other individual rights. This covenant is legally binding on states parties and includes Article 18, which unequivocally states, "Everyone shall have the right to freedom of thought, conscience, and religion." This language is intentionally broad, encompassing a wide range of belief systems. For example, this provision protects not only the right to practice mainstream but also ensures the rights of individuals who adhere to minority or non-traditional belief systems. This inclusiveness reflects a commitment to recognizing and protecting the diverse array of belief systems that exist worldwide.

Furthermore, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the United Nations General Assembly in 1992, emphasizes the rights of minority groups, including their religious rights.[54] This declaration reinforces the principle that minority communities have the right to practice their own religion and maintain connections with related groups globally. Article 1(1) of the declaration requires certain steps to It also encourages states to create conditions that promote and protect the identity and rights of minority groups within their territories, fostering inclusivity and diversity.[55]

In this row mentioning the resolution passed by the General Assembly, such as the one in 2000, reaffirm the commitment to human dignity and the principles of the UN Charter. These resolutions impose a duty on all governments to counter intolerance and related violence, including discrimination against women and the desecration of religious sites.[56] However, despite the legal framework in place, the effectiveness of addressing these issues often hinges on political will. The main challenge lies in translating these laws and resolutions into concrete actions that protect the rights of religious minorities and promote tolerance and respect for diverse belief systems. It is imperative that governments and international bodies remain vigilant and take proactive steps to enforce and implement these legal provisions.

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[54] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992.
[55] *See*, Art. 1(1) of Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992.
[56] UN Resolution on Elimination of all forms of religious intolerance, 2000, available at http://www.un-documents.net/a55r97.htm (accessed June 13, 2018).

9. Conclusion

Religious freedom in India, both in its present state and its trajectory into the future, embodies a complex tapestry of pluralism, historical heritage, and contemporary challenges. India's history has been marked by a profound acceptance of diverse faiths and philosophies, reflecting a deep-rooted commitment to religious freedom and peaceful coexistence. Nevertheless, the present reality paints a more intricate picture. Instances of religious intolerance, discrimination, and violence persist, often exacerbated by divisive political agendas and extremist ideologies. Contentious issues like personal law, minority identity, conversion, and affirmative action continue to fuel debates that sometimes polarize society.

Looking to the future, hope emerges amid these challenges. India's democratic framework, founded on secularism and equality, holds the promise of securing religious freedom. The key lies in the collective commitment of citizens, government institutions, civil society, and religious leaders to uphold the principles of tolerance and inclusivity. To ensure a robust future for religious freedom, India must engage in constructive dialogues, transcend differences, and create legislation and policies that safeguard minority rights and guarantee all citizens the unfettered practice of their faith. India, as a model of religious pluralism, can demonstrate that a nation prospers when it cherishes the fundamental right of individuals to follow their chosen beliefs. While the journey may be challenging, India has the potential to shine as a beacon of religious freedom and coexistence in our interconnected and diverse world.

Legal Paradigm to Regulate Domestic Workers in India: Intersectionality and the ILO Convention 189

Mr. Animesh Srivastava*

1. Introduction

Domestic workers are a class of unorganized workers who have been ignored for long. Neither do they get protection within the existing labour law norms, nor do they get to exercise their fundamental rights or human rights to ensure a basic human existence. Neglected by the state, their survival often depends on the mercy and benevolence of others such as their employers. While such a state of affairs should get public attention and immediate remedial measures should be taken, it does not really happen. The reason may be that because domestic workers are a group which is so scattered – invisible yet present – that they rarely are able to advocate for their rights as a group. Collective bargaining is indeed a right which can be materialized, to a limited extent, by the industrial proletariat.

1.1. Cause of concern: failed attempts at regulating the sector and its 'why'

Several attempts, though, have been taken by different actors to address this silent yet real mass denial of human rights, such attempts have not been able to materialize into something of real worth for addressing the plight of domestic workers. We can go as far as the 1950s to find legislative attempts to confer some social security to the domestic workers by means of a law. However, even after a number of attempts to introduce such laws in India, none of these bills could ever get translated into an act of the parliament. Whether this has to do something with real challenges that are posed by implementing such a law, or merely because the composition of Parliament is as such that there is no political will to address the issues of domestic workers is something to critically examine.

In the international level as well, there were no regulations, laws, conventions, or customs that could sufficiently address the unique situation of domestic workers. Their situation is *unique* because of several aspects that are present in the domestic work sector which sharply distinguishes it from other sectors. Domestic work is done in a *domestic setting* which means that the home of the employer is the workplace for the worker. In such a scenario, making arrangements

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that are generally made available in an industrial setting become difficult. There are many factors regarding the working conditions and facilities that are different while working in the homes of employers than in an industrial establishment. The issue of sexual harassment requires urgent attention because the women working in the homes of employers find themselves in constant proximity with the harassers – which in absence of any body such as the ICC, poses threat to the safety of the domestic worker. Patriarchal notions like looking at domestic work as women's reproductive labour also come in and shape the narrative around the legal regulation of this sector. Furthermore, domestic work cannot be understood in a purely *employment relationship* manner – which may be true for other industrial establishments. This is because domestic work involves many aspects of *the social* and certain *care* related aspects are also present. Many times, a worker who works in several households. From the perspective of the employer such a worker is a part-time worker while from the perspective of the worker, she is a full-time worker.

1.2. Bringing about Change: new developments in the sector

It is said that Human Rights are for all but a question of immense importance is whether the domestic workers possess *capabilities* to exercise such rights in their life when they are faced against their employers. Domestic workers were specifically excluded from the scope of several labour laws and regulations, even those made by the International Labour Organization ("ILO"). Perhaps, the capitalistic distinction of *public-private* divide which focuses on conferring rights in an industrial setting but shuns away legal obligation on part of state actors to address problems in "private sphere" was too heavily relied upon in framing these labour protection norms.

While it may have come about very late, the ILO convention for the protection of domestic workers ("Convention 189"),[1] aims to remedy the situation by making member states commit to some level of labour regulations to protect the domestic workers in their respective jurisdictions. The biggest contribution of Convention 189 can be said to be the fact that it recognizes domestic work as *work*.[2] The dominant notion of the past that since domestic workers work in *households* it is not work but merely an extension of the reproductive work that women do, was rightly rejected by this recognition at the international level [emphasis added]. However, while there are many progressive aspects to this convention, there are certain causes of concerns that need to be taken up for effective resolution of the problems that domestic workers face in their lives.

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[1] Decent Work for Domestic Workers, Convention 189 & Recommendation 201, International Labour Organization, 2011.

[2] *Ibid, Art. 1.*

2. Domestic Workers: A Neglected Workforce

There are far too many people engaged in domestic work to remain unnoticed from the eyes of the state, as well as, the international community; yet, for so long their issues have remained in the corner of priorities of the international community – hidden completely from sight, and beyond any action. As per estimates, around 67 million people over the age of 15 are working as domestic workers.[3] While it may otherwise have been surprising to find a work-sector dominated by women workforce in the patriarchal setup we find ourselves in, it is no surprise that 83% of the people engaged as domestic workers identify as women.[4]

2.1. Invisibilization of work: patriarchy and beyond

Indeed, the question is, if such a large number of us are engaged as domestic workers, why has domestic work been denied the status of *work* and why have the issues of domestic workers not considered at par with the workforce engaged in sectors such as industry. What are the reasons behind the domestic workers' plight, why have they not been able to fight for their rights to a greater extent and why do we still not see mass action for their cause? These are important questions to ask, and answers to these questions can be found in the hetero-patriarchal structures we are surrounded by, and live in.

One of the reasons why domestic work has traditionally, and even today, not been considered as *work* is because of it being associated with the reproductive labour which stereotypically every woman is supposed to do, and be able to do without need of any training or skill.[5] Patriarchal norms have put women at subordinated position in the society; the gender based division of labour is such, which considers the work associated with men as being real work or productive labour, and the unpaid work which women have been forced to do at homes as being mere reproductive labour which is not considered 'real' work. It is because of such gendered natured role of domestic work as being considered to be "women's work" that the socio-legal understanding of domestic work has put it beyond the scope of law and regulation.[6] This can also be understood in terms of *public-private* divide. In the capitalistic form of societal setup, only the issues falling under the *public sphere* should come under the purview of law – for example, industrial workforce or organized workforce is given protections under

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[3] *Protecting Migrant Domestic Workers: The international legal framework at a glance,* Research series, International Labour Organization, 2016.

[4] ibid.

[5] Sophy KJ, 'Lockdown In Poverty: Orphaned By Economy, Women Domestic Workers Struggle To Make Ends Meet' *Outlook India,* (21 April 2020).

[6] S. Natalie, *Domestic Workers, the 'Family Worker' Exemption from Minimum Wage, and Gendered Devaluation of Women's Work*, Industrial Law Journal (April 2022)

the law.[7] Whereas, the issues under the *private domain* are matters that do not concern any state action and so law cannot be applied on such issues. Since domestic workers work in households, and households are considered to be a private sphere of families, their labour is not considered worthy of state or legal actions. Therefore, domestic work has not been considered *work* for many years, and giving it status of *work* is a very recent happening.[8]

2.2. Bringing the invisible to light: ILO and international developments

The denial of labour law protections to domestic workers is the primary cause for their plight. While now there are a few states that have extended the right to minimum wages to domestic workers, largely there is inaction to undertake such an action.[9] Domestic workers, hence, have been denied labour rights such as paid leaves, maternity benefits, notice before termination, and decent work conditions. While we have seen the organized workforce protesting, demanding these rights and succeeding in getting a lot of benefits, the domestic workers have not been able to undertake similar action. This is because domestic workers are not a group closely tied within itself – there are segregated groups within domestic workers and even these groups are not very cohesive. Domestic workers do not share the workplace, therefore, they cannot mobilize together and so it is easier for employers to exploit them.[10]

The International Labour Organization (ILO) was established in 1919 as a specialized agency of the United Nations. Its primary objective is to promote global social justice and adequate working conditions. In recognition of the need for international cooperation in labour standards and the preservation of worker rights, the ILO was established after World War I. The ILO is unique in that it brings together government, employer, and worker representatives to establish international labour standards and promote respectable work for all.[11] ILO prepared labour standards, sometimes in the form of conventions which are legally binding multilateral treaties which can

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[7] G. Sujata, *The Plight of Domestic Workers: Confluence of Gender, Class and Caste Hierarchies*, Economic and Political Weekly, Vol. 48, No. 22 (JUNE 1, 2013), pp. 63-75.

[8] G. Shraddha, *Decent work for domestic workers: reflections in the Indian legal context,* Manupatra (September 2018).

[9] M. Jeet, *Employment rights protection and conditions of domestic workers: a critical appraisal,* Journal of the Indian Law Institute, Vol. 57, No. 2 (April-June 2015), pp. 216-243.

[10] B. Eileen & F. Jennifer, *"Slaves No More": Making Global Labor Standards for Domestic Workers*, Feminist Studies , Vol. 40, No. 2, Special Issue: Food and Ecology (2014), pp. 411-443

[11] *Domestic workers across the world: Global and regional statistics and the extent of legal protection,* International Labour Organization, 2013

be ratified by states. Such conventions include within themselves the requirement of altering the domestic law of states in tune with the convention text. This ensures progressive understanding and growth of the labour law regime.

The Domestic Workers Convention, 2011 (No. 189)[12] is the first international agreement that addresses domestic worker rights specifically. The Convention recognizes domestic labour as work and affirms domestic workers' entitlement to the same fundamental labour protections as other workers. These rights include the right to social security, the right to organize and collectively negotiate, and the right to labour under decent conditions. The Convention also establishes a framework for the employment contracts of domestic employees, as well as minimum standards for working hours, rest periods, and annual leave.[13] Various parties, including domestic workers' organizations, trade unions, and women's groups, advocated for the Convention.[14] These organizations had campaigned for years for the recognition of domestic work as work and the protection of domestic workers' rights. The Domestic Workers Convention, 2011 (No. 189) was a significant victory for these groups and a significant step towards enhancing the conditions and rights of domestic workers around the world.

3. ILO Convention 189 – Progress, But How Far?

This part focuses on the shortcomings of the ILO Convention 189 by critiquing two aspects which are not sufficiently addressed. *First*, it argues that the convention 189, while acknowledging that discriminatory practices may exist, misses out on addressing the intersectional issues that domestic workers face. The convention is too broad in its definition of domestic work and domestic workers, and treats domestic workers as a homogeneous class – which they are not. *Second*, it argues that the convention 189 does not sufficiently address the power imbalance between domestic workers and employers because (i) it solely focuses on an employment relationship, missing out on different forms of domestic work which might not strictly fit in such arrangement like part time domestic work which often is identified as self-employment; (ii) its definition of domestic workers is so broad that it includes within itself different gendered natured works which traditionally are not recognised as domestic work thereby reducing group solidarity and collective bargaining powers; and (iii) it solely focuses on a rights based approach by conferring rights on workers to be exercised against better socio-political and economic

[12] Convention 189 & Recommendation 201 (n 6).

[13] *Towards achieving decent work for domestic workers in ASEAN*, 10th ASEAN Forum on Migrant Labour (AFML) – Thematic background paper, 2017.

[14] *Unionizing Domestic Workers: Case study of the INTUC- Karnataka Domestic Workers Congress,* International Labour Organization, 2013.

placed employers, while failing to recognize that domestic work is not merely *work* in the industrial sense but also includes an element of *care, personal relations,* or *the "social"*

3.1. Intersectionality and the ILO Convention 189

In various contexts, the domestic workers are not a class of people which has homogeneous lived-experiences and issues. Domestic workers in countries such as India can be segregated in terms of social backgrounds that they come from.[15] This creates unique issues of intersectional issues in an already oppressed class of labour. If we see in the Indian context, gender, caste, religion are extremely relevant factors for determining the issues and problems of domestic workers.

There is some benefit in acknowledging the social realities that even while the total women participation in the workforce remained abysmal, domestic work was one sector in which it continuously grew.[16] Reasons behind this are multifaceted. The injustices to the Dalit/Adivasi communities in India denied them the right to human dignity and educational opportunities. They were put in subordinated positions in the society. The lack of employment opportunities is another factor which forces people, primarily women, to take up domestic work.[17]

All this ensures a constant "supply" of domestic labour to privileged households which frequently belong to those of Upper castes. Intersectionality in experiences of domestic workers in India can also be seen in context of how employers discriminate these workers on the basis of castes by giving cleaning work or work which has been traditionally considered *dirty* to workers belonging to lower caste backgrounds and work such as cooking to the ones belonging to upper castes.[18] This is a discrimination based on the *purity* of blood of the workers. All this makes the already oppressed class of domestic workers more persecuted and denied human dignity. Therefore, an intervention which accounts for these differences in lived experiences and intersectional issues in domestic workers is a must to effectively address the plight of domestic workers.

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[15] R. Parvati, *Caste and Gender in the Organisation of Paid Domestic Work in India,* Work, Employment & Society , September 2001, Vol. 15, No. 3 (September 2001), pp. 607-617.

[16] M. Sabrina, *The Global Governance of Paid Domestic Work: Comparing the Impact of ILO Convention No. 189 in Ecuador and India,* Critical Sociology (2018), pp. 1-15

[17] C. Nicola, *Domestic workers in India: a case for legislative action*, Journal of the Indian Law Institute, Vol. 36, No. 1 (January-March 1994), pp. 53-63.

[18] N. Neetha, *Misconstrued Notions and Misplaced Interventions: An Assessment of State Policy on Domestic Work in India,* The Indian Journal of Labour Economics (2021) 64:543–564 https://doi.org/10.1007/s41027-021-00334-w.

ILO convention 189 merely defines domestic work as work done in or for a household in an employment relationship.[19] This definition is so broad that it does not take into account specific issues present in the domestic work sector. There might be situations when there is an unpaid domestic worker who works for a family member – taking other types of benefits. Similarly, there can be situations where strict employment type of arrangement is absent.[20] Such situations will not be covered by the domestic workers' convention. The Convention neither recognizes nor obligates ratifying parties to identify the intersectional issues in the domestic work sector.

In such a scenario, the workers placed in the bottom-most position in the hierarchy within domestic workers would be left helpless and no actions would be taken to address their problem as the ground of there being a law *for* domestic workers would be sufficient to deny taking further immediate action.

It is important to account for the lived experiences of the domestic workers. It is also important to understand domestic workers as a *non-homogeneous* group. There are several reasons for this, which are most visible in the case of a country like India. There are deep-rooted power structures in the society which range from caste, gender, to religion and ethnicity. The individuals, predominantly women, engaged in domestic work come from different social strata of the society. While some may come from upper caste backgrounds, most of these workers come from lower caste backgrounds. This has a huge impact on the kind of treatment these workers get in their workplace, which is, home of the privileged class. Largely, the domestic workers who are given tasks such as cooking are from an upper caste background and not from a lower caste background. This is because of the casteism and concept of purity where some jobs are seen as too menial for upper castes to perform, and some jobs are seen as more important and pure and so given to the upper castes. Prime example of such casteism playing out in real life is the profile of domestic workers who are engaged in cleaning tasks, and those who are engaged in cooking tasks. Such social factors also determine what kind of perks the employer is willing to provide to the domestic workers. While a domestic worker from the upper caste background may be allowed to use the family utensils to drink water, to have food, or to use the residential bathrooms, the employer would be relatively reluctant in extending such basic facilities to domestic workers from lower caste backgrounds. All this highlights the need to acknowledge and address that even individuals engaged as domestic workers do not form a

[19] Convention 189 (n 6).

[20] Supriya Routh, 'Situated Experience as Basis of Legitimate Law-Making: ILO Convention 189 and Domestic Workers in India' in Upasana Mahanta and Indranath Gupta (eds), *Recognition of the Rights of Domestic Workers in India* (Springer 2019)

homogeneous group and come from different social strata. Doing so would make the intervention by the law and policy more effective in addressing the issues in the domestic work sector.

ILO convention 189 was held to be a progressive document that seeks to regulate domestic work and provide social security to domestic workers by recognizing such work to be *real work*. However, by failing to provide for a framework which takes into account the differences in lived experiences within the domestic workers' class and which does not treat domestic workers as a homogeneous class, the convention 189 denies rights and dignity to a large number of these domestic workers.[21]

3.2. Addressing the power imbalance in the domestic work sector: ILO Convention 189

As is generally true in other contexts, domestic work too has a huge power imbalance between workers and employers. This can be seen from the fact that domestic workers are not able to negotiate wages, ask for leaves, or some emergency benefits. The employers enjoy too strong and dominant a position in the hierarchy that domestic workers are deterred from demanding decent working conditions.[22] While in the context of various workforce like that of industrial workers, there is a strong emphasis on collective bargaining, no such method is undertaken in the context of domestic work. This is because the industrial workers are a cohesive group which can communicate and discuss demands among each other and then raise such demand in front of the employer; the domestic workers do not form such a cohesive group which can raise demands as a collective group.[23] There are multiple reasons behind this – one of which is the lack of a common employer. Other reasons include, no identification of common demand, non-registration of their groupings as trade unions, caste hierarchies within the domestic workers, etc. In this context where such huge power imbalances exist between the employers and domestic workers, it is imperative for any law seeking to address the situation to focus on this power imbalance and take countermeasures to decrease its effect.

ILO convention 189 fails in addressing this essential issue. At several counts, the convention misses out on the opportunity to address the power imbalances between employers and domestic workers.

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[21] Neetha (n 21).

[22] G. Sujata, *The Plight of Domestic Workers: Confluence of Gender, Class and Caste Hierarchies*, Economic and Political Weekly, Vol. 48, No. 22 (JUNE 1, 2013), pp. 63-75.

[23] S. Hila & M. Guy, *The Global Governance of Domestic Work*, *in* Migration and Care Labour - Theory, Policy and Politics 142, 2014.

3.2.1. Misplaced focus: employment relationship

First, the convention by defining domestic work in a certain way, focuses solely on domestic work which can be seen as an *employment relationship*. An *employment relationship* is the kind of employer-employee relationship generally seen in the context of an industrial establishment. In such a case, the relationship meets the legal tests of a *contract of service* as has been developed by the labour law jurisprudence. Generally, it can be found that there is a term of contract or term of employment which is signed by the employer and the worker to enter into such a relationship. In the case of domestic work such a strict *employment relationship* is not present universally. There are situations where the workers work in the households of their family members for support in some other terms than monetary wages. There are also situations where rather than working in an employment type of relationship with an employer, a worker works in several households for service. In such a style of part-time work (from the perspective of an employer; for a worker, the work is full-time engagement only), the worker understands the work to be self-employment rather than an employment with the employer.

The focus of the convention strictly on an *employment relationship* misses out on other forms of domestic work which cannot be fitted in such an economic market-relation framework of domestic work. Domestic work which is unpaid or is done as self-employment, thus, falls outside the purview of this convention[24]. Since the convention defines domestic work as such, it excludes such nature of domestic work.

3.2.2. Definitional blunder: contextual scope of domestic work

Second, since the definition of domestic work and worker is so abstract and broad, it misses on the locally present gendered natured notions of work. The convention can be said to be insensitive to the social realities.[25] For instance, in the Indian context, work such as driving the family car, gardening, etc are considered to be work primarily for "men". If a definition, as adopted by this convention, is taken which clubs all these categories of work into domestic work, then it clubs together different forms of gendered work. This will act as a hindrance to group solidarity and collective bargaining strength.

3.2.3. Error in judgment: sole focus on a rights based approach

Third, this convention focuses solely on a rights-based approach towards addressing the issues in domestic work. Such an approach

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[24] Routh (n 23).

[25] Neetha (n 21).

may prove fruitful in situations where there is absolute mechanical conduction of work such as in industries where the workers do not interact with employers that much, and rather work in an establishment setting. Because of such settings, the workers are in a much better position to take collective action and materialize their rights. However, domestic work is very different in nature – it is performed in a very close, emotional, family-like setting. Such social settings where the workers have to interact with their employers on a daily basis and continue some social *care*, it is extremely difficult for a worker to materialize their rights. A broader approach which takes into account this social aspect[26] is needed for any law to sufficiently and effectively address the problems in the domestic work sector. This convention fails to sufficiently consider any such *social* factors such as caste, gender, or even the domestic/home/personal setting in which the work is performed, and identifies workers in an individualistic and atomistic fashion, thereby overlooking complex continuum of social relations that are shared between employers and domestic workers in a close setting – households. If the law has to incorporate these social aspects while regulating the domestic work it needs to address the lived experiences and intersectionality among the domestic workers. It needs to focus more on how to balance the domestic setting in which the work is performed and the facilities and social securities that need to be given to the domestic workers.

Due to these three reasons, the Convention 189 fails to sufficiently account for the inherent power imbalance present between the employers and domestic workers.

4. Conclusion

This paper has attempted to study the context and broader social realities in which the ILO Convention 189 needs to work. The convention, while taking the case of domestic workers further by recognizing domestic work as *work* and providing a platform to mobilize people for this cause, misses on significant aspects of lived experiences of workers. The convention ignores the broader social context in which a domestic worker is placed in. The convention contains capitalistic market-related understanding of domestic work and is ignorant towards the social aspects of *care* in domestic work. There are major concerns regarding the effectiveness of this convention majorly because most state parties have not ratified this convention. Even if the convention is able to get widespread ratification, there are concerns with respect to the contents of the convention itself. The convention does not sufficiently take into account the power imbalance between workers and employers in a domestic setting. There are no support structures as those available to workers in the organized

[26] Poddar M. & Koshy A., *"Legislating For Domestic 'Care' Workers In India – An Alternative Understanding",* NUJS Law Review (2019), Vol. 12, (March 2019) pp. 67-117

industrial sector which can come to the rescue of domestic workers so that they can materialize their rights.

However, the convention irrespective of these concerns is a positive development in the international arena and the understanding of labour law so far as domestic work is concerned. Various stakeholders have been advocating for recognizing domestic work as *work* for years; It is after the passage of a substantial amount of time that such a recognition has been given to the domestic work. There are areas in which work is still needed. The law needs to take into account social aspects like caste as well for effectively addressing the problems of domestic workers.

Some suggestions which may help in the positive development of the law in this respect include: *first*, the enactment must place its focus on the issues faced by the domestic workers; *second*, it must recognize that there are significant power imbalances between the employers and domestic workers. Therefore, the law must attempt to equalize these imbalances by providing beneficial protections to the workers; *third,* the protections provided under the law must be based in an intersectional analysis of the sector and thereby address the issues emerging from various socio-economic factors such as caste; *fourth,* the law must be developed in a consultative manner with various stakeholders involved. A consultative process would address the diverse and intersectional issues which may not be accounted for without involving various actors such as Labour Unions, NGOs, Informal Local Groups, and Associations of Domestic Workers.

The law needs to progress in a manner which leaves behind the narrow market based understanding of domestic work and move towards placing it in a much broader social context. Taking such an approach would mark a pivotal shift in the understanding of domestic work and would prove fruitful to remedy the situation at hand, and put a stop to the exploitation of domestic workers.

Defending Freedom of Expression in the Digital Age: Analysing the Legitimacy and Implications of India's Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2023

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1. Introduction

"If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error." – John Stuart Mill.

The Information Technology Act was enacted in the year 2000 ("**the Act**") with an object to "*provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication…, to facilitate electronic filing of documents with the Government agencies."*

Section 87 of the Act provided for such formulation of Rules by the Central Government that it is fit to advance the Act's objectives. A separate set of Rules were notified with respect to regulation of intermediaries. Section 2(w) of the Act defines intermediary as-

(w) —intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that

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record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes

As seen from the definition of intermediaries provided above, the Act does not specifically deal with social media platforms. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 specifically have been notified to regulate digital and social media intermediaries.

These Rules were amended in the year 2022, and again in the year 2023 to Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 ("**amending Rules**"). The current set of amending Rules of 2023 have been challenged in the Bombay High Court in the case of *Kunal Kamra v Union of India*[1] on various grounds of not being in conformity with Part III of the Indian Constitution as the amending Rules allow the Government to constitute a Fact Check Unit for regulating information related to the business of the government. Such a unit will be empowered to flag any information it believes to be "fake, false, or misleading" and if the intermediaries want to keep the safe harbour afforded to them by Section 79 of the Act, they can choose to remove such content. If the respective intermediary does not take the content down, it loses the legal immunity afforded by the Act, and the Government can take them to court for third-party information. Such draconian Rules should have no place in a democracy. The implications of this Rule would lead to widening the scope of censorship on free speech outside the reasonable restrictions provided under Article 19(2) of the Constitution.

2. Grounds on which the amending Rules are Unconstitutional:

A. Not in consonance with the Information Technology Act

The amending Rules of 2023 are ultra vires the IT Act. As seen above, sub-section 1 of Section 87 of the Act enables the Centre to "*make rules to carry out the provisions of the Act*". This in-turn means that the Rules must be within the four walls of the Act and cannot in itself be a separate legislature, outside the scope of the Act. However, the amending Rules of 2023 do exactly that.

In the enactment of the IT Rules, 2021, powers granted under sub-section (1) and clauses (z) and (zg) of sub-section (2) of section 87 of the Act have been invoked. The sub-sections read as follows:

"87. Power of Central Government to make rules.– (1) The Central Government may, by notification in the Official Gazette and in the Electronic Gazette, make rules to carry out the provisions of this Act.

[1] WP(L) No. 9792 of 2023.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:– (z) the procedures and safeguards for blocking for access by the public under sub-section (3) of section 69 A; (zg) the guidelines to be observed by the intermediaries under sub-section (2) of section 79;"[2]

The Rules can provide for blocking of public access to information, according to Section 69A, only *"….in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above…"* and no other ground can the freedom of speech and expression be curtailed according to Article 19 of the Constitution and the IT Act. The abovementioned Section is in consonance with the restrictions provided under Article 19(2) of the Constitution. However, the IT Rules 2023 go beyond the limitations provided under Section 69A read with Section 87(2)(z) and allow blocking from public access in case the information is "*in respect of any business of the Central Government, identified as fake, false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify."* This applies to any information relating to any business of the Central Government which the Government appointed 'Fact Checking Unit' adjudicates to be fake, false, or misleading. The Central Government, by this reason, acts as a self-appointed arbiter of truth of content.

When Section 79(2) is read with Section 87(2)(zg), it authorizes the Central Government to establish guidelines that intermediaries must follow to be eligible for legal protection under the Act. In accordance with Section 79, the rule is that intermediaries are not held accountable for third-party information, data, or communication links they provide or host, unless they fail to meet the conditions specified in sub-sections (2) and (3). However, if intermediaries want to keep their "safe harbour," they must remove the item that the fact-checking unit flagged.

B. The Amending Rules fail the test of overbreadth and creates a chilling effect on account of it being vague

The information that the amending Rules seek to regulate relates to the business of the Central Government. It requires social media intermediaries to take "*reasonable efforts"* to not host "*fake, false or misleading information"* in respect of the "*business of the Central Government*". To what extent the intermediaries are required to take action so as to avail the protection provided to them is not provided. Each of the quoted phrases are undefined and leave room for a wide

[2] The Information Technology Act, 2000

interpretation for a law which curbs a fundamental right. Every quoted phrase is inherently unclear, employing ambiguous language with boundaries that are impossible to define, and it encourages subjective interpretations that can vary greatly, making it difficult to apply the phrase consistently and fairly.

The phrase "*business of the Central Government*" is overbroad and can include within its ambit, a plethora of acts. No clear-cut definition of the same leaves us to question whether the phrase would extend to actions of the Government and its ministers alone, as provided for in Part V of the Constitution, or would also include areas such as judicial appointments where the central government has a role.

Furthermore, the phrase "*fake, false, or misleading*" also leaves room for the question as to whether the truth or falsity of information would be adjudged based on the facts available in the public domain or reliance could be placed on information that is solely in the custody of the Centre. This information, in sole custody of the Government, would also not be provided for defence in case of grievance redressal opted for by the individual, as the government may take a stand that it is a State secret and hence, cannot be made available to the public. There is uncertainty to what extent can this power be used as the Rules cast a wide net. Hence, it can lead to the taking within its breadth even innocent and protected speech and the amending Rules are likely to have a chilling effect. It would result in the line separating the lawful and unlawful information to become blurry and hence, cannot pass the test of overbreadth and self-censorship would lead to a chilling effect on free speech as individuals would avoid all forms of commentary on the actions of the government, for fear of this Rule. The problem remains is that there are no clear and certain indications of when a speech or publication will be taken by the Government to be fake, false or misleading.

The chilling effect of vague laws (and their tendency to result in self-censoring) has been judicially recognised as a ground to strike it down.

In *Kartar Singh v State of Punjab*,[3] the Hon'ble Supreme Court quoted *Grayned v. Rockford*,[4] which stated that-

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague

[3] (1994) 3 SCC 569.
[4] 33 L Ed 2d 222: 408 US 104 (1972).

laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them..... Uncertain meanings inevitably lead to citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."

The doctrine of vagueness aims to tackle two distinct yet related due process issues. First, it emphasizes that individuals subject to regulations should have a clear understanding of the requirements imposed upon them to enable them to comply. Second, it stresses the importance of precision and guidance to prevent law enforcement from acting arbitrarily or discriminatorily. In cases involving speech and expression, it is crucial to rigorously adhere to these principles to prevent any uncertainty from stifling protected speech.[5]

When the law is vague, it impermissibly delegates to the adjudicating authority –the FCU in this case—to decide what is or is not against that particular law in question, which leads to arbitrary and biased implementation of the same. Such a law cannot stand the scrutiny of Article 14 of the Constitution.

C. Violative of Article 14 and 19 of the Constitution

The amending Rule implies that fake, false, or misleading speech or expression about the government's affairs are in a distinct position than any other form of fake, false, or misleading information. This unreasonable classification does not stand the test laid down in the case of *State of Rajasthan v Mukan Chand & Ors.*,[6] which states that-

"For a classification to be valid, it must -

i. be founded on intelligible differentiation that distinguishes the those who are banded in one class, from those who are left out;

ii. the classification/ differentia must have a rational relationship with the object sought to be achieved by the law."

In the amending Rules, there is no rationale nexus for such classification and it is contrary to Article 14 of the Constitution. Such an impermissible classification is discriminatory and manifestly arbitrary, and acts as a little less than a government veto, targeted at free speech that is potentially critical of the government.

Furthermore, it is well-settled that for any limitation on freedom of speech and expression as outlined in Article 19(1), it must be well within the four corners of the exceptions provided under Article 19(2) of the Constitution.

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[5] Shreya Singhal v Union of India, (2015) 5 SCC 1.
[6] (1964) 6 SCR 903.

This Article allows the State to make laws which restrict the operation of Article 19(1) on the exhaustive list of grounds clearly set out in clause (2) of Article 19, and none other:

"Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of -

i. sovereignty and integrity of India;

ii. the security of the State;

iii. friendly relations with foreign states;

iv. public order;

v. decency or morality;

vi. contempt of court;

vii. defamation; and

viii. incitement to an offence."

The amending Rules do not cast a valid restriction within the ambit of the eight grounds enumerated above as no ground contemplates censoring of fake, false, or misleading information. The Article includes fake, false, or misleading speech to be disseminated, and further allows such speech to be rebutted by counter-speech and not censorship. It is only if such speech results in any of the above-mentioned eight situations, is when speech and expression can be reasonably restricted. However, one cannot pre-determine that fake, false, or misleading speech will necessarily result in one of the eight situations.

The Supreme Court in *Anuradha Bhasin v Union of India & Ors.*,[7] has stated that-

"…the freedom of speech and expression through the medium of internet is an integral part of Article 19(1)(a), and accordingly, any restriction on the same must be in accordance with Article 19(2) of the Constitution."

D. Undermines the Free Marketplace of Ideas

Social media platforms are a powerful medium of communication on account of their low cost and wide reach. These platforms are important for the dissemination of information and vital for the exercise of the fundamental rights of the citizens to speech and expression. The Supreme Court is *Anuradha Bhasin supra* has

[7] (2020) 3 SCC 637.

identified that freedom of speech and expression is both qualitative and quantitative in nature.

This freedom also recognises the protection of marketplace of ideas, where a free exchange of ideas is the best means to determine the truth. This has been emphasised upon by Justice Holmes in *Abrams v United States* as-

"…that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."

The principles of 'marketplace of ideas' and 'pursuit of truth' have been recognised by the Apex Court in the case of *Amish Devgan v Union of India & Ors.,*[8] wherein it has stated-

"Dissent and criticism of the elected government's policy, when puissant, deceptive or even false would be ethically wrong, but would not invite penal action. Elected representatives in power have the right to respond and dispel suspicion. The 'market place of ideas' and 'pursuit of truth' principle are fully applicable. Government should be left out from adjudicating what is true or false, good or bad, valid or invalid as these aspects should be left for open discussion in the public domain."

The creation of monopoly by way of a government appointed Fact Checking Unit in the marketplace of ideas is a dangerous notion to the pursuit of truth by way of exchange of information guaranteed under Article 19.

E. Other issues

The amending Rules also violate basic principles of natural justice by way of allowing the Central Government to handpick members of the fact-checking unit and also the grievance redressal forum to determine the false, fake, or misleading information about the business of the government itself acts like a judge in its own case, which presents a likelihood of abuse. A body appointed by the Government to adjudge government-related information has no standing in a democracy.

Furthermore, the Rules do not provide the individual, whose right has been restricted, to be heard before the FCU renders a decision of the information being fake, false, or misleading. *Audi alteram partem* is a well settled principle and recognised by law and the courts across the country.

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[8] (2021) 1 SCC 1.

After concluding that the information is false, fake, or misleading, the adjudicating authority, i.e., the FCU does not even provide a speaking order, stating its reasons for arriving at that conclusion. And after the content is already taken down, an individual will be faced with having to justify its speech without knowing the reasons for the government restricting such speech. This coupled with no opportunity for hearing as well as the government acting like a judge in its own case proves the arbitrary nature of the Rules and the intention of the government to use this provision to curb any critical speech and moderate, control, and censor discourse about the government.

The grievance redressal as provided under Rule 3(2)(a) and 3A do not have any power to override, correct or contradict a determination of the FCU. To make matters worse, the Appellate Committee is also to be constituted by the government itself.

3. Arguments in favour of the amending Rules:

In the Kunal Kamra case, the Union had its work cut out for itself, when it set out to defend Rules 3(1)(1)(A) and (C) to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 that amend Rules 3(1)(b)(v) of the Information Technology Rules, 2021. At the cost of repetition, they are challenged on the ground of being *ultra vires inter alia* Article 14, Article 19(1)(a), 19(1)(g) and Section 79 and Section 87(z) and (zg) of the IT Act, 2000.

Some arguments in defence of the amending Rules may be made on the grounds discussed below:

A. "Business of Government" is a well-defined term and "fake, false and misleading" are not vague or overbroad

"Business of the Government" is defined under the Constitution to mean the business transacted officially by the government under Order 2 of the Government of India (Allocation of Business) Rules, 1961, detailed in the First Schedule of these Rules. The amending Rules apply only in the realm of any information or event which finds its place in the official record or files of the Government of India which are maintained under these Rules.

The terms "fake, false and misleading" are understood with precision in general parlance by every English-speaking individual. The well settled rules of statutory interpretation grant the ordinary dictionary meaning of the words to their construction.

It may also be argued without prejudice, it is settled law words and expressions do not suffer from the vice of unconstitutionality

even though they are held to be incapable of precise definition.[9] Courts may take the dictionary meanings of terms which are not strictly defined in statutes.[10] Additionally, mere allegations of vagueness do not render a provision unconstitutional.[11]

B. An Article 14 and 19 violation vis a vis a citizen's right to know

The Union may contend that neither is the government made into a separate class with special protection violative of Article 14, nor is there any tangible restriction imposed on speech protected under Article 19. Additionally, the Supreme Court held that there must have been a tangible harm accrued to the petitioner to claim a chilling effect on free speech.[12] A citizen's right to know true and correct information is also recognised as a fundamental right.[13]

It may be argued that under the new system in absence of any such tangible harm caused to the user, in the presence of grievance redressal mechanisms, in view of the balance of equities of the trifecta of stakeholders and the narrow realm in which the fact check unit claims to operate, no case for a chilling effect on free speech is made out. The mere potential for misuse is not a valid reason to declare a provision unconstitutional.

C. The grievance redressal mechanism contemplated under the amending Rules

A recipient of patently false information, whether any damage accrues to him or not, on being aggrieved, can take the following available recourses. It is also to be taken into consideration whether the dissemination of the information was done knowingly and intentionally or otherwise.

(i) Grievance redressal mechanism of the intermediary as contemplated in Rule 3(2) of the IT Rules, in the first instance; and

(ii) Appellate provision, i.e., appeal to Grievance Appellate Committee(s) as contemplated in Rule 3A of the IT Rules.

Failing the above two remedies, the recourse to a court of law under Article 226 and Article 32 of the Constitution is open as a final resort to the recipient. Indian Courts would be the final arbiter to

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[9] State of Madras v VG Row, AIR 1952 SC 196; AK Roy v Union of India, AIR 1982 SC 710 : 1982 SCC (1) 271.
[10] Union of India v Harjeet Singh Sandhu, (2001) 5 SCC 593; State of Bihar v Bihar Distillery Ltd and Ors, AIR 1997 SC 1517.
[11] KA Abbas vs Union of India, 1970 (2) SCC 780.
[12] Anuradha Bhasin *supra*.
[13] Tata Press Ltd v Mahanagar Telephone Nigam Ltd, (1995) 5 SCC 139.

decide whether the information in question is patently false, misleading or untrue.

It is vehemently argued that in the new system, it is the courts, and not the government, who is the final arbiter of the "truth". There also exists an obligation under Rule 3(1) of the amended Rules on the intermediary, at the first instance, to exercise due diligence should the fact check unit flagging any information hosted by the intermediary. Despite being found by the fact check unit as being fake, false or misleading information, the intermediary is still at liberty to exercise its discretion to host the information or not. Needless to say, this can and will make the intermediary vulnerable to either a loss of safe harbour or to legal proceedings, or both.

D. The mischief rule: the evil of disinformation sought to be redressed

The amended Rules are proportional to the evil they seek to redress. The mischief rule of statutory interpretation allows Courts to look beyond the literal text of a statute and consider the broader legislative intent and purpose. The intermediaries provide not only anonymity, but also an ubiquitous platform. They rely on user-generated content which creates a vast volume of, making it challenging to monitor and verify every piece of content. Additionally, social media algorithms are designed to maximize user engagement. This can inadvertently lead to the amplification of sensational or controversial content, including fake news, because such content tends to generate more clicks, likes, shares, and comments. Coupled with anonymous accounts and bots, it is next to impossible to trace the origin or hold individuals accountable for spreading false information. Algorithms also have a tendency to display content to users that corresponds with their current beliefs and preferences. This can lead to the formation of echo chambers, where users are more inclined to embrace and disseminate information that validates their existing views, even if such information is incorrect.

E. The proliferation of fake news as compared to the truth is manifold

It may be argued that it is proven fact that fake news is far more likely to spread as compared to the truth, with statistics to indicate that fake news travels at a speed of as high as seven times that of the truth. There are demonstrable incidents where fake information with regard to sensitive topics have led to people taking extreme steps. For example, misinformation regarding the COVID-19 vaccine led to many people refusing to take the second jab. The proliferation of fake news goes hand in hand with a user's increasing difficulty to distinguish it from the truth making the new system even more utilitarian.

The Press Information Bureau ("**PIB**") has been playing the role of a fact check unit dealing with information relating to the Central Government since its inception in November 2019, either suo moto or on a reference by way of complaints. It may be argued that keeping in mind the imminent dangers posed by fake news, the new system attempts to bolster efforts of the PIB.

F. Truth and falsehood are a binary; and not a spectrum

It may be argued that it is important to differentiate between two concepts - false information, that which claims to be true but cannot be maintained as true under any reasonable interpretation, and the subjective truth which is primarily a question of interpretation.

What is under consideration and is likely to be flagged by the fact check unit is the former, i.e., patently false information, that which cannot exist as a spectrum and one that is founded on untrue facts. The fact check unit is said to have no business with the subjective truth, which may take the form of ideas, opinions, the analysis and criticism of government action and policies etc.

With regard to patently false and misleading information, the argument that the truth lies on a spectrum is fallacious. In legal systems worldwide, the concept of truth is based on factual accuracy and the absence of falsehood. The burden of proving a claim rests on the party making the assertion, and objective and empirical evidence is to establish the truthfulness or falsity of a statement.

4. Conclusion

In the midst of these complex arguments, it remains to be seen how the courts will ultimately adjudicate on the constitutionality and impact of the amending Rule. A critical analysis of the arguments advanced indicate that the balance may tip over in favour of the petitioners. The case underscores the ongoing debate between safeguarding freedom of speech and addressing the challenges posed by the dissemination of false information in the digital age. The outcome will have significant implications for the balance between these competing interests in the Indian context.

"*Liberty is an eloquent assertion of one principle which is so truly the foundation of all social happiness that any experiment which encroaches on it is foredoomed*" – John Stuart Mill.

From Constitutional Vision to Digital Realities: Tracing India's Privacy Rights Journey

Mr. Dhairya Jain*

1. Introduction

"I cherish my privacy and woe betide anyone who tries to interfere with that."

– Jeff Beck

The foundation of a nation's governance is laid forth in the Constitution, which is based on several basic principles. Preamble, Fundamental Rights, and Directive Principles represent our founding fathers' ideals and ambitions, which they wanted to accomplish via the constitution. They, together with the next section on fundamental duties, make up the Constitution's heart and soul, as well as the legacy the founding fathers left for future generations to carry on.

Freedom fighters often asked for constitutional guarantees for our people's human rights throughout the struggle. The "Universal Declaration of Human Rights, 1948" was given to the Constituent Assembly in 1949 after it completed the Fundamental Rights Chapter. A democratic republic must enable people to participate fully and effectively in the political and social activities of the nation. Taking a position, defending and promoting freedom, and guaranteeing that all people have access to a decent level of living are all demanded by the Constitution. It demonstrates a strong desire to improve the lives of all citizens, regardless of caste, religion, race, community, or gender, without any kind of bias. Defending and protecting individual liberty is essential in a democracy. But, on the other hand, less has been thought on Right to privacy by the constitution makers and which is the prime topic of discussion even today.

The need for individuals to possess personal autonomy, including physical boundaries, intellectual capacities, and the ability to exercise independent judgement, is crucial for their overall well-being. Over the course of history, these many dimensions of privacy have gradually evolved and become integral to human flourishing. The need to protect this entitlement is further heightened in contemporary culture, which is heavily influenced by the Internet. The article explores the concept

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of privacy in the context of the digital era, specifically examining the potential impact of social media on individuals' privacy. This paper aims to examine the significance of the right to privacy in India, along with an analysis of the legal framework that safeguards this fundamental right. The issue of invasion of privacy is a matter of concern due to its status as a basic right protected by Article 21 of the Constitution.

2. Right to Privacy: Right to Privacy in India

There exists a perspective among some individuals that the scope of the right to life, as articulated in Article 21, encompasses dimensions beyond mere biological existence and animalistic nature. Consequently, it embraces all facets of living that enhance an individual's overall well-being and contribute to the meaningfulness of their life.

The first proposal to include the right to privacy, safeguarding individuals from unwarranted intrusion, was introduced during the deliberations of India's Constituent Assembly. However, regrettably, this crucial provision was ultimately excluded from the final version of the constitution. The topic of privacy as a constitutional right and a common law right has been a focus of discourse since the 1960s. In the case of M.P. Sharma v. Satish Chandra, an eight-judge panel of the Supreme Court rendered a decision suggesting that the right to privacy may not be considered a basic right and might potentially be incongruous with the provisions of the Indian Constitution.[1]

Despite the absence of privacy being recognised as an inherent right, the Supreme Court invalidated the night-visiting provision on the grounds of infringing upon the concept of "personal liberty." In the case of Kharak Singh vs. State of UP, the Supreme Court determined that Regulation 236 of the UP Police regulation violated the provisions of Article 21 of the Constitution. One dissenting judge expressed a contrasting viewpoint to the majority, asserting that although privacy is not explicitly enumerated as a basic right in the constitution, it is an essential prerequisite for safeguarding individual liberty.[2]

Following the ruling in the case of Kharak Singh, a considerable duration of nearly 11 years elapsed before the courts officially recognised the existence of a fundamental entitlement known as the right to privacy, which was subsequently included inside Article 21 of the constitution. Consequently, in the case of Gobind v. State of MP, privacy was granted a degree of validity within the framework of personal liberty under the Indian Constitution.[3]

The Supreme Court in the case of Maneka Gandhi v. Union of India interpreted Article 21 in a comprehensive manner. Article 21 is often regarded as safeguarding the fundamental rights pertaining to personal security and freedom, also referred to as the 'natural law' rights. The concept of the right to life has been interpreted expansively, including the right to privacy within its scope.[4]

One significant legal case that pertained to the practise of phone tapping was the People's Union for Civil Liberties v. Union of India. The Apex Court has established that the right to privacy in phone calls is often regarded as secret and private. However, it has been determined that invoking this right requires the presence of extraordinary circumstances.[5]

3. The landmark judgement of K. Puttuswamy v. UoI.[6]

The case of K. Puttaswamy v. Union of India has significant importance as it established the recognition of privacy as an inherent fundamental right. This ruling solidifies the inclusion of privacy within the esteemed trio of constitutional provisions, namely Articles 14, 19, and 21. This verdict overturns both the M.P. Sharma and Kharak Singh rulings.

The government introduced a proposal for compulsory use of biometric-based identification cards across all government services and benefits, which encountered opposition from supporters of privacy. Judge Puttaswamy, a retired high court judge, initiated a legal proceeding at the court. The petitioner said that privacy is an inherent right, which is independently sustainable and supported by the safeguards provided under Article 21. This article guarantees the right to live with dignity. Conversely, the respondent said that the constitution only recognises personal rights, including privacy but subject to reasonable classifications as stipulated under the same article.

The unanimous decision of the nine-judge Supreme Court bench affirmed that the constitution guarantees protection for the right to privacy, seeing it as an inherent component of Article 21. A prevailing agreement within the judiciary has emerged, supporting the notion that an individual's freedom of choice is included within their right to privacy.

Consequently, it has been acknowledged that this particular entitlement is not without limitations, since it may be subject to legal restrictions if necessary to accomplish a valid governmental objective and if the restrictions imposed are reasonable in relation to the

objective being pursued, similar to other rights. This ruling expands the scope of freedom of expression by acknowledging the independent right to privacy, which may be upheld alongside the constitutional protections of freedom.

The Delhi High Court's landmark ruling legalising consensual homosexuality has had a significant impact, marking a pivotal time in history. In this particular case, the decision was made to examine the applicability of Section 377 of the Indian Penal Code (IPC), together with Articles 14, 19, and 21. The right to privacy safeguards the individual's ability to attain and maintain a personal realm where one may fully embody and express their authentic self. According to prevailing discourse, individuals need a secure refuge in order to liberate themselves from the limitations imposed by societal norms and expectations. In some contexts, individuals may choose to remove their metaphorical masks and cease their efforts to project a curated image of themselves onto society. Imagine a picture that symbolises the values and principles held by individuals in their social circles, rather than depicting the objective traits and qualities of their own character.[7]

It is now widely accepted that the right to life and liberty guaranteed by Article 21 of the Indian Constitution also encompasses the right to privacy in certain circumstances. The right to privacy might be defined as “the right to be left alone”.

4. Right to privacy and Manohar Lal Sharma case

In 2019, a legal action was initiated by the NSO Group, an Israeli technology enterprise, against Facebook. The assertion was made that the virus developed by NSO, known as Pegasus, was used for the purpose of surveillance on WhatsApp users. The potential presence of spyware on a mobile device, unbeknownst to the user, poses a significant threat to their privacy. According to the NSO Group, the sale of this virus is limited only to governmental entities. A complaint submitted in 2019 identified a group of individuals from India, including journalists, Dalit activists, and Adivasi advocates, numbering at least 40, who were potentially subjected to monitoring. This implies that the Indian government had obtained and used this virus.

On July 18, 2021, further allegations were disclosed by the 'Pegasus Project', a global consortium including 17 media entities and Amnesty International. A compilation of 50,000 telephone numbers that exhibited possible susceptibility to spyware was made publicly available. The findings of the Project were disseminated in India via The Wire, a reputable media outlet. It was alleged that the editors-in-chief of The Wire were afflicted with malware subsequent to its detection on their computer systems. Additionally, there was

information pertaining to Prashant Kishor, a political strategist who had previously served as a consultant for the Trinamool Congress (TMC) in West Bengal. The aforementioned list includes the names of opposition leader Rahul Gandhi, Supreme Court justices Ranjan Gogoi and Arun Mishra, as well as Union Minister Ashwini Vaishnav, who are identified as potential targets. However, it is important to note that the veracity of these claims has not been confirmed. The Monsoon Session of Parliament, which began on July 19, was disrupted by these occurrences. Members demanded a response from the government about the claims. According to the Minister of Information Technology, Vaishnav, on July 22nd, Pegasus reports lacked a factual basis. The individual proceeded to assert that the act of monitoring is permissible in accordance with the provisions outlined in both the Telegraph Act of 1885 and the Information Technology Act of 2000.[8]

5. Key Issues:

i. Whether or whether not the Union Government employed Pegasus spyware, should the Court compel an investigation?

ii. Is the right to privacy violated if the government uses Pegasus spyware?

iii. Is it illegal for the Union Government to have employed Pegasus spyware if it has?

6. Analysis:

Following the Puttaswamy decision in 2017, the Supreme Court of India considered many cases in which individuals asserted their privacy rights. The case of Manohar Lal Sharma v. Union of India exemplifies the multifaceted nature of the right to privacy, which is evident in individuals' private and public spheres. A comprehensive autocratic regime that used nationalism and patriotism as means to incarcerate its own citizens is now under significant examination from the judicial system. Despite the many restrictions and restraints imposed upon it, the court successfully tackled a range of challenging inquiries at a period when the opposition inside the country is confronted with a fundamental predicament.

Between the dates of July 22 and August 3 of the current year, the Supreme Court was presented with many petitions pertaining to the contentious matter of the Pegasus issue. Jagdeep Chhokar, the individual responsible for establishing the Association for Democratic Reforms, and writer Paranjoy Guha Thakurta, were among the individuals subjected to the malware's targeting. In addition to the aforementioned individuals, N. Ram, the editor of The Hindu, and John Brittas, a Member of Parliament in the Rajya Sabha, also submitted

petitions. The petitioners have requested a judicial probe into the potential use of Pegasus by the Indian government for the surveillance of journalists and other civilians, with a particular focus on whether proper adherence to due process was observed. In addition, the proponents said that the use of Pegasus would potentially impede the exercise of freedom of speech and expression, so contravening the fundamental right to privacy, as presented before the Court. The European Court of Justice sent an invitation to the Union on August 10th, 2021, requesting a response to the submitted applications.

The ruling rendered by the Supreme Court in the Pegasus case is of considerable importance because to its recognition and emphasis on the fundamental rights of individual privacy and free speech. The Pegasus infection presents a persistent challenge that needs resolution, and the actions undertaken by the SC (presumably referring to a specific entity or organisation) are poised to establish a noteworthy precedent for further endeavours. Due to the Supreme Court's concerns over the potential inhibitory impact of surveillance on people, it is facilitating the possibility of enacting laws aimed at safeguarding their rights. The Supreme Court has taken on the responsibility of safeguarding the private rights of all Indian citizens, in the absence of enacted privacy law.[9]

In the opinion delivered by Chief Justice NV Ramana, Justice Surya Kant, and Justice Hima Kohli, it is said that the existence of self-censorship cannot be refuted in situations when individuals are subjected to surveillance and are aware of being monitored. This aspect assumes special significance in relation to the preservation of press freedom. The authors expressed their viewpoint that this situation might potentially undermine the press's ability to correctly and dependably convey news. In order to get answers about the government's use of spyware Pegasus for the surveillance of ordinary individuals, the bench was compelled to initiate an independent inquiry, a decision that was regretted by the court.

The Supreme Court (SC) intends to undertake an extensive inquiry, therefore rejecting the suggestion put out by the Centre for a committee. Instead, the SC has made considerable efforts to build a highly skilled team, headed by former SC judge Justice RV Raveendran, which consists of experts in the fields of cyber-security and criminal investigation. It is important to acknowledge that the committee's scope encompasses more than just the current occurrence. The task at hand involves the examination of preventive maintenance measures and the subsequent provision of suggestions pertaining to the modification of existing surveillance laws or the

creation of new legislation. These recommendations aim to safeguard and uphold the rights to improved privacy.[10]

The Supreme Court is making efforts to guarantee that individuals' privacy rights are sufficiently protected. On the other hand, this might be seen as a catalyst for the federal government to take action, since it has been engaged in the development of data privacy laws for an extended period of time. In order to safeguard the rights of persons throughout the legislative process, the Supreme Court has requested the panel to devise a provisional "ad hoc" measure. Furthermore, it is essential for the committee to develop effective policies aimed at safeguarding the privacy of individuals, including protection from both governmental and non-governmental entities. Unless it is required by law.

The court characterised the Centre's answer to the contentions raised by the petitioners in its brief affidavit as a comprehensive and vague denial. Given that it has been a span of two years from the first reported incident of the alleged Pegasus spyware attack, which occurred in 2019 and purportedly targeted devices using WhatsApp due to a vulnerability in its software, it is reasonable to expect a higher degree of transparency and openness from the government. The Supreme Court appropriately dismissed the government's assertion that such content may be used by terrorist groups and pose a threat to national security. The potential compromise of national security is not a concern, as the government possesses full jurisdiction to use technological means for the purpose of monitoring. The infringement of individuals' privacy is a significant matter of concern..

7. Vis – a – Vis Human rights and Fundamental rights

Protection of the right to privacy is standard procedure under human rights treaties on a regional and global scale. This right to privacy is enshrined most comprehensively in the Universal Declaration of Human Rights.[11]

At the time, it was unpopular to recognize the right to privacy as a fundamental constitutional element. Humans have a basic right to privacy, according to Article 12 of the Universal Declaration of Human Rights. Everyone in every nation must be safeguarded against unauthorized access to their person, property, and personal information within the terms of this article. As a result of Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights included the right to privacy to the list of rights protected by the Covenant (ICCPR).[12]

Each and every one of the country's citizens should have equal access to the country's basic rights and remedies. No one may be taken away from his or her life or liberty unless it is done in compliance with the law, according to Article 21 of the Indian Constitution. "Life," as defined by Article 21, now includes all aspects of a person's existence that give their existence value and purpose.

The right to privacy is currently recognized as a constitutional right in the majority of democracies across the world. Other universally applicable law recognizes this right, too, and includes measures addressing it.

8. Restrictions to Right to Privacy

To maintain social order in a democratic society, freedom must be protected and maintained, but this freedom must also be restricted so that it does not become too broad or too unrestricted. According to the Indian Constitution's Article 19(2), the government is allowed to impose "reasonable limits" on a person's private rights in the following areas:

9. In the matters of States security:

A government must be able to control behaviours that might jeopardize state security. In accordance with Article 19(2), reasonable restrictions on freedom may be imposed for the sake of state security.

But the word "safety" is a very crucial word to remember. Revolt, insurgency, and conducting a war against the state are no longer considered "safety of the state," but rather "widespread and worsened public order violations." Violence and murder are two examples of crimes for which the state is at risk if an individual is free to commit them.

In Kedarnath Singh v State of Bihar[13], Anything that interferes with or threatens the government's power is considered seditionary by the Supreme Court. This means that the country's sovereignty is at risk. The government must thus take steps to keep them under control in order to avert anarchy.

10. Instigation to commit a crime:

This basis was also added in the Constitution (First Amendment) Act of 1951. The right to advocate for others to commit crimes is clearly not included in the right to be free. An "offense" is any action or omission that the law considers to be unlawful at the moment.

Supreme Court scolded the government in the KA Abbas v Union of India[14] case that censorship is a societally beneficial instrument. An individual's reaction to art and literature is profoundly influenced by what they see and hear. When words, signs, or any other form of communication are exposed to persons who are vulnerable to their effects, the state has a duty to ensure that they are regulated. Alternatively, these emotions may lead to criminal activity, rioting, and other societal upheavals in the nation.

11. Maintenance of Public Order

The phrase "maintenance of public order" refers to the administration's efforts to keep the citizens of a civic society in a state of tranquillity by curbing any actions that disrupt the quiet. This amendment was included in the First Amendment to the Constitution. Anything that disturbs the peace and harmony of the community is a threat to public order. Strikes and riots that have been organized purely for the goal of blaming workers for their own problems are, by definition, breaches of public order. The phrase "in the interest of public order" refers to both statements intended to cause a stir and those that have the potential to do so.

There were many legal challenges to the Bombay Municipal Corporation Act, which mandated street hawkers get a license before doing business, and the government may revoke or expel those without one if they were found to be operating without one. The Supreme Court ruled that hawkers who annoy, inconvenience, or irritate the general public should be expelled from using public roadways. It was determined that the restrictions were permissible.[15]

12. Contempt of Court:

In a democratic democracy, the judiciary is extremely essential. It develops imperative to hold reverence for such an establishment and its direction in such a scenario. Thus, if the freedom surpasses an equitable and justifiable threshold and can or is leading to a disobedience of the judiciary, such autocracy needs to be curbed, and any legislation or administrative action curbing it is not in contravention to privacy. The use of truth based on facts as a legitimate defence should be authorised, anytime a court is asked to decide on a contempt case involving a speech, an editorial, or an article, the court opined in the landmark judgement passed in Indirect Tax Practitioners Assn. vs R.K. Jain[16] case. The condition is that such a defence should not be utilised to escape the penalties of attempting to humiliate the court on purpose.

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[16] Indirect Tax Practitioners Assn. Vs. R.K. Jain [2010] INSC 630

13. Conclusion

The entitlement to privacy is a fundamental human right. Both non-state actors and state actors are banned from interfering with an individual's personal life choices in accordance with this right. Due to technological advancements, it is now possible for both State and non-State actors to gain entry into a citizen's residence without the need for physical interaction, marking an unprecedented development in history.

The individuals who get access to an individual's residence, their manner of living, and their choice of companionship are all subjects that fall under the realm of personal autonomy. The preservation of dignity necessitates the safeguarding of familial dynamics, marital relationships, reproductive choices, and sexual orientations within the confines of the private sphere. The act of granting access to one individual inside a house does not automatically extend permission to others to enter. If an action does not violate the rights of another individual, then it might be seen as morally permissible. This pertains to both the physical and technical dimensions of our existence. The protection of privacy is a fundamental right that must be safeguarded against both governmental and non-governmental entities, and acknowledged as a fundamental right at a time characterised by varied social and cultural norms. The objective of the researcher is to identify viable conclusions that may serve as a basis for lawmakers to formulate laws, implement suggestions, and conduct further investigations pertaining to the emerging privacy concerns in the digital era, along with potential remedies.

The absence of an effective monitoring mechanism to safeguard individuals' private and personal information underscores the urgent need for the implementation of privacy laws. Given the phenomenon of globalisation, it is crucial to build a cohesive legal framework that aligns with international norms in order to safeguard personal data.

India is positioned to emerge as the global epicentre for the establishment and administration of contact centres. The business process outsourcing (BPO) industry is seeing significant growth and success in India. The personal information of many Indian clients has been collected as a result of the lack of privacy regulations. If these practises persist, customers in India may potentially face an even more challenging situation.

In light of the proliferation and ramifications of global trade, especially in the era of digital connectivity, it is imperative for India to collaborate with the international community in formulating exact regulations pertaining to the safeguarding of privacy and personal data. Presently, countries, including those inside the European Union, exhibit hesitancy in engaging with India due to its inadequate privacy regulations. This is particularly relevant since India is gradually

becoming a central location for outsourcing a variety of back-office operations, such as credit processing and medical transcription. An further concern associated with establishing a secure environment for online discourse is to the potential jeopardy posed to users' personal data. India's inability to address these issues hinders its ability to fully harness the economic and social benefits that e-commerce offers to developing nations such as ours.

It is essential to establish a comprehensive legislative framework that delineates explicit regulations governing the methods and objectives of amalgamating personal data obtained via both offline and online channels. The collection of data must be conducted with the informed consent and explicit agreement of the customer, and this requirement should be transparently communicated. Achieving a delicate balance between safeguarding individual rights and ensuring business security is vital for fostering India's economic success.

As the expanding encroachment of the state on the right to privacy persists, it becomes imperative to ensure that the whole community remains well-informed of the underlying idea and relevant legislative measures. According to established norms and regulations, it is argued that the authority to intrude into an individual's private should be exclusively vested in the government. In order to ensure adherence to both the literal interpretation and the underlying principles of the verdict, it is essential to start with the case of KS Puttaswamy. The delicate equilibrium between privacy and technology in the context of Indian law enforcement necessitates a cautious approach, ensuring that technology is used as a facilitator rather than an impediment.

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Pendency Penalty: Fighting Unfairness in Section 33 Through Maruti Suzuki India Ltd. V. Lal Chand

Mr. Chetan R*

1. Introduction

The primary aim of labour laws in India is the maintenance of law, order and peace within the industry while ensuring justice and fairness is rendered to everyone involved in the running of these industries.[1] This aim looks to result in an uninterrupted and smooth functioning of the industry, thereby, increasing production and prosperity. In all of this, the relationship between the management and the labour becomes a key factor, which forms the basis of most of the provisions in over 40 existing labour laws in India.[2] These relations are regulated in such a manner as to promote industrial peace and smooth functioning, without excessive costs and complexities.

These aims in industrial adjudication can be located in Constitutional principles of social welfare, economic and social justice, particularly within Preamble,[3] Part III and Part IV.[4] Relying on these principles, the state aims to resolve industrial disputes in a peaceful manner, while at the same time ensuring equality, harmony and justice between labour and capital. In this endeavour, the state also seeks to maintain conditions conducive to such resolutions of industrial disputes.[5] One such legislation which attempts to do this is the Industrial Disputes Act, 1947 ("the ID Act"). Among the innumerable precedents which have evolved from this statute, this paper will be focusing on the Punjab and Haryana High Court case of Maruti Suzuki India Ltd v. Lal Chand ("Maruti Suzuki"),[6] which has particularly focused on Section 33 and Section 33A of the ID Act.

To that effect, this paper has been divided into four sections. *Firstly*, this paper will delve into the factual matrix of the said case

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[1] Sulekha Kaul, *A Brief Guide To Labour And Industrial Laws Of India*, MONDAQ (Sep. 22, 2017), https://www.mondaq.com/india/employee-rights-labour-relations/631074/a-brief-guide-to-labour-and-industrial-laws-of-india.

[2] *Overview of Labour Law Reforms*, PRS INDIA, https://prsindia.org/billtrack/overview-of-labour-law-reforms#:~:text=The%20central%20government%20has%20stated,conditions%2C%20social%20security%20and%20wages.

[3] INDIA CONST., preamble.

[4] INDIA CONST, art. 38.

[5] State of Mysore v. Workers of Gold Mines, AIR 1958 SC 923.

[6] 2020 Indlaw PNH 186.

along with its procedural history and judgement. *Secondly*, this paper will analyse the extent, scope and nature of Section 33 and Section 33A of the ID Act, by relying on previous jurisprudence and ratios. *Thirdly*, this paper will expand upon the theoretical and philosophical justification of Section 33 and Section 33A arising both, out of academia and precedents. *Lastly*, by placing reliance on the justification and object behind Section 33 and Section 33A, this paper will highlight the inadequacies and shortcomings of the two sections, while also suggesting a way forward for overcoming these inadequacies.

2. Case Background

Factual Matrix

The respondent was working in the appellant company as an Assistant L-5 in the administrative sector. Through a mass transfer order, the appellant company transferred 63 workers (including the respondent). The Maruti Udyog Employees Union (to which the respondent belonged) raised this matter as an industrial dispute. Thereafter, this case was pending was before the appropriate government for approval. During this, the respondent was again transferred, but this time, from the administrative sector to the technical sector. He joined the service first, and then absented himself. Then, the appellant company charge-sheeted the respondent before initiating an enquiry proceeding. During this, the appropriate government raised this Union dispute to the Industrial Tribunal on 16.07.2003. Thereafter, the respondent was dismissed from service on 26.08.2003 and the appellant company, under Section 33(2)(b) of the ID Act, made an application to the Industrial Tribunal. The detailed summary of facts and dates are mentioned in the annexure.

Procedural History

The dispute raised by the Union was dismissed by the Industrial Tribunal on 01.04.2004, which agreed with the appellant company's contention that dispute was related to the respondent's transfer and the same was not raised by the Union. Therefore, it held that the dispute was not covered under the definition of industrial dispute, due to which the court had no jurisdiction over the case. The Section 33(2)(b) proviso application raised by the appellant company was also rejected by the Industrial Tribunal as not being maintainable in view of its previous 01.04.2004 decision which found that there was no jurisdiction for the Industrial Tribunal to adjudicate over the matter. Both these decisions were appealed to the High Court and heard together by a Single Judge bench, which set aside both the judgements and remanded them back to the Labour Court. This decision was appealed before the Supreme Court which forms the present case.

Judgement

The Supreme Court heard the arguments made by the appellant company and the respondent and premised its decision on the Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma ("Jaipur Zila")[7] case to elaborate upon the extent and nature of Section 33(2)(b) and Section 33A. Finally, it held that the respondent's dismissal will only come into effect after it has been approved by the Industrial Tribunal. Moreover, it also held that the fact that the respondent challenge the dismissal in a separate proceeding will not render the proceedings as infructuous.

3. Jurisprudence On Applicability of Section 33 And Section 33a

Scope of Application

Section 33 prohibits the alteration of the terms of engagement of the worker by the employer during the pendency of any industrial proceedings, whether it is before a court or a tribunal or a conciliatory authority. The first two clauses of this provision are the ones which will be dealt with in this paper. The first clause prevents the (i) alterations of the conditions of the employment to the prejudice of the worker and (ii) the dismissal of the worker involved in the dispute. Both these actions need to be connected to some matter related to the dispute.

The second clause of this provision prohibits (i) the alternations of the conditions of the employment and (ii) the dismissal of the worker involved in the dispute, but neither actions need be related to any matter concerning the misconduct which was pending adjudication. Moreover, the proviso to s.33(2) specifies a definite procedure which the employer should follow while dismissing any workmen under the said clause. The first clause requires an express permission from the authority before changing the conditions of service or dismissing the worker.

In the second clause, the employer needs to pay one month's salary and then make an application for approval after only the dismissal of the worker, to the authority before the pending authority. Section 33A of the ID Act was added to the statute through an amendment in 1950.[8] This section aims to provide recourse to the worker for any breach of responsibility by the employer under Section 33. With respect to Section 33(1), if the company (employer) fails to procure the express approval from the government authority before changing the conditions of service or dismissing the worker, the worker can file a written complaint under Section 33A to the concerned authority or raise an industrial dispute under the procedure envisaged in Section 10.

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[7] (2002) 2 SCC 244.

[8] Industrial Disputes (Amendment) Act 1950.

On the other hand, Section 33(2)(b) has seen a different trajectory with regard to the invocation of Section 33A. For most of the 20th century, the Supreme Court has held that if the employer fails to raise an application seeking approval of their decision of removal, it does not automatically reinstate the worker, but may open the employer to criminal liability under Section 31.[9] It has held that the remedy available to the worker for a contravention of Section 33(2)(b) proviso would lie in Section 33A.

The workman has to file a written complaint under this section, and only after judicial proceedings would they be reinstated.[10] There have also been contradictory judgements by the Supreme Court on the issue of the date from when the worker has to be reinstated. While some cases have held the dismissal date to be the same as the reinstatement date,[11] other cases have held it to be the day of decision.[12] This position of law clearly depicts an unfair standard wherein an employer who voluntarily chooses to not seek an approval for their actions of dismissing the employer, would be in the same, if not better, position as an employer who has applied for an approval.[13]

These issues were put to rest and finally decided in the *Jaipur Zila* case, where a constitutional bench adopted a broad approach favouring the worker. It held that the mere fact that the employer has failed to make an application seeking approval of the dismissal of its worker under Section 33(2)(b) would render the dismissal *void ab initio*. The worker does not have to go through the rigmaroles of going to the court and legal proceedings under Section 33A. The non-application for an approval of dismissal by the employer, would render the order of dismissal as having never been passed.

Moreover, with respect to the date of reinstatement, the Supreme Court held it to be from the date of dismissal itself. Thus, the Supreme Court overturned the previous precedents and set a new principle for the invocation of Section 33A. This also meant that following such a breach of the mandatory provision under Section 33(2)(b), the tribunal should only direct the worker to have never been dismissed, and they be given appropriate remedies and reliefs with respect to their wages and other benefits.[14]

It was also clarified that this doesn't render Section 33A as being futile and meaningless because this recourse is still available for the

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[9] HL KUMAR, PRACTICAL GUIDE TO INDUSTRIAL DISPUTES ACT & RULES (8th ed., 2019).
[10] Punjab Beverages Pvt. Ltd., Chandirarh v. Suresh Chand & Anr., (1978) 2 SCC 144.
[11] Tata Iron & Steel Co. Ltd. v. S.N. Modak, AIR 1966 SC 380; Strawboard Manufacturing Co. v. Gobind, AIR 1962 SC 1500.
[12] *Supra* note 10.
[13] Krishna Vijay Singh, *Statutory Protection for Workmen Pending Adjudication Of Disputes - The Legal Position*, MONDAQ (Sep. 22, 2016), https://www.mondaq.com/india/employee-rights-labour- relations/529256/statutory-protection-for-workmen-pending-adjudication-of-disputes--the-legal-position.
[14] I.S. Rana v. M/s. Centaur Hotel, 2013 SCC OnLine Del 3090.

worker if they are aggrieved by the grant of approval by the authority.[15] Section 33 aims at maintaining status quo while there was already a dispute pending before the tribunal.[16] It promotes peace to prevail in the industry by preventing the degradation of the rights of the workers and the workplace.[17]

Conditional Invocation

There are various conditions required to be met before the invocation of Section 33 of the ID Act. For ascertaining a breach of Section 33(2)(b), the authority should confirm the following conditions:

1. Existence of a previous dispute,
2. Dismissal of the workman,
3. Standing order or terms of contract mentioning the procedure for dismissal,
4. Payment of one month's wages, and
5. Application which seeks the permission for dismissal, made to the authority.[18]

The non-compliance with these conditions would automatically render the dismissal as being inoperative and the same need not be raised before any authority under Section 33A or Section 10 of the ID Act. Moreover. these conditions need not be followed for the changes in the conditions of service if they were done as per certain standing orders or the contract. However, the conditions under Section 33(1) is much more stringent (as evidences through the use of the phrase, "no employer shall…").[19]

The conditions for the invocation of Section 33A is slightly different, in the sense that it requires there to be a breach of Section 33, which has taken place while a dispute has been previously pending, and the workman (who is also the complainant) who is aggrieved by the contravention, makes that application before concerned authority which is adjudicating over the previous pending dispute. If this application is withdrawn before the authority hears it or before it gives

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[15] Duncan Engineering Ltd. v. Ajay C. Shelke, 2020 SCC OnLine Bom 11189.
[16] Prime Legal, *Section 33 of the Industrial Disputes Act, 1947 Act plays an important role in the maintenance of the status quo between disputants: High Court of Delhi*, PRIME LEGAL, https://primelegal.in/2021/05/18/section-33-of-the-industrial-disputes-act-1947-act-plays-an-important-role-in-the-maintenance-of-the-status-quo-between-disputants-high-court-of-delhi/.
[17] Central Warehousing Corporation v. Govt. Of India and Ors., 2021 SCC OnLine Del 2102.
[18] *Supra* note 7.
[19] KUMAR, *supra* note 9.

any relief, then it will be considered as having not made any application.[20]

The confirmation of these violations by the authority may even attract criminal sanctions as per Section 31(1) of the ID Act. Moreover, Section 33A will only be invoked when the worker making the complaint is also concerned with the previous dispute, without which there would be no contravention of this section.[21] It is of no importance whether the worker is a permanent or temporary worker.[22] The law however, does not allow any union to avail the relief under Section 33A, unless an individual worker has authorised the union to do so.[23]

Supervisory Jurisdiction Under Section 33(2)(b)

The tribunal performs a supervisory jurisdiction under Section 33(2)(b) of the ID Act, where it merely presided over the decision of the employer to dismiss the workman. This calls for different standards of proof and methods of adjudication for the tribunal for adjudicating under Section 33(2)(b) as compared to Section 33A and Section 10.[24] According to Section 33(2)(b), in the process of granting permission for the dismissal, the court has to not only ensure the various requirements of the said section are complied with, but also that the dismissal of the workman is valid and bona fide without any form of victimisation or unfair labour practices.[25] This is just a *prima facie* enquiry which the tribunal has to do without delving into the merits and proportionality of the punishment.[26]

This proceedings has to be held in the form of a summary proceeding, and should only engage itself with whether the employer engaged in conducting a fair internal enquiry to prove the workman's misconduct.[27] This means that it should concern itself with whether the workman was given an opportunity to reasonably defend themselves according to the principles of natural justice. Thereafter, the tribunal will have to lift the veil to determine whether the employer had any hidden motive to punish or victimise the workman for a non-existent or made-up misconduct.[28]

This is much unlike the dispute adjudication performed by the tribunal under Section 10 of the ID Act. Moreover, even with respect to the evidence which can be led, the tribunal may allow the parties to

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[20] Rajasthan State Road Transport Corpn v. Judge, Industrial Tribunal, Jaipur, 1984 SCC OnLine Raj 69.
[21] New Indian Sugar Mills Ltd v. Krishan Ballabh Jha, 1966 SCC OnLine Pat 37.
[22] Bhavnagar Municipality v. Alibhai Karimbhai, (1977) 2 SCC 350.
[23] Tata Iron & Steel Co Ltd v. DR Singh, AIR 1966 SC 288.
[24] M. L. Puri, *Nature and Scope of the Jurisdiction of the Tribunals Under Section 33 of the Industrial Disputes Act, 1947*, 23(4) JILI 547 (1981).
[25] Atherton West & Co. v. The Suti Mill Mazdoor Union, AIR 1953 SC 241.
[26] Martin Burn Ltd. v. R.N. Bangerje, AIR 1958 SC 79.
[27] Hotel Corporation of India v Sudesh Kumar Julka, 2012 SCC OnLine Del 4124.
[28] John D'Souza v. Karnataka SRTC, Civil Appeal No. 8042 of 2019.

produce evidence regarding the propriety and legality of the internal enquiry, only if the tribunal, on the standard of "preponderance of probabilities", finds that there are inherent defects and violation of the principles of natural justice, with the internal enquiry.[29] It cannot automatically allow the parties to lead evidence without a thorough examination of the material which were led in the employer's internal enquiry. But after being given the permission to lead evidence, if the parties do not produce any, then they will not be allowed to produce that evidence at a later stage, if the decision of approval is appealed.[30] However, this does not take away the workman's right to raise this dismissal as an industrial dispute under Section 10.[31]

Original Jurisdiction Under Section 33a

While the jurisdiction of the tribunal under Section 33(2)(b) is more of a supervisory nature, the same body exercises a form of original jurisdiction under Section 33A which is more akin to any other industrial dispute which can be made under the ID Act. The Supreme Court has also opined that a complaint made to the tribunal under Section 33A, should be treated as though it is a dispute pending before it or referred to it by the appropriate government.[32] All the aspects of Section 10 and the procedural requirements of Section 11 will be applicable on the case.

The authority shall also render its award as per the procedure mentioned in Section 16 and the said award would also be published as per Section 17 of the ID Act.[33] Moreover, after 1982, if this complaint is made to a conciliatory authority, then the same will be considered in the course of the conciliation or mediation process, and will be decided.[34] The removal of the appropriate government's role in referring the dispute, greatly enables the workman to bring this matter to the notice of the tribunal for a quick dispensation of justice.

Additionally, the mere finding that the employer has not followed the procedures of Section 33 and has contravened the same, does not mandate the tribunal to automatically order the reinstatement of the workman.[35] Even after finding that Section 33 has been breached by the employer company, the tribunal is bound to go into the merits of the order to decide whether the workman warranted being dismissed through the pleadings of both the parties.[36] This is particular important when the tribunal finds the internal enquiry to be conducted in an improper, invalid and unfair way which has greatly prejudiced

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[29] Mysore Steel Works Pvt. Ltd. v. Jitendra Chandra Kar and Others, (1971) 1 LLJ 543.
[30] Cooper Engineering Ltd. v. P. P. Mundhe, (1975) 2 SCC 661.
[31] *Supra* n 28.
[32] Hindustan General Electrical Corpn Ltd v. Bishwanath Prasad, (1971) 2 SCC 605.
[33] Punjab National Bank Ltd v. Their Workmen, AIR 1960 SC 160.
[34] Industrial Disputes (Amendment) Act 1982.
[35] Automobile Products of India Ltd v. Rukmaji Bala, AIR 1956 SC 258.
[36] *Supra* note 20.

the workman, but at the same time, the workman has also committed an act which can warrant a dismissal from service.

4. Theoretical Justification of Section 33 And Section 33a

Reading and understanding the text and jurisprudence of Section 33 and Section 33A, leads one to place its theoretical justification in one of the main objects for the existence of labour legislations around the world, which is social justice. This principle aims to adjust the different forms of imbalance in economic and social structures in society, particularly those that exist within an industry, so that there is a harmonious, peaceful and smooth functioning of the industry along with the contentment of the workmen.[37] Through this principle, the law aims to find just and fair solutions for all those involved in the running of an industry.[38]

This principle particularly provides the workmen with a safeguard and safety valve against the immense power which the employer holds.[39] Inspite of the two parties entering into a contract voluntarily willingly, there still exists a great divide of power between the two because the workmen don't own anything and have nothing to sell but their labour, whereas the employer is the one who owns the means of production as well as the capital through which the labour of the workmen can be rewarded.[40]

These forms of contract are never freely negotiated and are always unilaterally dictated by the employer, with the workman agreeing to almost all terms sometimes without any choice. The inequality in the bargaining power between the two parties requires laws regarding collective bargaining, minimum standards of work and labour rights to exist.[41] Through these collective bargaining processes, the workers can negotiate for better contractual terms of employment. But these collective bargaining and industrial dispute processes may take months or even years to reach a finality, and during all this time, the workman still exists and works under the same employer.[42]

So, in order to prevent victimisation or punishment of the workmen for raising any industrial dispute and the inadequacy of contract law in employment relations, labour law exists, particularly provisions like Section 33 and Section 33A. Irrespective of how inefficient and inelastic these provisions may seem for various libertarian counter-arguments, their existence is a must particularly in the light of the asymmetrical

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[37] Hotel Taj Palace v. Ravi Rohilla, 2016 SCC OnLine Del 1539.
[38] J.K. Cotton Spinning & Weaving Mills v. Labour Appellate Tribunal, AIR 1964 SC 737.
[39] HUGH COLLINS, GILLIAN LESTER & VIRGINIA MANTOUVALOU (EDS), PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW (2018).
[40] Guy Davidov, *The (Changing) Idea of Labour Law*, 146 ILR 311 (2007).
[41] *Id.*
[42] Gursimar Setia, *New Law, Same Old Mistake? Failed Opportunity to Amend Section 33A of the ID Act*, IRCCL (Apr. 27, 2021), https://www.irccl.in/post/new-law-same-old-mistake-failed-opportunity-to-amend-section-33a-of-the-id-act.

power dynamics between the two parties whereby the employer, with all of their power, place structural constraints on the freedom of the workmen, with regard to their employment.[43]

The freedom to contract, in such a context, is itself imbalanced because of the expendable nature of employment for the employer, and the source of living nature of employment for the workman. Moreover, in the context of Section 33 and Section 33A, which operate during the employment, there also exists an imbalance of power even within the everyday functioning of the parties. There is a structure of subordination between the employer and the workman where the former has the power to direct and manage the latter, while the latter can only obey the former.[44]

Further, this system also bestows the employer with the power to change the conditions of employment or even fire the workmen at their will, particularly if the workmen have gone against the employer in any manner. Therefore, such protective provisions particularly aim to safeguard their dignity and liberty during their employment at the workplace and do complete justice to the parties.[45] These provisions greatly tip the scale towards a more equitable position for the workmen against the immense power of the employer.[46] Moreover, such provisions which induce confidence into workers regarding their employment status, also improves efficiency in their work.

While some may argue that these provisions which add additional methods of adjudication within an already expansive labour law sphere, increase transaction costs,[47] labour focusing provisions increase the trust and confidence which workmen have in the legal adjudication process, which in turn helps them work with greater efficiency, without having the fear and anxiety over their jobs, particularly when they are involved in some industrial dispute with the employer.[48] Moreover, such provisions through which workers can directly go to tribunals for addressing concerns they have with regard to their dismissals or changes in conditions of work, greatly decreases transaction costs which would have otherwise come up if the same workman were to raise this dispute through the union, or even by themselves under Section 10.

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[43] GERRY A. COHEN, 'CAPITALISM, FREEDOM AND THE PROLETARIAT', IN ALAN RYAN (EDS), THE IDEA OF FREEDOM: ESSAYS IN HONOUR OF ISAIAH BERLIN 11-14 (1979).
[44] *Id.*
[45] Imperial Tobacco Co Ltd v. Ishwar Das, AIR 1958 All 317.
[46] COLLINS, LESTER & MANTOUVALOU, *supra* note 39.
[47] David Boaz, *Libertarians and Right to Work Laws*, CATO INSTITUTE (Dec. 19, 2012), https://www.cato.org/blog/libertarians-right-work-laws.
[48] Davidov, *supra* note 40.

5. Is The Current Law Sufficient?

Issues With The Current Law

One key issue which arise with the working of Section 33(2)(b) is that it is an *ex-post facto* provision. This means that, the employer first dismisses the workman, and then has to apply for an approval of the authority for their order of dismissal. What this law and the subsequent jurisprudence do not contemplate is the condition of the worker during the pendency of approval application. Even in the presently concerned *Maruti Suzuki* case, the approval application was pending for almost 8 months before it was held as not maintainable by the tribunal, and then a further 16 years before this matter was finally decided by the Supreme Court. This Court has also not decided the matter, and has merely said that the matter would not be infructuous.

While the appellant company, with their deep pockets and resources can hire other workers for labour to run the industry, the law and the court misses out on a key party involved in the issue, i.e., the respondent. Post his dismissal, the respondent was left with no job or income, inspite of him being dismissed by the appellant company without following the procedures laid down in Section 33(2)(b).[49] This point has also been acknowledged by the Supreme Court in *Karur Vysya Bank v. S Balakrishnan*,[50] where it observed that many a times workmen have to remain without a job while waiting for the outcome of their complaint under Section 33A.

In addition to this, the respondent also had to go through the tumultuous judicial process before reaching some form of an outcome. While this may be one case, there are be numerous other labour law cases pending under Section 33(2)(b) and Section 33A of the ID Act, which have not attained finality for years, pulling the workman along inspite of the employer being at fault for not having followed the proper procedure under Section 33(2)(b).[51] In this way, the broader goal of these sections, although present on paper, are not being realised in reality, and are hence, defeated to a certain extent.

Moreover, if the employer does not make an application after the dismissal of the workman under Section 33(2)(b), the onus again lies on the workman to bring the same up before the court and get a remedy. So, in all of this, for any lapse of procedure by the employer under Section 33(2)(b), it is the workman who will suffer the consequences of being without their job and regular income. This drawback of the ID Act, has even been transposed into the new Industrial Relations Code, 2020 ("IR Code"), without any change.

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[49] Setia, *supra* note 42.
[50] (2016) 12 SCC 221.
[51] *Id.*

The second major issue with regard to the operation of Section 33A is the lack of finality attached to this adjudication. The policy question regarding a further raising of a dispute under Section 10 after its adjudication under Section 33A, which was not addressed by the Supreme Court in *Atherton West & Co. v. The Suti Mill Mazdoor Union* still remains. Inspite of Section 33A adjudications operating like Section 10 application with regard to the evidence, pleadings, etc., the latter section still remains open even after the complaint raised under Section 33A is decided.[52]

Due to this lack of finality, there always remains an opportunity for the parties involved to keep raising contentions regarding the contravention of Section 33 until they get some desired remedy.[53] Moreover, with the introduction of Section 11A in 1971, it permits tribunals to once again adjudicate over dismissal under Section 33, by not only re-appraising previous evidence on record from the Section 33A complaint, but also interfere with any punishments pronounced by the tribunal. Therefore, there is immense duplication of work, with no finality of adjudication regarding the dismissal under Section 33.

The Way Forward

One way of addressing the issue which was raised with regard to the working of Section 33 and Section 33A is by directing the employer to give a form of "suspension allowance" to the workman during the pendency of the application for approval before the tribunal. This has even been stated by the Supreme Court in the case of Fakirbhai Fulabhai Solanki v. P.O., Industrial Tribunal Gujarat & Anr.,[54] wherein the concept of "suspension allowance" was used by the court, but the same was not directed to be the norm in all cases of Section 33(2)(b) application.

This also fits in with the reasoning of the Supreme Court in the *Jaipur Zila* case which stated that the order of dismissal remains inchoate till its approval by the tribunal. So, the relationship of employment technically, does not come to an end after such a dismissal. The workman just remains in a state of suspension till the approval order. Therefore, such an allowance would not only act as a constant source of income for the workman during the pendency of the application, but would also help them meet any litigation expenses that they may have to incur under Section 33A.

Such a mechanism would also prevent unscrupulous employers from delaying the approval of such application and the adjudication of any subsequent complaints with the aim of driving the workman away from defending themselves. A change in the law, either through a

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[52] Puri, *supra* note 24.
[53] Solomon E. Robinson, *Supreme Court and Section 33 of the Industrial Disputes Act, 1947*, 3 JILI 161 (1961).
[54] AIR 1986 SC 1168.

judicial pronouncement or through the amendment of the ID Act or the IR Code, mandating the provision of a "suspension allowance" to the worker during the pendency of the application approval would greatly improve the current precarious situation of the workmen.[55]

The second major issue can perhaps be addressed by introducing a finality clause with regard to the Section 33A adjudication, whereby the same need not be appealed before another tribunal under Section 10 of the ID Act. This is because the entire process will essentially be a mere replication of the entire proceedings under Section 33A. The parties should only have the option of going to the High Court or Supreme Court through writ petitions. In such a case, the Section 33A complaints would act as *res judicata* for any further appeals made under Section 10. This would ensure not only complete and quick justice to the involved parties, but also prevents the court and the parties from duplication of their Section 33A complaint work.[56]

6. Conclusion

Labour law, particularly in India, has always endeavoured to safeguard the rights and interests of the workmen while also respecting the industrial interests of the employers. One of the main objectives of Indian labour law, particularly the ID Act, is to protect the workmen within the greatly imbalanced power structure which exists within industries. Different theories of labour laws can be clearly seen applicable in various provisions of the ID Act. Among them, Section 33 and Section 33A play a key role in acting like a protective clause for the workmen when they are involved in some pending industrial dispute with the employer.

These provisions aim to prevent the victimisation of these workers, and them being punished for being a part of the industrial dispute at the hands of the employer. Inspite of the texts of these provisions being modest, the judiciary has gone over and beyond in laying down jurisprudence regarding the application and scope of these two provisions covering almost every single aspect in its 75 years of adjudication over industrial disputes. Inspite of all this, there still remains a few pragmatic issues with regard to the application of these provisions.

This is particularly during the pendency of the approval application and the lack of finality of the Section 33A complaints. However, these problems can be addressed by generalising previous Supreme Court judgements and mandating concepts like "suspension allowances" along with introducing some forms of finality to Section 33A, so that the objects of the ID Act are realised not just on paper but also in reality in an efficient and effective manner.

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[55] Setia, *supra* note 42.
[56] Puri, *supra* note 24.

Rural Justice System in India

Kiruthika P*

1. Introduction:

Every society has their own dispute settlement mechanisms as for Asian countries like India, Pakistan, Nepal and Sri Lanka having the ideology of panchayat system since Rigveda (1700 BC) itself. Rural communities will not take law as a set of rules rather they choose to follow moral or dharma. Panchayat is a agency for settling the local and regional disputes since ancient, it believed that panchayat was first introduced during the period of king Pirthu, while colonizing the Between the Ganga and Yamuna. in the manusmriti, Shanti Parva of Mahabharat and Kautilya Arthshastra 400 BC in the existence of Gram Sanghas aur rural community was mentioned[1] . Pre-British India had both caste and village panchayats. In the caste panchayat they were concerned about the marriage and rituals to their particular caste. village panchayat Consists elders of prominent households in a village , Primary concern with adjudication of Civil disputes of residence related to rights in land and also deals with criminal justice.They also performed regulatory functions related to village commons.

The role of Panchayat was undermined by the British Raj. with the legislation in 1860 Indian Penal Code IPC, Criminal Procedure Code CRPC etc. The collectorate and courts took over the Power of caste and village panchayat Which had transplanting Of equality, impact on India during the British period[2]. There was massive codification of procedural Civil and criminal law to get a bit recognition of British judicial system for British India during the period of late 18th century with interesting note that in 1934, interference in award granted by Panchayat in family dispute was refused by privy council[3]. In the late 19th century the village self-government had been established during the colonial era itself. Some officials believed that the British legal system was not compatible with the Indian notion of Justice and they saw Panchayat as a way to Bridge gap. The Mayo resolution 1870 Lord Ripon's interest for self government and William Wordderburn's work in Bombay helped to revive the village panchayat. From the 1920 Royal Commission report on decentralization, the Government of India Resolution and the

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[1] Ministry of law and justice,Government of India, 14th Law Commission report,154 [1995 - 1997]

[2] Discussion paper on decentralization in India: challenges and opportunities by the United Nation development programme.

[3] This case was regarding partition on estate between members of Hindu families; the award was challenged before Madras High Court but the Court upheld the The panchayat award. in appeal to the privy Council denied to interfere in the award granted by panchayat

Montague Chelmsford Report all called for formal vesting of legal powers in village panchayats.Panchayats were established in 5 provinces; they had some initial success for example in 1925,Bengal panchayat disposed of more than 1 lakh cases. However, the panchayats Soon lost their Importance, subversion by the British[4]. The British were initially reluctant to support the panchayat system but they eventually came to see it as a way to promote stability and order in rural areas. The panchayats were not without their critics, who argued that they were not democratic enough and that they were often dominated by wealthy landowners. Despite this criticism, the Panchayat system played an important role in rural India, and it continues to be an Important part of Indian society today.

2. Reviving Of Panchayat System:

"Very often our justice delivery poses multiple barriers for the common people. The working and the style of courts do not sit well with the complexities of India. Our systems practice rules being colonial in origin may not be best suited to the needs of the Indian population. The need of the hour is the Indianisation of our legal system[5]"

-The former Chief Justice of India N.V. Ramana.

When India became independent the national government paid special interest on reviving the panchayat. Mahatma Gandhi used to say that freedom should start from grassroot level even though it was supported by B R Amabakar with note that it will bring dens of corruption,localism,backwardness etc[6].,. Art.40 "state shall take steps to organize village panchayats and endow them with the power and authority as may be necessary to enable them to function as units of self government" to follow this many governments constituted village panchayats. First of all the panchayat raj introduced in three states namely andhra pradesh, madras, rajasthan[7]. Every village should be a small republic in which every right should be vested. Provisions have been made in the Indian constitution that the government will organize the village panchayats and give them all the rights so that they may be in position to function as units of swarajya. After the independence state government also took initiative to establish grama sabhas, independent village panchayats and panchayat adalats (courts) in the villages of india.

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[4]Dr. Laju P Thomas, Dispute resolution in rural India: An overview, Journal of legal studies and research volume no:2(issue 5),page101& 102.

[5] Anathakrishnan G, CJI Ramana calls for ' indianisation 'of country legal system, Indian Express,sep 19, 2021 https://indianexpress.com/article/india/justice-system-colonial-not-suited-for-indian-population-says-cji-7517470/

[6] Malik & Raval, Law and Social Transformation in India,pg.465,edn:2014

[7] Muhammad siddqui, Punjayat Raj in India,pg.21,1996
https://core.ac.uk/download/pdf/144518343.pdf

3. History of Panjayat Raj :

Panjayat raj system is an ideology of local self governance, it helps to improve rural development,strengthen democracy and protect the rights of marginalized groups. Number of committees were formed to suggest a better version of rural governance.

I. Balwant Rai Committee 1957:

The committee suggested the decentralized local government with the three tier system of panchayat Raj,

a. This system would consist of village panchayat (basic), panchayat samitis (middle), and zila parishads(village).

b. The election of members of Panchayati Raj bodies: Members of Panchayati Raj bodies would be elected directly by the people.

c. The transfer of powers and functions to Panchayati Raj bodies: Panchayati Raj bodies would be given a wide range of powers and functions, including agriculture, education, health, and rural development.

d. The provision of financial resources to Panchayati Raj bodies: Panchayati Raj bodies would be provided with adequate financial resources to carry out their functions.

II. Ashok Mehta Committee: 1977

To bring back the panchayat raj instead of 3 he recommended 2 tier system for zila level and mandal level

(a) representation of SCs and STs in the election of PRIs on the basis of their population

(b) four years of term of service through election.

The states of Karnataka, Andhra Pradesh and West Bengal, passed new legislation based on the Asoka Committee Report. However the flux in politics at the state level did not allow these institutions to develop their own political dynamics. This period post 1978 was an unstable period in State politics[8].

III. Singhvi Committee : 1986

The concept paper on panchayat raj institution recommends the following ideology to incorporate in constitution:

a) Recommend constitutional status for panchayat system.

[8] Peter Donald deSouza, Overview of Rural Decentralisation in India,pg.no.21,volume 3 edn 2000;

b) Suggested more power to levy tax to strengthen the panchayat system.

IV. 73rd and 74th CONSTITUTIONAL AMENDMENT : 1993

Through these amendments after 43 years of independence local self governance in India was introduced as a constitutional body[9]. The 73rd amendment adopted part IX "Panchayats" on April 24th,1993. The 74th amendment adopted IXA "Municipalities" on june 1st,1993.

a) Three-tier system of panchayat as per the recommendations given from balwant rai committee ,for village level zila parishad ,panchayat samiti as a block level, gram panchayat for ward[10]

b) Direct election for all the levels of the panchayat system[11].

c) One third Reservation for SC and ST community[12].

d) one-third from total seats reserved for women[13]

e) Term of office 5 years,on part of dissolution before term compilation the election shall be conducted within 6 months[14].

Article 243 empowers gram sabha powers and functions at village level. The elected candidate by the people believed to be no longer from the caste influence or any discrimination still we have not achieved this context there are still proxy exists especially in panchayat election still they use reservation flexible for their needs. To safeguard the tribal welfare and protect their customs and tradition PESA Act 1996 was introduced by government of India, does it protected the people in Manipur [15]As per Gandhi rural society is the grass root for the welfare of India but from there itself the corruption and caste demons occupied as the way Dr.B R Ambedkar predicted.

4. Challenges For Rural Democracy

In village panchayat upper caste persons played a dominant role and lower caste had no say in village panchayat. Members belonging to high caste, old age and economic status people follow the leads of village heads. There is also a concept of faction in the village community it is a group Based on political ideology, caste power and simply due to clash of personalities[16]. The headman of the village mostly belongs to this kind of group. They will be an influential group on deciding disputes,Also they are dominative in election results Of

[9] Based on Singvi committee Report 1986
[10] Art 243C (2),THE CONSTITUTION OF INDIA, 1950
[11] *ibid*
[12] Simon vs UOI , nov 2010 https://indiankanoon.org/doc/820304/
[13] Art 243D ,ibid
[14] Art 243E, ibid
[15] Infra note.17
[16] Rajendran Kumar Sharma, Rural Sociology , pg no: 208, edn.2004

the village. The panchayat cannot be dissolved without reasonable cause to do[17]

Few factors determining the rural polity in India:

A. Economic factor:

Rural India Faces many challenges including drought, famine,poverty and unemployment. These challenges are exacerbated by the fact that many rural Indians are uneducated and Lack of skills to take advantage of opportunities. As a result they are often exploited by those who are more powerful; the judicial system in rural India is also struggling and underfunded and people are often unaware of their rights, making it difficult for rural Indians to get justice when they are wronged.

B. Territorial factor:

The Naga insurgency[18], which began in 1950 is one of the oldest and resolved armed conflicts in India; it has been followed by low intensity conflicts in Manipur, Assam, Nagaland and Tripura between 1990 and 2000. The lack of judicial infrastructure in these areas makes it difficult for people to get justice as a result many people in this area are at risk of exploitation and abuse. Currently most of the states in North East India are facing some kind of conflicts especially Manipur[19] and Assam . These conflicts have been caused by a variety of factors including inter community and inter ethnic conflicts and management of the judicial system which led to a number of problems including late delivery of Justice, the guidance of poor people and the exploitation of people by those in power.

C. Organization

Organized structure had caste Panchayat Councils of elders That are responsible for mediating disputes and enforcing social norms within a cat that established rules and regulations for the members of that particular caste. Each caste was autonomous socially and financially to self govern themselves.

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[17] Mohammad yunus Vs state of U.P. (2013)

[18] Samudra Gupta Kashyap, Explained: Everything you need to know about Nagaland insurgency, The Indian Express, August 4th, 2015 https://indianexpress.com/article/india/india-others/everything-you-need-to-know-about-nagaland-insurgency-and-the-efforts-to-solve/

[19] SriRam Lakshman,European parliament calls on India to act promoting to end Manipur violence, protect minorities, The Hindu, July 13th, 2023 https://www.thehindu.com/news/national/european-parliament-calls-on-india-to-act-promptly-to-end-manipur-violence-protect-minorities/article67075615.ece see also , Sangeetha Barooah Pisharoty, Seven reasons why the violence in Manipur cannot be considered a sudden occurrence, The wire, May 5th 2023 https://thewire.in/politics/explainer-manipur-violence-biren-singh-meiteis-kuki-zo-nagas

D. Other communal factors:

In India there are so many socio-economic problems that particular groups of people face when trying to access health and Healthcare. Identifying these groups is not simple as they belong to vulnerable communities. For example, women, people from scheduled caste and tribes,children, people with disability and poor migrants are all more likely to face discrimination in the judicial system because they might not have been successful in education and resources as other people. In this male dominated society women face double discrimination. This mindset is often supported by the people in rural areas who may not be educated or understand the importance of Judiciary. These groups often have a great impact on them.

Not only the speedy trial[20] is a fundamental right but also the speedy justice[21], delayed justice is denied justice. The people belonging to rural communities are not only denied justice but also their rights are robbed. Especially the people from the tribal community. We are accessing the right to know through the Right to information Act,2005 even this access is the reason behind judicial decision. How far the people from rural communities know they have the right to know and access to justice. The way we are still lacking .

5. Reforming The Rural Justice System :

Reforming the rural community is an ongoing process. We have a long way to go. The major hindrance for the rural reform will be lack of resources,isolation,disparities. The challenges make it difficult to provide adequate law enforcement,judicial,and corrections services in rural communities. Still there are few initiatives taken by the government to reform the rural system which also needs more enforceability.

The legal system have experiencing the refining the justice delivery system to make more popularity accessible, prompt and effective[22] . Incorporation of Art.39A[23] The constitution is a breakthrough step to access justice by all the communities not even discriminated against by class. First time in India village courts were introduced through the Gram nyayalaya Act,2008. Before that we have practice of nyaya panchayat which is different from gram nyayalaya;

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[20] Maneka Gandhi Vs union of india 1978 AIR 597, 1978 SCR (2) 621

[21] Subarata chattoraj Vs union of india & ors (2014) https://indiankanoon.org/doc/44296413/

[22] P. Ishwar Bhat, Law and Social Transformation,pg.820,first edn,2009

[23][Art.39A: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide **free legal aid**, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.] 42nd amendment, 1976.

a. Nyaya Panchayat:

It has a significant role in the Indian judiciary on giving speedy and free justice. The panchayat will be headed by dharmadikari who will be solving the disputes in the village.he will trying the petty cases arising out of civil and criminal cases.no fabrication of evidence.the main demerit of the system is sarpanch can only be occupied by people from upper caste.so there is high chance for biased decision. In the view of justice Krishna Iyer : since the panchayat sitting will be under the elders of the village they were well acquainted with the locals also he will be aware of their customs and tradition. Almost every individual of the village is known to them. The very fact could easily let them know the reason behind the dispute that arose[24].

b. Gram Nyayalaya Act,2008 :

The grama nyayalaya is a court that settles disputes between community members at the village level. The purpose of establishing this court is to make easy access to justice for rural people.The 114th Law Commission Report[25], titled "Gram Nyayalaya", was submitted in 1986. It was a comprehensive report on the need for a system of decentralized justice delivery in India. The report made a number of recommendations, including the establishment of Gram Nyayalayas (village courts) at the village level, the creation of a new cadre of lay judges, and the simplification of court procedures.

Features of the Act:

a) Appointment of Gram nyayadhikari recommend from state government based on consultation with high court judges.

b) Nyayalayas (village courts) are established at the headquarters of each Gram Panchayat (village council).

c) Each Gram Nyayalaya has a judge who is a first-class judicial magistrate.

d) Gram Nyayalayas deal with simple civil and criminal cases as mentioned in schedule I & II.

e) Cases in Gram Nyayalayas are disposed of quickly and efficiently.

f) Cases in Gram Nyayalayas are disposed of at a low cost

g) This court will not be bound to the Indian evidence Act.

[24] Supra note:7, pg.no.508
[25] Ministry of Law and Justice,Govt of India; 144th Law Commission Report,1986

Enforceability of the Act:

As for status mar 2022,there are 476 gram nyayalaya only 257 were functional[26] and there are number of state denied set up gram nyayalaya in their state even after the supreme court intervention[27], as the act was introduced with the aim of constituting 5,000 gram nyayalaya ,the supreme court ordered the high court to take necessary action in this matter in a speedy manner. In L.Chandra Vs Union of India[28] where the court discussed the malimath committee report which suggested to consider gram nyayalaya also one of the tribunal under Article 323A - 323B. The supreme court ruled that they can't waiver the gram nyayalaya if they have competent jurisdiction they can even take suo moto action with respect to their jurisdiction.summary trial under sec.262 -265 can be done by gram nyayalaya. From the recent report of NJDC there are 10 crore pending cases, so with the help of gram nyayalaya we can reduce the burden on courts.

c. Justice on wheels:

It is a concept inspired from the Philippines , where justice can be reached on door steps. It is also known as mobile court.in 2007 haryana disposed of 2,000 cases with help of the idea[29]. Later in 2016,pune also tried to result in disposing of 2076 cases by 2018. Jharkhand had the mobile legal awareness program in [2009 - 2013][30]. It can be quite useful for the rural community who are daily wage workers also who choose to earn rather than reach justice with limited economic resources where they are going to be trolled for years.

6. Suggestion

a) The power and funds given to the panchayat system should be monitored along with the awareness of people about their right in that funding so they won't be cheated by dominating people of their village . like they have right to conduct no confidence motion on panchayat[31].

b) The legal awareness program in rural areas should be done by the students studying in the schools near the village,for that they have to be trained well. By doing the awareness with help

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[26] Press release, Ministry of Law and Justice,GRAM NYAYALAYA,24 MAR,2022 ,https://pib.gov.in/PressReleasePage.aspx?PRID=1809619

[27] National Federation Of Societies Of Fast Justice vs UOI,29th jan,2020 https://indiankanoon.org/doc/193611977/

[28]AIR 1997,SC 1125 https://indiankanoon.org/doc/1152518/

[29]Inauguration Of Mobile Court In Punjab https://highcourtchd.gov.in/sub_pages/top_menu/about/events_files/mobilecourt.htm

[30] Jharkhand State Legal Service Authority,Justice On Wheels, 2015-2016 https://jhalsa.org/justice_on_wheels

[31] Bhanumati Vs state of U.P. AIR 2010 SC 3796 https://indiankanoon.org/doc/10378377/

their own kids it will more effective and the idea reached next generation before the current generation

c) Tribal participation can happen only when we make safe with their culture and tradition . their right to preserve their inheritance should be recognized by courts

7. Conclusion:

In rural justice is an important issue that deserves attention. By taking the steps outlined above, the government can help to ensure that everyone in rural areas has access to justice and that the justice system is fair and just. For the question of whether women and tribes can access justice, no they don't have legal awareness to know their rights first so it's impossible to access justice for them. This can only be done by the future generation of the village; they have to be taught beyond the caste so that they can reform the future. nyayamitra scheme, justice on wheels are milestones for the future because they are not used as they were expected as.ensuring the equal justice for all is the ultimate goal for the current scenario without discrimination on any basis including urban and rural. More training to be given for village police to handle the case in an effective and speedy manner, because dominance of caste and class is high. Technology improvement even though we bought e filing still how far it is accessible to the people in rural areas should be considered.These are just a few of the reforms that could be implemented to create a better justice system. It is important to have a national conversation about these issues and to work together to find solutions that will make our communities.

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vi. Inauguration Of Mobile Court In Punjab

vii. https://highcourtchd.gov.in/sub_pages/top_menu/about/events_files/mobilecourt.htm

viii. Jharkhand State Legal Service Authority,Justice on Wheels, 2015-2016 https://jhalsa.org/justice_on_wheels.

Breaking The Cycle: Correction And Rehabilitation in the Fight Against Recidivism

Sourabh Jha*

Shivani Kataria**

1. Introduction

In India, the criminal justice system aims to combine punishment with rehabilitation. In Indian Constitution, individuals have the right to a just trial and are presumed innocent until proven guilty. Punishment in India is primarily in the form of imprisonment, fines, or both.[1] The severity of a crime committed is used to determine the length of the sentence. The Indian Penal Code (IPC) and the Code of Criminal Procedure (CrPC) are the primary legal frameworks used to regulate criminal offenses and their corresponding penalties. However, the Indian criminal justice system also recognizes the importance of rehabilitation in reducing recidivism and promoting social reintegration. Counselling, education and vocational training are the common rehabilitation programs that are provided to the offenders after they are being released from the prison in order to help them reintegrate in the society and to in leading a good productive life.[2]

Parole and Furlough are some of the statutory remedies that provides the prisoners a chance to get released from the prison early and reintegrate back in the society. For a prisoner to get release on parole in India, it is mandatory for prisoner to complete at least one-third of the prison time and that too while showing a good behaviour. Overall, while punishment remains an important aspect of the Indian criminal justice system, there is a growing recognition of the need for rehabilitation and reintegration of offenders into society.

The purpose of correctional law is to bring about social change, and a well-organized criminal justice system is essential for a

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[1] Shyam Prakash Pandey, Kinds of Punishment under Indian Penal Code:A Critical Evaluation and Need for Reform, ISSN 2581-5369: Volume 4 Issue 1 : International Journal of Law Management & Humanities. 1699, 1703-1709 (2021).

[2] Vidit, Correctional & Rehabilitative techniques of Punishment: A Need for legislative reform in India, ISSN:2348-8212:Volume 4 Issue 1 : International Journal of Law and Legal Jurisprudence Studies. 114, 116-117(2014).

functioning democracy.[3] It is the responsibility of the criminal justice system to effectively rehabilitate offenders. The goal of this study is to examine the role of rehabilitation strategies in the context of India for restoring the criminal justice system and reintegrating offenders, and to promote international best practices in the correctional system.

2. Objective of the Study

Each offender has the capability to reform himself. The only limitation to that note is that if the system allows the person to do so. The prison system in India needs some serious overlooking and major reforms. We can't think of rehabilitating or correcting an offender of law if we don't have a proper prison system and administration in our country.

Our prison system in India was heavily influenced by the Britishers since and before the time of independence. Still, to this day, the prisons are considered as a house of captives where the prisoners must go through rigorous treatment as a result of the wrong committed by them rejecting all the basic human needs and reforms to them. This interpretation of prison is not just an imagination, in fact this is probably the closest to what every person thinks when it comes to prison. This stigmatised thinking needs to be stopped and measures and ways of rehabilitation of a prisoner must be created once again so that the criminal inside the mind of a criminal can be eliminated and a chance to start a new and better life must be given to such prisoners.

The present study would focus upon the Problems in the Indian prison system, meaning of rehabilitation of prisoners, strategies on promoting the victim-centeredness in the criminal justice system. The paper also substantiates upon How the implementation of Open prisons, victim-centric approaches including pre-sentence hearings and Victim Impact Statements impact the rehabilitation and punishment policy, and the potential benefits and drawbacks of these measures in terms of reducing recidivism rates and addressing the needs of victims.

3. Research Methodology

To evaluate the effectiveness of rehabilitation programs on offenders, the research utilizes both a doctrinal and exploratory approach. The researcher gathered information from various secondary sources such as books, theses, research papers, online articles, and journals to conduct the study. The objective of selecting this subject was to comprehend the psychology behind why individuals commit crimes and whether punishment is the only solution. Appropriate punishment or assistance should be given according to

[3] Ankita, Critical Evaluation of the Imprisonment and Recidivism, ISSN 2581-5369, Vol. 4 Iss 5: International Journal of Law and Legal Jurisprudence Studies. 261, 268-270(2021).

the seriousness of the offense. In order to prevent future crimes, it is essential to understand the underlying reasons behind the occurrence of the crime, as the purpose of punishment is to serve as a deterrent. The research paper aims to identify the internal and external factors that contribute to an offender's decision to commit a crime and to investigate whether rehabilitation is a viable option.

4. Review Of Literature

- Ms. Shalini Gupta's Paper titled "Correctional and Rehabilitative Techniques of Punishment: A need for Legislative reform in India" in which the author examines the role of Criminal Justice system in the prisoner rehabilitation process. In the paper, the author gives insights about the problems existing in the system of rehabilitation and also suggest ways of overcoming it. The paper also mentions various alternatives to the imprisonment and how using these alternatives instead of detention will not only help maintain but also restore the rule of law in prisons where corrupt practices and violations of human rights are rampant.

- National Crime Records Bureau's Report which gives the statistics of the prisons in India. The report provides the information regarding the recidivism rates, inmates occupancy in the prisons and shows a clear picture of overcrowding in the Indian prisons.

- Paul Cassell's paper titled "In Defense of Victim Impact Statements". The paper thoroughly defends the use of victim impact statements during criminal sentencing by highlighting their significance to the victims of crime. Additionally, the paper argues that opponents of these statements do not adequately address the importance of these statements to those who have suffered harm.

- Suryansh Tiwari's paper titled "Concept of Open Prison System as a Correctional System" in which the paper aims to examine the origin of open prisons, analyze their effectiveness as a form of correctional facility, particularly in India's present circumstances, and offer suggestions for enhancement.

- Meagan Denny's paper titled "Norway's Prison System: Investigating Recidivism and Reintegration" in which the author talks about the higher recidivism rates in Western countries. The paper examines the unique qualities of Norway's prison system and investigates the reasons behind its notably low rates of repeat offenders, emphasizing the system's emphasis on reintegrating prisoners back into society through educational programs and normalization techniques, particularly in Norway's open prisons. This approach to incarceration is centered on rehabilitation, which is widely accepted by the majority of the Norwegian populace.

- National Institute of Mental Health & Neuro Sciences, Bengaluru-560029 handbook on "Dealing with Mental Health Issues in Prisoners during COVID-19". The handbook discusses the urgent requirement for the readiness, promotion of health measures, and handling of mental health concerns of both prisoners and prison personnel.

- Kaustubh Rote's research paper titled "Prison Reform and Social Change in India" in which the author argues that the current prison system in India needs to be reformed. The paper highlights the issue of overcrowding in prisons due to an increase in the number of pre-trial prisoners who are detained in worse conditions than convicted prisoners despite being innocent until proven guilty. The lack of separation between different types of offenders in overcrowded prisons can lead to negative influences on other prisoners, which can be harmful to society.

5. Conceptual Framework of Rehabilitation

The concept of rehabilitation is justified by the idea that individuals commit crimes due to negative societal conditions. As a result, it is both a societal responsibility to intervene and assist the offender, as well as the offender's right to seek help from society.

Bentham's utilitarianism philosophy focuses on actions that aim for greater happiness for all the people. Also, the theory of rehabilitation advocates the practice of restorative justice.

A wide range of punishments does not mean that the criminal justice system of the country are rigid and inhumane. The astute of those who are in power reflects upon the diversity and the range of punishments. It has become important to deploy various methods of preventing the crime as the society gains more knowledge on the nature of crime, intention behind them and circumstances surrounding the crimes. Therefore, having diversity in the types of punishments available is a strength of a penal code.[4]

The conceptual framework of rehabilitation for prisoners is a multifaceted approach that aims to address the unique needs and challenges faced by incarcerated individuals in order to help them successfully reintegrate into society.[5] This framework is grounded in the belief that rehabilitation should be a central goal of the criminal justice system, as it can reduce recidivism and improve public safety.

[4] Jeremy Bentham, Bentham on Utilitarianism, Journal of Liberal History. (Feb 23, 2023, 3:47 PM)

[5] Suryansh Tiwari, Concept of Open Prison System as a Correctional System: A Study in Light of Present Context, [ISSN 2581-9453] Vol. 3 Issue 4; International Journal of Legal Science and Innovation. 1025(2021).

The key components are as follows:

i. Treatment plan based on individual assessment: The needs of each of the prisoners are identified through an extensive assessment. Some prisoners require vocational trainings, some requires program on substance use and mental health. The extensive assessment helps in formulating a treatment plan for such prisoners.

ii. Holistic Approach: A holistic approach is taken to address the physical, emotional, and social needs of prisoners. This may include access to healthcare services, mental health services, and educational and vocational training.

iii. Re-entry Planning: Rehabilitation efforts begin as soon as possible and continue throughout the period of incarceration. A key component is reentry planning, which involves preparing prisoners for a successful return to their communities. This includes providing access to community-based resources and services, such as housing and employment assistance.

6. Rehabilitative Measures for Prisoners

No society is crime-free. Crime will take place no matter, how adverse a country's law gets. We cannot just get rid of the criminals; it is their criminal mind that needs to be eliminated. For that purpose, the reformative measures are required to eliminate the criminality within a criminal so that the individual gets a chance to live a normal live again. It is observed that the process of rehabilitation is not a single one and it doesn't stop at one point. It starts when the prisoner enter the prison and continues even after the prisoner is released.

In India, the most common form of punishment is the imprisonment out of all the other 5 kinds of punishment that are described in Section 53 of the Indian Penal Code, 1860.[6] Prisons have long been viewed as a powerful means of achieving the goals of punishment, but it appears that simply incarcerating individuals is not meeting these objectives in the desired manner. In order to achieve these objectives, prisons must serve to inspire and equip offenders for a life that follows the law and is financially independent after their release.

The main areas where prisons fall short in achieving these goals are in education and employment opportunities. The criminal justice system must prioritize the aspect of rehabilitation. Those who hold a reformative perspective believe that punishment is only reasonable if it looks forward, rather than backward. They maintain that punishment should not be viewed as settling a previous score, but

[6] Indian Pen. Code, 1860, § 53

instead as an opportunity to start anew. The Supreme Court has also provided certain directives concerning the well-being and improvement of prisoners.[7] Some of those recommendations are:-

1. New inmates should be allowed to call their family members once a day for a few weeks upon arrival in order to help them adjust to prison life quickly.

2. It is necessary to provide modern cooking facilities and a canteen to the prisoners, as the current conditions are inadequate.

3. Video conferencing could be used for trials to take place remotely.

4. Due to overcrowding in prisons, more staff should be hired to better manage the situation.

5. Greater priority should be placed on providing speedy trials and establishing fast-track courts.

7. Challenges Confronting the Existing System of Prison Rehabilitation

It is important to discuss the problems with our prison systems before talking about the reformative measure for the prisoners. If we take a deeper look at our Indian criminal justice system, we can find thousands of lacunae in it. The increase in the prison population has led to overcrowding in prisons, which in turn has led to a rise in the cost of maintaining prisoners. Unfortunately, the budgetary allocation for prison administration has been consistently neglected, which has resulted in a significant decline in the quality of life for prisoners. In the post-independence era, the Indian government attempted to introduce significant reforms in prison administration. However, despite these efforts, there remain key areas where prisons are failing to adequately address the needs of prisoners, particularly in the areas of education and employment. Some of the problems with our prison system are:-

i. Overcrowding in prisons is the major problem in our country. The idle capacity of any prison to hold prisoners is being over utilized and more prisoners are kept in a single prison. The report of National Crime Records Bureau for the year 2021 showed that out of the 425609 available capacities of prisons, the inmate population of prisoners in the Indian prisons stood at 554034 taking the occupancy rate beyond normal at 130.2%.[8]

[7] PRISON REFORMS. Ministry of Home Affairs. https://www.mha.gov.in/Division_of_MHA/Women_Safety_Division/prison-reforms

[8] National Crime Records Bureau, Prison Statistics India Tables – 2021, Table-1.2 Capacity, Inmate Population and Occupancy Rate of Jails.

ii. Another major problem in our prison system is that the prisoners are not distinguished from each other. The first lacuna in this is that the under trial convicts are being locked up second lacunae is that these under trial prisoners are being kept with the convicted prisoners who are already serving their sentence. In fact, it is shocking to note that 77% of inmates in the prisons of our country are under trial prisoners.[9] This factor plays a major role in the rehabilitation and correction of the prisoners in our country.

iii. The existing rehabilitation system faces a significant challenge due to the absence of consistency in the sentencing policy across India. Judges in India have discretion in awarding sentences within the prescribed range of punishments for a particular offense. This discretion is exercised after taking into account various factors such as the nature and severity of the offense, the circumstances surrounding the commission of the offense, the age, gender, offender's social and economic status, and the impact of the offense on the victim. This discretion exercised by judges faces a lot of criticism. Judges have been accused that they either show leniency or become too harsh while prescribing the sentencing time in some particular cases. The sentencing process has also become a point of concern because of the political and external factors. In "Bachan Singh v. Union of India"[10], the Supreme Court held an important ruling. The matter was related to the lawfulness of capital punishment in India, with a particular focus on whether it conflicted with the constitutional guarantee of the right to life. The Supreme Court concluded that although the death penalty was consistent with the constitution, it could only be applied in extremely rare circumstances where the punishment of life imprisonment would not suffice.

iv. The National Crime Records Bureau's report on the reoffending rates of individuals arrested for all crimes under the Indian Penal Code during 2015[11] stood at 8.1% as compared to 7.8% for the year 2014[12]. The past trends also portray a similar

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https://ncrb.gov.in/sites/default/files/PSI-2021/TABLE%201.2%20-%202021.pdf

[9] 77% prisoners in India are under trials: NCRB. Money control. https://www.moneycontrol.com/news/india/77-percent-of-indias-prisoners-are-undertrials-ncrb-9142041.html

[10] Bachan Singh v. Union of India (1980) 2 SCC 684.

[11] National Crime Records Bureau, Prison Statistics India Tables – 2015, Table-11.1 Recidivism Amongst Persons Arrested under Total IPC Crimes During 2015. https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2011.1_2015.pdf

[12] National Crime Records Bureau, Prison Statistics India Tables – 2014, Table-11.1 Recidivism Amongst Persons Arrested under Total IPC Crimes During 2014.

picture of increase in the number of recidivists which is a major concern as it prima facie showcases that the punishment policy in India has failed to achieve its objective of reducing the recidivism among offenders.

8. Strategies for Combating Recidivism and Promoting Rehabilitation

There has been a growing emphasis on victim-centric approaches to criminal justice, which prioritize the needs and concerns of victims of crime. The current scenario of the prison systems in India seems to put less emphasis on the rehabilitation of prisoners and the various problems stigmatizing the Indian prison system makes it an unattainable goal. The purpose of rehabilitation is to provide offenders with the skills and tools they need to lead productive and law-abiding lives after release. There are many strategies for promoting the idea of rehabilitation which, if followed correctly is believed to yield a better result. The use of open prisons, pre-sentence hearings, and victim impact statements forms the part of a broader strategy to promote rehabilitation and victim-centeredness in criminal justice policy.

I. Concept Of Open Prison System

As the name suggests, the concept of open prison means prisons without bars and limitations. Apart from being less expensive, open prisons allow the government to make better use of the inmates' abilities. The financial returns are positive, and once operational, the open jails achieve financial self-sufficiency. Open prisons are also beneficial in reducing prison overcrowding, which is desperately needed in Indian prisons.

Certain prisoners require special handling to facilitate their reintegration into society, particularly those who are first-time offenders or who express a desire to reform. Open prisons serve as a means of addressing their needs and providing them with an opportunity to reintegrate into mainstream society. Open prisons have existed in some form or another in India for a long time. Around the 1960s, the first open prison was established in India, and presently there are 63 such facilities. These prisons do not have walls or stringent restrictions, but the prisoners are still penalized and encouraged to repent for their offenses, and the experience of freedom serves as the most effective means of rehabilitation.[13]

Only prisoners who have been sentenced to life imprisonment and demonstrate positive conduct, progress, and willingness to reform and

https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2011.1_2014.pdf

[13] Suryansh Tiwari, Concept of Open Prison System as a Correctional System: A Study in Light of Present Context, [ISSN 2581-9453] Vol. 3 Iss 4; INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION. 1025(2021).

rehabilitate are selected and transferred to these prisons. Various actions for open prisons have been carried out in some Indian states. The primary objective of these open prisons is to create an environment that is akin to a jail but not entirely confining. Although the prisoner remains in custody, their mind and body are afforded a degree of freedom. This approach aims to promote self-esteem, self-reliance, a sense of responsibility, and instil confidence in the individual, thereby reducing the likelihood of reoffending. Multiple Indian states have open prisons in operation. The benefits of open prisons are as follows:

i. It mitigates the adverse effects of criminal behaviour on both the offender and the community.

ii. It addresses prison overcrowding concerns while also promoting humane living conditions.

iii. Operational costs are lower because there is less of a need for security and guards because they are in open prisons.

iv. Self-development and socialisation are encouraged so that they can maintain their place in society and avoid turning into sociopaths. They are also permitted to interact with others and communicate with their family.

v. Allowing inmates in open jail settings to find employment both inside and outside the prison gives them a confidence boost and allows them to earn money.

Research done by the Norwegian Correctional Service showed that the recidivism rates were quite lower in criminals in open prisons whereas it was high in the cases of traditional prison. Prisoners in open prisons were equipped with sufficient knowledge so as to allow them to secure employment and maintain a livelihood after they get released from the prisons.[14]

II. Pre-Sentence Hearings

The purpose of pre sentence hearing is to give the convicted offender the chance to discuss with the sentencing judge any elements of their past or character that might affect the type of sentence that will be given. However, there is evidence that judges are treating this provision indifferently or perfunctorily because they are unable to understand its intended purpose. The pre sentence hearing is frequently scheduled by judges on the same day as the conviction,

[14] Meagan Denny, Norway's Prison System: Inv s Prison System: Investigating Recidivism and estigating Recidivism and Reintegration, Bridges: A Journal of Student Research(2016). https://digitalcommons.coastal.edu/cgi/viewcontent.cgi?article=1032&context=bridges

which leaves little time for the defendant's defence team to prepare a proper sentencing case.

Additionally, given that many sentencing decisions are made almost immediately after the hearing, there are signs that judges do not give themselves enough time to consider all the sentencing-related factors after the hearing. Mandatory sentences create another obstacle to following the presentence hearing's goals. While presentence hearings are intended to consider factors that affect sentencing, mandatory sentences do not take any sentencing mitigation into account. Thus, mandatory sentencing often works against the presentence hearing's goals. Each judge must make every effort to enter the presentence hearing with an open mind and the intention to consider all the material and arguments given there before deciding on the appropriate punishment.

This is an advantageous approach for both victims and offenders. A research by the Australian Institute of Criminology showed that the satisfaction level in the victims was high who attended the pre sentence hearings from those victims who did not. The recidivism rate in the offenders attending the pre sentence hearing also reduced significantly.[15]

III. Victim Impact Statements

Victim impact statements (VIS) are written or oral statements given by crime victims, or their families or friends, about the impact of the crime on their lives. These statements are typically given during the sentencing phase of a criminal trial, and are intended to inform the court about the harm caused by the defendant's actions.

Studies indicate that victim impact statements can have a beneficial effect on both victims and the criminal justice system. For example, a study by the National Institute of Justice showed that, in the criminal justice process involving victim impact statement, the victims felt more validated and satisfied. Judges also get a good assistance from Victim impact statement as it helps them in better understanding the crime and making the decision accordingly.[16]

Victim Impact statements also have a deterrent effect on the offenders. It was found in a study that offenders actually showed repentance for their actions.[17] Offenders get to know about the damage

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[15] Edna Erez, Victim Impact Statements, AUSTRALIAN INSTITUTE OF CRIMINOLOGY. https://www.aic.gov.au/sites/default/files/2020-05/tandi033.pdf

[16] Victim Satisfaction With the Criminal Justice System, National Institute of Justice. (Jan 1, 2006). https://nij.ojp.gov/topics/articles/victim-satisfaction-criminal-justice-system.

[17] Paul Cassell, In Defense of Victim Impact Statements. (Vol 6:611 2009) OHIO STATE JOURNAL OF CRIMINAL LAW. 611, 616-619 (2009). https://www.researchgate.net/publication/228187798_In_Defense_of_Victim_Impact_Statements.

they have inflicted upon the victim and also to be accountable for their actions. Victim impact statements are effective way of making the offenders accountable for their actions and helping victims heal.

IV. Mental Health of Prisoners

The mental health of prisoners refers to the psychological well-being of individuals who are incarcerated in correctional facilities. There is a well-established fact that inmates are more likely to suffer from mental health issues, including depression, anxiety, post-traumatic stress disorder, and substance use disorders, in comparison to the general public. This can be attributed to a range of factors, including exposure to violence, trauma, and isolation, as well as limited access to mental health care and support services. Mental health care facilities like counselling and medications of prisoners must be provided by the correctional facilities.

Some of the strategies promoting the mental health of prisoners include identification and treatment of mental health problems of prisoners and helping the prisoners gain skills that would come to their use after releasing from prison.[18]

V. Seperate Prisons

The differentiation of the prisoners is quite important for criminal justice system. The differentiation must be based on the basis of criminal record, age of the offenders. One reason for this is that the influence of hardened criminals can negatively impact other prisoners, leading to potentially harmful outcomes for society. Furthermore, different types of offenders may require different approaches to rehabilitation. For instance, some may need to address behavioural issues, while others may require treatment for past traumas and emotional insecurities. Certain crimes may also require punitive measures rather than rehabilitative ones. Therefore, separating prisoners is important to ensure that each inmate receives the appropriate treatment and that the prison environment remains safe and conducive to rehabilitation.

VI. Parole

Everyone should get a chance to correct their mistakes. The same is the thought while granting parole to the offenders who are serving their sentence in the prison. Parole is a significant part of the criminal justice system. it refers to the temporary or permanent release of a prisoner before the end of his/her sentence in view of good behaviour. Therefore, to put it simply, parole is the premature conditional temporary release of a prisoner on the condition that they abide by the

[18] Hegde, P.R ,Dealing with Mental Health Issues in Prisoners during COVID-19: A Handbook. National Institute of Mental Health & Neuro Sciences, Bengaluru, India. (2021).

conditions and observe certain restrictions in order to be granted the privilege of returning to the community and socialising with family and friends while considering correctional theory and preparing to resume their social lives. Simply deferring the execution of the sentence while maintaining its overall length. The paroled inmates risk being sent back to jail if they break the rules that govern their release. It helps in making the offenders deter from committing crimes by making them realise about the benefits of free living.

VII. Probation

A court-ordered period of supervision known as Probation serves as an alternative to jail. Although some jurisdictions permit probation periods of up to five years, it usually lasts one to three years. According to state legislation, if someone is found guilty of a serious crime like drug trafficking or sexual assault, their probationary period may be prolonged or potentially last for the remainder of their lives. The goal of probation is to let offenders live in the community as long as they follow the rules the court sets forth. In recent years, punishment and retaliation have received more attention than recovery, but trust in care and healing has resurged as a result of signs that certain things are "working," a concentration on policy-making based on "evidence," and other factors. As the person who started the process at the beginning, the probation officer's role is crucial in this process of treating and rehabilitating offenders. If he performs his duties honestly and fairly, the system can be reinforced in order to reduce the number of offenders in the future.

9. Conclusion

The criminal justice system is a framework that regulates the operation of the courts, prisons, police, and other organisations that serve to provide victims with justice. Individuals are not born as criminals; it is always the circumstances surrounding an individual which makes him a criminal. These external factors can arise from different sources, including societal influences. Nonetheless, there have been developments in how the Indian Judicial System deals with crime by adopting a rehabilitative approach. This approach involves identifying the root cause of the offender's behaviour and addressing it to prevent the offender from repeating their criminal activities. Rather than solely punishing offenders, rehabilitation offers them an opportunity to reform and make amends for their actions. Special Courts, fast track courts may help in achieving this goal. Both the offender and society are to gain various benefits from the rehabilitative approach pointing out the need for reform in the current criminal justice system.

Politics of Defection and Democratic Distortion: Critiquing the Representativeness and Legitimacy of the Post-Defection Governments in India

Dr. Avinash Samal*

1. Introduction

Switching loyalty from one political party to another or quitting the party under whose banner a politician had won the election to the parliament or a state legislature is not new to Indian politics. The problem of defection, as it is called, has been haunting the Indian polity over the decades. The politics of 'Aya Ram Gaya Ram', which began in the second half of the 1960s, has reached such a point that frequent splits, defections, resignations, and the consequent governmental instability and unwanted elections have vitiated the democratic ethos of our polity. According to a Consultation Paper on India's Electoral Law prepared for the National Commission to Review the Working of the Constitution (NCRWC), between 1967 and 1972, nearly 2000 of the roughly 4000 members of the Lok Sabha and Legislative Assemblies in the states and union territories had defected and counter-defected.[1] The paper states that by the end of March 1971, approximately 50 per cent of the legislators had changed their party affiliations and several of them had done it more than once – some of them as many as five times. Interestingly, one MLA was found to have defected five times only to be a Minister for five days.

Though the Congress Party, under the leadership of Rajiv Gandhi, had brought in an anti-defection law banning political defections as early as 1985, the last few decades of our experience suggests that rather than containing the problem of defection, the law has actually aggravated it. The anti-defection law (Tenth Schedule of the Constitution), which was enacted to end defections, has become a remedy worse than the disease. While barring individual defections on grounds of disqualification from membership of the concerned legislature, the anti-defection law had encouraged *en bloc* defections of one-third or more members of the concerned legislature party. Contributing to the problem of governmental instability in many states like Gujarat, Uttar Pradesh, Arunachal Pradesh, Goa,

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Karnataka, Manipur, Madhya Pradesh and many more states, the law has exposed the most immoral and unethical character of our politicians. In the absence of any accountability mechanism, while the practice of defection continues unabated, rewarding the defectors with plum political positions and other perquisites, the law has made a mockery of our democracy.

With the drama of defection unfolding at regular intervals, several committees, and commissions like the Goswami Committee on Electoral Reforms (1990), the Law Commission's Report on Reform of the Electoral Laws (1999), and the National Commission to Review the Working of the Constitution (2001) had recommended amendments to the Tenth Schedule of the Constitution. While the BJP led NDA government of Atal Behari Vajpayee had finally introduced the Constitution (Ninety-Seventh) Amendment Bill, 2003 on 5th May 2003, it was passed by the Parliament on 18th December 2003 and came into force on 1st January 2004 as the Constitution (Ninety-first Amendment) Act 2003.

Scraping the provision pertaining to exemption from disqualification in case of splits (Para 3 of the 10th Schedule), the new law effectively barred defections either individually or as a group comprising one-third of the legislature party. Limiting the size of the council of ministers to 15 per cent of the strength of the lower house of national and state legislatures, the law prescribed that those disqualified for defecting would also be disqualified to hold any public office until the completion of the tenure of the current legislature or till they were reelected to the legislature. While the new law was lauded across the political spectrum for bringing in significant improvements in the existing anti-defection law, the intelligentsia, media, civil society organizations and people in general welcomed it with the hope that it would help curb the menace of defection and strengthen the party system and democratic governance.

But the euphoria did not last long. The political drama that unfolded in the tiny state of Goa on 29th January and continued till 4th March 2005 shattered those hopes. The resignations submitted by 03 BJP legislators leading to imposition of 'President's Rule' on 4th March 2005 demonstrated that clever politicians had already thought of ways to skirt the rather stringent clauses relating to disqualification of members of the legislature. The same resignation drama was enacted again by 17 JD(S) and Congress MLAs in Karnataka in July 2019 and 22 Congress MLAs in Madhya Pradesh in March 2020 to pull down the respective governments in power.

This being the way our politicians and political parties behave, there are certain fundamental questions which the paper tries to address. They are: What exactly constitutes defection? Can the resignation from the legislatures by a member elected on the banner of a political party be considered as defection? What has been India's

experience regarding defections vis-à-vis other democracies? Should the post-defection governments be allowed to be formed based on the majority support of a truncated legislature? Whether such governments formed after defection based on the majority support of a truncated legislature be considered as representative and legitimate in keeping with the democratic principles and values? And finally, how do we curb the menace of defection?

The paper consists of seven sections. Outlining the nature of the problem and the major research questions in the introductory section, the second section attempts to define defection and discusses resignations as the latest avatar of defection. Presenting an international perspective on political defection, the third section presents the dynamics of political defection in India and the measures taken to curb them. While the fourth section discusses resignations as the latest avatar of defection, the fifth section discusses and analyses the representativeness and legitimacy of the post-defection governments formed in India. Based on the perceptions developed during the study, while the sixth section presents the findings and suggestions to curb defections, the final section presents the concluding remarks.

2. Defining Defection

Defection in general means a change in political allegiance of a legislator after his election under the banner of a particular political party. A politician can change his/her views and even join a new party if the latter's ideology appeals to him. However, having won the election on a party ticket, if a legislator changes allegiance during his/her tenure, he/she loses the representative character and legitimacy, which is the very essence of democratic system of governance. If a legislator defects for personal gain or political reward, it reflects his/her moral degeneration. Moreover, such actions adversely affect the political stability and the democratic system of governance in a country. The issue is not as simple as it looks. In fact, what should be considered as 'defection' is a very complicated one.

Jumping from oner political party to another or sitting alone obviously constitutes defection. But can the act of a legislator voting against his/her party in the legislature be considered as defection? Counting this as a defection would certainly prevent a legislator from voicing his/her opinion and voting against the party unless the party permits a dissenting vote or free (or conscience) vote. Yet, this is the case in many countries that prohibit voting against the party and the non-compliance of the same is treated as disqualification.[2] The main objective of disqualifying a legislator who votes against the party is to prevent a politician from staying within a party while opposing its decisions. But this in turn curtails a legislator's freedom to exercise his/her judgment and act against

party policies and practices. This probably was the reason why both the Goswami Committee on Electoral Reforms (1990) and the National Commission to Review the Working of the Constitution (2001) recommended redefining defection much more clearly and comprehensively so that the party did not misuse its power. They recommended that the party whip should be applicable in situations where the life of the government is at stake and not to all voting as it exists currently under the Tenth Schedule. Specifically, they recommended that the disqualification provision should apply only when a member violates the party whip in respect of a motion of vote of confidence/no-confidence, a money bill, a motion of vote of thanks to the President's address or when he/she defies party directives on critical issues.

However, these committees and commissions did not take into account the issue of resignations from a political party into consideration. In fact, the extreme step of resignations resorted to by the unscrupulous legislators in recent years have been destabilizing and toppling the incumbent governments in many states causing havoc for the democratic system of governance. Resigning from a political party after winning the election on a party ticket not only constitutes defection but also a fraud on the representative democracy. The present paper focuses on this rather unusual behaviour of our political representatives.

3. Dynamics of Political Defections in India

3.1. Defection: The International Scenario

Political defection is not peculiar to India alone. As a common political behaviour, party switching or defection has been plaguing the democratic politics not only in India but also in many advanced and developed democracies in the world. Renowned politicians who had once quit their party to join another party include leaders like Winston Churchill, Joseph Chamberlaine and Ramsay Macdonald, who had defected from their respective parties at different times.[3] The War-time Prime Minister of UK Winston Churchill had actually entered the British Parliament in 1901 as a Conservative, but crossed to the Liberal Party in 1904, a move that led some to refer to him as 'the Blenheim Rat'.[4] However, Churchill later 're-ratted' and returned to the Conservative party in 1924 and became the Prime Minister in 1940.

Most of the democracies in the world including UK, USA, Canada, France, Italy, Japan, Australia, and New Zealand have been experiencing political defections for quite some time. In fact, defections have come to be seen as a part of the political culture in many countries and party switching is seen as an expected and accepted behaviour.

While party switching in Brazil is seen a routine affair and is on rise ever since Brazil returned to democracy in 1985, in countries like USA, UK and Australia, party switching may not be common. Nevertheless, it does occur. Though defections are common to most of the developed democracies in the world, the differences in defections across countries can be attributed to several factors including a country's political culture, electoral or party systems. Whatever it may be, the attitude towards party jumping or defection in these countries is seen negatively.

However, Edmund Burke (1729-97) believed that elected representatives do not owe voters their blind obedience, rather their judgment.[5] According to Burke, politicians best serve their constituents when they exercise their judgment on voters' behalf and do not simply follow the demands of voters' or their parties. This can be interpreted to mean that a politician can, at times, go against the specific wishes of voters and leave the party if they think that such an action is in the voters' best interests.

Even though almost all democracies are afflicted with the problem of defection, most countries do not have legislation controlling defection. Neither the United States nor the United Kingdom has anti-defection legislation. Even those countries in Western Europe that are (or have been) plagued by party jumping (including France and Italy) have refrained from introducing laws to curb the practice.

3.2. Political Defections in India

India has had a checkered history of political defections. Though the phenomenon of defection came to be widely practiced in parliamentary politics during the late 1960s' – more specifically from the year 1967 when the monolithic Congress party lost out to the opposition in as many as nine states – it had its origin during the pre-independence era.

In 1950, 23 Congress legislators defected to form the Jan Congress in Uttar Pradesh. In 1953, the Praja Socialist Party leader Prakasam defected from the PSP and joined the Congress to form the government in Andhra Pradesh. Another PSP leader, Pattam Thanu Pillai, Chief Minister of Travancore and Cochin, crossed the floor and joined the Congress. As a matter of fact, during the period 1957 to 1967, a total of 97 members defected from Congress and 419 from other political parties to join the Congress. During 1967-1971, as many as 32 governments were toppled by floor crossing legislators.[6]

In 1967 alone, more than 500 legislators crossed floor, giving rise to the politics of 'Aya Ram and Gaya Ram'. The Opposition got the opportunity in the 1967 general elections to capture power in some States. The electoral debacle of Congress encouraged more dissidence within the party, and in a matter of weeks after the elections,

defections brought down the Congress governments in Haryana, Madhya Pradesh, and Uttar Pradesh. In fact, the aftermath of 1967 elections initiated a climate of politics of defection in which the Congress, and to a lesser extent, the opposition, attempted to overthrow governments by winning over their state legislators with promises of greater political power and outright bribes. This period in the history of Indian politics seriously undermined the ability of most parties to discipline their members. Unprincipled alliances and defections became the order of the day.

Concerned with the malady of frequent floor crossing, a Congress member, P. Venkatasubhiah moved a private member's resolution in December 1968 in the Lok Sabha suggesting that the House appoint a committee to consider the problem of legislators changing their allegiance from one party to another. Subsequently, a committee was set up under the chairmanship of the then Home Minister Y. B. Chavan, who observed that "Defections are a national malady which is eating into the vitals of our democracy". However, the report of the committee was put in cold storage. Another abortive attempt to curb defections was made in 1973 when a Constitution (Thirty Second Amendment) Bill was introduced in Parliament. But it could not be passed and ultimately lapsed with the dissolution of the Lok Sabha.

The Janata Party government headed by Morarji Desai brought another Anti-Defection Bill in 1978. This was, however, opposed by a substantial number of MPs led by Mr. Madhu Limaye who asserted that such a law would, in effect, defeat the democratic right to dissent and invest the entrenched leadership of the political parties with uncontrolled and autocratic powers. Soon thereafter the Janata Party split, and Charan Singh became the Prime Minister for about a month, which was followed by Mrs. Indira Gandhi. It was against this background that after securing a massive mandate, Mr. Rajiv Gandhi took the initiative to enact the 'Tenth Schedule' through the Constitution Fifty-second (Amendment) Act 1985.

3.2.1. The Anti-Defection Law and Its Impact

The Tenth Schedule of the Constitution appended through the *Fifty Second Constitution (Amendment) Act 1985*, empowers the Speaker or Chairperson of the House concerned to decide on the question of disqualification of a member who defects. The defector invites disqualification if he or she voluntarily gives up membership of his party or abstains from voting in violation of any direction issued by the party without obtaining its prior permission or such action is not condoned by the party within 15 days from the day of voting. Independent members too invite disqualification if they join a political party during their tenure as members of the legislature. The law says that the legislator who gets elected other than as candidate of a political party (i.e. independents) 'shall be disqualified for being a member of the House if he/she joins any political party after such

election.' In short, independent members of legislative houses remain free to do as they wish, except that they cannot join any political party during their tenure as members of the legislature.

However, these provisions do not apply in the case of a split in the party or its merger with another party. A split is recognized if at least one-third of the total membership of the legislature party defects. In the event of any merger, the move must have the backing of not less than two-thirds of the legislature party. In other words, if more than two-thirds of the number of legislators of a party decides to join another party, it is recognized as a merger. In that case, the remaining legislators of the parent party will not be disqualified.

As the experience suggests, the anti-defection law had by and large failed to check defections. While making individual acts of defection illegal, the law allowed *en masse* defections. As such, the anti-defection law has been criticized on the grounds that it infringes on the basic powers, privileges, and immunities of members in exercising their freedom of speech and freedom of action, which includes the freedom to vote. While defections continue to happen, that too on a large scale; this has been aided and abetted by the role of Governors and Speakers, who have acted with political bias to further the interests of their parties.

The decisions taken by the presiding officers in exercising powers granted to them under the Tenth Schedule have varied, giving rise to allegations of partisan behaviour by Speakers and Governors. For instance, giving a momentous ruling in November 1990, the Lok Sabha Speaker Mr. Rabi Ray had declared 28 members of the Janata Dal as 'unattached' after the Janata Dal leader in Parliament V. P. Singh expelled them from the party. He held that "the law does not provide for the recognition of some members as 'unattached', but neither does it provide for disqualification of members who have been expelled from a party."[7] Subsequently, Ray recognized Janata Dal (S) headed by Chandra Shekhar, which consisted of 54 Lok Sabha members of the Janata Dal Parliamentary Party. These 54 included the 28 'unattached' members. However, he had disqualified seven members of the Janata Dal including V. C. Shukla and four others, who later defected to the Janata Dal (S) and became Ministers in the Chandra Shekhar Government. Ray thus interpreted the law to establish that a split was a one-time affair.

However, his successor Shivraj Patil ruled that a split was a continuous process and extended legal protection to all members who left the Janata Dal at various points of time during 1992-93, when P. V. Narasimha Rao of Congress was heading a minority government. In fact, Shivraj Patil took quite some time to pronounce his verdict on the splits that occurred in the Janata Dal when Ajit Singh and 20 other MPs broke away from the Janata Dal. He took nine months to pronounce his judgment in the first instance, and in the second

instance, he took two years to recognize the split, when seven members quit the Ajit Singh faction.

In practice, checking the individual defections, the anti-defection law has promoted group or wholesale defection contributing to governmental instability both at the centre and the state level. While we have had defections and splits in most of the states leading to the fall of a large number of governments, Uttar Pradesh, Arunachal Pradesh and Goa present the chronic cases of defections in the country. The next section briefly discusses the dynamics of defection politics in the state of Goa.

3.2.2. Goa: The Laboratory of Defection Politics

Goa has always been at the centre of discussion as far as defection politics is concerned. It presents one of the most interesting cases of defection politics in India and can rightly be said to have provided the most fertile soil for defection. In fact, it won't be wrong to call Goa as the laboratory of defection politics in India. Discussing the political behaviour of elected representatives within the party system in Goa, Peter Ronald deSouza presents Goa as an 'inconvenient fact' for Indian democracy as it poses a challenge to our thinking of representative democracy. [8]

Since 1963 when the first government was formed by Mharashtrawadi Gomantak Party (MGP) till January 1990, Goa had relatively stable governments.[9] Since then Goan politics has been marked by defections, splits, frequent changes in government, partisan decisions by speakers, re-election of those indulged in floor crossings and rewards for defectors, who were given cabinet berths that set the trend for Jumbo cabinets in this country.

From the first Assembly in 1963 till the sixth Assembly in 1990, Goa had a total of seven Chief Ministers spanning over a period of 27 years.[10] As opposed to that, during the last fifteen years, i.e. between January 1990 till June 2005, Goa has had 16 Chief Ministers including Pratapsingh Rane of Congress who was sworn in recently after four of the five by-election results went in favour of the Congress led alliance.[11] Of these 16 Chief Ministers sworn in at different points of time, the seventh Assembly (Jan 1990-Dec 1994) itself had witnessed seven Chief Ministers with one Chief Minister lasting for 2 days and another for 19 days.[12] The defections also had their impact on the size of the Ministry. In a house of 40 legislators, Goa often had 14 ministers which is definitely a luxury that small states like Goa can hardly afford. During the ninth Assembly (June 1999 - Feb. 2002), defections took place 14 times. While only 20 legislators defected, most of them defected several times causing a total of 44 cases of defections.[13] And interestingly, during the last fifteen years, none of the defecting MLAs thought it fit to resign and seek a re-election.

As has already been mentioned, the speakers of the legislatures often played a crucial role in facilitating defections. With Speakers taking partisan stands and giving rulings that favour the government in power to whom they owe their position, the high office of the Speaker now has been compromised. In interpreting defection and giving their rulings, while some of the Speakers of Goa Assembly had taken 4 days, some of the speakers had taken more than 9 months to do the same.[14] Of particular importance is the behaviour of Speaker Luis Porto Barbosa, who in order to become chief minister engineered a defection in Pratap Singh Rane's government in 1990 by putting Curchill Alemao in the forefront. After dislodging the Rane government, he gave his ruling, got Alemao sworn in as Chief Minister for 19 days and got a deputy speaker elected. And finally, he resigned from the Speaker's post to become the Chief Minister of Goa.

3.3. Constitution Ninety-First (Amendment) Act 2003

In view of the loopholes in the Anti-Defection Law 1985 and the recommendations made by various committees and commissions to bring in necessary changes in the law, the BJP led NDA government enacted the Constitution Ninety-First (Amendment) Act 2003. Barring group defections and limiting the size of the council of ministers to 15 per cent of the strength of the lower house of national and state legislatures, the law prescribed that those disqualified for defecting would also be disqualified to hold any public office under state or central government until the expiry of the term of the current legislature or till they are re-elected to the legislature.

Other than scraping paragraph 3 pertaining to split, putting a cap on the size of the ministry, and disqualifying the defectors from occupying any public office, the Act has not addressed the fundamental question of what constitutes defection and who should interpret it? It has also ignored one of the persistent issues facing the Indian polity – namely when there is a disagreement between the party whip and the legislator (people's representative), whose will should prevail in a system where sovereignty resides with people? Secondly, the Act has not taken into consideration the idea of taking away the power to decide on the issue of disqualification from the speaker/chairperson and entrusting it to an impartial authority, i.e. may be a multimember independent regulatory authority. Thirdly, exemption from disqualification in the case of two-thirds of legislators of a party merging with another party has also skipped the attention of the government. Most importantly, while bringing in stringent provisions for preventing defection, it has opened the flood gates for 'resignation' as a last resort to topple an incumbent government for plum political positions and personal gain. The next section deals with the cases of resignation as the latest incarnation of political defection in India and its corrosive impact on democratic system of governance.

4. Resignation: The Latest Avatar of Defection

Left with no option to defect after all the doors were closed by bringing stringent provisions under the Constitution Ninety-First (Amendment) Act 2003, the elected politicians and political parties have been increasingly resorting to the extreme step of resigning from the post of legislators to destabilize and topple the incumbent governments in many states. Creating governmental instability, the individual and mass resignations by elected legislators have distorted the democratic system of governance in India. Starting with the resignation of 3 BJP MLAs in Goa in January 2005 that toppled the Manohar Parrikar Government in February 2005, after one and half decade, the latest avatar of defection has assumed monstrous proportions. The mass resignation of 17 JD(S) and Congress MLAs in Karnataka in July 2019 and 22 Congress MLAs in Madhya Pradesh in March 2020 has not only toppled the lawfully elected coalition governments in Karnataka and Madhya Pradesh but also raised fundamental questions about the 'representativeness' and 'legitimacy' of the post defection governments formed in these states.

Political parties constitute the lifeblood of a democracy. Starting with political socialization and recruitment, and interest aggregation, in a democracy, they perform a variety of functions including the forming and managing of the government. With the erosion of social and political values since independence, there has been a complete degeneration of politics in our country today. It is ironic that the same political parties, who indulge in this kind of undemocratic and unethical behaviour, cry foul when they themselves become victims of defections. In fact, both the major political parties such as Indian National Congress (INC) and Bhartiya Janata Party (BJP), which took the lead to enact and strengthen the anti-defection laws, have been openly and blatantly misusing the law on a regular basis. While Congress has been a Great Master in engineering defections and has remained so even after Rajiv Gandhi's government enacted the anti-defection law, the BJP, which claims to be a party with a difference, has, over the last few decades, engineered innumerable defections from other parties for its own political benefit.

Whether one likes it or not, as opposed to the predominantly bi-party/tri-party system operating in United States and the United Kingdom, we, in India, are into an era of coalition politics. Given the pluralistic society we live in, the complex social structure and the competing demands of various groups and communities for promoting their personal and parochial interest have ushered in an era of coalition politics in India. Rather than being members of larger national political parties, politicians of today's genre prefer to have their own political outfits or regional parties. Hence, there are hundreds of parties and small political formations in our country, which are organized along divisions based on community, caste, religion, and region. Since elections have often resulted in hung

legislatures, with the balance of power hanging in their hands, these small political parties have in recent years played a crucial role in our country's politics having far reaching implications on governance and public policies. In the past, while the challenges seemed to be mainly for building electoral alliances for forming government, in the changed context, strategic coalition building for effective electoral and political management has assumed greater importance than ever before. As such, in their electoral and political management strategies to acquire and retain power, the political parties have been using defection as a weapon to split the opponent parties and topple the legitimately elected governments in many states.

Since coalition politics provides the scope to play the game of defection in various permutations and combinations, the problem gets compounded when it comes to smaller states. With the deletion of the provision pertaining to split from the anti-defection law, when the people of this country were feeling relieved that this would put an end to defections and promote governmental stability, the resignation of three BJP legislators in January 2005 revealed an altogether new way of defecting within the law. In fact, no one had expected that legislators would take such a drastic step to topple a government. Whatever it may be, an objective analysis of the situation suggests that in an era of coalition politics, parties are often forced to form governments with slender majorities. When these majorities are cobbled up by engineering defections and splits, the government ought to be fragile. The situation becomes worse when it comes to smaller states with legislatures comprising of 40 or 60 legislators. The delicate balance of power that a ruling party or coalition enjoys in smaller or bigger states can easily be altered or disturbed by a small group of people shifting sides or tendering resignations. And this is what has been happening in recent years. While it has happened in Karnataka and Madhya Pradesh, in 2019 and 2020, it can happen in any state in future causing grave challenges to the stability of governments and representative democracy in general.

5. Representative Character and Legitimacy of Post-Defection Governments

Though the Constitution of India provides that there shall be a government, i.e. Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his/her functions, act in accordance with such advice, nowhere in the Constitution it says how the government is to be formed. The way the government is formed is something that is based on parliamentary practices or conventions followed/adopted from United Kingdom, as India was under the British Rule for a longtime and, hence, it adopted the same system. Following the British convention, in India, the government is formed based on majority of total number of seats in the lower house of Parliament or of State legislatures. However, in case of defection or resignation, when the strength of Lok

Sabha or Legislative Assembly of a State gets reduced partially or substantially, the government is formed based on majority of the seats of truncated strength of the house and not on the basis of the full strength of the house. This clearly violates the principles of representative government and distorts democracy as a system of government. Primarily being practiced as a convention, in the absence of any constitutional provision regarding the formation of governments on the basis of majority (i.e. whether of full strength of the house or the truncated house with reduced number of seats), the political parties have been twisting and manipulating it to their advantage by resorting to the tactics of resignation as it happened in the case of Goa, Karnataka and Madhya Pradesh.

Table 5.1

Strength of Political Parties in the Legislative Assembly and the Governments Formed

State Legislative Assembly	**INC**	**BJP**	**Others**	**Total**	**Required Majority**	**Government Formed**
Goa (2002-07)	16	17	07	40	21	BJP+ (21)
Karnataka (2018-23)	80	104	40	224	113	INC & JD (S)+ (120)
Madhya Pradesh (2018-23)	114	109	07	230	116	INC+ (121)

Table 5.2

Strength of Political Parties in the Legislative Assembly Post-Resignation and the Governments Formed

State Legislative Assembly	**INC**	**BJP**	**Others**	**Total**	**Required Majority**	**Government Formed**
Goa (January 2005)	16	14	07	37	21 (19)	INC+ (19) *
Karnataka (July 2019)	67	104	36	207	113 (104)	BJP+ (105) #
Madhya Pradesh (2018-23)	91	108	07	206	116 (104)	BJP+ (112) $

Note: * With the resignation of 3 BJP MLAs when the strength of the GOA Assembly was reduced to 37, the INC with the support of 19 MLAs including the other regional parties and independent MLAs formed the government in February 2005.

With the resignation and subsequent disqualification of 13 INC, 3 JD (S) and 1 KPJP MLAs in July 2019 when the strength of the Karnataka Assembly was reduced to 207, the BJP with the support of 105 MLAs including one independent MLA formed the government in July 2019.

$ With the death of 2 MLAs (INC:1 and BJP:1) and resignation 22 INC MLAs in March 2020, when the strength of the MP Assembly was reduced to 206, the BJP with the support of 112 MLAs including other parties and independent MLAs formed the government in March 2020.

Looking at the data presented above and the way the government was formed, it's grossly unfair that for forming the government in the post resignation/defection period, the required majority is worked out based on the reduced/truncated strength of the legislature. This has certainly left out a substantial number of people, whose representatives have resigned/defected/disqualified, and their voices from the process of government formation and governance have been conveniently ignored.

Box 5.1

Population Statistics of Madhya Pradesh as per 2011 Census and the Projected Population

Total Population in 2011:	7,26,26,809
Total Population in 2018:	7,96,34,400 (Projected)
No. of Assembly Seats:	230
No. of MLAs Resigned:	22
No. of Districts:	52

Based on the above figures, on an average, an MLA represents 3,46,236 people.

Accordingly, 22 resigned MLAs would represent 76,17,203 people.

Given that there are 52 districts in MP, the average population of a district being 15,31,430.77, the resigned MLAs would be representing 4.97 or 5 districts of MP.

Taking the case of Madhya Pradesh into consideration and the population statistics worked out and presented in box (No. 5.1), it can be safely argued that by forming the post resignation/defection governments based on majority of the truncated house, we have left

out around 76,17,203 people which is equal to 5 districts of the State of Madhya Pradesh. As the largest democracy in the world, can we afford it, and can we still call ourselves a representative democracy and representative government which leaves out 76,17,203.48 people in 5 districts from the process of government formation and governance of the state? If the ruling party from where the MLAs have defected (resigned) has lost the majority support, does the opposition party staking claim to form the government have the required majority as per the total strength of the house? Should both parties not be given a chance of going to the people and having their representatives elected by conducting bye-elections before taking a call on government formation based on truncated house strength? Who knows, the party which has lost the majority may again win the confidence of the people from those constituencies and form the government? And to do so, can't the government formation process be put on hold till the bye-elections are held by appointing the former chief minister as the caretaker chief minister?

One may argue that after the formation of the government, elections have been conducted to elect the representatives of people in these constituencies and they have been represented in the governance process. But the question is whether the representatives elected later had any 'say' or 'voice' at the time of government formation? Rationally speaking, what has been done is that a conclusion has been drawn first by forming the government on the basis of truncated strength of the legislature and then a methodology (election) has been worked out to justify the conclusion drawn in advance. In fact, it is a forgone conclusion that once a government has been formed in a state, it can have the likelihood of influencing the electoral outcome of constituencies when the elections are held at a later stage.

As the experience suggests, one can also argue that the ruling party at the centre can always influence the weak links in the other party and try to topple the opposition governments in states by offering them plum political positions and pecuniary benefits. Further, going by the current practice and the kind of politics and the genre of politicians we have today, the party in opposition may also try and succeed in engineering a similar resignation-cum-defection of another group of legislators from the current ruling party and alter the power equations. This way, the history may keep repeating itself and it may be seen as the story of the clever monkey trying to balance and equally distribute the pie stolen by the cats. One really wonders as to what kind of governance it would eventually result in.

6. Findings and Suggestions

The foregoing discussion on defection suggests that the anti-defection laws have not worked. While the laws are not foolproof, they are rapidly becoming ineffective in the fast-changing political

scenario. No matter whatever law one comes out with, the politicians always find ways to circumvent it. Keeping themselves within the letter of the law they violate its spirit nonchalantly, as has been amply demonstrated in Goa, Karnataka, and Madhya Pradesh. International experience shows that except Papua New Guinea where the law has been able to tackle the problem of frequent defections for some time, it has not worked in many countries. No wonder, many developed democracies in the west do not have any anti-defection laws, even though they too are afflicted with the problem of defection. And they do not intend to bring any law either.

This raises questions regarding what and why of the differences between their and our electoral and political system. So far as defection is concerned, one can find certain differences between India and other countries like UK, USA, France, Italy, Australia, and New Zealand.

- Firstly, while the number of defections in other countries is less, defections in India are galore. As compared to other democracies, more people defect and counter defect in India.

- Secondly, while politicians elsewhere defect individually, in India, defections usually take place in groups, i.e. *en bloc*. Of course, the anti-defection law itself has, to some extent, contributed to the process.

- Thirdly, while politicians in UK, USA, Australia, or New Zealand defect mostly due to professional incompatibility and ideological factors or differences on policy issues, in India, defections mainly take place due to petty personal factors and for political benefits or pecuniary gain. Mostly, defections are instigated, engineered, and encouraged by the opponent political parties and are highly rewarded. Whether in opposition or in government, political parties always look out for weak links in the other party/parties and instigate them to defect to their side in return for plum political positions or membership/chairperson of bodies with high potential for making money.

- Moreover, the highly polarized party system that they have does not encourage much defection unless there is a genuine reason for the politician to switch his loyalty or sever ties with the party. Some of them have either proportional representation system or a mix of proportional and first-past-the-post system. In contrast, we have a parliamentary form of democracy with a multi-party system that has led to coalition governments with inherent problems of stability and continuity. As mentioned earlier, the balance of power in a coalition government is so delicate that defections can create

havoc necessitating change of governments and frequent elections.

Given the potential of damaging impact that the defections can have on our polity and society, we cannot afford to have defections. Though there is a viewpoint that anti-defection law undermines some of the basic principles of democracy, keeping in mind our domestic conditions and the behaviour of political parties and politicians, we must have an anti-defection law that ensures stable representative governments. We need to have a law which is foolproof and has the potential to do away with the virus of defection that is eating into the vitals of our body politic. Given that the anti-defection law has failed to check defections even in its latest manifestation, following remedial measures can be taken to curb the menace of defection.

- We must redefine defections much more clearly and comprehensively. Yet, we should retain scope for freedom of expression on the part of the individual legislators. As suggested by the Goswami Committee on Electoral Reforms (1990) and the National Commission to Review the Working of the Constitution (2001), the party whip should be applicable in situations where the life of the government is at stake and not to all voting as it exists currently under the Tenth Schedule. In fact, the disqualification should apply only when a member violates the party whip in respect of a motion of vote of confidence/no-confidence, a money bill, a motion on vote of thanks to the President's address or when a member defies party directives on critical issues. Additionally, resignation from the membership of the legislature by legislators should also be counted as defections.

- The power of deciding on the disqualification owing to defection should be taken away from the speakers/chairpersons and entrusted to an impartial authority like the multi-member Independent Regulatory Commissions which should decide on the validity of defection/resignation from the party. Whether it is an individual legislator or a group, the defectors must face such regulatory authorities to enable it to arrive at a conclusion as to who has violated the party's constitution or its principles and policies. If the party is found to have breached its constitution or alienated itself from its principles and policies, the defectors should not be disqualified. On the other hand, if the individual legislator or the group has breached the party's constitution or has alienated from its principles or policies, he/she must be disqualified.

- While doing away with the provision pertaining to splits, the anti-defection law still has left the merger option open for two-thirds of the members of a legislature party. This is what has prompted many legislators to instigate defections including the

Eknath Shinde faction of Shiv Sena Party in Maharashtra. This too must be done away with to prevent such defections occurring in future. Those defecting legislators who merge with another party must be disqualified from holding any public office either under the State or the Central Government at least for a period of five years or till the current legislature's tenure comes to an end whichever is earlier. This would go a long way in checking mass defections and mergers.

- Our system of governance recognizes a critical role for the political parties, and the governments are formed by political parties or parties enjoying the majority support of full house of the Lok Sabha or Legislative Assemblies. It is in this context that in case of disqualification or resignation (as it happened in Goa in January 2005 or in Karnataka and M. P. in 2019 and 2020, respectively), the ruling party must not be asked to have a vote of confidence in the legislature with a truncated strength till the by-elections are held to elect the new members from the vacant seats in the legislature. The vote of confidence must take place only when the house acquires its full strength. This does not mean to say that a vote of confidence should take place only when all its members are present. It only means that the full house which had enabled a party or political formation to form the government with majority support must have all its elected members before the government is asked to prove its majority. An elected member may be absent from voting or may not come to the house on the day of vote of confidence. But that is a different matter all together. While it's logical that the party had formed the government with the support of the full house of legislator(s) elected by people, the people must be given a chance to elect their new representative(s) expressing their will as to whether they would like the government to continue or not. Since the government is for the whole of the people in a state, the people of a particular constituency or constituencies should not be left out in having their voice as to who should govern them. Otherwise, the government becomes unrepresentative in character. Till the bye-elections are held, the chief minister may be designated as the caretaker Chief minister or the President's Rule imposed keeping the Assembly in suspended animation. This provision will go a long way in checking the instigated or engineered resignations from the membership of the legislature as it happened in Goa, Karnataka, and Madhya Pradesh.

- Under the Constitution Ninety-First (Amendment) Act 2003, those disqualified for having defected have also been disqualified to hold any public office till they are re-elected or till the tenure of the legislature comes to an end. The same logic should also be applied in acquiring membership of a political party. A member who resigns from the legislature or defects from a party should

not be allowed to acquire membership of another political party for five years or till the tenure of the legislature comes to an end. He may however seek a re-election as an independent candidate to vindicate his/her stand that he/she had resigned from the party or the legislature owing to ideological differences and to protect the interest of his electorate. This will take care of the resignation/re-election issues raised during the Karnataka Assembly case in July 2019. As a part of the political reform, political parties must follow this principle in the larger interest of the party and the polity. The Election Commission must be vested with the power to reject a defected legislator's candidature if he/she files nomination for by-election as a candidate with any political affiliation. There is no guarantee that after winning the election under a party symbol, he/she will not defect again to another party.

7. Concluding Observations

To conclude, it can be said that there are no easy and shortcut solutions to eliminate political defection. The issue is of such a nature that any attempt to plug the loopholes results in creating some fresh problems of its own. As Peter Ronald de Souza rightly observes, "The history of democracy is such a dialectical history where processes begin to undermine institutions, and when institutions respond to it by introducing new qualifiers that processes then again begin to undermine them."[15] Needless to say that the changes that were brought in the original Anti-Defection Law through the Constitution Ninety-First (Amendment) Act 2003 with a view to plug the loopholes have backfired. Our experience in the case of Goa, Karnataka and Madhya Pradesh clearly substantiates the point.

One thing is clear that even in those cases where the act can work, it is not being allowed to work on account of various factors, the most important being the adjudicating power given to the speaker in this regard. The Congress party which brought the anti-defection law deliberately gave the adjudicating authority to the speaker to use it to its advantage in a partisan manner, which the speakers have done repeatedly on most occasions. Now that the BJP has emerged as the dominant political party, it also has done the same thing. Whichever party is in power, it uses it to its advantage to allow the speaker to retain the adjudicating authority in such matters. They, however, do not have the foresight to see that tomorrow they may be at the receiving end and, therefore, it is better to give this authority to an impartial regulatory authority.

Moreover, in our attempt to come up with a law banning defection or to do away with the loopholes in the existing anti-defection law, rather than hard options, we have always gone in for soft options. While any law banning defection is fraught with problems as it impinges on the democratic rights of individuals, in the very interest

of strengthening and promoting democracy and democratic system of governance, in our effort to curb the menace of defection, we must prepare ourselves to pursue the harder options. While the suggestions given above seem to be very hard and harsh, in the larger interest of promoting good governance with a stable government to pursue public policies without being controlled by any external forces, we must go in for the hard options. Let the road to good governance be as democratic and fair as the system of good governance one would like to have.

Notes and References

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[1] "Review of Election Law, Processes and Reform Options", *Consultation Paper prepared for the National Commission to Review the Working of the Constitution*, New Delhi, 8th January 2001, p. 24.

[2] In India, voting against the party can bring the anti-defection laws into play, unless the party has given its prior approval for the dissenting vote or it condones the action within 15 days of the vote being cast. In Australia, although free votes generally mean there is no party line – and therefore a politician cannot be said in the strictest sense to have 'crossed the floor' – the party can still make its preference known on a 'free' vote issue. See John Warhurst and Malcolm Mackerras, "Constitutional Politics: The 1990s and Beyond", in John Warhurst and Malcolm Mackerras (eds), *Constitutional Politics: The Republic Referendum and the Future,* University of Queensland Press in association with the API Network and Curtin University of Technology, St Lucia, Queensland, 2002, pp. 14-15.

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[8] Peter Ronald deSouza, "Democracy's inconvenient fact." See http://www.india-seminar.com/2004/543/543%20peter%20ronald%20desouza.htm

[9] Peter Ronald de Souza, 'Pragmatic Politics in Goa 1987 -99', *Economic and Political Weekly*, Vol 34, Nos 34 and 35, August 21-28, 1999, pp. 2434-39.

[10] Peter Ronald deSouza, "Democracy's inconvenient fact", op. cit. Table 1.

[11] Ibid.

[12] Ibid.

[13] Peter Ronald deSouza, "Democracy's inconvenient fact", op. cit. Table 2.

[14] Peter Ronald deSouza, "Whose Representative." See http://www.india-seminar.com/2001/506/506%20peter%20ronald%20desouza.htm

[15] Ibid. p.1

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