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WOMEN PRISONERS AND THEIR RIGHTS: SPECIAL NEED TO CONCERN

Prof. Rajaram Garud[1] *& Dr. Anjali Bondar*[2]

ABSTRACT

Since ancient times, women is most neglected and vulnerable group of society. In ancient and medieval era, the concept of prison not applicable to women offenders. During British colonial era in India, Britishers created the system of prison and also made some provisions for women prisoner. If woman is prisoner then her total life with the life of next generation effects on the social structure. So, their rights in prisons needs to be protected. The concept of prison is the product of Positive School of Criminology. Positivist consider that purpose of punishment is to bring change among the life of offender. Hence imprisonment is widely accepted as form of punishment. Hence, number of initiatives regarding prisons taken by national and international authorities. Institution must take cognizance of women prisoner not to become victim of authority. Because life in jail is life in hail.

The aim of this article is to elaborate the rights of women prisoner at national and international level. Their rights specially needs to be considered and implemented by the concern authorities.

KEYWORDS: Women Prisoner, Rights, Conventions, Laws and Cases.

[1] Rajaram Garud (Research Scholar, NMU, Jalgaon & Faculty, SOL, ADYPU, Pune, Maharashtra)
[2] Anjali Bondar (Faculty,S.S. Maniyar Law College, Jalgaon, Maharashtra)

INTRODUCTION

Woman is most vulnerable person and deprived on all fronts of the society. Women differs from men physically, socially and also psychologically. The life of woman inside prison and outside prison are one and the same. Life in prison is so hard because living with other criminals may adversely effects on the behavior of first offender. As stated by Nelson Mandela about prison that no one truly knows a nation until one has been inside its jails. Though with the passage of time, modern corrective approaches applied by prison authorities, but still we have to wait a lot for necessary changes. Some of the committees, commissions etc. really gives strong guidelines for prison reforms. THE CORSTON REPORT[3], published in U.K. under the chairmanship of Baroness Jean Corston, recommended many things for the holistic, women-centered development of women in the criminal justice system. In India also same kind of a report[4] on improving the condition of Women inmates in prisons published by National Commission for Women.

Woman prisoner, an inmate, confined or forcefully restrained by authority. In literal sense, a prisoner is a person in prison and a prison[5] is a jail or a place where prisoners are detained for permanent or temporary period. In short prisoner is a person deprived of liberty against his will.

Prison system is a part of Criminal Justice System and administrative network of Government to manage accused and convicted criminals. Prison system was not much exercised in ancient and medieval era. Because in ancient time, Retributive theory and deterrent theory of punishment was applicable and authorities (Rulers/Kings) only believe on speedy justice. If there is prison then such prison is cage for treatment of animals not humans. Hence, Court must ensure about the protection of rights of prisoners inside the jails. Their freedom inside the jail is sign of reformative theory of punishment.

The mention of women prison rarely found in ancient or medieval period of time. During British Colonial Rule in India, Indian prisons shaped their role and hence imprisonment is widely accepted as punishment. In 1919[6], the Committee firstly gives remarks about the prison that the aim of prison administration is restoration of criminals. In the same report women inmates also considered as separate entities and some suggestive measures given for prison reforms.

Modern democratic countries started viewing prisons as correctional institutions and bears responsibility to make reform among offenders.

In India, Prison is a subject of Entry-4 List II (State List) mentioned under Seventh Schedule of

[3] https://www.asdan.org.uk/media/ek3p22qw/corston-report-march-2007.pdf
[4] http://ncw.nic.in/ncw-report/report-improving-condition-women-inmates-prisons
[5] Sec. 3(1) of The Prison Act, 1894
[6] Paranjape NV. Criminology & Penology with Victimology, Central Law Publications; Sixteenth Edition; 2014, p-479

Indian Constitution. Also Section-59 (1) of Prison Act, 1894 which empowers State government to make rules regarding prison.

As per data collected in 2022 and published as World Female Imprisonment List (Fifth Edition)[7], number of Indian female prisoners increasing year to year. Such increasing number of women prisoners is alarm to all modern welfare democratic country. It is also hurdle in the development of country. Each member State must take cognizance of not to violate rights of person. It is the duty of prison authority not to harm to the rights of prisoner. As rightly stated by Martin Luther King that injustice anywhere is threat to justice everywhere. Injustice in prison is also threat for all progressive democracies. In the category of prisoners, women prisoners are the most neglected and vulnerable group of the society which needs to be focused.

"A right is an interest recognized and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong."--- Salmond

We can say that right is one person's capacity which is supported or protected by third party. If the third party is the State then it is legal right. If the third party is the God then it is of divine right.

INTERNATIONAL SCENARIO ON THE RIGHTS OF WOMEN PRISONERS

1) The United Nations Standard Minimum rules for the Treatment of Prisoners (The Nelson Mandel's rule)[8]

In 2015, certain new rules at international level, under the heading of the Nelson Mandel's rule adopted by United Nations Office on Drugs and Crime. This adaptation is one kind of tribute to the prison life of Nelson Mandela. These rules also named as The United Nations Standard Minimum rules for the Treatment of Prisoners. There are total 122 rules and few rules of them includes and highlights over women prisoner.

Rule-11 Separation of Categories.

As per rule-11 of the Nelson Mandela's Rules women prisoner must be kept in separate institutions. The whole premises allocated to women prisoners shall be entirely separate from men prisoners.

Rule-28 Special accommodation for prenatal and postnatal care and treatment.

As per rule-28, special accommodation for prenatal and postnatal care and treatment must be provided to women prisoner. It also includes provision for the child born in prison that if the

[7] Pg. 8, World Female Imprisonment List (Fifth Edition) https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_5th_edition.pdf

[8] https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

child born in prison then birth certificate shall be prohibited the prison as birth place.

Rule-45 Prohibition on the use of solitary confinement and similar measures.

This rule-45 mentioned that there is prohibition on the use of solitary confinement and similar measures in cases of women prisoners. This rule applied as it is mentioned under United Nations Standards and Norms in crime prevention and criminal justice[9].

Rule-48 Instrument of restraints shall never be used.

As per rule-48 instrument of restraints shall never be used on women during labour, during childbirth and immediately after child birth.

Rule-58 Contact with outside the world.

Under this rule, women prisoners' conjugal visits are protected. Right to make contact with outside the world must be enjoyed safely with dignity.

Rule-74 Adequate salary

Women prisoners salaries, employment benefit and conditions of service shall be adequate with the nature of work.

Rule-81 Attendance and supervision

Attendance and supervision over women prisoner must be accompanied with women staff members.

2) United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)[10]

In December 1990, the Tokyo Rules[11] with 23 headings adopted by General Assembly of United Nations with the headings of Non-custodial measures.

The main object[12] of adaptation of Tokyo rules is to promote the use of noncustodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment and to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society.

But it is also mentioned in the Tokyo Rules that these rules shall be implemented as per the political, economic, social and cultural conditions of each country and should be matched with the aims and objectives of its criminal justice system. Also Member States should

[9]https://www.unodc.org/pdf/criminal_justice/UN_standards_and_norms_in_crime_prevention_at_your_fingertips.pdf

[10] https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/tokyorules.pdf

[11] Adopted by General Assembly resolution 45/110 of 14 December 1990

[12] Rule 1, Chapter1 General Principles, The Tokyo Rules, 1990 https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/tokyorules.pdf

ensure about a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention[13].

Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender[14].

3) United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules)[15]

In December 2010, these Bangkok rules adopted by General Assembly of United Nations. The Bangkok Rules developed to complement and supplement[16] the Tokyo Rules, 1990. The Tokyo rules are applicable to all prisoners without gender discrimination. While, women prisoners is the basic category of persons for the application of the Bangkok Rules. It is United Nations Human Rights office which framed 70 rules with four chapters[17] under specific headings. The reason behind adoption of the Bangkok rules is due to worldwide increasing number of women prisoners and second reason is in-efficiency of resolving attention towards needs of women prisoners.

Undermentioned are some important rules for women prisoners as.

Rule-2 Adequate attention needs to be provided to newly arrived women prisoners.

Rule-4 Women prisoners shall allocated to prisons close to their homes or place of social rehabilitation.

Rule-5 As per specific hygiene needs, extra facilities needs to be provided to women prisoner.

Rule-6 Health Screening of women prisoners needs to done regularly.

Rule-8 Women prisoner has right of medical confidentiality with right not to share information related with health and reproductive history.

Rule-10 Gender Specific health care services needs to be provided.

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[13] Rule 1.3, Chapter1 General Principles, The Tokyo Rules, 1990 https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/tokyorules.pdf

[14] Rule 1.4, Chapter1 General Principles, The Tokyo Rules, 1990 https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/tokyorules.pdf

[15] https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-rules-treatment-women-prisoners-and-non-custodial#:~:text=Women%20prisoners%20who%20report%20abuse,specifically%20the%20risks%20of%20retaliation.

[16] Para.2, Preliminary Observations, The Bangkok Rules, 2010.

[17] Ibid, Table of Contents, Preliminary observations, Introduction, I. Rules of general application, II. Rules applicable to special categories, III. Non-custodial measures, IV. Research, planning, evaluation and public awareness-raising

Rule-16 Mental health care facilities needs to be developed and implemented to avoid risk of suicide or self-harm.

Rule-17&18- Preventive health care services like education and information of diseases like HIV, Breast Cancers, Gynecological cancer etc. needs to be given to women prisoners.

Rule-19- Dignity of women needs to be ensure during personal search procedures.

Rule-23- Disciplinary actions should not be taken against women prisoners with prohibition on family contact and contact with children.

Rule-25- In monitoring committee or board of women prison, there should be inclusion of women staff.

Rule-27 Allowed conjugal visits to women prisoner.

Rule-29 to rule-35 are related with prison staff who is working in and for women's prisons.

Rule-36 to rule-39 are the rules specifies about juvenile female prisoner.

Rule-40 Classification methods of prisoners for early rehabilitation, treatment and reintegration of prisoner should be done.

Rule-42 Psychosocial support needs to be given especially to those who are subjected to physical, mental or sexual abuse.

Rule-43 to Rule-47 mentioned about the maintenance of social relation and measures to be taken under the heading of aftercare program.

Rule-48 to Rule-52 includes rules for pregnant women, breastfeeding mothers and mothers with children in prison.

Rule-53 considered woman prisoner who is foreign nationals. Under bi-lateral treaty and with the best of woman prisoner, such woman prisoner must be transferred in her home country and priority given to those who are mothers of child.

Indian Legislative framework on rights of woman prisoner

In India, the legislations were made and drafted with and after the recommendations of various committees or commissions.

Following are few notable committees played their role in shaping prison development.

Pre-independence Prison Committees

1. The Prison Discipline Committee, 1836 (Lord Bentick)
2. First Jail Reform Committee, 1838 (Lord McCauley)
3. The Fourth Jail Commission, 1888 (Lord Dufferin)
4. Indian Jail Committee, 1919-1920 (Sir Alexander Cardio)

Post-independence Prison Committees

1. All India Jail Manual Committee, 1957
2. Working Group on Prisons, 1972
3. All India Prison Reforms Committee, 1980-1983 (Mulla Committee)
4. All India Group on Prison Administration, Security and Discipline, 1986 (R.K. Kapoor Committee)
5. National Expert Committee on women Prisoners, 1987 (Justice Krishna Iyer Committee)

Important statutes which have a bearing on the regulation and management of prisons in the country are:

i. The Indian Penal Code, 1860.
ii. The Prisons Act, 1894.
iii. The Prisoners Act, 1900.
iv. The Identification of Prisoners Act, 1920.
v. The Constitution of India, 1950
vi. The Transfer of Prisoners Act, 1950.
vii. The Representation of People Act, 1951.
viii. The Prisoners (Attendance in Courts) Act, 1955.
ix. The Probation of Offenders Act, 1958.
x. The Code of Criminal Procedure, 1973.
xi. The Repatriation of Prisoners Act, 2003.
xii. Model Prison Manual (2016).
xiii. Model Prisons And Correctional Services Act, 2023

Besides these above laws The Mental Health Act, 1987, The Juvenile Justice (Care & Protection) Act, 2000 etc. statutes also related with prisoners.

1) THE CONSTITUTION OF INDIA, 1950[18]

Specific guarantees to women as prisoner not provided under The Constitution of India. The Constitution of India is fundamental law of the country which specifically protects the human rights as Indian citizens. Preamble of Indian Constitution itself guarantees justice, equality, liberty to each and every Indian. Protection of life and maintaining the dignity of the individual also part of the Constitution of India.

[18] https://www.indiacode.nic.in/bitstream/123456789/15240/1/constitution_of_india.pdf

Through Article 14 and Article-15, The Constitution of India guaranteed equality of status and opportunity and prohibits discrimination on the grounds of sex. Article-14 provides equal protection of laws to women in India and Article 15 prohibits discrimination on grounds of sex. It is Article-15 (3) of the Constitution which allows the State to make special provisions for women. Hence, it is obligation on the State to provide adequate facilities and to fulfil needs of women prisoners by making special provisions. Article-21 guarantees the right to life and protects the human dignity of all citizens. This article also ensures due process must be followed by law during deprivation of life a person. Therefore, it protects the rights of women prisoners and ensures that they are not subjected to arbitrary detention or mistreatment. Constitution of India also provides and guarantees free legal aid under its directive principles of state policy.

2) THE PRISON ACT, 1894[19]

The rights of prisoners mentioned under the Prison Act, 1894. This Act of 1894 is the first legislation in India which regulates all subject matters of prison. The main focus behind enactment of this Act is of reformation of prisoners and of regulation of their rights. The rights like as separation of women prisoners from men prisoners[20], medical examination of women prisoner carried out of lady medical officer only[21], suitable employment of women prisoner during day time[22] etc. mentioned under different provisions of the Act of 1894.

3) THE PROTECTION OF HUMAN RIGHTS ACT, OF 1993

The Human Rights Act also important statutes enacted in 1993 with specific object of protection of Human rights. National Human Rights Commission works for the protection of women as most disadvantaged group of society. Under the chairmanship of NHRC, Justice Verma called meeting[23] to make prison reforms effective. NHRC[24] issued guidelines to prison authorities, high courts as well as to state governments to pay attention for promotion and protection of human

[19] https://indiankanoon.org/doc/626516/
[20] Section-27, The Prisons Act, 1894
[21] Section-24, The Prisons Act, 1894
[22] Section-59, The Prisons Act, 1894
[23] https://nhrc.nic.in/press-release/nhrc%E2%80%99s-initiatives-prison-reforms
[24] Ibid, NHRC has been focussing its attention on the promotion and protection of human rights of prisoners, from its inception. The Commission has issued instructions/guidelines that mentally ill person should not be kept in prison and if during jail inspection by the Commission, mentally ill persons are found in the prison it would award compensation to them or to their kin. The State government could recover such compensation from the erring jail officials. The Commission has also written to Chief Justices of all High Courts, for effecting speedy trials of cases and release of undertrials and to give appropriate instruction to district and Sessions Judges to ensure that they visit jails regularly as is envisages in the State Prison Manuals. Again the Commission has issued instruction to all prison authorities requiring compulsory health screening of all prisoners and sending monthly report to the Commission. The issues of premature release of prisoners undergoing life imprisonment have also been taken up by the Commission.

rights of prisoners, from its inception.

4) THE NATIONAL COMMISSION FOR WOMEN ACT, 1990[25]

The National Commission for Women is a statutory body set up in 1992 with the object to review the constitutional and legal safeguards for women. Its object is also to recommend remedial legislative measures. In short the Commission initiated various steps for improvement the status of women. Recently i.e. in 2018, a report was submitted by National Commission for Women (NCW) suggesting certain recommendations for improvement in the status of women prisoners.

5) NEW CRIMINAL LAWS, 2023 AND WOMEN PRISONERS.

Recently, Central Government enacted new criminal laws and they were effected from date of first of July 2024. Now, Bharatiya Nyaya Sanhita, 2023 (Previously Indian Penal Code, 1860) provides separate i.e. chapter-iv for offences against women and children.

When we say it's Bharatiya Nyay Sanhita then the statute also must be in the form to give justice to Indian Citizen. Few provisions under specific headings as offences against women and children were added in BNS, 2023. Also new provisions which were added and amended in old criminal laws (Provisions added in post Nirbhaya period and added due to recommendations made by Justice Verma Committee appointed for revival of criminal laws) kept as it is in BNSS, BNS AND BSA statutes.

6) MODEL PRISONS AND CORRECTIONAL SERVICES ACT, 2023[26]

Model Prisons and Correctional Services Act, 2023 in short Model Prisons Act, 2023 enacted by Ministry of Home Affairs of Government of India with basic purpose of safe custody, correction, reformation and rehabilitation of prisoners as law abiding citizens, and management of prisons and correctional services of the prisons in the State/Union Territories. Chapter- X with the title of Prison regimen for women prisoners added in Section 30 to Section 33 of the said Act of 2023.

In the preliminary part of the Act Government clears that Prison and it's management is related with State Government but to remove the irregularities from outdated colonial laws, new uniform law is prepared in 2023.

In the categorization of prisoner, women prisoners segregated on the basis of natural categorization. Women prisoners with children is subcategory added and segregated under this Model Prisons Act, 2023. Women prisoners are allowed to kept their children upto the age of six.

[25] http://ncw.nic.in/commission/about-us
[26] https://www.mha.gov.in/sites/default/files/advisory_10112023.pdf

But after six, who is guardian of that children was not specifically mentioned. Though, Central Government prepared this statute of 2023 which is related with correctional ideology but still its actual execution depends upon the will power of State Government. A provision has been made for the change in the designation of 'Inspector general' in 'Director General' in Model Prison Act, 2023. There is news[27] from Maharashtra that State cabinet of Maharashtra has approved the introduction of this Bill in the Maharashtra Legislature. State governments tries to take initiates of adaptation of rules framed in Model Prison Act, 2023.

Generally, following are the prisoners' rights provided in Indian Statutes:

a. Separation of prisoners

b. Accommodation and sanitary conditions.

c. Safety and Security from fellow prisoners

d. Health check up

e. Punishment

f. Social and cultural rights

FEW RIGHTS NEEDS TO BE CONCERN

A) Right of progeny

This right is part of conjugal rights. In Nand Lal vs. State of Rajasthan[28], High Court granted parole to life convict[29] by mentioning that denial to prisoner to perform conjugal relation for progeny would adversely affect rights of his wife. Jodhpur High Court tested the right of progeny on legal, social as well as on religious level.

B) Rights on readmission after release

Bail, Parole, Furlough are the ways of release of Prisoner. But after such release woman prisoner must have special right of medical examination. Actually this right is available to all prisoners but on readmission after release, pregnancy issue must be properly handled by authorities. The same issue was highlighted in various provisions of the Bangkok rules[30].

As per the report prepared by BPRD[31] every woman prisoner shall be examined by a lady

[27] https://epaper.loksatta.com/Pune-marathi-Late-epaper?eid=15&edate=09/07/2024&pgid=126122&device=desktop&view=3

[28] D.B. Criminal Writ Petition No. 10/2022

[29] https://indiankanoon.org/doc/153917496/

[30] https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-rules-treatment-women-prisoners-and-non-custodial#:~:text=Women%20prisoners%20who%20report%20abuse,specifically%20the%20risks%20of%20retaliation.

[31] Model Prison Manual For The Superintendence And Management Of Prisons In India, Bureau Of Police Research And Development, Ministry Of Home Affairs, Government Of India, New Delhi, 2003

Medical Officer. It is necessary on readmission after parole and furlough. After confirmation of pregnancy till the birth of child, each right of woman prisoner as well as the child who is in womb of such pregnant woman prisoner also needs to be protected. But if we see in general, ladies who are outside the prison their rights also number of times infringed by various strata of society. Hence, the rights of pregnant woman prisoner is crucial issue in front of Prison authorities.

C) Right of medical care during pregnancy and right of delivery outside the prison

If any woman found to be pregnant then she has very much right of medical care. In the same right she also possess right of delivery outside the prison. It was mentioned in that the birth place of such child should not include the name of prison.

D) Right of property regained after release

Stridhan (Woman's property) is also important economical part of woman. Her property received from parental house and from in-laws also needs to be protected. So, whatever property, woman prisoner owned and possessed before her arrest, after completion of period of punishment, she has this right to regain her property.

E) Right of bedding during menstrual cycle or pregnancy

Menstrual cycle or pregnancy is the natural gift of woman. So her proper hygiene and health is important which needs to be protected during the same. Hence woman prisoner has right of proper bedding with clean environment and supply of sanitary napkin during menstruation.

F) Rights after death of Woman Prisoner

Every person possess right whether of alive or after death. In the case of woman prisoner whose child is with her also in need of care and protection. If such woman dies in prison and leaves a child behind then child's future arrangements and care must be the duty of government. This right of woman prisoner after death taken into consideration.

G) Right of education

"You educate a man; you educate a man; you educate a woman; you educate a generation"- Brigham Young[32]

After release of women prisoner she must be able to earn and for the same, she must be educated.

[32] https://www.goodreads.com/quotes/37892-you-educate-a-man-you-educate-a-man-you-educate

So her right of education may be in the form of learning some skilled based vocational programs or the programs which builds her confidence to earn. It is easy for male prisoner to manage the jobs but hard for women prisoner to become self-dependent. So, education of women prisoners is important.

H) Right to take care of children

If the family members of women prisoners are not able to take sufficient care of children then such child should be placed in child care center. This right is directly related with child and indirectly related with women prisoner. If the child is in between seven to sixteen.

I) Right of health after abortion or miscarriage

In case of abortion or miscarriage of women prisoner, her right of proper health with due medical facilities should be protected. So, during sentence period, regular support of psychiatrist and health specialist (Especially Gynecologist) needs to be provided.

J) Right to live with human dignity (After release from prison)

After completion of prison sentence, it is difficult to person (Prisoner) to spend life with dignity. So, it is social and legal duty of each person not to violate human dignity of an imprisoned person. Imprisonment is one kind of social stigma attached to prisoner for lifetime and solution for the same is to create social awareness.

Also rehabilitation after release is most serious neglected part of the authority. This right is related with right to live with human dignity.

INDIAN WOMEN PRISONS AND RIGHTS - CURRENT SCENARIO

In India, few state run different programs for the rehabilitation of women prisoner. As per data mentioned by prison authorities, 41 women prisons[33] were established in India. Out of 41 jails, 34 jails are exclusively women jails which confines women prisoners only. The occupancy[34] rate in women jails was 60.10 %. Only 16 out of 36 states/union territories have their own set up for women prisons of India. As per prison statistics of India, 2022 there are 1537 women prisoners with 1,764 children were kept in the women prisons. 198 women prisoners are convicted women prisoners accompanying by 230 children.

[33] https://eprisons.nic.in/NPIP/public/ePrisonsLiveStatus

[34] Pg.-x, PSI 2022, https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/psiyearwise2022/1701613297PSI2022ason01122023.pdf

Tamil Nadu State Government[35] created 3 women welfare officer posts for Special prison for women. These officers with considering welfare of women prisoners, act as intermediary between prisoners and their families. Also Tamil Nadu government allowed emergency leave for a period of 15 days is being granted to the pregnant women prisoners for delivery.

In Maharashtra, "Nanhe Kadam Balwadi"[36] is the program launched by government for the children who are in Byculla women prison.3 staffs for 12 hours appointed under this program.

In Punjab, Teachers have been deployed for the children of women prisoner. Certain rehabilitative programs which improves skills also run by Punjab Govt.

In Gujarat Angadwadi[37] facilities also provided to the children who are kept with women prisoner. Also women prisoners are allowed and promoted for taking education in open universities.

There are 202[38] NGO's working exclusively for women prisoners. A total 8,674[39] of women staff working in different cadre across Indian jails.

As per the report[40] prepared by National Commission for Women, 2018 most common observations found in women prisons are as follows..

a) Over-crowding in female ward
b) Lack of health-care facilities
c) No involvement of NGO'/ Civil Society for cultural programs/ counselling etc.
d) No proper skill development program / Vocational training programs.
e) Illiteracy among women prisoners
f) Inadequacy of staff
g) No crèche facility is available.

JUDICIAL ROLE ON PROTECTION OF PRISONER'S RIGHT

The work of Judiciary is to adjudicate the laws. The judicial system work for the administration of justice. As rightly stated by William Gladstone about justice as "Justice delayed is justice denied." Judges maintains a repo in delivering judgments. Judges are aware about the justice

[35] Pg. 206, PSI 2022, ibid
[36] Pg. 223 of PSI 2022, ibid.
[37] Pg. 222 of PSI 2022, ibid.
[38] Pg. 244 of PSI 2022, https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/psiyearwise2022/1701613297PSI2022ason011220223.pdf
[39] Pg. 252 of PSI 2022, https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/psiyearwise2022/1701613297PSI2022ason011220.pdf
[40] http://ncw.nic.in/ncw-report/report-improving-condition-women-inmates-prisons

hurried is justice buried. Supreme Court of India as apex judicial body plays a crucial and important role in the protection of rights of prisoners. The Courts have onerous duty to protect detenues from the custodial tortures. Through its interpretations, courts gives landmark judgment on the prisoner's right. Now, Supreme Court accepted that prisoner also have certain constitutional rights. Supreme Court is most vigilant about the protection of rights of neglected groups of the society. It is because of vigilance of Supreme Court, Article-21 broadly interpreted and day by day number of rights are parts of right to life and personal liberty. After interpretation following rights are the parts of Article-21 of the Constitution of India, 1950…

a. Right to speedy trial:
b. Right to free legal aid,
c. Right to be prisoner to be treated with dignity and humanity,
d. Right to bail,
e. Right to privacy,
f. Right to compensate for custodial death,
g. Right of fair wage,
h. Right to security,
i. Right to education
j. Right to healthy environment.

Following are the cases through which Supreme Court tries to protect the rights of prisoner. Such judgments also covers the rights of women prisoners.

In *Sunil Batra vs. Delhi Administration*[41], the Supreme Court held that prisoners have the right to basic amenities in prison and protection from prison abuse and prison discrimination.

In Hussainara Khatoon vs. State of Bihar[42], Supreme Court gives recognition on the free legal aid which should be provided by the State to an indigent prisoner.

Same in case of *Sheela Barse vs. State of Maharashtra*[43], Supreme Court established the right of person to legal aid and representation.

In *D.K. Basu vs. State of West Bengal*[44], Supreme Court specifically concentrated on custodial torture and mentioned that custodial torture is a naked violation of human dignity. Court also mentioned that law does not permit the use of third degree methods and right of human dignity must be protected.

[41] (1978) 4 SCC 409
[42] 1979 AIR 1369
[43] 1983 AIR 378
[44] AIR 1997 SC 619

In the case of *Prem Shankar Shukla vs. Delhi Administration*[45], Supreme Court highlighting on corrective justice, recognised the right of prisoners to conjugal visits. Supreme Court allows prisoners to release on parole and furlough to maintain family ties and relationships.

In *T. Vatheeswaran vs. State of Tamil Nadu*[46], Court held that Article-14, 19 and 21 are equally applicable to all persons and that person may be of prisoner.

Francis Mullin vs. The administrator, union territory Delhi[47] is also one of the landmark case where Court in its judgment allowed women prisoners to meet their children more frequently and directed to authority to be more liberal in case of under trial prisoners.

In *Prabhakar Pandurang vs. State of Maharashtra*[48], Supreme Court held that right to write and publish a book is part of right of personal liberty under Article-21 and the detenu has also this right.

In *R.D. Upadhyaya vs. State of Andhra Pradesh*[49], Court held that children born out to women prisoner during period of sentence should not be mentioned prison as birthplace of that child.

SUGGESTIONS

1. **Panel of female advocates needs to be appointed.**

   Though our Constitution guaranteed free legal aid to each of the needy but absence of quality legal aid is serious issue in front of our legal system. In case of women prisoner, there is need to appoint panel of female advocates and such advocates must be skillful and capable to give support to women prisoner.

2. **Well trained and sufficient women staff.**

   Increasing number of women prisoners gives an alarm as well as gives hint to appoint sufficient women staff to handle prison affairs. Hence, training with sufficient equipment needs to be provided to women staff.

3. **Regular judicial visits.**

   Make it compulsory to all female judicial members to keep close watch over women prison management. Regular judicial presence may reduce the tense in women prison.

4. **Allow regular conjugal visits.**

   Allow conjugal visits to needy women prisoner. Regular conjugal visits may reduce the psychological, emotional and social problems of women prisoner.

5. **Create separate cells for women accused in each district jail.**

[45] 1980 AIR 1535
[46] AIR 1983 SC 361
[47] 1981, AIR 746
[48] AIR 1986 SC 424
[49] AIR 2006 SC 1946

There is no separate jail available at each of district of the State. Women Prisoners kept in the separate place of the district jail. It creates lot of tension between male prisoner and prison officials. So, creation of separate cells for women accused or prisoner is essential thing.

6. **Prison Survey should be conducted.**
   To ensure smooth working of prison administration, a survey should be conducted within fixed time slot.
7. **Proper adoption and implementation of national laws and international conventions.**
   There is need for proper implementation of the national and international conventions. It may protect the rights of women prisoner.

8. **Custodial sentence for violents and Community Sentence for non-violents.**
   There should be presence of custodial sentence for those women prisoners who are violent and threat to public at large. But presence of community sentence for non-violent prisoners may reduce psychological problems and leads reformation among prisoners.

CONCLUSION

The above mentioned rights are in the statutes, but in actual practice needs to be applied by authorities. Instead of the above discussed rights, woman prisoners have also religious, educational and social rights. There has been a lack of strict implementation of specific rules within criminal justice system.

In India, the percentage of women prisoners are far less than men prisoners. Though Constitution guarantees equality without discrimination on the basis of gender but still there is huge gap found in social status of women and men. Though rights under specific statutes mentioned but still women prisoners faces number of problems like as lack of legal aid, poor infrastructure, lack of well trained staff etc. Also lack of education and awareness regarding rights of prisoners are the main fields where government's special attention needs to be increased.

Indian prison history achieved a lot and since independence India follows the corrective approach. Substitution of transportation into imprisonment for life shows the clean object of prison reforms. Also adding prison in state list of seventh schedule of Constitution of India, 1950 and inviting to Dr. W.C. Reckless (United Nations expert on correctional work) in 1951 in India also gives blueprints of adaptation of prison policies of India.

Recently at central level government prepared Model Prison Manual in 2023 but its adaptation and implementation is great task in front of State Government. Prison history shows that number of times Central government prepared Model Prison Manual for maintaining uniformity of prison

rules but such Manual has not been implemented by most of States[50].

Once Gandhiji said about the women's freedom that "True freedom is when a lady with jewels can walk in the midnight." As per my view true freedom is that when we found our prisons but without bars.

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[50] In 1983 Inter-State conference admitted the Model Prison Manual, 1959 but it was not implemented by number of States.

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THE JUDICIAL SYSTEM IN ANCIENT INDIA: EXAMINATION REGARDING HIERARCHY AND INTEGRITY

Mr. Amit Pandey[51] *& Dr. Swapnil Pandey*[52]

ABSTRACT

This paper examines the judicial system of ancient India, characterized by its well-organized and hierarchical structure that effectively managed justice within its socio-cultural setting. Deeply embedded in societal norms and detailed in ancient writings, this system provided accessible and fair justice. The judiciary was structured in tiers, ranging from local family courts to the King's court, with each tier addressing cases of varying complexity and significance. Judges, including the King, followed rigorous ethical standards to ensure fair and unbiased decisions. Family courts were essential for resolving domestic issues, reflecting the joint family system of the time. The King's court, as the supreme judicial authority, operated with a focus on transparency and fairness, often with the aid of a council of advisors. This study highlights how principles of impartiality, integrity, and hierarchical organization have persisted from ancient times to the present, demonstrating the lasting impact of ancient Indian legal traditions. Understanding this historical framework offers valuable insights into the development of judicial practices and their relevance to modern legal systems.

KEYWORDS: Ancient Indian Judiciary, Judicial Hierarchy, Judicial Conduct, Family Courts, Legal Principles

[51] Research Scholar, Maharishi University of Information Technology, Lucknow. (U.P.)
[52] Assistant Professor,Maharishi School of Law,Maharishi University of Information Technology,Noida Campus. (U.P.)

INTRODUCTION

The judicial system of ancient India was an intricate and hierarchical structure designed to administer justice effectively[53]. Deeply rooted in the socio-cultural context of the era, this system ensured that justice was both accessible and fair. Ancient texts meticulously outlined the principles of judicial conduct, the roles of judges, and the operational mechanisms of the courts. The system was organized in tiers, starting from local family courts and culminating in the King's court, the highest judicial authority. Each level addressed cases according to their complexity and importance, with minor disputes handled by lower courts and more significant matters escalated to higher authorities.

Judges, known as Pradivivaka or Adhyaksha, and the King played pivotal roles in this system. Their duties were clearly defined to ensure justice was delivered impartially, without bias or personal interest. The King, often advised by a council of Brahmins, ministers, and judges, presided over the most critical cases, ensuring transparency and fairness in his court. Ancient texts not only described the judicial hierarchy but also emphasized the ethical standards expected of judicial officers. Judges were required to be impartial, restrained, and free from personal biases like anger and greed. Their decisions were expected to be performed with a sense of duty, similar to a sacred ritual, ensuring adherence to legal procedures and absence of personal gain[54].

Family courts were a distinctive feature of the ancient judicial system, reflecting the joint family structure of the time. These courts were essential in resolving domestic disputes with empathy, maintaining family unity, and preserving social harmony. It was advised that family disputes be initially addressed within the family before moving to formal courts. The King's court, as the supreme judicial authority, operated with high solemnity and adherence to legal principles. The King's decisions were made openly, guided by a strict code of conduct to ensure impartiality and avoid prejudice. The involvement of advisors and assessors, similar to modern jurors, helped ensure collective and fair justice. Studying the ancient Indian judicial system provides valuable insights into the evolution of judicial practices and their relevance today. The principles of impartiality, integrity, and hierarchical organization that characterized the ancient system continue to influence modern legal systems, showcasing the lasting legacy of ancient Indian jurisprudence.

This examination of the ancient judicial system underscores the importance of a well-organized and principled approach to justice, revealing that contemporary legal practices are deeply rooted in these early judicial principles. By understanding this historical system, we can appreciate the foundational values that have shaped justice administration over the centuries and continue to guide modern legal frameworks.

[53] History of the Constitution of the Courts and Legislative Authorities in India, by Cowell (1872), p.3.
[54] Alan Gledhill: The Republic of India, p.147.

REVIEW OF LITERATURE

The judicial system in ancient India is marked by a sophisticated hierarchy and a profound emphasis on integrity, reflecting the philosophical and ethical foundations that shaped its operations. Various scholarly works provide a comprehensive understanding of this system's structure, its underlying principles, and the mechanisms that ensured its integrity.

1. **Hierarchical Structure**

   The judicial framework in ancient India was characterized by a clear hierarchy, with the king as the supreme authority[55]. According to Kautilya's *Arthashastra*[56], the king held the highest judicial power and was supported by various levels of courts, including local councils (Mahasabha) and village assemblies (Kulani).

   Each of these courts had specific jurisdictions, allowing for localized adjudication of disputes, thereby facilitating access to justice for all societal members. This tiered system is further detailed in texts like the *Manusmriti*, which outlines the duties of judges and the procedures they were to follow in administering justice.

2. **Principles of Justice and Dharma**

   Central to the judicial system was the concept of Dharma[57], which emphasized moral righteousness. The *Manusmriti* articulated that the administration of justice should reflect the ethical values of society, guiding judges to consider the intentions and circumstances surrounding each case. Scholars like Menski (1991) argue that this alignment of law with morality was crucial for maintaining social order and ensuring that justice was perceived as legitimate by the populace.

3. **Integrity and Impartiality**

   Integrity in the judiciary was paramount, with judges expected to uphold high ethical standards. Research indicates that judges were often selected based on their knowledge of the law, moral character, and impartiality. Kaur (2021) highlights the mechanisms designed to prevent corruption, such as the collective deliberation of cases among a panel of judges, which acted as a safeguard against bias. Additionally, the role of the king was not merely as a ruler but also as a protector of justice, responsible for appointing qualified judges and ensuring that they adhered to ethical guidelines.

[55] Das, A. (1982). *Manusmriti and the Justice System in Ancient India*. Journal of Indian Law Institute
[56] Kautilya. *Arthashastra*. (Translated by R. Shamasastry).
[57] Lahiri, N. (1986). *The Role of Dharma in Ancient Indian Jurisprudence*. Indian Journal of Sociology.

4. **Case Studies**

   Several case studies illustrate the practical applications of these principles within the judicial system. The *Sreni* or trade guilds operated their own tribunals, effectively resolving disputes within their communities while maintaining a hierarchical appeal system to higher courts. Historical records also suggest that local village assemblies were empowered to adjudicate matters relating to property, family disputes, and minor criminal offenses, reflecting a decentralized approach to justice that was both efficient and culturally relevant.For instance, during the Mauryan period, the case of a merchant guild's dispute over trade practices showcases how local tribunals operated under the watchful eye of royal authority, ensuring that decisions aligned with both community standards and overarching legal principles[58]. Such cases underscore the adaptability and contextual relevance of the ancient judicial system.

5. **Evolution and Influence**

   The literature indicates that the ancient Indian judicial system evolved over time, influenced by changing societal norms and external factors, including invasions and colonial rule. Scholars argue that the integration of indigenous practices with colonial legal frameworks resulted in a hybrid system that continues to impact contemporary Indian jurisprudence.

The examination of the judicial system in ancient India reveals a rich interplay of hierarchy and integrity, deeply rooted in the philosophical concepts of Dharma and justice. The literature highlights how this system was designed to ensure fairness and accessibility while maintaining a structure that could adapt to the complexities of social relations[59]. Through a combination of historical texts and case studies, it becomes evident that the principles established in ancient India have had lasting implications for modern legal practices.

HIERARCHY OF COURTS

In ancient India, the judicial system was a well-structured hierarchy designed to administer justice across various levels. The Brihaspati Smriti outlines that this system began with family arbitrators and extended to the King's court, the highest judicial authority. The judicial hierarchy featured family arbitrators at the lowest level, followed by judges, and the chief justice, known as Pradivivaka or Adhyaksha. The King's court was responsible for handling the most significant and complex cases, ensuring a systematic approach to justice. Jurisdiction was based on the nature and severity of disputes or crimes. Minor issues were addressed by lower courts, such as village councils or Kulani, which were similar to modern panchayats and

[58] Sharma, R. (2020). *Village Councils and Justice in Ancient India*. Journal of Legal History. Menski, W. (1991)

[59] Underwood, J. (1978). *Justice and the Role of the Judge in Ancient Indian Law*. Journal of Comparative Law Studies.

dealt with land, irrigation, and minor crimes. Courts in towns and districts, managed by government officers under the King's authority, handled simpler civil and criminal cases, ensuring that more serious matters were escalated appropriately.

The decision-making process was structured to ensure fairness and impartiality. Vachaspati Mishra noted that higher courts' rulings were binding on lower courts, maintaining a consistent and hierarchical application of justice. This precedent system helped ensure legal consistency and reliability. Village councils played a crucial role in local governance and justice. Comprising a board of members, these councils addressed everyday matters and minor disputes within the community. They served as intermediaries between the local populace and higher governmental authorities, reflecting a decentralized approach to justice at the grassroots level. For disputes involving traders or artisans, specialized tribunals known as Sreni were responsible. These tribunals, led by a president and several co-adjutors, handled civil cases within their respective guilds. Appeals could be made to local courts and, if necessary, to the King's court, ensuring efficient resolution of trade and commerce disputes within the community. The King's administration of justice adhered to strict ethical standards and procedural guidelines. Advised by a council of learned Brahmins, ministers, and judges, the King's decisions were made with collective wisdom. The King's court emphasized open trials, promoting transparency and accountability. Judges and the King were expected to act without personal bias, maintaining the integrity of the judicial process.

Judicial qualifications were stringent, focusing on impartiality, restraint, and a profound understanding of the law. Judges were required to avoid personal gain or bias and strictly follow legal procedures. They were expected to be steadfast, dutiful, and free from anger, ensuring that their decisions were fair and just.

BINDING AUTHORITY OF JUDICIAL AUTHORITY

Vachaspati Mishra, a distinguished 9th-century Indian Hindu philosopher from the Advaita Vedanta tradition, emphasized the significance of judicial precedents. He observed that the rulings made by judicial tribunals had binding authority over future judgments. This principle of precedence was crucial for maintaining consistency and stability within the legal system, offering a dependable framework for adjudication.

Similarly, the modern Indian judiciary operates with a hierarchical structure akin to the ancient system. It begins with the Gram Nyayalaya (village court) at the lowest level and progresses through the Munsif magistrate court, civil judge, district and session judge, high court, and finally, the Supreme Court of India. This continuity reflects the lasting impact of ancient judicial principles on current legal practices.

FAMILY COURTS AND THEIR SIGNIFICANCE

Family courts were a vital element of the ancient Indian judicial system. In a society where joint families were common, resolving disputes within these large family units required both empathy and understanding. Family courts played a key role in maintaining familial harmony. The joint family system, often encompassing multiple generations living together, created a need for a judicial mechanism to address conflicts in a conciliatory manner. It was advised that family disputes be first addressed by an internal family arbitrator, underscoring the value of resolving issues within the family to preserve unity and social cohesion. The importance of family courts stemmed from their deep societal integration, which contributed to their effectiveness. These courts operated on the principle that justice should be administered with empathy and an appreciation for the complex dynamics of family relationships.

ROLE OF THE KING IN DELIVERING JUSTICE

In ancient India, the King was viewed as the ultimate arbiter of justice. The sovereign's role in justice administration was central, embodying the concentration of judicial authority. The King was tasked with delivering punishments and ensuring that justice was administered impartially.The King’s court stood as the highest judicial body, and the King was expected to follow a rigorous code of judicial conduct. According to Katyayana, an ancient legal scholar, the King was required to take an oath of impartiality before undertaking his judicial responsibilities. This oath emphasized the necessity for unbiased adjudication and the importance of the King remaining free from personal biases.

The King’s court was marked by open trials, with cases being heard in public courtrooms. This level of transparency was essential for upholding the integrity of the judicial process. The King, together with his council of Brahmins, ministers, and judges, would deliberate on cases, ensuring that decisions were reached collectively and with due consideration.

JUDICIAL CONDUCT AND COURTROOM ETIQUETTE

Katyayana established comprehensive guidelines for the conduct of judicial officers and courtroom decorum. Both the King and judicial officers were required to be formally attired in the courtroom, underscoring the gravity of the judicial proceedings. Judges were to face east while hearing cases, a practice intended to improve concentration and attentiveness.

Judicial officers carried out their responsibilities under the supervision of the chief justice, ensuring adherence to established norms and standards. The King’s council, which included Brahmins, ministers, and judges, was instrumental in advising the King during trials, offering collective wisdom to guide judicial decisions.

The code of conduct mandated that both the King and judicial officers remain impartial and free from personal biases. The King was expected to administer justice without favoritism or prejudice, embodying the principle of judicial independence. Similarly, judges were required to uphold the highest standards of integrity, ensuring that their rulings were fair and just.

DELEGATION OF JUDICIAL FUNCTIONS

As society developed, the King's duties grew more demanding, leaving him with insufficient time to personally handle all judicial cases. To manage this, the King began delegating judicial responsibilities to professional judges. Katyayana advised that the King appoint a knowledgeable Brahmin judge to address cases that the King could not personally oversee due to his other obligations.

The standards for judges were high, emphasizing impartiality, self-control, and a composed demeanor. Judges were expected to be resolute, responsible, and free from anger to perform their roles effectively. This delegation helped ensure that justice was delivered efficiently without overloading the King.

The delegation of judicial tasks also highlighted the importance of a structured judicial hierarchy. Appointed by the King, professional judges managed cases at various levels, ensuring the smooth and effective operation of the judicial system. This hierarchical delegation allowed the King to concentrate on more critical matters while maintaining an efficient administration of justice.

QUALITY OF JUSTICE

In ancient India, the quality of justice was closely tied to the integrity and impartiality of judges. Judges were expected to resolve cases without any personal gain or bias, strictly following the legal procedures set out in ancient texts. Brihaspati underscored that judges should remain free from any attachment or partiality to ensure that their rulings were fair and just.

Judges were also required to observe stringent measures to maintain impartiality. For example, during open trials, judges were prohibited from privately engaging with litigants to prevent any influence from personal interactions. Complex cases were often reviewed by multiple judges or even the King, adding an extra layer of protection against judicial misconduct.

The focus on impartiality and integrity was evident in both the appointment and behavior of judges[60]. Judges needed to possess a deep understanding of the law, demonstrate strong character, and be devoid of anger and

[60] Ancient India as described by Magasthenes and Arian, by Mc. Rindle, p.6.

greed. They were expected to be honest and unbiased, ensuring that their decisions adhered to the principles of justice.

ADVISORS AND JURORS

Advisors and jurors, akin to modern-day jurors, played a significant role in the ancient judicial system. These individuals were required to provide unbiased opinions, ensuring that justice was delivered fairly. The advisors and assessors served as the equivalent of a modern jury, offering their collective wisdom to guide judicial decisions[61].

In the absence of presiding judges or the King, the verdict of jurors was not overruled. This provision ensured that justice was administered impartially, reflecting the collective judgment of knowledgeable individuals. The role of advisors and jurors underscored the importance of collaborative decision-making in the judicial process.

CRIMINAL TRIALS

In criminal trials, the judges and jurors were responsible for determining the guilt or innocence of the accused. However, the final authority to decide the punishment rested with the King. This division of responsibilities ensured that the judicial process was collaborative, involving both judicial and sovereign oversight.

The King's role in criminal trials was crucial, as he was the final authority in sentencing. This centralized approach ensured that justice was administered consistently, with the King providing the ultimate oversight. The collaborative nature of the judicial process reflected the importance of collective wisdom in delivering justice.

CONCLUSION

The judicial system in ancient India was a sophisticated and well-organized structure that facilitated the administration of justice efficiently. The hierarchical courts, principles of judicial conduct, and the role of the King in delivering justice were meticulously codified in ancient texts, providing a robust framework for adjudication.

The enduring influence of ancient judicial principles is evident in the contemporary Indian judiciary, which continues to operate through a hierarchical structure, emphasizing impartiality and integrity. The ancient system's emphasis on collaborative decision-making, the integrity of judges, and the role of family courts offer valuable insights into the evolution of judicial practices and their relevance in modern times.

The ancient Indian judicial system's legacy underscores the importance of a well-organized and principled approach to justice, ensuring that justice remains a cornerstone of Indian society. By understanding the

[61] A.L. Basham: The Wonder that was India, p.116.

ancient judicial system, we gain valuable insights into the foundations of contemporary legal practices and the enduring principles that continue to guide the administration of justice in India.

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LEGAL AID IN INDIA: CURRENT SCENARIO AND FUTURE CHALLENGES

Yasho Jain

ABSTRACT

The paper is a detailed discussion of the legal aid system in India with the major emphasis on the situation in the present and the perspectives for further development. In light of the constitutional principles enshrined in Articles 38 and 39A of the Indian Constitution based on justice in the socio-economic political realms, the paper underscores the importance of attempts to stimulate the administration of justice to the poor and needy section of the society. The paper shall delve into this field by examining the periods before and after the introduction of Article 39A in the Indian constitution in 1976, and the introduction of Legal Services Authorities Act in 1987 that formulated rather a standard approach to legal aid programs.

Thus, the discussion highlights the need for legal aid to maintain public confidence in the judicial system as well as ensure equal justice for all members of society in the United States. The existing laws are underlined for extending efforts in order to narrow the gap between the legal services and the underprivileged, and promoting oral advocacy for pro bono and legal aid for the needy. The paper also focuses on the need to popularize the rights and possibilities available to the population, providing suggestions for the cooperation between local courts and legal clinics.

Notwithstanding the improvements which have been made in this area, the barriers which still remain include: lack of funding, few personnel, and lack of public awareness on this issue. The paper concludes that legal aid is to evolve and develop actively, citing the utilization of information technologies, specialized programs, and services, as well as novelties in the sphere of appropriate ADR. If such challenges are approached and the new strategies are adopted, India could work on improving the access to justice and ensure providing legal aid to all groups that need it.

KEYWORDS: Legal Aid, Public Confidence, Pro bono, Public Awareness, Constitution.

INTRODUCTION

The preamble of the Indian constitution articulates that the basic structure and goal of our country is to establish a social, economic and political justice for the citizens of India. The Constitution of India has some specific articles that deserve special attention – these are the Articles 38 and 39A. Article 39-A states that the government is under an affirmative duty to provide free legal aid, either through legislation or otherwise, because otherwise, citizens are not given an equal opportunity to litigate. Article 38 (1) states that regulating and promoting social order, that is justice, is the responsibility of the state with an intention of enhancing wellbeing that its residents. The Legal Assistance Authorities Act under which was passed in 1995 provides fair and make sure that rights of the people of India who are poor economically or socially, get their legal aid without any cost. The legislation has an aim of ensuring that everyone gets to have similar opportunities in accessing the legal aid of their choice by insisting that pro bono attorneys and advocates present themselves volunteering to represent and/or advise people who are financially incapable of paying for such services. It goes without question that the duty is quite arduous, which considerably limits its potential for reaching its maximum potential and simultaneously fails to afford destitute individuals the opportunity to acquire excellent legal representation.[62]

LEGAL AID IN INDIA

In order to promote and preserve the values of the legal system, thus enhancing the democratic kernel of the people's government, the matter is to provide equal access to justice for all people, especially for the poor, the voiceless, and the economically vulnerable. According to Article 14 of the Indian Constitution, the state has the obligation to guarantee equal treatment for all individuals under the law and provide them with a just and unbiased legal system. In 1976, the Indian Parliament incorporated Article 39A[63] into the Indian Constitution, therefore enshrining the provision of free legal assistance as a fundamental entitlement. The notion gained formal support with the enactment of the Legal Services Authorities Act in 1987 and the subsequent founding of NALSA in 1995. It now serves as a beacon of hope for individuals who previously had none. The subsequent legislations have been enacted to bolster the facilitation of legal assistance: The text refers to the Indian Bar Council Legal Aid Rules, which were created in 1983 by the Bar Council of India. Additionally, the text refers to the Legislators (Safeguarding Client Interests, Encouraging the Rule of Law, and Control and Upkeep of Standards in Practice) Bill of 2010. Despite the application of these norms, legal aid services in India still fail to meet the necessary

[62] Mathews and Outton, Legal Aid & Advice, London, Butterworths, 1971 cited in Mamta Rao, Public interest Litigation, Eastern Book Company, 2010, p.340
[63] Article 39A of the Indian constitution.

requirements. In the case of ***Sheela Barse v. State of Maharashtra***[64], it was determined that one of the essential obligations stated in articles 21 and 14 of the constitution, as well as article 39-A, is to offer legal aid to an indigent accused individual who is incarcerated and confronting capital punishment. In India, the term "legal help" refers to the provision of free legal services to individuals who are unable to afford the services of a lawyer or participate in court proceedings. The primary objective of legal assistance is to guarantee equitable access to justice for all individuals, irrespective of their financial circumstances. The following text contains crucial details regarding legal assistance in India. Constitutional authority Article 39A of the Indian Constitution ensures that every citizen has the unimpeded entitlement to receive legal assistance at no cost, regardless of their financial circumstances or any other limitations. [65]The 1987 Law Services Authorities Act: Enacted in 1987, this legislation offers a structured framework for the provision of legal assistance in India. This legislation created the State Legal Services Authorities (SLSAs) and the National Legal Services Authority (NALSA) at the federal and state levels, respectively. Specifications: Individuals who experience economic disadvantage, females, minors, individuals belonging to marginalized communities, and other susceptible groups typically have the right to receive legal assistance. States may have varying criteria. Legal aid encompasses a range of services, such as document preparation, court representation, legal consultation, and other forms of legal support. The article encompasses several legal topics, including criminal trials, civil litigation, and family law. Legal Aid Clinics: Throughout the nation, legal aid clinics have been developed to provide affordable legal assistance. Typically, attorneys and paralegals are responsible for supervising these clinics.

HISTORY OF FREE LEGAL AID IN INDIA

According to the 1958 study by the Law Commission of India titled "Reform of Judicial Administration," the lack of legal representation for low-income petitioners is a significant issue rather than a minor procedural concern. In 1960, the government put limitations on initiatives aimed at offering legal assistance. Article 39-A was incorporated into the Constitution with the enactment of the Constitution (Forty-second Amendment) Act, 1976 in 1976. Hon. Justice P.N. Bhagwati chaired the Committee for Implementing Legal Aid Schemes, founded in 1980 to oversee and administer legal aid programs. The Legal Services Authorities Act was enacted in 1987 with the aim of establishing a standardized organizational structure and regulatory framework for legal assistance programs throughout the country. The National Legal Services Authority was established on December 5, 1995, as a legislative entity with the objective of establishing effective and affordable legal service programs, together with the necessary regulations and guidelines to ensure that legal assistance is delivered in accordance with the law.

[64] Sheela Barse vs. State of Maharashtra: MANU/SC/0437/1988

[65] C.H. Scott , Legal Aid Past and Present, A Brief Bleak Picture, pp. 4-5.cited in Mamta Rao, Public Interest Litigation, Eastern Book Company, 2010 p.341

CONSTITUTIONAL PROVISIONS RELATING TO LEGAL AID

India provides legal aid to majority of its population in accordance with the article 39A of the Indian constitution. It is for this reason that this essay seeks to postulate the ways in which the legal needs of all people can be met fairly and without bias by the appropriate legal service providers or shelters, provided there are no financial restrictions or any other legal barriers that may hinder access to the kind of legal assistance required by such people. Here is the pertinent excerpt from the constitution: The Constitution of India by the Amendment Act of 1995 introduced the Article 39A which stipulates that the state should strive for establishing equality of opportunities in judicial processes and justice for all citizens. Thus, for all the mentioned cases, it is necessary to provide free legal aid to minimize people's opportunities to seek justice due to financial or other difficulties, which can be done due to proper legislation or other AI initiatives. This constitutional clause shows India's determination to affirm justice and offer free legal assistance to those, who cannot afford it or have lost their hope in it.[66]

This statement affirms that the right to have justice is one of the fundamental things which every person has a right to and it also stresses the need to ensure that there are no hurdles in-place which may prevent people from suing. The guidelines for implementing the Law were set up by the Indian government through Article 39A enacted as the Legislative Services Authorities statute of 1987. This statute makes the foundation on which the legal aid scheme in India would be premised on. This Act was meant to bring improvements in the speed of delivering of legal aid services and programs by both federal and state governments. Therefore the state legal skill authorities (SLSAs) and the national legal skill authority (NALSA) were created. Article 39A of the Indian Constitution outlines the structure of India's initiative that provides complimentary legal assistance to individuals. This statement emphasizes the need of ensuring fair and unbiased access to the legal system, as well as the government's responsibility to eliminate any obstacles that may hinder individuals from seeking justice due to inadequate finances or other factors. What is the meaning of Article 39-A in the Indian Constitution? The right to a fair trial is a fundamental human right that is strongly linked to the right to legal representation. Article 39-A became effective after the enactment of the Constitution (Forty-second Amendment) Act of 1976. The State is granted the authority to establish suitable legislation and initiatives for pro bono legal assistance in accordance with the standards referred to as the "Directive Principles of State Policy." The main objective of this proposed amendment was to guarantee that no individual's ability to seek justice would be hindered by financial or other constraints.[67]

[66] Upendra Baxi, Taking Suffering Seriously , Social Action Litigation in the Supreme Court of India", Law and Poverty; Upendra Baxi , Crisis of the Indian Legal System, Vikas Publishing Pvt Ltd, 1982, p.45

[67] EJ Cohn, Legal Aid for the Poor, Law Quarterly Review(1990), Vol 49, p 256,cited in S Muralidhar, Law Poverty and Legal Aid, Lexis Nexis, Butterworths, 2004, p.7

FREE LEGAL AID IN INDIA: THE POSITIVE CONTRIBUTION OF JUDICIARY

In the Hussainara Khatoon case,[68] the Indian Supreme Court had an opportunity to clearly express its strong support for the rights of destitute and marginalized citizens. The petitioner notified the court that most of the culprits involved in this case were already serving sentences that, if their convictions had been upheld, would have resulted in considerably lengthier lengths of incarceration. The main factor contributing to the delay in court proceedings was the parties' insufficient financial resources to hire legal counsel. In this particular instance, the court observed that Article 39-A emphasized the fundamental character of the guarantee expressed in Article 21, and that the provision of complimentary legal aid was a crucial element of a just, unbiased, and equitable process. In the ***Khatri v. State of Bihar*** [69]case, the court analyzed the matter of granting free legal assistance to indigent defendants who are unable to afford legal counsel. According to the constitution, the state is required to provide aid not just during court hearings but also when individuals are first brought before the judge and occasionally even when they are held in custody. It was determined that the state could not deny this privilege due to the accused's lack of request, insufficient funds, or administrative inefficiency. Magistrates and session judges must inform the accused of their legal rights. The State is obligated to provide legal representation in cases when it is considered essential, and the eligibility of the accused person to obtain such representation depends on their specific circumstances. This is a mandatory requirement stipulated by the Constitution. To ensure a fair and equitable process for all those accused of crimes, it is essential to offer free legal assistance. It is crucial to understand that the guarantee of Article 21 indirectly confers this right. The State cannot avoid this obligation by stating its administrative or budgetary capacities to deal with the issue or by arguing that none of the affected detainees sought legal assistance. In the ***Suk Das v. Union Territory of Arunachal Pradesh case[70],*** Judge P.N. Bhagwati noted that a substantial proportion of rural Indians are uneducated and lack awareness of their legal rights. Moreover, he emphasized the significance of imparting education to the underprivileged population regarding the legal system, since a substantial portion of them are unaware of their rights, namely the entitlement to free legal aid. Even those with the highest levels of education may lack information regarding their legal rights and entitlements. They are refraining from seeking legal counsel or aid because they do not fully understand the law. Furthermore, their restricted literacy and education impede their capacity to sustain themselves and attain self-sufficiency. Therefore, the nation's legal aid movement has constantly prioritized the improvement of legal literacy. In my argument, I contend that if individuals were denied their legally mandated entitlement to education, the primary goals of education would not be completely realized, and our constitutional commitment to ensuring justice for all would become outdated.[71]

[68] Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 98
[69] Khatri v. State of Bihar, AIR 1981 SC 262. 6 AIR 1986 SC 991
[70] 1986 AIR 991
[71] MP Jain, Outlines of Indian History, Wadhwa & Co. fifth edition 2000 p.23

AWARENESS OF LEGAL AID: STILL A CHALLENGE

An incomplete understanding of where to get legal representation is one component of the inadequate institutional architecture. Accused individuals often are unaware of their right to legal representation. Another major worry is the perception that a free service is of inferior quality. Inadequate funding means that the few attorneys who do work for the legal service authority are unable to conduct their jobs effectively. Obstacles to Accessing Legal Representation There is now a fragmented, unplanned, and unstructured legal aid movement in India. Cooperation is obviously lacking. It is now widely believed that no one should be able to avoid the justice system. Significant differences exist between the declared goals and the actual results. They are now too preoccupied with staying in business to take on pro bono cases, according to a recent survey by a legal firm. There are a number of reasons why attorneys would decline pro bono cases. There is a current shortage of funds. It was not customary for legal education to include social studies. Experts seldom engage with members of the public seeking legal aid, and neither the individuals nor their colleagues have a good grasp of the situation. Also, illiteracy is a major problem for legal help. It is well-known that 70% of rural residents are uneducated and do not know their legal rights. Mismanagement and denial of poor people's benefits and rights occur because of a lack of knowledge about the law. There are significant challenges both now and in the future for India's legal assistance system. A big problem with accessibility is that many low-income and rural communities do not have access to legal services due to a lack of knowledge, limited resources, and bad infrastructure. The quality of legal guidance provided through legal assistance is sometimes inadequate because of budget constraints, busy attorneys on the program, and systemic inefficiencies. Furthermore, the shame associated with seeking for legal assistance deters many individuals from asserting their rights in court. Future challenges may include meeting the increasing need for online and distant legal representation due to developments in technology and the COVID-19 pandemic. It is critical to strengthen legal aid policy frameworks, educate and train legal aid attorneys on a continuous basis, and reduce the disparity between rural and urban areas in access to legal assistance. It will require concerted action from the state, the legal profession, and civil society to resolve these issues and guarantee equal access to justice for all.[72]

THE ROAD AHEAD

The initial stage would be to provide the general population with comprehensive knowledge regarding their rights and options under the law. This goal can be achieved by establishing a connection between the local courts and the law school's legal clinics. This would facilitate communication between those in need and these non-judicial experts, who can help individuals understand their rights under the Indian Constitution.

[72] S Muralidhar, Law, Poverty and Legal Aid , (2004) Lexis Nexis Butterworths, pp 37,38

One strategy to ensure that illiterate people know their rights is to organize awareness campaigns in remote places and provide lectures in the community's language. In order to bring more attention to the issue, it could be feasible to reach out to NGOs. The following step is to promote a culture of pro bono work and educate future lawyers on social issues. To add insult to injury, the present legal aid system has a number of procedures that fail to adequately track, evaluate, and report on the quality of services provided to those who need them. Although it is encouraging to see the Legal Aid Defence Council System in action, there are major limitations to how effective legal aid services can be due to the system's inadequate infrastructure, which prevents responsible court officials from monitoring legal aid cases in real-time. Therefore, as mentioned earlier, legal aid still needs help. To guarantee that everyone has access to legal aid, it is crucial to thoroughly examine the suggestions provided in this article. Modifications to India's legal assistance system may be necessary in the future to address emerging challenges and new situations. Mainly in charge of it are: Advancements in Technology: Online legal aid portals, virtual legal clinics, and electronic filing systems are expected to play an increasingly larger role in the provision of legal aid services. Access to Expert Legal Counsel: Modern practice also shows a trend towards serving the targeted populations' legal needs, such as a specialized representation in several fields, which include family law, environmental law, and labor law among others. Also, the mentioned work may contribute to ensuring that geographically remote territories are connected and legal assistance is provided to a greater extent. Mediation, arbitration and negotiation are some of the techniques that are collectively referred to as ADR which is an abbreviation for Alternative Dispute Resolution. In expanding the delivery of legal aid services to reach a wider audience, chosen clients of the program can be encouraged to use other ADR processes like mediation and arbitration to address their concerns. Justice system changes: It is not implausible to then assume a direct connection between legal aid programs and other enhancements made to the body of law to enhance the functionality of the justice system by effecting eradication of frivolous procedures that characterize clogging of the system. It is crucial to understand that the priorities of the top legal aid goals of India will change over time according to the feedback and inputs including the government, legal professions, civil society and the society as a whole and as will the future directions of legal aid be shaped. The ultimate goal is to ensure that every person can receive justice, charge or seek his rights in the justice system without discrimination if he is a poor man or belongs to other category of discriminated people[73].

CONCLUSION

Being a significant component of India justice delivery system, legal aid guarantees equal accessibility of the court by all especially the needy poor and defends the citizen's legal claims. Two of the primary goals of the legal assistance program are to uphold the public's confidence in the judicial system, as well as ensure equal

[73] VG Ramachandaran, Legal Aid an Imperative Social Need, (1970) 2 SCC (Journal) p.44.

access to reactive justice across the populace. Due to the necessity that every citizen and toddler, man, woman, senior citizens and other groups and types of disadvantaged people should and can obtain legal aid justice no mater their positions in life or any form of social and economic disadvantages. Thus, according to the Indian Constitution, equality before the law and equal protection of the laws is ensured by Article 39A of the Constitution that guarantees equal access to courts as an important component of the Indian justice system. Legal Aid law was introduced in India in 1987 through the Legal Services Authorities Act which resulted into formation of National Legal Services Authority (NALSA) and the state Legal Services Authorities (SLSAs). These organizations were formed for the purpose of providing pro bono legal aid was the key reason behind the formation of these institutions. In the following manner, legal assistance is an indispensable means of maintaining justice, safeguarding the rights of all citizens, and achieving social justice in service of justice. This shows the Indian government's commitment to eradicating anything that may prevent someone from seeking justice and thereby discourages the notion that there exists anyone who deserves to be turned away from a court of law because of his or her ability to pay the costs or expertise through a form of disability. The different Indian societies will therefore have their societies adapt new ways of tackling trials and these will require means that support legal aid programs needed to balance the odds in favor of Human rights.

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CYBERNETIC CONUNDRUM: DECRYPTING PRIVACY CONCERNS AMID GOVERNMENTAL DATA REGULATION EFFORTS

Ananya Gupta

INTRODUCTION

In the contemporary Internet age, netizens are assiduously engaged in online social media platforms. The advancement of technology has given rise to platforms that provide instantaneous updates on global occurrences to almost everyone. Nonetheless, it has progressed and transformed from a cutting-edge innovation to a potential tool for exploitation.

Most applications utilized for daily communication deploy various security checks for the safety of user data, with encryption being a commonly used measure. Encryption encodes users' messages to prevent any third party from interfering in the communication. However, cybercriminals are also exploiting this technological anonymity for various illicit activities. To address such instances, the government requires access to the Encryption keys which can decrypt cybercriminals' data to trace the originator of messages.

This presents a conundrum due to the potential for misuse of these backdoor encryption keys by the government. While the primary aim is to curb unlawful activities, there is a risk that these measures could lead to violations of the right to privacy and freedom of speech and expression, if not regulated. This potential misuse threat has given rise to the conundrum for the intermediaries to share the keys with the government due to the legal considerations surrounding the same, both globally and specifically within India. The present Article addresses the plight of users in the backdrop of the enactment of the Digital Data Protection Act, 2023 in India.[74]

The research paper is structured into five sections. Section II shall provide an overview of the Encryption method used by Intermediaries. Section III shall explain the measures adopted by the Government Agencies to get access to backdoor encryption keys. Section IV shall delve into the intricacies of conundrum; which intermediaries are facing due to such measures. Section V shall provide alternative methods that can be considered by the Government. Section VI will highlight the key features of the Digital Personal Data Protection Act, 2023, focusing on how the Act, in the backdrop of such conundrum, introduces certain provisions that are burdensome for users, as they infringe upon their rights and freedoms. Section VII will present the conclusions and offer recommendations.

[74] The Digital Personal Data Protection Act, 2023.

THE DEVELOPMENT OF CRYPTOGRAPHY: A HISTORICAL OVERVIEW AND CONTEMPORARY ENCRYPTION METHODS

In the contemporary digital landscape, social media platforms employ encryption to safeguard users' data from unauthorized access. Nevertheless, this technology, albeit by a different name, has been in practice for a significant duration and was historically referred to as cryptography.

Cryptography

Cryptography[75] originates from two Greek words: "Krypto," meaning hidden, and "grafo," meaning to write, thus encapsulating the concept of concealed or hidden writing. Historically, cryptography is rooted in ancient practices where it served to obscure the content of messages during transmission.[76] In essence, cryptography refers to the process of converting a message into a code or alphanumeric value to secure its contents.

In ancient times, cryptography was employed primarily for the protection of basic communication messages. These early methods were essential for ensuring the authentication of the message's sender and the confidentiality of its content during transmission. Historical cryptographic techniques, such as the Caesar cipher and the substitution cipher, were fundamental in securing messages from unauthorized access and verifying the integrity of communications. For example, the Caesar cipher, used by Julius Caesar, shifted letters in the alphabet to encode messages, a simple yet effective means of maintaining secrecy and authenticity.

However, as we transition from these historical practices to the present era, our focus shifts to contemporary technological advancements in the field of cryptography. Modern cryptographic techniques have evolved far beyond these rudimentary methods, incorporating sophisticated algorithms and protocols to address complex security challenges in the digital age. In the contemporary age, such technology is termed Encryption.

Encryption

"Encryption is a reversible or irreversible transformation of data from the original to a difficult-to-interpret format to protect confidentiality, integrity and sometimes its authenticity".[77] In the field of Encryption, a *key* is a sequence of characters used within an encryption algorithm to transform data, rendering it seemingly random and unintelligible to unauthorized individuals. Analogous to a physical key that locks or unlocks a door, the cryptographic key serves to *encrypt* data, making it accessible for *decryption* only to those who possess the correct key. In this process, the original data is known as *plaintext*, while the data that results from encryption is referred to as *cipher text*.

[75] Oxford English Dictionary (10th edn, 2020).
[76] M.S. Baptista, 'Cryptography with Chaos' (1998) 240(1) Physics Letters A 54.
[77] Apar Gupta, Commentary on Information Technology Act (3ed edn, Lexis Nexis 2015) 55.

Historically, before the advent of computers, creating ciphertext often involved a simple technique called a substitution cipher. In this method, each letter of the plaintext is substituted with another letter in the alphabet based on a fixed system or pattern. Consider a scenario where someone transmits a message "Hello" to another person, and each letter is substituted with the succeeding one in the alphabet: "Hello" transforms into "Ifmmp." Although "Ifmmp" appears as a seemingly random sequence of letters, possessing the key allows one to substitute the corresponding letters and decipher the message back to "Hello." In this instance, the key is determined by shifting each letter down one position in the alphabet, unveiling the original letter.

These ciphers are relatively susceptible to decryption through straightforward statistical analysis, as certain letters tend to appear more frequently in any given text (for instance, E is the most common letter in the English language). To counter this vulnerability, cryptographers introduced a system known as the one-time pad. A one-time pad is a key designed for single-use only, comprising at least as many values as there are characters in the plaintext. Essentially, each letter is substituted with another letter that represents a distinct number of positions removed from it in the alphabet. For instance, if someone needs to encrypt the message "Hello" using a one-time pad with the values 7, 17, 24, 9, and 11.[78]

Different platforms employ various encryption methods, which can be categorized based on different parameters. In this paper, we will focus specifically on differentiating encryption methods based on the “recoverability” of the encrypted data.

Types of Encryptions:

Encryption can be classified into multiple categories based on varied parameters. Amongst others, one such criterion is the “Recoverability” of encoded information. Lewis, Carter, and Zheng differentiated encryption based on recoverability in 2017, by classifying the encryption method as Recoverable and Non-Recoverable encryption.[79]

Recoverable Encryption

In Recoverable Encryption, the service provider has the access to the decryption key. This helps the service provider to decrypt the data in the message. The service provider or whosoever has access to the private key can access the information by decrypting it.

Recoverable encryption is advantageous for recovering lost data in many situations by using effective decryption algorithms such as File Vault 2 and BitLocker[80]. However, it poses a risk, potentially violating the

[78] ‘What is a Cryptography Key’ <https://www.cloudflare.com/en-gb/learning/ssl/what-is-a-cryptographic-key/> accessed 22 December 2023.

[79] James A. Lewis, Denise E. Zheng and William A. Carter, ‘The Effect of Encryption on Lawful Access to communications and Data’ (2017) Centre For Strategic International Studies.

[80] ‘Comparing BitLocker, FileVault And Encryption On External Disks – What’s The Difference’ <https://www.micronicsindia.com/comparing-bitlocker-filevault-and-encryption-on-external-disks-whats-the-

Right to Privacy,[81] by unauthorised data access or interference. Therefore, in Recoverable Encryption even if the data is encrypted, the service provider has access to the information.[82]

Non-Recoverable Encryption

Non-recoverable encryption entails situations where the technology used by the service provider does not have access to the content of the information. In this form of encryption, the content of the message cannot be recovered because the service provider or any third party does not have access to the decryption key. Non-recoverable encryption is prevalent in End-to-End Encryption being used by Social Media Applications. In End-to-End Encryption the content of the message is encrypted for both the sender and receiver, unless they have access to decryption keys.

Social Media Applications, which are intrinsically used by individuals for day-to-day communications, employ this technology to offer privacy and autonomy to their customers for a safe and better experience while communicating. Applications such as WhatsApp,[83] Telegram[84] and Signal[85] set off an example of the usage of technology for a wide user base. The beneficiaries of End-to-End encryption are inclusive of government agencies. Notably, the Ukrainian government has demonstrated a growing reliance on Telegram as an official platform for communication during both the Russia-Ukraine War and the COVID-19 pandemic.[86] This highlights the benefits associated with the utilization of end-to-end encryption technologies in facilitating reliable communication channels.

Therefore, the Non-Recoverable technology employed by the Social media application ensures anonymity since the decryption key is unavailable to the service provider and any third party.

PARADOX OF NON-RECOVERABLE ENCRYPTION: GOVERNMENTAL EFFORTS

The significant benefits of employing end-to-end encryption technologies in creating reliable communication channels, as highlighted, are noteworthy. Yet, the flip side of the coin encompasses the drawbacks linked to the secrecy and privacy afforded by end-to-end encryption on these platforms. With the widespread accessibility of the internet, such applications have reached the wrong hands, enabling them to disseminate

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difference/#:~:text=Both%20BitLocker%20and%20FileVault%20use,encrypt%20certain%20types%20of%20data.> accessed 29 December 2023.

[81] *Justice K.S. Puttaswamy (Retd.), and Anr v Union of India* AIR 2018 SC (SUPP) 1841.

[82] Rishab Bailey, Vrinda Bhandari and Faiza Rahman, 'Backdoors to Encryption: Analysing an intermediary's duty to provide "Technical Assistance"' (2021).

[83] 'About end-to-end encryption' (WhatsApp) < https://faq.whatsapp.com/820124435853543> accessed 25 December 2023.

[84]'Telegram Privacy Policy' (Telegram)<https://telegram.org/privacy?setln=fa#:~:text=Telegram%20has%20two%20fundamental%20principles, and%20feature%2Drich%20messaging%20service.> accessed 25 December 2023.

[85]'Signal Terms & Privacy Policy' (Signal) < https://signal.org/legal/#:~:text=Signal%20utilizes%20state%2Dof%2Dthe, yourself%20and%20the%20intended%20recipients.> accessed 25 December 2023.

[86] Matt Burges, 'When War Struck, Ukraine Turned to Telegram' (2022).

disinformation and rumours, thereby escalating chaos within society. Numerous instances attest to the paradoxical nature of technology, where what was intended as a boon is sometimes manipulated for detrimental purposes.

For instance, according to French Investigators, a group of ISIS had utilised Telegram for coordinating and planning the terrorist attack. Multiple Reports suggest that even WhatsApp has purportedly been employed by such organizations to coordinate attacks, including the bombings in Sri Lanka[87] and Paris.[88] Additionally, instances of Rumours and misinformation have also rampantly increased on such applications.[89]

Government Efforts vis-à-vis Access to Decryption Keys

To combat illicit activities, misinformation, and rumours, governments worldwide, including India, have decided to implement stricter regulations on social media platforms to more effectively monitor and control the third-party content disseminated on these platforms. Despite various global efforts to resolve these issues, no solution has proven fully effective. One proposed solution by government agencies is to gain access to backdoor encryption keys from Social Media Applications for encrypted messages, enabling them to decrypt and decipher which messages contain illicit information.

A backdoor is a covert method of bypassing data authentication or encryption, enabling surreptitious access to information.[90] An example of a legitimate backdoor is when a manufacturer incorporates a mechanism in its software or device for restoring the data.[91] Henceforth, a back-door encryption key is a way, whereby the government has access to the Decryption Key to decrypt the chats or the required data.

A notable instance illustrating this demand occurred in the legal dispute between the Federal Bureau of Investigation (FBI) and Apple Inc., known as FBI v. Apple.[92] In this case, the FBI requested Apple to supply anti-encryption software to access data on an iPhone. Initially, Apple refused, citing concerns about customer privacy. Despite a court directive, Apple contested the order. Notably, the FBI later revealed it had acquired a third-party solution, obviating the need for Apple's involvement.

The never-ending resolute of governments across the world to gain backdoor entry to Encrypted messages has again become relevant. United Kingdom’s government drafted the Online Safety Bill which attempts to assault the End-to-Encryption prevalent in the social applications.[93] The Bill has noble aims however, the method to approach the same may lead to privacy intrusions for the customers. The Bill's objective to

[87] ibid.
[88] ibid.
[89] Nic Newman, Richard Fletcher, Anne Schulz, Simge Andı, and Rasmus Kleis Nielsen, ‘Reuters Institute Digital News Report 2020’ Reuters Institute for the Study of Journalism, p.19.
[90] Kim Zetter, ‘Hacker Lexicon: What Is a Backdoor?’ (2014).
[91] Donald L. Buresh, ‘The Battle for Backdoors and Encryption Keys’ (2021) p.22.
[92] *Apple v FBI* 2015 C.D. Cal.
[93] Joe Mullin, ‘The U.K. Government Is Very Close to Eroding Encryption Worldwide’ (2023).

enforce age verification through government documents, biometric data, or facial scans poses a grave threat to individual privacy.

The privacy intrusion due to the bill could be such that Wikipedia has claimed that it will withdraw from the United Kingdom, if necessary.[94] Leading social media applications like WhatsApp[95] and Signal[96] have asserted their intention to exit the United Kingdom instead of compromising encryption as stipulated in the Bill.

Similarly, the United States drafted the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2022,[97] which attempts to penalise companies for not breaking end-to-end encryption. Similar to the United Kingdom's Bill, this act also penalises companies for not scanning CSAM content, making it necessary for them to break end-to-end encryption. Security experts have unequivocally and unambiguously opposed the Government's access to Encrypted Communication as it can wreak havoc on citizens' innate privacy.[98]

Indian Government's Mandate: Compliance at the stake of losing the Intermediary Status

To counteract the rumours, illicit activities and misinformation the government of India has since long established a web of rules and regulations to impose stricter regulations on Intermediaries. Intermediaries are Social Media applications which act as a platform for users to communicate.

Information Technology Act, 2000[99] is the grundnorm of the other regulations that have been drafted by the Government of India for regulating the third-party content on Social Media Platforms (herein referred to as intermediary). According to Information Technology Act, 2000[100] (herein referred to as the Act), an intermediary is any person who on behalf of another person receives, stores or transmits that message or provides any service concerning that message, under section 2(1)(w) of the Act.[101] Further, under section 79(1) of the Act,[102] an intermediary is granted an exemption from any third-party information, data, or communication link made available or hosted by him. The exemption provided is subject to section 79(2) of the Act.[103]

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[94] Dan Milmo, 'UK readers may lose access to Wikipedia amid online safety bill requirements' (2023) *The Guardian.*
[95] James Vincent, 'WhatsApp says it will leave the UK rather than weaken encryption under Online Safety Bill' (2023).
[96] Chris Vallance, 'Signal would 'walk' from UK if Online Safety Bill undermined encryption' (2023) *BBC News.*
[97] Eliminating Abusive and Rampant Neglect of Interactive Technologies Act, 2022.
[98] Harold Abelson, Ross Anderson, Steven M. Bellovin, Josh Benaloh, Matt Blaze, Whitfield Diffie, John Gilmore, Matthew Green, Susan Landau, Peter G. Neumann, Ronald L. Rivest, Jeffrey I. Schiller, Bruce Schneier, Michael Specter, and Daniel J. Weitzner, 'Keys Under Doormats: Mandating insecurity by requiring government access to all data and communications' (2015) Computer Science and Artificial Intelligence Laboratory Technical Report.
[99] The Information Technology Act, 2000 (21 of 2000).
[100] ibid.
[101] The Information Technology Act, 2000 (21 of 2000) s 2(1)(w).
[102] The Information Technology Act, 2000 (21 of 2000) s 79 (1).
[103] The Information Technology Act, 2000 (21 of 2000) s 79(2).

The provision requires an intermediary to act as a host,[104] and not initiate transmission or select or receiver of transmission.[105] Furthermore, under section 79(2)(c) of the Act,[106] An intermediary is required to observe due diligence and to observe guidelines as may be prescribed. Thereby, if an intermediary need to take protection from third-party content on the website by using the *'safe harbour provision'* under section 79(1) of the Act,[107] it is required to follow due diligence and guidelines as may be prescribed.

The guidelines, in the form of Rules, to be followed by Social Media Intermediaries are enacted by the Central Government of India, through the power conferred by sections 87(1)(z) [108]and 87(2) (zg)[109] of the Act. The Rules are Information Technology Rules (Intermediary Guidelines and Digital Media Ethics Code) 2021[110] *(IT Rule 2021)*, Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 and Information Technology (Procedure and safeguards for blocking for access of information by Public) Rules 2009[111] ('*IT Rules, 2009'*).

The Primary bone of contention between the Government and the Intermediaries in India is the IT Rules 2021. Section 7 of the IT Rules 2021,[112] clearly notifies that a failure to follow these rules by the intermediary would lead to the forfeiture of its protection under Section 79(1) of the Act[113] which, conclusively, rips the intermediary off its status of an intermediary in the country. Hence, an Intermediary is mandatorily required to follow the stipulated regulations to gain the status of an Intermediary.

This legislation triggered a dispute between the government and social media applications. Notably, the Indian government opted to withdraw Twitter's Intermediary status due to non-compliance with the IT Rules, 2021,[114] specifically regarding the appointment of statutory officers.[115]

Significantly, Rule 4 of IT Rules 2021,[116] stipulates 'Additional due diligence' that must be adhered to by Significant Social Media Intermediaries[117] (*SSMIs)*. SSMIs are intermediaries with over 50 lakh registered

[104] The Information Technology Act, 2000 (21 of 2000) s 79(2)(a).
[105] The Information Technology Act, 2000 (21 of 2000) s 79(2)(b).
[106] The Information Technology Act, 2000 (21 of 2000) s 79(2)(c).
[107] The Information Technology Act, 2000 (21 of 2000) s 79(1).
[108] The Information Technology Act, 2000 (21 of 2000) s 81 (1)(z).
[109] The Information Technology Act, 2000 (21 of 2000) s 87 (2) (zg).
[110] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.
[111] Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009.
[112] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E) r 7.
[113] The Information Technology Act, 2000 (21 of 2000) s 79(1).
[114] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E).
[115] Sowmya Ramasubramanian, 'Reports of witter losing intermediary status is based on incorrect reading of the law: Internet Freedom Foundation' *The Hindu* (New Delhi 16 June 2021) <https://www.thehindu.com/sci-tech/technology/internet/reports-of-twitter-losing-intermediary-status-is-based-on-incorrect-reading-of-the-law-internet-freedom-foundation/article61811195.ece> accessed 222 December 2023.
[116] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E) r 4.
[117] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E) r 2(v).

users.[118] Under Rule 4(2) of the IT Rules, 2021,[119] SSMIs are mandated to facilitate the identification of the *first originator* of information on their computer resources as deemed necessary by a judicial order from a Court of Competent Jurisdiction or an order issued under Section 69 of the Act[120] by the Competent Authority as outlined in the IT Rules, 2009.[121]

The introduction of Rule 4 in the IT Rules 2021 highlights the government's intention to trace the original perpetrators of misinformation or illicit activities. However, this requirement has led to legal and technical challenges for intermediaries, who are caught between upholding their intermediary status and protecting the privacy of millions of users. The following section will address these challenges focusing on the aspects of privacy and technical feasibility.

EXPLAINING THE PRIVACY CONUNDRUM VIS-À-VIS LEGAL AND TECHNICAL IMPLICATION

The IT Rules, 2021,[122] stipulates that the SSMIs should facilitate the identification of the first originator. However, the Intermediaries have challenged the IT Rules 2021 and the government's order due to Legal and Technical irregularities. Intermediaries such as WhatsApp have vociferously denied traceability[123] and have challenged the legality of Rule 4(2) of IT Rules 2021,[124] before the Delhi High Court. In the present section, the same shall be enlisted while explaining the dilemma of the Intermediaries.

Technical non-feasibility of the Government Order under Rule 4(2) of the IT Rules, 2021

The primary contention raised by intermediaries is that to identify the originator of a message, in accordance with Rule 4(2) of IT Rules of 2021 by the governmental order, they are required to trace the message through every individual chat to which it has been forwarded. In the process of tracing a message, intermediaries are required to scan and intercept messages, a task rendered impractical due to the implementation of end-to-end encryption.

End-to-end encryption utilises unrecoverable encryption technology, as elucidated earlier, wherein even service providers lack access to decryption keys. The absence of decryption keys on the part of the service

[118] Ministry of Electronics and Information Technology, 'Notification CG-DL-E-26022021-225497' <https://www.meity.gov.in/writereaddata/files/Gazette%20Significant%20social%20media%20threshold.pdf> accessed 24 December 2023.
[119] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E) r 4.
[120] The Information Technology Act, 2000 (21 of 2000) s 69.
[121] The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rule, 2009, G.S.R. 781(E).
[122] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E) r 4(2).
[123] WhatsApp, 'What is traceability and why does WhatsApp oppose it?' <https://faq.whatsapp.com/1206094619954598> accessed 20th December 2023.
[124] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E) r 4(2).

provider implies the impossibility of message recovery. The keys are essential for message decryption to reside on the user's device rather than with the intermediary. Thus, the interception and reading of messages by service providers is not possible in the first instance.

Legal Challenges concerning Rule 4(2) of IT Rules, 2021

The primary criticism with Rule 4(2) of the IT Rules, 2021,[125] is that it is claimed to violate Articles 21 and 19 of the Constitution of India,[126] which protect the Right to Privacy and the Right to Freedom of Expression, respectively.

Violation of Article 21: Right to Life and Privacy

Article 21 of the Constitution of India[127] guarantees the Right to Life, which has been interpreted to include the right to privacy. The right to Privacy can be construed positively and negatively.[128] The former deals with the aspect when the State has to intervene and provide the facilities so that a person's right to privacy is ensured, while the latter deals with the concept when the State is not allowed to interfere with the personal sphere of an individual.

This right was affirmed in the landmark judgment of *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors*[129]. Rule 4(2) of the IT Rules, 2021[130] which mandates that SSMIs enable the identification of the first originator of information on their platforms. This requirement raises significant privacy concerns because it would necessitate the interception and scanning of all messages to trace the originator, thus infringing on users' privacy.

A four-pronged test was laid down by K.S. Puttaswamy which has to be fulfilled to determine whether the action by the State is proportional or is in violation of the Right to Privacy, which has been articulated from the work of David Bilchitz's, who is a distinguished Fundamental rights and constitutional law scholar. It is categorised into the following prongs:

There has to be the existence of a legislation and for the formulated legislation, there has to be a legitimate State Aim. Furthermore, there has to be a Rational Nexus between the impugned method and the Aim. Additionally, the impugned measure should be the Least Restrictive Method and equally efficient. Lastly, there should be a balance between the benefits to be attained and the rights which are infringed.

[125] ibid.
[126] The Constitution of India, 1950 Arts 21 and 19.
[127] The Constitution of India, 1950 Art 21.
[128] Lok Sabha Secretariat, 'Right to Privacy' (*Lok Sabha Secretariat Internet,* 2017) <https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/Right%20to%20Privacy%20as%20a%20fundamental%20Right.pdf> accessed 1 Feb 2024.
[129] *Justice K.S. Puttaswamy (Retd.) and Anr. v Union of India and Ors* (2017) 10 SCC 1.
[130] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E), r 4(2).

Rule 4(2) of IT Rules, 2021[131] satisfies the first prong of the test, i.e., there is a Legislation. The second prong, i.e., Legitimate State Aim is also justified by the State because the originator is required in scenarios where there has been a disturbance in public tranquillity and order. However, the rational nexus between the Aim and the Method is absent. This can be construed as for rational nexus the action of the State needs to be least restrictive, should not be disproportionate and the balance between the benefits and rights which are infringed should be maintained.

However, in the present case, if SSMIs are required to break end-to-end encryption to trace the originator, it would entail that decryption keys are held by service providers for millions of users' chats. This creates a significant risk of misuse and interception by malicious actors, such as scammers.

Despite any justified aim behind the request, such as maintaining public order, breaking end-to-end encryption is not the least restrictive measure available. This approach could have a chilling effect, not only compromising individuals' privacy but also impinging on their freedom of speech and expression. Additionally, breaking encryption is technologically infeasible as SSMIs do not possess the decryption keys necessary for this task.

Moreover, Rule 4(2) of IT Rules, 2021[132] stipulates that *"No SSMI shall be required to disclose the contents of any electronic message, any other information related to the first originator, or any information related to its other users."* [133]The government's order to trace the originator would require SSMIs to scan and intercept messages, directly contravening this stipulation and leading to a breach of the right to privacy protected under Article 21 of the Constitution.[134]

Violation of Article 19: Right to Freedom of Expression

Article 19 of the Constitution of India[135] guarantees the Right to Freedom of Expression. Rule 4(2) of the IT Rules, 2021,[136] by imposing the obligation on SSMIs to trace the originator of messages, indirectly curtails this freedom. The fear of being traced can lead to self-censorship among users, thereby hampering free expression of the users.

In the case of *K.A. Abbas v Union of India* the Supreme Court recognized that the "*freedom of expression can be curtailed if regulations are reasonable and serve a legitimate purpose, but it also stressed that excessive control could infringe upon the freedom guaranteed under Article 19(1)(a)*"[137] This was further solidified in the case of *S. Rangarajan Etc vs P. Jagjivan Ram* where the Supreme Court held that

[131] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E), r 4(2).
[132] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E) r 4(2).
[133] ibid.
[134] The Constitution of India,1950 Art 21.
[135] The Constitution of India,1950 Art 19.
[136] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E) r 4(2).
[137] *K.A. Abbas v Union of India* (1970) 2 SCC 780.

"*Restrictions on freedom of expression must be reasonable and proportionate. Excessive controls which unduly restrict free expression violate the fundamental right under Article 19(1)(a).*"[138]

The present act of Government to trace the originator of the message, controls and restricts the freedom of expression by creating a chilling effect on users' willingness to communicate freely and openly on intermediary platforms. Thus, in line with the principle established in K.A. Abbas v Union of India, although the IT Rules, 2021 serve a legitimate purpose, excessive control could infringe upon the freedom guaranteed under Article 19(1)(a) of the Constitution of India.

Procedural Safeguards under IT Rules, 2009

The IT Rules, 2009 [139]lay down procedural safeguards that must be followed when an order under Section 69 of the Act[140] is issued by the Competent Authority for interception, monitoring, or decryption. Rule 4(2) of the IT Rules, 2021 states, *"by a judicial order passed by a court of competent jurisdiction or an order passed under section 69 by the Competent Authority as per the Information Technology (Procedure and Safeguards for interception, monitoring and decryption of information) Rules, 2009."*[141]

Technological Infeasibility, Legislative Intent, and Privacy Concerns

The legislative intent behind Rule 4(2) of the IT Rules, 2021,[142] is that any order passed by the Competent Authority must align with the IT Rules, 2009. Intermediaries have made it clear that they do not have control over the decryption keys for the messages sent on their platforms.

Rule 13(3) of the IT Rules, 2009[143] stipulates that *"Any direction of decryption of information issued under Rule (3) to an intermediary shall be limited to the extent the information is encrypted by the intermediary or the intermediary has control over the decryption key."* This provision clearly states that an order requiring an intermediary to decrypt information is limited to cases where the intermediary possesses the decryption key.

In this instance, Social Media Intermediaries, such as WhatsApp, do not have access to or control over the decryption keys, preventing them from decrypting the information. An order demanding that an intermediary decrypt messages, which they are unable to do due to the lack of a decryption key, contravenes the procedural safeguard outlined in Rule 13(3) of the IT Rules, 2009.[144]

[138] *S. Rangarajan Etc v P. Jagjivan Ram* 1989 SCR (2) 204.
[139] The Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, G.S.R. 780(E).
[140] The Information Technology Act, 2000 (21 of 2000) s 69.
[141] ibid.
[142] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E) r 4(2).
[143] The Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, G.S.R. 780(E) r 13 (3).
[144] ibid.

Therefore, the order to trace the originator of the message under Rule 4(2) of IT Rules, 2021 is not technologically feasible due to unrecoverable encryption. In arguendo, if technologically feasible it will lead to a violation of the Right to Privacy because millions of chats will be at the helm of access by the government and Intermediaries. Further, the order of Rule 4(2) of IT Rules, 2021 procedural safeguards of IT Rules, 2009[145] apply to such orders or not.

EMPLOYMENT OF ALTERNATIVES TO RESOLVE THE CONUNDRUM

Indian Technical and Legal minds have raised substantive alternatives for the Intermediaries to fulfil the demand of the Government Orders, however, the same proposition is still sub judice before the Courts. Furthermore, there are certain existing legal principles which may help in fulfilling the demands of the Government. In this section, we shall analyse the same.

Existing Alternatives for the Government

For instance, the metadata from a messaging service could be used to trace the origin of a message. This metadata refers to the data collected by intermediaries about individual users of the social media application. For instance, WhatsApp[146] collects various types of data, including account registration information, transaction data (if you use their services), and your IP address, among other details outlined in their Privacy Policy.

Intermediaries can share this metadata with government authorities, allowing them to trace both the sender and recipient of messages, as well as access relevant user information. However, the amount of data collected by different applications varies. For instance, Signal collects minimal data, only retaining information such as the registration date and the last date on which the numbers were active.[147] Consequently, this approach is not a viable solution for tracing the origin of messages because the amount of data available differs significantly between applications.

Proposed Alternatives by Experts

Although there appears to be no compromise between government security concerns and WhatsApp's privacy protections, Dr. V Kamakoti, a Professor of Computer Science and Engineering at IIT Madras, has proposed a potential solution. In his technical report, Dr. Kamakoti presents a strategy for achieving both

[145]The Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, G.S.R. 780(E).
[146]'About end-to-end encryption' (WhatsApp) < https://faq.whatsapp.com/820124435853543> accessed 25 December 2023.
[147]'Signal Terms & Privacy Policy' (Signal) < https://signal.org/legal/#:~:text=Signal%20utilizes%20state%2Dof%2Dthe,yourself%20and%20the%20intended%20recipients.> accessed 25 December 2023.

end-to-end encryption and traceability of the original sender of a message. He outlined this approach in a filing to the Madras High Court, aiming to balance traceability with the confidentiality guaranteed by encrypted messaging services. However, WhatsApp has since challenged the feasibility of this proposed solution.

Dr. Kamakoti outlines two ways to trace the first originator of a message. The first method is to make the originator visible to everyone who sends or receives the message. The second method encodes the originator's information so only the platform can access it. Kamakoti identifies two key factors: whether a message can be forwarded and identifying the original sender. He proposes that the message creator should decide if a message is "forwardable" or "not forwardable." If it is "forwardable," the originator's information is included with the message. If it is "not forwardable," the person who forwards the message becomes the new originator.

Each receiver will know the originator information

This recommendation suggests including the originator's information with the message itself. For example, if A creates a message and sends it to B and C, both B and C will receive the message along with information about A, the original sender. If B forwards the message to D and E, and C forwards it to F and G, each new recipient will also see the originator's information from A. If the message was about something like a bombing, this method would allow us to trace it back to A, the original sender. Each person who receives the message will see who started it as it continues to be forwarded.

Attaching Encrypted Originator Information with each message

The second idea is similar but focuses on adding the originator's information to each message and encrypting it so only the service provider can read it. In this method, the service provider holds a special key to decrypt the originator's information included in the messages. If needed, the service provider can reveal the originator's details to authorities with a valid court order. The encrypted originator information travels with the message as it gets forwarded.

For example, if A creates a message and sends it to B and C, the originator information from A is encrypted using a public key and sent to B and C along with the message. When B forwards the message to D and E, and C forwards it to F and G, they receive the message with the encrypted originator information of A, which they cannot decrypt because the private key is held by the platform. If the message is found to be threatening or illegal, the Law Enforcement Agency can request it, and WhatsApp can use the private key to decrypt the originator information and provide it to the authorities.

Limitations of the Proposed Alternatives

The proposed solution of Dr. V. Kamakoti has been severely criticised for multiple shortcomings. Senior Advocate Kapil Sibal, WhatsApp's counsel stated, "If you open up the encryption, there is no platform."[148] The main purpose of encryption or encoding a message is compromised by the theory proposed by Dr. V. Kamakoti.

Dr. Manoj Prabhakaran, a computer science professor at IIT Bombay, submitted an expert analysis to the Madras High Court for the Internet Freedom Foundation, arguing that Dr. V. Kamakoti's traceability recommendations for WhatsApp would compromise user privacy and discourage free expression[149]. He argued that Dr. Kamakoti's claims are not practical, even if modified, because a phone number doesn't provide strong identification. Phone numbers can be easily obtained using fake identities or apps like Google Voice, Skype, and Viber. He also warned that adding a digital signature to every message would discourage people from freely expressing themselves.

Furthermore, the theory assumes that only public key cryptography, which was developed in 1976, can be used for both encrypting and decrypting messages. However, as discussed earlier, WhatsApp employs a more advanced Signal Protocol that uses both symmetric and public key cryptography, discarding encryption keys after each use. Furthermore, varied legal experts claimed that the concept of end-to-end encryption is violated the instant anything is sent along with every communication that WhatsApp can trace.

WhatsApp also highlighted several concerns. For instance, they pointed out that non-state actors might use modified versions of the app, potentially leading to innocent individuals being implicated during investigations targeting the app's creators. Modified versions of apps, often downloaded from the internet rather than official app stores, are becoming increasingly common and may include features selected for user convenience. Official developers, including WhatsApp, find it nearly impossible to deactivate these modified versions.

Furthermore, WhatsApp, Facebook Messenger, Skype, and Google, among others, use the Signal Protocol. This protocol is designed to simulate a private whisper, where the recipient knows the content of the message but cannot verify the identity of the sender. Therefore, adding information like a phone number or ID about the message's originator would not be sufficient evidence in a court of law, as it cannot prove that the claimed sender delivered the message.

[148] Aditi Agrawl, 'IIT Madras's Kamakoti Tells MediaNama How WhatsApp Traceability is Possible without Undermining End - to-End' *MediaNama* (8 August 2019) < https://www.medianama.com/2019/08/223-kamakoti-medianama-whatsapp-traceability-interview/> accessed 19 December 2023.

[149] Aditi Agrawal, 'Traceability and end-to-end encryption cannot co-exist on digital messaging platforms: Experts' *Forbes India* (16 March 2021) <https://www.forbesindia.com/article/take-one-big-story-of-the-day/traceability-and-endtoend-encryption-cannot-coexist-on-digital-messaging-platforms-experts/66969/1> accessed 19 December 2023.

Conclusively, the prevailing situation has led to a stalemate between the State and the Intermediaries, bringing the state of affairs back to square one. Technologically, no feasible solution has been identified thus far. In a hypothetical scenario, granting the capability to trace the originator by compromising end-to-end encryption could pose a significant risk to the privacy rights of millions, giving rise to concerns about the establishment of a "surveillance state."

To conclude, the ongoing conflict between the State and the Intermediaries has resulted in a standstill, bringing the situation back to a neutral stance. Technological solutions that balance traceability with privacy have not yet been identified. If a solution were found that compromised end-to-end encryption to enable originator tracing, it could endanger the privacy of millions and raise concerns about creating a "surveillance state."

GROWING DATA PRIVACY CONCERNS VIS-À-VIS THE DIGITAL DATA PROTECTION ACT, OF 2023

The Government of India's effort to demand access to the decryption key has been coupled with the enactment of the Digital Data Protection Act, of 2023[150] (herein referred to as DPDP Act, 2023). While the Data safety of millions of users is at the helm of being accessed by service providers and government agencies, the Government of India, in the backdrop, has enacted these legislations which have significantly raised public concerns.

Digital Personal Data Protection Act, of 2023

DPDP Act, 2023[151] was brought in to set a standard for data protection in times of major uprisings of cyber-attacks, and the introduction of the Act has wavered things southwards. The DPDP Act, of 2023 stipulates the Intermediaries as Data Fiduciaries. Under Section 8(1) of the DPDP Act,[152] there is an obligation on the Data Fiduciary to comply with the provisions of the Act. This unequivocally mandates the Fiduciary to comply with all the provisions of the Act. Amongst others, the Data Fiduciary must protect the Personal Data of the Data Principal.[153]

The DPDP Act, of 2023 enlists numerous provisions as procedural safeguards which are required to be followed by Data Fiduciaries before collecting the Data of users. These procedural Safeguards such as mandatory consent act as a sigh of relief for users of such platforms. However, Section 17(2) of the DPDP Act,[154] declares that the provisions of this Act do not extend to an instrumentality of the State established by the State Government in the interest of the sovereignty, security, integrity, friendly relations with foreign

[150] The Digital Personal Data Protection Act, 2023 (22 of 2023).
[151] ibid.
[152] The Digital Personal Data Protection Act, 2023 (22 of 2023) s 8(1).
[153] The Digital Personal Data Protection Act, 2023 (22 of 2023) s 17(2).
[154] ibid.

states, maintenance of public order, or prevention of incitement to any cognizable offence related to these concerns.

The exclusion of the provisions of the entire act implies that all the procedures and safeguards outlined for obtaining the consent of the Data Principal (User) or provisions for safeguarding Data Protection do not apply to the State Instrumentality when it engages in processing and analysing the data of individuals. The blanket exemption amounts to an excessive and arbitrary power given to the Instrumentality, and it shall certainly lead to a violation of the Right to Privacy of the citizens under Article 21 of the Constitution.[155]

Furthermore, Section 36 of the DPDP Act, 2023[156] enlists, *"The Central Government may, for the purposes of this Act, require the Board and any Data Fiduciary or intermediary to furnish such information as it may call for".* The State machinery, while exercising power under the section can have access to "*any such information as it may call for".* Such exemptions provided under the DPDP Act, 2023[157] have intensified citizens' fears about their data safety.

The government should reconsider multiple stakeholders concerning such blanket exemptions. It is imperative to narrow the broad exemption granted to the government instrumentalities under the DPDP Act, 2023[158] to safeguard the concerns of the citizens. Additionally, the government should reassess and employ various features from the Data Protection Jurisprudence, which has made significant strides in several countries worldwide.

The Model Law of Data Privacy, the General Data Protection Regulation (herein referred to as GDPR)[159] provides limited powers to the Government. The GDPR plays a crucial role in addressing privacy concerns and safeguarding personal information. Its objective is to enhance and harmonize data protection for all European Union citizens and to set standards for how global businesses manage the personal data of their customers.

Article 23 of the GDPR,[160] grants the government the authority to "process personal data for the prevention, investigation, detection, or prosecution of criminal offences, or the execution of criminal penalties, including measures to safeguard and prevent threats to public security, national security, and the protection of individuals' rights and freedoms. However, this power can only be exercised if it "respects the essence of fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society."

[155] The Constitution of India, 1950 art 21.
[156]The Digital Personal Data Protection Act, 2023 (22 of 2023) s 36.
[157] ibid.
[158] The Digital Personal Data Protection Act, 2023 (22 of 2023).
[159]The European General Data Protection Regulation, 2016 (679 of 2016).
[160]The European General Data Protection Regulation, 2016 (679 of 2016) art 23.

Furthermore, in the United Kingdom, the Data Protection Act[161] was enacted in 2018, and although there exists an exemption for the governmental authorities in scenarios concerning national defence and security, the data processed for such purposes is under strict surveillance for its fair use. The Investigatory Powers Act of 2016[162] governs activities such as government agencies collecting personal records in bulk for intelligence and law enforcement purposes.[163]

To protect the privacy and personal rights of its people it further provides the provision for the Secretary of State, or the Home Minister, to issue a warrant for such action, which needs judicial commissioner permission beforehand. It is necessary to determine the necessity and proportionality of such acts and retention of data after the warrant's expiration is limited. In addition, this statute establishes parliamentary supervision.

The Government could also consider the enlisted safeguards for the citizens' data in Justice B.N. Shri Krishna Committee's Report.[164] The report from the proposed committee emphasized user rights and the responsibilities of data fiduciaries, including the State. Central to the report's recommendations is the concept of informed consent for data sharing. Additionally, the report advocated for the principle of privacy by design for data processors and provided definitions for key terms such as consent, data breach, and sensitive data. The report underscores two critical aspects: first, the primary value of any data protection framework should be privacy; and second, such a framework must also consider other important values, including collective interests.

The Report also proposed the establishment of a Data Protection Authority (DPA) which aimed to oversee and enforce the provisions of the Act, ensuring a fair and transparent process. As government agencies will also be data fiduciaries under this Bill, the DPA will be governed by a board that includes six full-time members and a chairperson, all appointed by the Central Government based on recommendations from a selection committee. This committee will comprise the Chief Justice of India or her nominee (a Supreme Court judge), the Cabinet Secretary of India, and a distinguished expert.

Incorporating this proposal into amendments to the DPDP Act of 2023 is crucial. Currently, the Central Government alone has the authority to appoint members of the Data Protection Board. Such amendments are essential to address concerns with the DPDP Act, which, at first glance, aims to uphold the 'Right to Privacy.' However, its current provisions grant substantial and unchecked power to governmental entities.

[161] The Data Protection Act, 2018 (c. 12).
[162] The Investigatory Powers Act, 2016 (c. 25)
[163] ibid pts 6,7 and 8.
[164] Justice B.N. Shri Krishna Committee, *A Free and Fair Digital Economy Protecting Privacy, Empowering Indians* (2018) 10.

Therefore, the DPDP Act, of 2023[165] introduces substantial data protection measures but also contains provisions that might undermine citizens' privacy rights, particularly through broad exemptions for state instrumentalities. Compared to international standards like the GDPR[166] and recommendations from the Justice B.N. Shri Krishna Committee,[167] The Act's approach to granting power to the state and data protection authorities could be improved by incorporating more stringent safeguards and achieving a better balance between privacy and collective interests.

CONCLUSION AND SUGGESTIONS

The current research conclusively addresses various questions regarding the interplay of law and technological advancement globally and particularly within the framework of the Indian regime. Governments across the world are grappling with challenges posed by social media applications. Intermediaries providing end-to-end encryption offer absolute anonymity to users' chat content. Consequently, this technology has been misused by non-state actors, such as terrorists, for planning illicit activities. Government agencies have experienced severe loss of life, property, and resources, due to the utilization of such technology.

In response to this, these agencies have requested information about the originator or content of messages used for communication by various organizations. However, Intermediary Platforms have collectively asserted that they employ unrecoverable encryption methods, making it impossible to identify or provide the government with the content or originator of the messages. Also, attempting to dismantle end-to-end encryption is argued to infringe upon the privacy rights of millions of users, as it puts all users' data at risk of misuse.

Furthermore, the possession of a backdoor encryption key by the government introduces several significant challenges. Primarily, the grant of access to such keys to numerous agencies will inevitably create a high demand for such keys to resolve issues pertaining to the respective agencies which would create a floodgate situation where the security of both encrypted chats and the backdoor encryption will itself be jeopardised. The extensive dissemination of these keys amongst law enforcement personnel poses a risk to confidentiality.

[165]The Digital Personal Data Protection Act, 2023.
[166]The European General Data Protection Regulation, 2016 (679 of 2016).
[167]Justice B.N. Shri Krishna Committee, *A Free and Fair Digital Economy Protecting Privacy, Empowering Indians* (2018) 10.

Secondly, there is a critical concern regarding the volume and quality of data accessible to the government through these keys. The complexity intensifies in situations involving disinformation disseminated across multiple devices, necessitating the government to decrypt every chat through which the misleading message was circulated to identify the source, raising profound privacy and security concerns.

Lastly, data protection by government agencies throughout the globe is a great question to be resolved by the government. In 2023, data of 2,37,000 U.S. government employees was hacked from the government sites.[168] There are other reports which highlight the level of intrusion faced by the government agencies.[169]

In India, the Government and Intermediaries have faced a deadlock concerning the demand of the government to find the originator of the messages. The government's order under Rule 4(2) of IT Rules, 2021[170] mandates the facilitation of the Originator of a message by Social Media Application. However, the Intermediaries have vociferously challenged the legality of Rule 4(2) of IT Rules, 2021[171] and denied the technical possibility of fulfilling the government's order. The same shall lead to the loss of their "Intermediary" Status.

Against the backdrop of this perplexing situation, the Indian government enacted the Digital Data Protection Act of 2023.[172] This legislation incorporates various safeguards, including the requirement of unanimous consent from the Data Principal, and the responsibilities of Data Fiduciaries and Data Processors. However, the government has granted blanket exemptions under Sections 17(2) and 36 of the DPDP Act of 2023[173] to government instrumentalities from the entire procedural safeguards outlined in the legislation. This development has heightened concerns among numerous scholars.

The Government of India should reassess the concerns of multiple stakeholders involved in the process. This could be substantially achieved by amending the provisions of the act in accordance with Data Protection Jurisprudence across the world, such as EUGDPR and the United Kingdom's Data Protection Act and in accordance with the principle of data safety as has been incorporated in the B.N. Shri Krishna Report.

[168] David Shepardson, 'Data of 237,000 US government employees breached' (2023).
[169] David Shepardson, 'Data of 237,000 US government employees breached' (2023).
[170] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E) r 4(2).
[171] The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, G.S.R. 139(E) r 4(2).
[172] The Digital Personal Data Protection Act, 2023 (22 of 2023) s 17(2)(a).
[173] ibid.

Therefore, the Government of India must address the conundrum to ensure that users can utilize apps with maximum safety and confidence. The existing stay between intermediaries and the government impacts not only the rights of businesses to operate in the country but also the privacy and freedom of speech and expression of citizens. The demand for backdoor encryption keys by the government should not come at the expense of compromising the right to privacy and the freedom of speech for millions of individuals.

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DEMOCRACY ON TRIAL: IN REFERENCE TO THE CHANDIGARH MAYOR ELECTION CASE

Muskan Suhag[174]

ABSTRACT

Elections at the Municipal level, as stated by Hon'ble CJI DY Chandrachud, form the microcosm of the larger democratic setup of the nation. However, the recent electoral misconduct by the Presiding officer himself who single-handedly attempted to overturn the outcome of the election shook these very foundations and has raised several questions about preserving the integrity of the electoral process. Thus, this piece first analyses this extraordinary case that warranted the exercise of jurisdiction under Article 142. It then delves into analysing the broader questions of how to prevent electoral misdemeanor by the presiding officers in future by referencing the 2015 Law Commission Report on Electoral Reforms and landmark cases. This analysis aims to underscore the importance of maintaining election integrity at grassroots levels, addressing issues such as presiding officer objectivity and the need for technological solutions in vote counting. The paper concludes with recommendations to enhance democratic processes and public trust in elections in India.

KEYWORDS: Municipal Election, Electoral Misconduct, Presiding Officer, Electoral Reforms, Objectivity

INTRODUCTION

Elections form an integral part of any democracy. Free and Fair elections have been held as an integral part of the Basic structure of the Indian Constitution[175] and maintaining the integrity of the process throughout, at the local-body level especially is foremost because they act as a microcosm of the larger democratic structure in the country.[176] While issues pertaining to election funding, anti-defection, etc. come up now and then, what if the presiding officer of the election himself is guilty of electoral misconduct? Undoubtedly it would strike at the heart of democracy. The instant case brings out this very occurrence. The concerned officer had the audacity to deface ballot papers fully knowing that the whole process was being video

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[175] Indira Gandhi Nehru v Raj Narain (1975) Supp SCC 1; Kihoto Hollohon v. Zachilhu and Ors., AIR 1993 SC 412.

[176] Kuldeep Kumar v U.T. Chandigarh & Ors., (2024) INSC 129, ¶36 (Unreported)

graphed. The Hon'ble Supreme Court ("SC") yet again came forth to the rescue of democratic values, rightly invoking its jurisdiction under Article 142[177] to render complete justice in such an extraordinary case.

This analysis delves deeper into the question of the writ jurisdiction of the Courts over election cases and then possible ways to prevent such serious electoral misconduct in the future. To answer these questions, the 2015 Law Commission Report focusing on Electoral Reforms will be studied along with landmark cases in this regard, with the ultimate aim being to seek ways to strengthen democratic, free and fair elections at the grassroots level. This case provides an opportunity to delve into the more subtle and lesser-highlighted issues in the domain of elections like that of the objectivity of the presiding officer, making the counting process free from malpractices and unwarranted human intervention, and so on.

FACTS IN BRIEF

The instant case came before the Hon'ble SC via Article 136[178] (Special Leave to Appeal) arising from an interim order (dated 31 January 2024) of a Division Bench of the High Court of Punjab & Haryana ("HC"). The petition was in the nature of a writ filed under Article 226,[179] alleging electoral malpractice by the presiding officer of the election for the post of Mayor at Chandigarh Municipal Corporation. In the impugned order, the HC declined to grant a stay or any interim relief to the petitioner. However, on 17 January 2024, the HC had, inter alia, directed Chandigarh Police to ensure that the elections were free and fair and also that the whole process be video recorded. The elections were postponed from the decided date i.e. 18 January, which was disputed. On finding that there was no valid ground for such postponement, the HC ordered the elections to be held on 30 January 2024.

There were two candidates for the post of Mayor. One was Mr Kuldeep Kumar, fielded by an alliance between the Aam Aadmi Party and the Indian National Congress. The other was Manoj Kumar Sarkar, a candidate set up by the Bharatiya Janta Party. There were a total of thirty-six eligible voters for the election. As per the result sheet, out of the 36 votes polled, 12 were for the former candidate, 16 were for the latter candidate and 8 votes were counted as invalid. the dispute arose on the alleged defacing of these 8 votes held to be invalid by the Presiding officer. Thereafter, the appellant approached the SC, alleging serious misconduct by the presiding officer and questioning the sanctity of the Mayoral election.

[177] The Constitution of India. 1950, Art. 142.
[178] The Constitution of India. 1950, Art. 136.
[179] The Constitution of India. 1950, Art. 226.

PRIMARY ISSUE

The primary issue before the SC was whether the presiding officer was guilty of electoral misconduct by deliberately defacing votes which were in favour of the former candidate i.e. Mr. Kuldeep Kumar, to make the latter candidate win.

ARGUMENTS

1.1. PETITIONER

Based on the video recording of the election, the main argument put forth was that the presiding officer deliberately defaced all those 8 ballot papers with ink which were held to be invalid by him. This was done to make the other candidate win as all these 8 votes were in favour of the former candidate (the process being based on the first past the post system)

1.2. RESPONDENT

The presiding officer accepted that he did mark those 8 papers with ink, but it was because the papers were already invalid. Thus, while fulfilling his duty of signing all the votes under regulation 6(11) of the Chandigarh Municipal Corporation (Procedure and Conduct of Business) Regulations 1996,[180] he only marked the already defaced votes to highlight that they were invalid.

Further, the respondents argued that since the latter candidate had already resigned from the post during the pendency of these proceedings, fresh elections must be conducted under section 38(3) of the Punjab Municipal Corporation Act 1976[181] [extended to Chandigarh via the Punjab Municipal Corporation Law (Extension to Chandigarh) Act 1994].[182]

THE JUDGEMENT

The SC perused ~~al of~~ the video recording of the election, especially the counting stage where the misconduct was alleged. ~~,~~ It was thus ~~the SC~~ found that the presiding officer was guilty of electoral misconduct and also under section 340 of the Cr.P.C, 1860183 (for making a statement which, prima facie, appears to be false to his knowledge in the course of judicial proceedings).184 While notice was to be issued for proceedings under section 340,185 the SC arrived at the former judgement based on several factors.

[180] The Chandigarh Municipal Corporation (Procedure and Conduct of Business) Regulations, 1996, §6(11).
[181] The Punjab Municipal Corporation Act, 1976, §38(3).
[182] The Punjab Municipal Corporation Law (Extension to Chandigarh) Act 1994.
[183] The Code of Criminal Procedure, 1860, §340.
[184] *Supra* note 2, ¶40.
[185] *Supra* note 9, §340

First and foremost, this was because none of the three conditions laid out in regulation 6(10) of the Chandigarh Municipal Corporation (Procedure and Conduct of Business) Regulations 1996[186] for invalidation of votes cast was fulfilled in the instant case. These conditions are:

1. where a member votes for more candidates than one (only the appellant was voted for clearly in these ballot papers);
2. where the member places any mark on the paper by which he may be identified (no such marks existed on the papers) and
3. if the mark indicating the vote is placed on the ballot paper in such a manner as to make it doubtful for which candidate the vote has been cast[187] (even after the mark added by the Presiding officer is considered, it is not at all doubtful for whom the vote was cast i.e. the appellant).

On careful consideration of the ballot papers along with the recorded video, the SC observed that none of those invalidated votes would have been so if the presiding officer had not marked them with ink himself.[188] Notably, all the votes marked were indeed for the appellant.[189] Moreover, the SC noted that regulation 6(1) requires that the meeting's presiding officer should be a councillor who is not a candidate for election.[190] The very purpose of such a provision is to ensure objectivity in his conduct. Thus, the presiding officer herein failed his duties as a presiding authority and is liable for serious electoral misconduct by deliberately favouring one candidate over the other.

Also, after casting the votes, the ballot papers are folded vertically to ensure that if the ink on the rubber stamp appears on the corresponding half of the ballot it will appear alongside the name of the candidate for whom the vote has been cast.[191] Thus, leaving no scope for invalidation or ambiguity of choice in the votes.

Further, the SC refused to reconduct the elections for the post, finding it inappropriate to set aside the entire election proceeding only due to the misdemeanour of the presiding officer during counting.[192] Such re-election would further undermine the democratic principles as it was not defects in the choice of the voters which created a need for re-election but only the conduct of the presiding officer. The choice of the voters was crystal clear in even these defaced votes. Thus, the court went on to add the so-called invalid votes to the votes of the appellant, making the total tally twenty votes and thereby declaring him the rightfully elected mayor of Chandigarh.

[186] The Chandigarh Municipal Corporation (Procedure and Conduct of Business) Regulations, 1996, §6(10).
[187] *Supra* note 2, ¶ 19, 29.
[188] *Id*., ¶27.
[189] *Id.*, ¶ 26.
[190] The Chandigarh Municipal Corporation (Procedure and Conduct of Business) Regulations, 1996, §6(1).
[191] *Supra* note 2, ¶32.
[192] *Id.*, ¶ 35.

Lastly, the SC invoked its authority under Article 142 of the Constitution[193] as the instant case is not any ordinary case of election malpractice. Rather, this is a case of brazen misdemeanour by the presiding officer himself, making the situation extraordinary enough to warrant such jurisdiction to render complete justice.

ANALYSIS

This case came as a significant opportunity for the SC to unequivocally signify the importance of maintaining the integrity of elections at the grassroots levels i.e. at the Panchayat and Municipality levels. There can be no dispute regarding the reasons for the decision rendered by the SC in this case. The facts and circumstances considered clearly showcased the utter dereliction of duty and rather serious electoral misconduct by the presiding officer. The SC was also correct in refusing to hold fresh elections as that would have arbitrarily negated an otherwise validly executed election proceedings, had the presiding officer not maliciously intervened.

While the SC successfully fulfilled its duty in safeguarding the democratic principles yet again, two major aspects can be analysed in the instant case. First, where did the Judiciary derive its writ jurisdiction in the presence of explicit bars in the Constitution? Second, how was such a brazen misdemeanour effected and how can it be prevented in future?

REGARDING JURISDICTION

While Article 329(b) of the Constitution[194] bars the writ jurisdiction of the court on challenges to the elections of the Parliament and the State Legislatures, articles 243O[195] and 243ZG[196] bars such jurisdiction for elections to any panchayat and municipality as well. However, it has already been held that remedy under article 226[197] cannot be taken away by any law. Judicial Review is part of the Basic Structure of the Constitution which can neither be limited by any statute nor any constitutional amendment.[198] Thus, articles 243O[199] and 243ZG[200] are to be subjected to articles 226[201] and 227.[202] However, such a remedy is at the discretion of a High Court.[203] Further, the bar contained in articles 243O[204] and 243ZG[205] are on the ordinary

[193] The Constitution of India. 1950, Art. 142.
[194] The Constitution of India. 1950, Art. 329(b).
[195] The Constitution of India. 1950, Art. 243O.
[196] The Constitution of India. 1950, Art. 243ZG.
[197] The Constitution of India. 1950, Art. 226.
[198] Lal Chand v State of Haryana, AIR 1999 P&H 1 (FB).
[199] *Supra* note 21.
[200] *Supra* note 22.
[201] *Supra* note 23.
[202] The Constitution of India. 1950, Art. 227.
[203] Boddula Krishnaish v State Election Commissioner, (1996) 3 SCC 416; Mahaveer Singh v Raghunath, AIR 1983 NOC 220 (Raj).
[204] *Supra* note 21.
[205] *Supra* note 22.

jurisdiction of the Courts and not the extraordinary jurisdictions under articles 226[206] and 136.[207] Also, while article 329[208] was an integral component of our Constitution originally, article 243[209] was brought by Constitutional amendments even after the position of Judicial Review as part of the Basic Structure was established.[210] Thus the former cannot override the latter.

Further, the SC showed disappointment in the HC owing to a failure to pass an interim order after the process was video graphed and presented to the Division Bench of the HC.[211] The SC seems to be correct in expressing such dissatisfaction. As held by the SC, any irregularity committed during the course of the election can be challenged only after the election process is over.[212] In the instant case, the election process was indeed over and the BJP candidate was declared the winner by the Presiding Officer. The video recording of the entire process was also presented to the HC. Even then, the HC failed to pass any interim orders. The HC could have, rather should have passed an appropriate order at this stage to protect electoral sanctity. Moreover, the SC has modified its earlier stance in the *Election Commission of India v Ashok Kumar* case,[213] holding that nothing bars the Court from smoothening an ongoing election proceeding to preserve a vital piece of evidence which might be destroyed or rendered irretrievable by the time results are declared. In its earlier orders, undoubtedly the HC rightly showcased the implementation of this principle (while also observing the self-imposed limitation of not delaying the election as a result of its orders)[214] by only passing orders to smoothen the election process for e.g., directing the Chandigarh Police to ensure the security of the Councillors and video graphing the entire process, etc. However, it later failed to fulfil its implicit duty to timely pass orders after the process was completed according to its directions, considering the gravity of the case.

Moreover, the SC was apt in invoking its jurisdiction under Article 142[215] owing to the gravity and the rareness of the matter at hand. However, in what sense or measure exactly it deployed this jurisdiction remains unclear in the judgment.

[206] *Supra* note 23.
[207] The Constitution of India. 1950, Art. 136.
[208] The Constitution of India. 1950, Art. 329.
[209] The Constitution of India. 1950, Art. 243.
[210] M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 528 (Lexis Nexis 2022)
[211] *Supra* note 2, ¶14.
[212] Ponnuswami NP V Returning Officer, AIR 1952 SC 64
[213] (2000) 8 SCC 216
[214] Lakshmi Charan Sen v AKM Hassan Uzzaman, AIR 1985 SC 1233
[215] The Constitution of India. 1950, Art. 142.

1.3. PREVENTING ELECTORAL MISDEMEANOUR

Even though this case ends with a happy ending, it calls into question the sanctity of all other, non-video-graphed election processes. Who knows what happens behind the curtains of counting? Most cases probably do not even come to the court, let alone attain such limelight. Further, when even after fully knowing that his acts are being video-graphed, the Presiding Officer could have the audacity of defacing the votes, only video graphing all elections might as well not serve the purpose. It is also not the case that such officers are unaware of the penalties in case they are caught. In accordance with section 136 of the Representation of People Act, any officer or clerk on election duty who commits an offence is punishable by two years in prison, a fine, or both, and six months in prison or a fine for all others.[216] Thus, it is also not the case that there is no deterrence through penalisation under the law. It therefore becomes crucial to look into the loopholes which leave room for such electoral misconduct and then endeavour to prevent such instances; or else public trust in democratic ideals and the justice delivery system will be lost, undermining the basic foundations of our Constitution itself. Thus, the real question posed herein is how to ensure that the sanctity of elections, down to the local-body levels is preserved.

1.3.1. Maintaining Objectivity of the Presiding Officer

The first question is about the objectivity of the Presiding officer. Similar to apprehensions of biases by the Speaker in dealing with Parliamentary Disqualification cases[217] who is ultimately a member of a particular political party; a councillor, even though not standing for elections himself, might not be able to leave his political colour and bias aside while donning the hat of the Presiding officer. Thus, it is important to check for any conflict of interests or biases while choosing a presiding officer or else, bringing in a qualified individual who has no interest in the election's outcome as the presiding officer. It is crucial to ensure such objectivity or else the whole electoral process loses its essence, the instant case being a classic example.

Also, it is noteworthy that Union Territories are governed by the Central Government and any directive issued by the Central government or the President is binding on the administration of the Union Territory.[218] Therefore, given this large overarching power, it must be additionally considered that the elections of U.T.s are not unduly influenced by the political parties helming the Centre. This concern is raised here as in the instant case, the candidate which was made to win by the presiding officer belonged to the political party ruling at the Centre. Though there exists no such proof, this is just to draw attention to the fact that to maintain true objectivity and integrity in the election process, any sort of political influence must be avoided.

[216] The Representation of the People Act, 1951, §136.
[217] Editorial, *Over the top: On Mahua Moitra and panel's disqualification recommendation,* THE HINDU, November 11, 2023.
[218] Chandigarh Administration v Surinder Kumar (2004) 1 SCC 530

1.3.2. **Exploring the applicability of the Recommendations of the 255th Law Commission Report**[219]

The Law Commission Report of 2015 delved into several important aspects of Electoral Reforms. Three of the major aspects discussed in the Report relevant to the current context are regarding adoption of the system of Proportional Representation ("PR"), the Establishment of Election Benches and using a totaliser for the counting of votes.

1.3.2.1.Adopting the system of Proportional Representation:

The Report recognises the faults in the existing First Past the Post ("FPTP") system and recommends the adoption of a hybrid approach i.e. a mix of both the FPTP and PR systems and combining elements of both direct and indirect elections.[220] The adoption of the PR system might prove helpful, especially in Municipal elections like that of Deputy Mayor, Senior Deputy Mayor and Mayor. This is because while the PR system might be ineffective in votes of the larger populace and make the process complicated for diverse voters, its usage in such small-scale elections like Mayoral Elections would firstly, make it a bit more difficult for officials to tamper votes with as much ease as they can in the FPTP system. This is because when a list of candidates with each voter filling out their preferences is involved, quickly marking ballots with ink to invalidate them would be difficult. Second, the three elections would not have to be conducted separately. The three posts may be filled based on the preference rankings of the voters in one go, that is, the candidate with the most first preferences can be declared the Mayor, the second in line the Senior Deputy Mayor and the next the Deputy Mayor. Thirdly, no votes would be wasted in this process and ultimately the views of all the voters would reflect.

1.3.2.2.Establishing dedicated election benches and expediting election cases:

The report lists several amendments to the Representation of the People Act[221] to expedite the process of disposal of election cases, by giving way to the establishment of special election benches across High Courts, setting time limits for passing orders, minimising adjournments etc..[222] The SC has already expressed its desire to set up such benches in *Mohd. Akbar vs. Ashok Sahu & Ors*[223] owing to the relatively short tenure of the members of the Parliament and the State Legislative Assemblies. One of the main instructive examples is that of the UK, where election disputes are resolved before an election court (having the same powers as that of a High Court), which comprises two judges of the Queen's Bench Division, who are on a rota for the trial of

[219] Law Commission of India, *Electoral Reforms*, Report No.255 (2015).
[220] *Id.*, ¶ 4.19.1
[221] *Supra* note 35.
[222] *Supra* note 38, Ch. X, Election Petitions, ¶ 18.9.
[223] Civ. App. No. 2538-40 of 2015, arising out of SLP (Civ) Nos. 2487-2489 of 2015.

parliamentary election petitions.[224] Thus, the aim is to expedite the disposal of election cases so that public trust in such democratic processes is maintained and the officials in charge along with the candidates are deterred against dereliction of duty and electoral misconduct.

1.3.2.3.Using a totaliser or similar technologies for counting:

While a totaliser may be employed for large-scale elections and where EVMs are involved, similar technologies may be employed even for small-scale elections like Mayoral elections. This would remove the possibility of tampering with votes at the behest of the officials in charge and make the process more transparent. It would also increase the secrecy of votes during counting, thus preventing the disclosure of voting patterns and countering fears of intimidation and victimisation.[225]

CONCLUSION

By and large, this case was indeed exceptional. Ordinarily, questions regarding elections are raised over the financing of elections, anti-defection, and maybe disqualifications; however, cases of mishandling by the presiding officer of the election itself are rare in the SC, thus rightly warranting jurisdiction under Article 142[226] for delivering complete justice.

While the question of writ jurisdiction for election cases has sparked debate in the past, eventually, the Courts have upheld such jurisdiction down to the level of local-body elections as being part of the power of Judicial Review. Next, while free and fair elections have been held to be part of the Basic structure, effecting it in actuality is difficult, considering myriad practical factors and political influences, biases, etc. Thus, regarding questions of maintaining the sanctity of the electoral processes in the Country, landmark precedents and the 255th Report of the Law Commission, which proposes the adoption of a hybrid system of elections, combining elements of both direct and indirect elections, expediting the disposal of election petitions via the establishment of dedicated election benches across all High Courts, usage of totalisers to remove human intervention in the counting of votes cast via EVM machines, etc. are noteworthy recommendations.

Overall, until and unless people recognise the importance of the sanctity of the electoral process, down to the local body elections, no fine would be enough and achieving long-term results would be difficult. Thus, it is

[224] *Supra* note 38, ¶10.33.
[225] *Supra* note ¶18.12.1.
[226] *Supra* note 41.

important to inculcate a sense of importance with regard to elections even at the lowest rung of the hierarchy for the democratic ideals to be effected in letter and spirit. To conclude by reiterating the SC,

'the little, large Indian shall not be hijacked from the course of free and fair elections by mob muscle methods, or subtle perversion of discretion by men "dressed in little, brief authority". For "be you ever so high, the law is above you".'[227]

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[227] Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405.

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DIGITAL SURVEILLANCE AND CIVIL RIGHTS: ASSESSING THE IMPACT ON PRIVACY

Dr. Rumi Dhar[228]
Ms. Sonia Nath[229]

ABSTRACT

In an age characterized by swift technological progress and rapidly increasing security challenges, the surveillance landscape in India has experienced substantial transformation. The importance of safeguarding national security has led to the implementation of various surveillance laws; however, there is no specific legislation to govern surveillance in India, but the Information Technology Act of 2000 and the Indian Telegraph Act of 1885 are used to regulate surveillance. Laws pertaining to surveillance have been a subject of ongoing discussion, especially concerning the delicate balance between national security imperative and preserving the rights to privacy of individuals. The issue has become even more pressing in the digital age, where various government agencies and private companies collect and store enormous volumes of personal data. Addressing these concerns, India has recently passed the Digital Personal Data Protection Act 2023, which seeks to find an equilibrium between national security considerations and the safeguarding of individual privacy rights. Surveillance is a tool for maintaining the nation's sovereignty, unity, and integrity. Now, the question arises whether surveillance by the government violates the individual's right to privacy. The objective of the paper is to conduct a thorough analysis of the current laws and regulations pertaining to surveillance in India, evaluating their implications for the rights and liberties of individuals.

KEYWORDS: *Right to Privacy, Digital Surveillance, Data Protection, and Digital Personal Data Protection Act 2023.*

[228] Assistant Professor, Department of Law, Nagaland University (a Central University) Nagaland, India, Email: rumidhar@nagalanduniversity.ac.in.
[229] Research Scholar, Department of Law, Nagaland University (a Central University) Nagaland, India, Email: sonia_rs2022@nagalanduniversity.ac.in.

INTRODUCTION

In today's first-running technological world, the internet has become essential to our life. Every individual in society needs some space in the digital world[230]. The internet has not only made people addicted to digital life, but they are also getting more vulnerable to cybercrime. Technology advancements have fastened our communication, transportation, and even the method of executing trans-border crimes, such as cybercrimes[231]. Cybercriminals or hackers who know how to misuse cyberspace are not only playing with the privacy of individuals but also misusing cyberspace, creating a risk to national security. Over the recent years, India has experienced notable technological advancements that have led to improved surveillance capabilities. However, the growth of these capabilities has led to growing concerns about the impact on individual privacy rights. Surveillance is a critical tool for national security agencies to control criminal activities and terrorist threats[232]. Though these measures are essential for maintaining national security, they also raise significant concerns about the potential abuse of surveillance powers and the erosion of individual privacy rights.

In tackling these concerns, it is crucial for India to find a sophisticated equilibrium between national security and the safeguarding of privacy rights. This can be accomplished through robust oversight and accountability measures, ensuring that surveillance powers are wielded in a lawful and proportionate manner. Balancing the need for national security with the protection of individual liberties is a complex and challenging task for lawmakers in India. The Indian government has enacted numerous laws and policies to address diverse threats to national security, encompassing terrorism, cyber-attacks, and organized crime. These laws have granted the government and law enforcement agencies broad surveillance powers, including the interception and monitoring of electronic communications, surveillance of public spaces, and the collection of personal data[233].

The enactment of the Digital Personal Data Protection Act 2023 marks a substantial stride in securing the privacy of Indian citizens within the digital domain. This Act acknowledges the significance of safeguarding personal data and sets forth a structure for collecting, storing, processing, and sharing such information. It outlines individuals' rights regarding their personal data and imposes strict penalties for any unauthorized access, utilization or disclosure of such information.

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[230] Tehilla Shwartz Altshuler, "Privacy in a digital world", Join TechCrunch+, Sept 27th, 2019, (https://techcrunch.com/2019/09/26/privacy-queen-of-human-rights-in-a-digital-world/) (accessed June 5th, 2024).

[231] UTICA University, "Ten Ways Evolving Technology Affects Cybersecurity", April 30, 2020, (https://programs.online.utica.edu/resources/article/ten-ways-evolving-technology-affects-cybersecurity) (accessed June 8, 2024).

[232] Maria Xynou, "Policy Recommendations for Surveillance Law in India and an Analysis of Legal Provisions on Surveillance in India and the Necessary & Proportionate Principles", (https://cis-india.org/internet-governance/blog/policy-recommendations-for-surveillance-law-in-india-and-analysis-of-legal-provisions-on-surveillance-in-india-and-the-necessary-and-proportionate-principles.pdf) (accessed June 12, 2024).

[233] Kamesh Shekar and Shefali Mehta, "The State of Surveillance in India: National Security at the Cost of Privacy", Observer Research Foundation (ORF) Feb 22, 2022, (https://www.orfonline.org/expert-speak/the-state-of-surveillance-in-india), (accessed June 07, 2024).

At the same time, Section 17(2)(a)[234] of the Act recognizes the legitimate need of the government to conduct surveillance for national security purposes. The law permits the legal interception of identifiable details under certain circumstances, including safeguarding India's security, fostering amicable relations with other nations, maintaining public order, and preventing the instigation of any recognizable offences. This reflects a considerate approach to reconciling national security considerations with individual privacy rights, recognizing the necessity for surveillance while imposing stringent restrictions and safeguards[235].

However, the Act is not without its critics. Some argue that the provisions for lawful interception are too broad and vaguely defined, potentially allowing for excessive government intrusion into individuals' privacy[236]. Furthermore, there are apprehensions regarding the effectiveness of enforcement mechanisms and the possibility of the misuse of authority in the gathering and utilizing of personal data for surveillance purposes. The paper explores the complex relationship between digital surveillance and civil rights, focusing on the impact of surveillance practices on privacy. Through a detailed analysis of legal framework, case studies and theoretical perspectives, this paper seeks to understand how digital surveillance is reshaping the landscape of civil liberties and exploring potential pathways for balancing security needs with the protection of individual rights.

RIGHT TO PRIVACY IN THE DIGITAL AGE

The contemporary era is witnessing a continual evolution in the concept of the right to privacy. The swift progress of technology and the growing reliance on digital platforms for communication and information sharing have elevated privacy rights to a significant and concerning issue. Additionally, with the advancement of technology, our data is getting more exposed to the public domain. As a result, our data often gets compromised without consent. Development requires new thinking to redefine the traditional definition of the right to privacy. The post-Menka Gandhi[237] era has witnessed fascinating developments in Constitutional jurisprudence. The Supreme Court has extended the width of Article 21 by giving an extensive definition of life and liberty.

The right to privacy is a fundamental human right recognized by international human rights instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

[234] The Digital Personal Data Protection Act, 2023, s 17(2) The provisions of this Act shall not apply in respect of the processing of personal data-(a) by such instrumentality of the State as the Central Government may notify, in the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States, maintenance of public order or preventing incitement to any cognizable offences relating to any of these, and the processing by the Central Government of any personal data that such instrumentality may furnish to it.

[235] Nishith Desai Associates, "India's Digital Personal Data Protection Act, 2023: History in the Making", Aug 7, 2023 (https://www.nishithdesai.com/NewsDetails/10703), (accessed June 5, 2024)

[236] Goyal Piyush, "7 major shortcomings of Digital Persona Data Protection Act, 2023", Medium Aug 17, 2023, (https://medium.com/@piyushgoyal2021/7-major-shortcomings-of-digital-personal-data-protection-act-2023-7ec16368332e), (accessed June 12, 2024).

[237] Maneka Gandhi v Union of India- AIR 198 SC 597; (1978) 1SCC 248.

Article 21[238] of the Indian Constitution ensures that "*No person shall be deprived of his life and personal liberty except according to procedure established by law*"[239]. Here, life does not mean only human life but a dignified life, including all aspects of complete and worthy living. The literal meaning of privacy is "*the of being alone, or the right to keep one's personal matters and relationship secret"*.[240] In today's world, privacy is not only confined to the physical but also to the virtual.

Article 12 of the Universal Declaration of Human Rights[241] ensures that

> "***No one shall be subjected to arbitrator interference with his privacy, family home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such inference or attacks***"[242].

Further, Article 17 of the International Covenant on Civil and Political Rights[243] guarantees

> ***"(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks***"[244].

The right to privacy encompasses the freedom from unwarranted government surveillance of any individual. In December 2018, the Ministry of Home Affairs (Cyber and Information Security Division) circulated a Gazette notification delegating its power to ten (10) organizations to monitor the inception of any messages, decrypting of any information generated, transmitted from a source, received, or stored in any computer resource[245]. The right to life has encountered new dimensions and complexities in the digital age. The rapid progress of technology and the widespread adoption of digital platforms have broadened the scope of the right to life, encompassing physical well-being and safeguarding an individual's personal identity, dignity, and data privacy in the digital domain.

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[238] The Constitution of India, art 21- Protection of life and personal liberty, Bakshi P M, *The Constitution of India* 74 (Universal Publication, 17th Edition 2021).
[239] Ibid
[240] Cambridge Dictionary, (https://dictionary.canbridge.org/dictionary/english/privacy)
[241] Universal Declaration of Human Rights, UN General Assembly Dec 10, 1948, (https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf).
[242] Universal Declaration of Human Rights 1948, art 12, (https://www.un.org/en/about-us/universal-declaration-of-human-rights)
[243] International Covenant on Civil and Political Rights, General Assembly Resolution 2200A(XXI), Dec 16, 1966, (https://www.ohchr.org/sites/default/files/ccpr.pdf).
[244] International Covenant on Civil and Political Rights 1966, art 17 (https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights)
[245] Ministry of Home Affairs (Cyber and Information Security Division) Gazette notification number S.O 6227(E.) Dec 20th, 2018, (https://www.humanrightsinitiative.org/download/MHA-SO6227-Dec18.pdf), (accessed June 3, 2024).

Growth of Right to Privacy in India

In India, the right to life is enshrined in Article 21 of the Constitution, which guarantees the right to life and personal liberty. Over the years, the Indian judiciary has broadly interpreted this right, encompassing various aspects of an individual's life, including the right to privacy and data protection[246]. The development of the right to privacy can be acknowledged through case laws:

1954 ⇨ ***M P Sharma v Satish Chandra***[247]

The Supreme Court, in discussing the search and seizure of a document, ruled that the right to privacy, as per the Indian Constitution, does not qualify as a fundamental right.

1963 ⇨ ***Kharak Singh v State of UP and Ors.*** [248]

The Supreme Court determined that the right to privacy is integral to the right to life and personal liberty. The surveillance by police was challenged and led to the Supreme Court expanding the right to life to encompass a new aspect, namely personal freedom.

1963 ⇨ ***Govind v State of Madhya Pradesh and others***[249]

For the first time, the right to privacy under personal liberty was recognized. The court held the existence of privacy under Article 21 of the Indian Constitution.

1973 ⇨ ***R M Malkani v State of Maharashtra***[250]

The Supreme Court observed that it would not allow the protection of citizens to be threatened by allowing law enforcement to use unlawful or irregular methods.

1978 ⇨ ***Smt Menka Gandhi v Union of India & Anr***[251]

The Supreme Court widened the ambit of Article 21 and held that personal liberty covers a variety of rights, and some have the status of fundamental rights under Article 19

[246] Thaorey Payel, "Legal Introspection Towards the Development of Right to Privacy as Fundamental Right in India", Indonesian Law Review, Dec 31, 2021, Volume 11 No. 3, (https://scholarhub.ui.ac.id/cgi/viewcontent.cgi?article=1238&context=ilrev) (accessed June 16, 2024).
[247] M P Sharma v Satish Chandra AIR 1954 SCR 1077.
[248] Kharak Singh v State of UP and Ors AIR 1963 SC 1295.
[249] Govind v State of Madhya Pradesh and others 1975(2) SSC 14.
[250] R M Malkani v State of Maharashtra AIR 1973 SC 157.
[251] Smt Menka Gandhi v Union of India & Anr AIR 1978 SC 597.

1995 ⇨ ***R Rajgopal v State of TN***[252]

The Apex Court held that no one could publish anything without consent. If he does so, he would violate that person's right to privacy and be liable for damages (Right to let alone).

1999 ⇨ ***Mr. X v Hospital "Z"***[253]

The Court held that when there is any conflict between two fundamental rights, including the right to privacy. Then, the right to further public morality or the public interest will prevail.

2005 ⇨ ***District Registrar and Collector v Canara Bank***[254]

It was held that it is right to let alone, and every citizen has the right to safeguard his privacy.

2010 ⇨ ***Naz Foundation v Govt of NCT of Delhi (2009[255])***

The Delhi High Court in the judgment regarding consensual homosexuality under Section 377 of the Indian Penal Code, the Delhi High Court ruled that Section 377 contravenes Articles 14, 15, and 21 of the Indian Constitution. Sec 377 causes unreasonable discrimination, describing homosexuals as a class and criminalizing their consensual sex. No person can enjoy life without dignity and privacy.

2010 ⇨ ***Selvi and Others v State of Karnataka[256]***

The Supreme Court sheds light on mental privacy in and acknowledges the difference between physical and mental privacy. The compulsory administration of neuroscientific investigative techniques violates the rights of the accused.

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2018 ⇨ ***Navjet Singh Johar v Union of India (2018)***[257]

This case revisited the issue of section 377 of the IPC, which criminalized homosexual acts. The Supreme Court, in a historic judgement, decriminalized consensual homosexual acts between adults, affirming the right to privacy, dignity, and equality. The Court emphasized that sexual orientation is an essential attribute of privacy and that the state has no business interfering in the intimate affairs of individuals.

[252] R Rajgopal v State of TN 1995 SC 264.
[253] Mr. X v Hospital "Z AIR 1999 SC 495.
[254] District Registrar and Collector v Canara Bank AIR 2005 SC 186.
[255] Naz Foundation v Govt of NCT of Delhi 2010 CRI L J 94
[256] Selvi and Others v State of Karnataka (2010) 7 SCC 263.
[257] Navjet Singh Johar v Union of India AIR 2018 SC 4321.

Joseph Sine v Union of India (2018[258])

The Supreme Court stuck down section 497 of IPC, which criminalized adultery. The court ruled that the law was archaic and violated the right to privacy and equality.

The evolution of the right to privacy in India reflects the judiciary's responses to the challenges posed by technological advancements, societal changes, and the need to protect individual freedoms. From its initial reluctance to recognize privacy as a fundamental right, the Indian judiciary has gradually expanded the scope of privacy, culminating in its recognition as a constitutionally guaranteed right.

Recent Development in the Right to Privacy

India has witnessed significant progress in technology and surveillance capabilities in recent years. Nevertheless, expanding these capabilities has raised increasing concerns regarding its implications on individual privacy rights. In the case of ***Justice Puttaswamy (Retd) v Union of India and Ors,***[259] the Supreme Court established a more reformed and well-established law regarding privacy. It has reaffirmed the right to privacy as a fundamental right, an essential aspect of Article 21 of the Constitution of India.

The emergence of the digital age has introduced new complexities in the form of cybercrime, data breaches, and violations of online privacy rights. In response, the Indian government has taken significant measures to tackle these challenges and safeguard the right to life in the digital realm. The Supreme Court of India 2017 affirmed the right to privacy as a fundamental right, setting the stage for the introduction of robust data protection laws like the Digital Personal Data Protection Act of 2023. This legislation has played a pivotal role in reshaping the regulatory landscape governing surveillance practices, serving as a crucial mechanism to balance the competing interests of national security and privacy rights. Its primary aim is to regulate the processing of personal data and empower individuals with increased control over their digital information. Later, the Supreme Court, in its recent judgement in the ***Anuradha Basin v Union of India,***[260] held that internet access had become an integral part of everyday life; therefore, freedom of speech and online expression are fundamental rights granted under Part III of the Indian Constitution.

[258] Joseph Shine v Union of India AIR 2018 SC 4898
[259] Justice Puttaswamy (Retd) v Union of India and Ors AIR 2017 SC 4161.
[260] Anuradha Basin v Union of India 2019 SCC Online SC 1725.

Data Privacy

Data privacy is a fundamental human right that is essential to the functioning of a free and democratic society. It encompasses the right of individuals to control their personal information and to have it protected from unauthorized access, use, and disclosure. Personal data is constantly being collected and processed by a wide range of entities. One of the main challenges in the realm of data privacy is the ever-increasing amount of data being collected. With the proliferation of digital devices and the rise of the Internet of Things, we are constantly generating and sharing data without even realizing it. This includes our online activities, social media interactions, location data, and more. As a result, there is a growing concern about the potential for this data to be misused, whether it is through identity theft, unauthorized surveillance, or targeted advertising.

There has been a growing push for stronger data privacy laws and regulations in response to these challenges. In the European Union, the ***General Data Protection Regulation***[261] (GDPR) has set a benchmark for data protection regulations, providing individuals with more control over their personal data and placing greater obligations on businesses to protect this information. Similarly, the ***California Consumer Privacy Act***[262] (CCPA) In the United States, new requirements have been introduced for businesses to disclose their data collection practices and give individuals the right to opt out of the sale of their personal information. The ***Personal Information Protection and Electronic Documents Act***[263] of Canada applies to businesses engaged in commercial activity across provinces, and the ***Digital Personal Data Protection Act 2023***, comprehensive data protection legislation of India, aims to regulate the processing of personal data by businesses and enhance the rights of individuals.

Right to Be Forgotten

The right to be forgotten, also known as the right to erasure[264], is a concept that has gained significant attention with the implementation of the ***General Data Protection Regulation (GDPR)***[265] by the European Union (EU) in 2018. This entitlement enables individuals to demand the deletion of their personal data from online platforms and databases unless there is a valid justification for its retention. This right is intended to empower individuals with authority over their personal information and safeguard their privacy in the era of digital technology. In the age of digitization, the right to be forgotten undertakes a crucial role as personal

[261] EU General Data Protection Regulation 201/679 of the OJL 119, (https://gdpr-info.eu/).

[262] California Consumer Privacy Act of 2018, California Civil Code [1798.100-1798.199.100], https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?division=3.&part=4.&lawCode=CIV&title=1.81.5

[263] The Personal Information Protection and Electronic Documents Act, S.C 2000, c 5, Assented to 2000-04-13 (https://laws-lois.justice.gc.ca/eng/acts/p-8.6/).

[264] GDPR Right to be Forgotten- The right to be forgotten derives from the case Google Spain SL, Google Inc v Agencia Espanola de Proteccion de Datos, Mario Costeja Gonzalez (C-131/12) (2014). For the first time, the right to be forgotten is codified and to be found in the General Data Protection Regulation (GDPR) in addition to the right to erasure. (https://gdpr-info.eu/issues/right-to-be-forgotten/).

[265] The European Union General Data Protection Regulation (EU) 2016/679, 27 April 2016, OJL 119/1 (EU), (https://gdpr-info.eu/).

data undergoes continuous collection, sharing, and utilization for various purposes. This right empowers individuals to safeguard their privacy and ensure that their personal information is not used in ways without their consent. Although the right to be forgotten is not explicitly defined in Indian law, it pertains to the capacity to eliminate particular information from public visibility, the internet, or any other public platform. This right, also known as the right to erasure, was brought forth by the EU GDPR.

The right to be forgotten is not an absolute right, there are limitations to this right under the GDPR. Article 17(1)[266] of the EU GDPR deals with the provisions relating to the right to erasure (right to be forgotten). Grounds under which the right to erasure can be exercised are:

1. Personal data becomes obsolete when it is no longer required for the original purpose for which it was collected or processed.

2. Revoking consent for processing, with no alternative legal grounds for data processing.

3. There are no compelling and justifiable reasons to persist with the processing.

4. Oppose the processing when personal data is being used for direct marketing.

5. Personal data has been handled unlawfully.

6. Erasing personal data is necessary to adhere to a legal obligation.

7. Personal data has been gathered concerning the provision of information society services.

While the legal framework in India does not formally acknowledge the right to be forgotten, but the judgements from different High Courts have recognized and affirmed this right in the absence of specific legislation in their respective judgements, such as in the case of ***Google India Pvt Ltd v Vishaka Industries and Ors,***[267] the Delhi High Court directed Google to de-index certain web pages that contain defamatory

[266] EU General Data Protection Regulation 201/679, art 17 - Right to erasure (right to be forgotten)- 1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:
(a) the personal data are no longer necessary in relation to the purpose for which they were collected or otherwise processed;
(b)the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing.
(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2).
(d) the personal data have been unlawfully processed;
(e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
(f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1). *Supra* note 32.

[267] Google India Pvt Ltd v Vishaka Industries and Ors AIR 2020 SC 350.

content. In the case of ***Dharamraj Bhanushankar Dave v State of Gujarat,***[268] the High Court refuses to acknowledge the right to be forgotten as there is no law in this matter, and hence no right has been violated. In the case of ***Vasunathan v Registrar General***[269]**,** the Karnataka High Court recognizes the right to be forgotten, which involves enabling individuals to seek the deletion of their personal information or data from online platforms. In the ***Subranshu Rout @ Gugul v State of Orissa,***[270] the court concluded that the right to be forgotten in India would serve a critical role in safeguarding women's cyber interests[271]. In the case of ***Jorawer Singh Mundy v Union of India and Ors,***[272] the Delhi High Court directed Indiankanoon and Google to erase information about the petitioner. Thus, from the judgement of various High Courts, the courts acknowledge the right to be forgotten without legislation. A special leave petition was filed before the Supreme Court in the case of ***Karmanya Singh Sareen v Union of India***[273]**.** WhatsApp privacy breach case is where WhatsApp shares data with Facebook and all its companies for commercial and marketing advertisement purposes.

Furthermore, the proliferation of digital surveillance technologies has created a complex web of challenges for the protection of privacy rights in India. With the advent of advanced surveillance tools such as facial recognition technology, smart city surveillance systems, and biometric data collection, the scope of digital surveillance has expanded exponentially. This has raised concerns about the potential for mass surveillance and the erosion of individual privacy rights[274]. The recent debates over the implementation of the National Population Register (NPR) and the proposed use of biometric data for the surveillance of individuals have highlighted the need for comprehensive legal and regulatory frameworks to safeguard privacy rights in the digital age. The constant monitoring and tracking of individuals' online activities raises serious concerns about the right to privacy and personal data protection. The recent judgment by the Supreme Court of India in the landmark ***Justice K. S Puttaswamy (Retd) & Anr. Vs. Union of India & Ors***[275] case has established the groundwork for safeguarding privacy rights in the digital age. However, the challenges posed by digital surveillance continue to persist.

[268] Dharamraj Bhanushankar Dave v State of Gujarat SCA 1854 of 2015.
[269] Vasunathan v Registrar General 2017 SSC Online Kar 424.
[270] Subranshu Rout @ Gugul v State of Orissa BLAPL No. 4592 of 2020.
[271] Bang Yogesh (2021, July 19) Right to be forgotten: A tussle between data privacy and public information, The Daily Guardian, available at: https://thedailyguardian.com/right-to-be-forgotten-a-tussle-between-data-privacy-and-public-information/
[272] Jorawer Singh Mundy v Union of India and Ors WP (C) 3918/2020
[273] Karmanya Singh Sareen v Union of India SPL (C) No 000804/2017
[274] Shravistha Ajaykumar, "Ethical and Regulatory Considerations in the Collection and Use of Biometric Data", Observer Research Foundation (ORF) Oct 10, 2023, (https://www.orfonline.org/research/ethical-and-regulatory-considerations-in-the-collection) (acceded July 15, 2024).
[275] Justice K. S Puttaswamy (Retd) & Anr. Vs. Union of India & Ors (2017) 10 SCC 1, AIR 2017 SC 4161.

SURVEILLANCE LAWS IN INDIA

Surveillance means close observation or State of observation. Surveillance is a tool for the government to control crime in society and to have an eye on criminals. It is a precautionary step by the government to protect the State from external threats. In the present-day scenario, the government exercise surveillance over email, telephonic conversation, CCTV surveillance, etc.[276] Surveillance laws in India have evolved in response to the challenges posed by technological advancements and the need for national security. These laws provide a legal framework for the use of surveillance technologies. Surveillance laws are aimed at protecting the country from internal and external threats, such as terrorism, espionage, and cyber-attacks. These laws grant the government and law enforcement agencies the power to gather information, monitor communications, and conduct surveillance on individuals and organizations that are deemed to be a threat to national security. While these laws aim to safeguard the nation and its citizens, they also raise significant concerns about the infringement of privacy rights.

In India, the regulation of surveillance is governed by various laws and regulations designed to balance national security concerns with the protection of the right to privacy. The primary legislative framework overseeing surveillance activities in the country is the ***Information Technology (Amendment) Act of 2008***[277], commonly known as the IT Act and the ***India Telegraph Act 1885***[278]. This legislation permits government agencies to intercept, monitor, and decrypt electronic communications under specific conditions, such as addressing threats to national security or conducting criminal investigations. There is no specific legislation in India for the surveillance of cyberspace. However, two legislations were there to regulate digital and telephonic surveillance:

1) Information Technology Act 2000 (for digital surveillance)
2) The India Telegraph Act 1885 (for telephonic surveillance)

Section 5[279] of the Indian Telegraph Act of 1885 grants authority to both the Central and State governments

[276] Sangeeta Mahapatra, "Digital Surveillance and the Threat to Civil Liberties in India", German Institute for Global and Area Studies (GIGA) May 2021, No. 2, ISSN 1862-359X, (https://www.giga-hamburg.de/en/publications/giga-focus/digital-surveillance-and-the-threat-to-civil-liberties-in-india) (accessed July 5th, 2024).

[277] The Information Technology (Amendment) Act, 2008 (Act no 10 of 2009), Gazette Notification Feb 5th, 2009, (https://www.indiacode.nic.in/bitstream/123456789/15386/1/it_amendment_act2008.pdf).

[278] The Indian Telegraph Act, 1885, (Act No. 13 of 1885), Gazette Notification July 22nd 1985, (https://www.indiacode.nic.in/bitstream/123456789/13115/1/indiantelegraphact_1885.pdf).

[279] The Indian Telegraph Act, 1885, s 5- Power of the Government to take possession of licensed telegraphs and to order interception of messages-

(1) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorized in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do, take temporary possession (for so long as the public emergency exists or the interest of the public safety requires the taking of such action) of any telegraph established, maintained or worked by any person licensed under this Act.

(2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorized in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India, the security of the State, friendly

to intercept messages under certain conditions:

(i) during an emergency or for public safety interests,

(ii) when deemed necessary, and

(iii) to uphold the sovereignty and integrity of the nation.

Likewise, section 69(1)[280] of the Information Technology Act of 2000 grants authority to both the Central and State Governments to intercept and decrypt any information that is transmitted, stored, or received in any computer source[281]. Recently, Google introduced an encrypted search facility. This encryption prevents computers from storing computer history and stops them from appearing in the AutoFill function for future searches. However, this encryption is not entirely private, as Google retains this information.

Government agencies in India are involved in surveillance, including the National Intelligence Grid (NIG), Crime and Criminal Tracking Network System (CCTNS), Central Monitoring System, Indian Computer Emergency Response Team (CERT-In), National Counter Terrorism Centre (NCTC), etc.[282]. India, the fastest developing country, must implement strong legislation and regulation policies to control cyberspace. National Intelligence Grid (NIG) Central Monitoring System (CMS) has been set up for surveillance on the internet, cell phone, private message as well as social media sites.

1) ***National Intelligence Grid (NIG):*** It links information saved in a server and network of a different department so that any department and intelligence agency can access it.

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relations with foreign State or public order or for preventing incitement to the commission of an offence, for reason to be recorded in writing, by order, direct that any message or class of message to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by Government making the order or an officer thereof mentioned in the order; Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.

[280] The Information Technology Act, 2000, s 69- Power to issue directions for interception or monitoring or decrypting of any information through any computer resources-
(1) Where the Central Government or a State Government or any of its officers specially authorized by the Central Government or the State Government, as the case may be, in this behalf may, if satisfied that it is necessary or expedient so to do, in the interest of the sovereignty or integrity of India, defense of India, security of the State, friendly relations with foreign State or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may subject to the provisions of sub-section(2), for reason to be recorded in writing, by order, direct any agency of the appropriate government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource.

[281] Saswat Singh, Surveillance in India Post the Right to Privacy Judgement, Legal Service India E-Journal, (https://www.legalserviceindia.com/legal/article-2273-surveillance-in-india-post-the-right-to-privacy-judgment.html), (accessed June 5, 2024).

[282] Maria Xynou and Elonnai Hickok, "Security, Surveillance and Data Sharing Scheme and Bodies in India", (https://cis-india.org/internet-governance/blog/security-surveillance-and-data-sharing.pdf) and Prashant Upadhay, " Surveillance in India and its Legality", Legal Service India.com, (https://www.legalservicesindia.com/article/2162/Surveillance-in-India-and-its-Legalities.html) (accessed June 24, 2024).

2) Crime and Criminal Tracking Network System (CCTNS): This network system helps store, analyze, transfer, and share data between various police stations and state headquarters.

3) Central Monitoring System: This system monitors every communication, including text messages, phone calls, online activity, social media conversations, content, etc.

4) The Indian Computer Emergency Response Team (CERT-In) is a nodal government agency for any computer security incident. It deals with cyber security incidents all over India.

5) The National Counter Terrorism Centre (NCTC) derives its power from the Unlawful Activities Prevention Act 1967. It was set up after the Mumbai 26/11 attack.

6) The National Cyber Coordination Centre (NCCC) screens all meta-data, ensuring better coordination between various intelligence agencies.

7) State cybercrime Coordinator and District Cybercrime cell.

8) Cyber Police Station.

India's growing legislative framework and policies are not strong enough to face future threats. Strong legislation is required to tackle cybercrimes and protect citizens' privacy. One of the drawbacks of the IT Act 2000 is that it needs to focus on cross-border cybercrime. India needs strong privacy and surveillance laws. The right to privacy and the necessity for surveillance consistently represent opposing aspects, creating conflict between citizens and law enforcement agencies.

3.1 *Information Technology Act 2000*[283]

The Information Technology (IT) Act in India is an extensive legal framework covering diverse aspects of electronic communication and data protection. A crucial component of the IT Act pertains to the government's authority for surveillance. The government can employ these surveillance powers based on specified conditions and procedures outlined in the Act. For instance, the government must obtain authorization from the competent authority before intercepting, monitoring, or decrypting any information. This authorization can only be issued under specific circumstances, such as when there is an imminent threat to national security or public order. Section 69[284] of the Act empowers the government to intercept, monitor,

[283] The Information Technology Act, 2000, (Act No. 21 of 2000), Gazette Notification June 9th, 2000, (https://www.indiacode.nic.in/bitstream/123456789/13116/1/it_act_2000_updated.pdf).

[284] The Information Technology Act, 2000, s 69-Power to issue directions for interception or monitoring or decrypting of any information through any computer resources-
(1) Where the Central Government or a State Government or any of its officers specially authorized by the Central Government or the State Government, as the case may be, in this behalf may, if satisfied that it is necessary or expedient so to do, in the interest of the sovereignty or integrity of India, defense of India, security of the State, friendly relations with foreign State or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may subject to the provisions of sub-section(2), for reason to be recorded in writing, by order, direct any agency of the appropriate

or decrypt any information created, transmitted, received, or stored in any computer resource when deemed necessary for the nation's sovereignty, integrity, defence, state security, diplomatic relations, public order, or the prevention of incitement to commit an offence. This provision's broad and ambiguous language gives the government extensive authority to surveil citizens and oversee their online actions. Section 69A[285] of the IT Act grants the government authority to restrict public access to any information via any computer resource when deemed essential for the interest of India's sovereignty, integrity, defence, state security, diplomatic relations, or public order. This provision enables the government to regulate and limit the dissemination of information on the Internet, thereby enhancing its surveillance capacities.

Section 69B[286] of the Act empowers the government to issue directives for the interception, monitoring, or decryption of any information via any computer resource if it is deemed necessary for investigating, preventing, or detecting any offence or ensuring cybersecurity. This provision allows the government to engage in surveillance for law enforcement purposes, enhancing its authority over digital communications. The clauses related to government surveillance powers in the IT Act of India are integral to electronic communication and data protection. While crucial for national security and public order, ensuring greater transparency, accountability, and oversight is imperative to prevent potential misuse.

3.2 *The Indian Telegraph Act 1885*[287]

The Indian Telegraph Act of 1885 is a legislative framework that governs the establishment, operation, and regulation of telegraph services in India. The Act contains several provisions that empower the government with surveillance powers to ensure national security and public order. One of the key provisions that empower the government with surveillance powers is Section 5(2)[288] of the Indian Telegraph Act, which

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government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource. *Supra* note 54.

[285] The Information Technology Act, 2000, s 69A- "Power to issue directions for blocking for public access of any information through any computer resource- (1) Where the Central Government or any of its officers specially authorized by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign State or public order or for preventing incitement to the commission of any cognizable offences relating to above, it may subject to the provisions of sub-section(2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource. *Supra* note 54.

[286] The Information Technology Act, 2000, s 69B- Power to authorize to monitor and collect traffic data or information through any computer resource for cyber security. (1) The Central Government may, to enhance cyber security and for identification, analysis and prevention of intrusion or spread of computer contamination in the country, by notification in the Official Gazette, authorize any agency of the Government to monitor and collect traffic data or information generated, transmitted, received or stored in any computer resource. (2) The intermediary or any person in-charge or the computer resource shall, when called upon by the agency which has been authorized under sub-section (1), provide online access to the computer resource generating, transmitting, receiving or storing such traffic data or information. *Supra* note 54.

[287] The Indian Telegraph Act, 1885, (Act No. 13 of 1885), Gazette Notification July 22nd, 1985, (https://www.indiacode.nic.in/bitstream/123456789/13115/1/indiantelegraphact_1885.pdf).

[288] The Indian Telegraph Act 1885 s 5(2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorized in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign State or public order or for preventing incitement to the commission of an offence, for reason to be recorded in writing, by order, direct that any message or class of message to or from any person or class

states that the government or any officer authorized by the government may intercept or detain any message transmitted by telegraph. This provision gives the government the authority to monitor and intercept any telegraphic communication deemed necessary for the enforcement of public order or national security. This provision essentially grants the government the power to conduct surveillance on telegraphic communications and gather information as they see fit.

Surveillance laws in India are intricate and multi-dimensional, prompting significant considerations regarding the equilibrium between national security and individual privacy. Conversely, proponents of privacy contend that these laws frequently encroach upon citizens' fundamental rights and freedoms. The intricacy of India's surveillance laws lies in the participation of numerous government agencies in surveillance efforts. The absence of effective coordination and oversight among these agencies has resulted in a dearth of accountability and potential misuse. The complexity of surveillance laws in India is a result of a lack of clear and consistent regulations, a lack of oversight and accountability, and the rapid advancement of surveillance technology. This has created a situation where individual privacy rights are often compromised in the name of national security. Addressing these issues will require a comprehensive review and reform of India's surveillance laws to ensure that they strike the right balance between national security and individual privacy[289].

3.3 Judiciary on Digital Surveillance and Right To Privacy

The extensive adoption of surveillance technologies has posed a challenge to the conventional conception of privacy, prompting inquiries into the degree to which individuals can anticipate preserving their privacy in the digital era. Presently, the widespread deployment of surveillance technologies has brought forth crucial queries regarding the boundaries of government and corporate interference in the personal lives of individuals. Exploring surveillance's legal and ethical aspects is crucial to establish an equilibrium between security and privacy. The influence of surveillance on the right to privacy is deliberated, accompanied by references to pertinent case laws.:

Surveillance often involves monitoring individuals' activities, communications, and movements without their consent. This invasion of privacy can profoundly impact an individual's sense of autonomy and personal freedom. One of the significant cases that illustrates the impact of surveillance on the right to privacy is the case of ***Carpenter v. United States***[290]. In the present case, the United States Supreme Court deliberated on

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of persons, or relating to any particular subject, brought for transmission by or transmitted or received by Government making the order or an officer thereof mentioned in the order; Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained unless their transmission has been prohibited under this sub-section. *Supra* note 58.

[289] Kamesh Shekar and Shefali Mehta, "The State of Surveillance in India: National Security at the Cost of Privacy", Observer Research Foundation (ORF) Feb 22, 2022, (https://www.orfonline.org/expert-speak/the-state-of-surveillance-in-india) (accessed July 07, 2024).

[290] Carpenter vs Unites States, 585 U.S. (2018).

the legality of law enforcement agencies obtaining cell phone location data without a warrant, assessing whether it infringed upon the privacy rights protected by the Fourth Amendment. The Court concluded that such government acquisition of data constitutes a search under the Fourth Amendment and mandates the need for a warrant.

Another relevant case that has implications for the right to privacy in the context of surveillance is the European Court of Human Rights judgment in ***Big Brother Watch and Others v. United Kingdom***[291] (2018). This case is centered on the lawfulness of government agencies engaging in the bulk interception of communications and sharing intelligence. The court determined that the expansive surveillance programs violate both the right to privacy and the right to freedom of expression, emphasizing the importance of implementing measures to prevent unwarranted intrusion into individuals' privacy. The judgement underscores the potential for surveillance to encroach upon fundamental rights and emphasizes the need for robust legal protection to safeguard privacy in light of technological advancements.

Another controversial case that sheds light on the impact of surveillance on the right to privacy is the case of Edward Snowden. In 2013, Edward Snowden, a former National Security Agency (NSA) contractor, leaked classified information about the NSA's mass surveillance programs. The leaked documents revealed the extent to which the NSA was collecting and analyzing data from millions of individuals, both within the United States and abroad, without their knowledge or consent. The Snowden case highlighted the potential for government surveillance to infringe upon the right to privacy on a massive scale. The surveillance activities revealed by Snowden went far beyond what most people would consider reasonable or proportionate, and they raised serious concerns about the impact of such surveillance on individual rights and freedoms[292].

The landmark judgment of ***Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors. (2017)*** marked the acknowledgement by the Supreme Court of India that the right to privacy is a fundamental right protected under the Indian Constitution. The Court upheld the triple test principle, which involves evaluating surveillance practices' legality, legitimate aim, and proportionality. This underscores the necessity for strict legal standards to be followed in surveillance measures, ensuring their suitability and necessity within the framework of a democratic society. The court asserted that a compelling state interest must warrant any infringement upon the right to privacy and must be executed in a lawful, equitable, and non-arbitrary manner. In the case of ***Internet Freedom Foundation vs Union of India***[293] (2019), The Internet Freedom Foundation, a digital liberties organization, filed a petition challenging the Indian government's surveillance program called the Central Monitoring System (CMS). The petition raised concerns about the surveillance

[291] Big Brother Watch and Others v United Kingdom, Application No. 58170/13.
[292] Kristain P Humble, "International Law, Surveillance and the Protection of Privacy", May 15, 2020, DOI: http://doi.org/10.1080/13642987.2020.1763315, (https://gala.gre.ac.uk/id/eprint/29181/1/29181%20HUMBLE_International_Law_Surveillance_and_the_Protection_of_Privacy_%28AAM%29_2020.pdf) (accessed June 16, 2024).
[293] Internet Freedom Foundation vs Union of India W.P.(C) No. 000044/2019.

process's lack of transparency and oversight.

DIGITAL PERSONAL DATA PROTECTION ACT 2023: A PARADIGM SHIFT

The Digital Personal Data Protection Act of 2023[294] presents a critical juncture in the intersection of digital surveillance and data privacy. The increasing reliance on digital technologies in all aspects of modern life has brought unprecedented challenges to protecting personal information. On the one hand, digital surveillance is a necessary tool for law enforcement and national security, but on the other hand, it poses a significant threat to individual privacy. Thus, finding a balance between these competing interests is essential for the harmony and functionality of modern society. In response to these concerns, the Digital Personal Data Protection Act of 2023 represents a paradigm shift in the regulation of digital surveillance and the right to privacy. One of the Act's key provisions is Section 4[295], which outlines the principles of data protection. This section emphasizes the need for transparency and accountability in handling personal data. It requires organizations to obtain explicit consent from individuals before collecting or processing their personal data. Section 6(1)[296], which outlines the rights of individuals regarding their personal data. This section emphasizes the importance of informed consent and the right to access and control one's own data under section 11(1)[297]. This represents a significant departure from the previous approach to data protection, which often allowed for the indiscriminate collection and use of personal data without the knowledge or consent of the individuals concerned.

Additionally, Section 7(c)[298] of the act addresses the issue of digital surveillance. It stipulates that surveillance measures must be proportionate and necessary for legitimate purposes such as national security or public safety. This provision strikes a balance between the need for surveillance and the right to privacy, ensuring that surveillance activities are not arbitrary or excessive. Furthermore, Section 10(2)(a) of the act

[294] The Digital Personal Data Protection Act, 2023, (Act No. 22 of 2023), Gazette Notification August 11th, 2023, (https://www.meity.gov.in/writereaddata/files/Digital%20Personal%20Data%20Protection%20Act%202023.pdf)

[295] The Digital Personal Data Protection Act, 2023, s 4(1) A person may process the personal data of a Data Principal only in accordance with the provisions of this Act and for a lawful purposes, -
(a) for which the Data Principal has given her consent; or
(b) for certain legitimate uses.
(2) For the purposes of this section, the expression "lawful purpose" means any purpose which is not expressly forbidden by law. *Supra* note 65.

[296] The Digital Personal Data Protection Act, 2023, s 6(1) The consent given by the Data Principal shall be free, specific, informed, unconditional and unambiguous with a clear affirmative action, and shall signify an agreement to the processing of her personal data for the specified purpose and be limited to such personal data as is necessary for such specified purpose. *Supra* note 65.

[297] The Digital Personal Data Protection Act, 2023, s 11(1) The Data Principal shall have the right to obtain from the Data Fiduciary to whom she has previously given consent, including consent as referred to in clause (a) of section 7 (hereinafter referred to as the said Data Fiduciary), for processing of personal data, upon making to it a request in such manner as may be prescribed. *Supra* note 65.

[298] The Digital Personal Data Protection Act, 2023, s 7(c) for the performance by the State or any of its instrumentalities of any function under any law for the time being in force in India or in the interest of sovereignty and integrity of India or security of the State. *Supra* note 65.

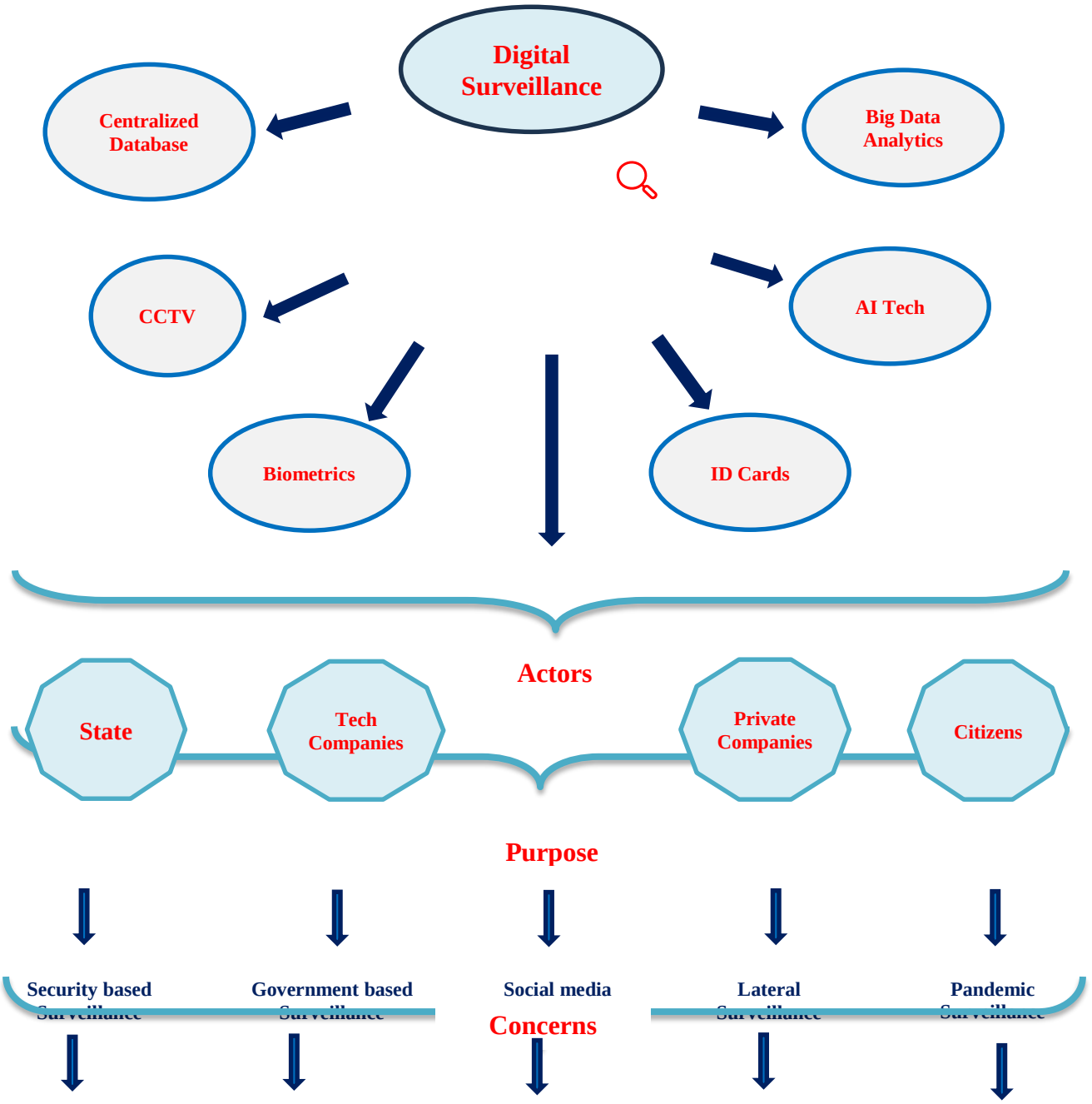
establishes the role of the ***Data Protection Officer***[299] ***(DPO)***, who is responsible for supervising the execution and enforcement of the law. DPO plays a crucial role in ensuring entities comply with legal provisions and protect the rights of individuals.

Thus, the Digital Personal Data Protection Act 2023 is comprehensive legislation that aims to strike a balance between digital surveillance and data privacy. It recognizes the importance of surveillance measures for security purposes while also safeguarding the fundamental right to privacy. The provisions create a framework for organizations and government agencies to protect personal data while still allowing for necessary surveillance measures.

IMPACT OF DIGITAL SURVEILLANCE ON THE RIGHT TO PRIVACY

With the advancement of technology, digital surveillance has become a prevalent issue in society. The use of surveillance technology by government agencies, corporations, and individuals has raised significant concerns about the violation of privacy rights and the possibility of misuse. The ability to monitor individuals' online activities, track their location, and collect personal data without consent raises concerns about the invasion of privacy and the potential for misuse of this information. The challenges posed by digital surveillance to privacy rights are:

[299] The Digital Personal Data Protection Act, 2023, s 2(l), Data Protection Officer- means an individual appointed by the significant Data Fiduciary under clause (a) of sub-section (2) of section 10*; Supra* note 65.



1) The diminishing of personal privacy is evident with the widespread use of digital devices and online platforms, where individuals undergo continuous surveillance, and their personal information is gathered

without explicit knowledge or consent. This intrusion into private lives gives rise to substantial ethical and legal issues concerning safeguarding personal data and the right to privacy.

2) Another challenge is the lack of transparency and accountability in digital surveillance practices. Many surveillance programs operate in secrecy, without adequate oversight or public scrutiny. This lack of transparency raises concerns about potential abuse and misuse of surveillance powers. Without proper checks and balances, there is a risk of overreach and the violation of privacy rights.

3) The rapid advancement of surveillance technology presents a challenge in terms of legal and ethical frameworks. With the introduction of new and complex surveillance technologies, lawmakers struggle to keep pace with the development and use of these tools.

4) The digital surveillance raises concerns about the potential for discrimination and profiling. Using algorithms and data analytics in surveillance can target specific groups based on race, religion, or political beliefs. This raises significant ethical concerns and has the potential to intensify existing social inequalities.

5) Another notable challenge presented by digital surveillance is the risk of power abuse by the state and other entities engaged in surveillance. The deployment of digital surveillance tools by law enforcement agencies and government authorities has prompted worries regarding the potential misapplication of these powers.

The impact of digital surveillance on the right to privacy is the loss of autonomy and control over our personal information. With the increasing prevalence of surveillance cameras, social media monitoring, and data collection, individuals are constantly being watched and their activities tracked. The pervasive presence of digital surveillance compromises the right to privacy, which encompasses the ability to control our personal information and make autonomous decisions. Furthermore, Digital surveillance extends beyond national borders, with governments and organizations often sharing information across jurisdictions. This raises concerns about the potential erosion of privacy on a global scale to protect individuals' rights.

CONCLUSION

In conclusion, the implications of digital surveillance on civil rights and privacy represent a complex matter that necessitates thorough examination and assessment. While digital surveillance can serve as a beneficial instrument for law enforcement and national security, it concurrently carries the risk of encroaching upon the privacy and civil liberties of individuals. As technology continues to advance, the potential for surveillance to encroach on individual rights and privacy also increases. It is essential to confront these challenges by establishing a legal and ethical framework that acknowledges and preserves individuals' right to privacy. Digital surveillance should be scrutinized to guarantee its alignment with individuals' protected privacy rights. Although there are valid justifications for employing surveillance in certain scenarios, explicit and precise guidelines must be in place to forestall misuse and guarantee accountability.

Furthermore, it is crucial to acknowledge that digital surveillance also plays a crucial role in maintaining public safety and national security. Therefore, finding a balance between the justified requirement for surveillance and safeguarding privacy and civil rights is essential. Establishing strong legal frameworks and oversight mechanisms is imperative to guarantee that digital surveillance is carried out in a manner that upholds civil rights and respects privacy. Additionally, the public needs increased awareness and education about digital surveillance's potential risks and implications on their privacy.

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DANGEROUS CHILDHOOD: THE ISSUE OF CHILD SOLDIERS WITH SPECIAL REFERENCE TO ARMED CONFLICT

Shreyashi Raj[300]
Ankit Kumar[301]

ABSTRACT

I killed two informers in Medellín. They were aged thirty-eight and forty-two. I was not afraid to kill them because I had already been in combat. Our collaborators had seen them talking to paramilitaries. I had their address and went to their house. There were two of us, but I was the one who had to do the killing. It was a test for me. I was thirteen. It was the same year that I joined the FARC-EP. After doing it, I felt really big, like a real killer (matón). But sometimes when I thought about it, I felt sad, and I wanted to cry.

Milton (pseudonym for a Colombian boy, age 13)[302]

"Whereas mankind owes to the child the best it has to give...."[303]

The use of child soldiers is one of the most distressing elements of contemporary armed conflict, raising significant ethical, legal, and humanitarian issues. This paper delves into the complex problem of child soldiers, examining the reasons behind their recruitment, the roles they play in conflicts, and the long-term repercussions of their involvement. "Child soldiers" refers to individuals under eighteen who are enlisted or utilized by armed groups, including government forces, rebel factions, and other non-state actors. These children are often forcibly conscripted or coerced into joining and are thrust into the harsh realities of warfare, serving as combatants, spies, messengers, or in other support roles.

The recruitment of child soldiers is influenced by various socio-economic factors, such as poverty, inadequate education, and the breakdown of social structures due to conflict. Armed groups exploit these vulnerabilities, preferring children because they are more easily manipulated and less likely to question orders. The use of children in combat reflects a broader strategy that flouts international legal norms and humanitarian principles. The consequences for these children are severe, including physical and psychological trauma, loss of family, and disruption of their development. These impacts extend beyond the individual, affecting entire communities and perpetuating cycles of violence and instability. This paper also

[300] Advocate
[301] Advocate
[302] "You'll Learn Not to Cry": Child Combatants in Colombia, Human Rights Watch, 18 September 2003.
[303] Preamble, UN Declaration of the rights of the child, General Assembly Resolution 1386, 20 November 1959.

reviews international legal frameworks aimed at preventing the recruitment and use of child soldiers, such as the United Nations Convention on the Rights of the Child (CRC) and its Optional Protocol on the Involvement of Children in Armed Conflict (OPAC). Despite these legal protections, enforcement is inconsistent, and many areas continue to witness the exploitation of children in warfare.

Through case studies from various conflict zones, this study provides a comparative analysis of the effectiveness of international interventions and reintegration programs designed to rehabilitate former child soldiers. The paper concludes with recommendations to enhance global efforts in protecting children from armed conflicts and improving reintegration strategies to help former child soldiers rebuild their lives. Addressing the issue of child soldiers requires a unified international response, focusing on both preventive measures and comprehensive post-conflict rehabilitation to ensure a future free from the scourge of child soldiers.

KEYWORDS: *Child Rights, Armed Conflict, Marginalisation, International Humanitarian Law, Vulnerabilities.*

INTRODUCTION

International organizations and media outlets have voiced significant concern over the global issue of child soldiers. According to various NGOs, armed groups in over 85 countries have recruited more than 500,000 minors under the age of eighteen, including both state-affiliated and non-state actors. Alarmingly, approximately 300,000 of these children are actively participating in combat, whether as soldiers or members of armed opposition groups. Despite the international community's long-standing awareness of this issue, a lasting solution remains out of reach. Nevertheless, the global community has made progress in establishing international legal frameworks that offer guidelines and directives, primarily for state parties, to protect minors involved in armed conflicts. This study explores how international humanitarian law and human rights treaties address the protection of child soldiers. It provides a detailed analysis of key provisions that prohibit the recruitment of minors, drawing on academic perspectives, NGO statements, and reports from global organizations.

These existing legal obligations should be viewed as a critical foundation for addressing the urgent problem of child soldiers. Significant advances have been made in shaping legal norms, particularly through the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, alongside other international human rights laws, though challenges remain. The recruitment and use of children as active participants in violent conflicts is especially troubling. Governments and non-state actors enlist children, often through coercion, challenging the idea that war impacts only civilians. The recruitment of child soldiers for conflicts aimed at achieving self-determination or national liberation

further complicates this issue.

The problem of child soldiers is not a new one. From World War II, where children were involved in groups such as the Hitler Youth, to present-day conflicts, children have played significant roles in armed conflicts, both as combatants and as civilians. Child soldiers are often involved in violent crimes, including forced displacement, rape, torture, and even fatalities. They may also witness or become victims of these atrocities. As noted in the 1999 book New and Old Wars: Organized Violence in a Global Era[304], most modern conflicts stem from domestic rather than international disputes, blurring the lines between organized crime, conflict, and severe human rights violations.

Child Soldiers International notes that despite international agreements established since the 1970s to curb children's involvement in armed conflicts, the practice of using child soldiers persists. Former UN Secretary-General Ban Ki-moon has expressed concern over the growing role of non-state actors in the recruitment of children and the continued use of child soldiers, especially in Africa. Regrettably, the current legal frameworks and practices fail to address the realities faced on the ground fully. [305]Despite the increasing presence of young soldiers in international conflicts, the terms "child" and "soldier" are rarely paired together. Yet, children are frequently deployed in conflicts across the globe. Estimates indicate that between 250,000 and 300,000 minors are currently involved in military operations worldwide. This issue is deeply connected to the origins and nature of modern warfare, especially in post-colonial contexts, and raises significant ethical concerns for the global community. The primary focus of this research is to explore the political, social, economic, military, environmental, religious, ethnic, and psychological factors that make the use of child soldiers—particularly in what is often called the "Kalashnikov age"—a more cost-effective and efficient strategy compared to deploying adults.

A child soldier is defined as any individual under the age of eighteen who has been recruited into the armed forces or used in any capacity by an armed group. This includes both boys and girls who serve as combatants, cooks, porters, messengers, spies, or for sexual purposes. The term applies to all minors involved, not just those directly engaged in combat.[306]

Currently, over thirty countries around the globe continue to employ child soldiers. These nations include Afghanistan, Burma, Burundi, the Democratic Republic of Congo, Chad, the Central African Republic, the Philippines, Somalia, Sudan, South Sudan, Thailand, Yemen, Uganda, Sierra Leone, Iraq, India, Indonesia, Israel, Ethiopia, Liberia, Rwanda, the Chechen Republic, Colombia, Cambodia, Sri Lanka, Mozambique, Mexico, Honduras, Peru, and Myanmar. The widespread use of child soldiers in intrastate armed conflicts has raised serious concerns among public and international organizations. Data indicates that the number of child soldiers has risen significantly over the past decade, and this troubling trend is expected to continue.

[304] Ary Kaldor, New and Old Wars, Stanford University Press, 2012, https://www.sup.org/books/title/?id=23193.
[305] Child Soldiers International. (2015). Who are child soldiers?
[306] Mulira, Dorcas B., "International Legal Standards Governing the Use of Child Soldiers" (2007). LLM Theses and Essays. 88. https://digitalcommons.law.uga.edu/stu_llm/88

Historically, children have been involved in military operations across different cultures, even in situations that defy social norms. For example, during World War I, the British Army recruited 250,000 minors under the age of eighteen. Similarly, young men were enlisted by the Warsaw Uprising, the Soviet Army, and Jewish resistance groups during World War II.

Despite multiple international agreements established since the 1970s to prevent the involvement of children in armed conflicts, Child Soldiers International reports that children are still being exploited as child soldiers and actively participating in conflicts. This persistent issue highlights the significant gap between existing legal norms and the harsh realities faced by child soldiers worldwide.

IMPORTANCE OF STUDY

In today's world, many children are subjected to horrific abuse, sold into slavery, and forced to become child soldiers. These children face unimaginable tragedies that rob them of their innocence and childhood. Growing up in environments marked by death and violence, they have little to no memory of life before these horrors or of a functional society. If they manage to escape or are released, they often return to communities that are filled with fear and rejection. Although the issue of child soldiers is gaining more recognition, systematic research on the topic has lagged behind the growing public concern. Much of the available literature is authored by activists rather than scholars, leading to common issues such as overgeneralization, disorganized analysis, and a lack of specificity.

In the Middle East, there have been numerous severe human rights violations, and in recent years, countries like Syria, Iraq, Israel, Palestine, and Yemen have increasingly recruited young people as soldiers. This paper aims to provide a case study focusing on Israel and Syria.

THE PROBLEMATIC DEFINITION OF THE PROBLEM

Many people initially question why children would be trained as fighters instead of using teenagers for combat. Understanding the issue of child soldiering helps clarify these concerns. While the terms "child" and "soldier" may seem simple on their own, their combination creates a troubling and harmful concept in the context of modern warfare. Although the use of children in battle is not new in human history, the contemporary phenomenon of child soldiers is closely tied to ongoing conflicts. Unlike in the past, the structured deployment of child soldiers has not been widely seen in recent times.

International humanitarian law and the United Nations Convention on the Rights of the Child mandate that individuals must be at least fifteen years old to enlist in the military or participate in armed conflicts.[307]

[307] Article 7, para 2 of the Additional Protocol I and Article 38 of the Convention.

Moreover, the Optional Protocol to the UN Convention on the Rights of the Child on the Involvement of Children in Armed Conflict prohibits governments and armed groups from recruiting individuals under the age of eighteen.[308] The concept of enlisting minors in the military presents significant challenges. First, the affected countries have different cultural practices and definitions of childhood compared to Europe and the United States. Since the age of eighteen does not hold the same significance across Europe and Africa, it becomes difficult to determine when childhood ends in certain regions. Additionally, there is inconsistency in the scope of the category of "childhood."

In 1997, an effort to clarify this issue was made with the Cape Town Principles. This crucial legal document defines a child soldier as "anyone under the age of eighteen who is involved in any capacity with a regular or irregular armed force or group, including messengers, cooks, porters, or anyone accompanying them—excluding family members." This classification also includes girls who are forcibly married or targeted for sexual exploitation.[309] The 2007 revision of the Paris Principles defines a child soldier as any individual under the age of eighteen who has been recruited or used by an armed force or group in any capacity, including but not limited to sexual exploitation, spying, messaging, cooking, portering, fighting, or any combination of these roles. This definition applies universally to all children who are or have been directly involved in armed conflicts.[310] The Cape Town Principles categorize children in three distinct ways: (i) as child combatants, those who carry weapons; (ii) as children associated with armed forces or groups; and (iii) as children affected by armed conflicts, including refugees, internally displaced persons, orphans, street children, and others.

THE PRESENT VICTIMS OF CHILD SOLDIERY AND POSSIBLE CAUSES

It is estimated that around 300,000 minors under the age of eighteen are currently engaged in conflicts worldwide. While the exact number of child soldiers in military units and groups is difficult to determine, many tens of thousands of children are involved in armed conflicts globally. These children are not only forced into combat but also serve as cooks, porters, and messengers, and some are even exploited for prostitution. Factors such as discrimination, hardship, and violence may drive them to join, or they may seek revenge for harm done to them or their families. A small proportion are abducted or coerced into these roles.

Gathering precise data on the number of adolescents involved in military activities and the impact of conflict on children is a challenging task for the United Nations and other humanitarian organizations.

[308] Para 7 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, childprostitution and child pornography.

[309] The Paris Principles, Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007, https://www.unicef.org/mali/media/1561/file/parisprinciples.pdf.

[310] Principles and Guidelines on Children Associated with Armed Conflict or Armed Groups of February 2007, drafted under UNICEF auspices, http://www.diplomatic.gouv.fr/en/article-imprim.php3?id_article=8638.

According to the Global Report 2008, co-edited by UNICEF and the Child Soldiers Global Institution, children were actively involved in armed conflicts in nineteen countries or territories between 2004 and 2007. These included the Democratic Republic of the Congo (DRC), Afghanistan, Burundi, Chad, Israel, the Occupied Palestinian Territory, India, Iraq, Myanmar, Nepal, the Philippines, Somalia, Sri Lanka, Sudan, Thailand, and Uganda.[311]

The primary factor driving the recruitment of child soldiers is the ease with which they can be enlisted. Their lack of a well-defined worldview and clear goals makes them vulnerable to manipulation, including brainwashing, drugs, and propaganda. These children quickly develop a strong loyalty to an adult, especially a leader who has the power to offer rewards or impose punishments. Girls are often targeted for sexual exploitation or to fulfil roles such as providing food and other necessities for the group. Additionally, children who are separated from their families are frequently left alone, desperate, and in need of protection. Ishmael Beah, a former child soldier from Sierra Leone, recounted how, at the age of twelve, he became lost and joined a group of thirty other children, aged seven to sixteen, who scavenged for food until they were eventually found by the government army. Under the influence of stimulants, Beah witnessed and participated in horrific acts, including forcing other children to kill their parents and engaging in violent competitions, such as cutting the throat of a rival.[312] In other situations, the family is too poor to provide for their kids.[313] Children's low maintenance costs and their susceptibility to manipulation through medication, rewards, or punishments also contribute to their recruitment.

Another factor is the accessibility of firearms and ammunition. Since these weapons are readily available, children can operate submachine guns just as effectively as adults. According to media reports, "650 million lightweight, easily operated, and lethal small arms are affordably accessible anytime and anywhere."[314] Another reason for using child soldiers is that their handlers know experienced militias often hesitate to engage with child combatants. The presence of a child soldier can demoralize opposing forces and make them less willing to fight, making children a potent asset on the front lines.

[311] Child Soldiers Global report, 2008. http://www.hrw.org/en/reports/2008/12/11/child-soldiers-global-report, 2008.

[312]Ishmael Beah. A Long Way Gone, Memoirs of a Boy Soldier. Douglas & McIntyre, Vancouver/Toronto,January 01, 2007, at Page 72, 111, 121-124.

[313] Shin, H.K. Remembering Korea, 1950, A Boy Soldier's Story. University of Nevada Press, https://unpress.nevada.edu/9780874174823/remembering-korea-1950/.

[314] Dallaire, Roméo, Senator, L.Gen. (Ret'd). The Fight Like Soldiers, They Die Like Children. Random House,Canada at P. 12, 120

THE LEGAL STANDERS GOVERNING CHILD SOLDIERY: INTERNATIONAL INSTRUMENTS

Treaties, state laws and norms, international humanitarian law, customary international law, and children's rights fall under the broad area of international law.[315] The 1979 Additional Protocols to the Geneva Conventions and the 1989 Convention on the Rights of the Child established the prevailing legal framework, which previously allowed the recruitment and deployment of adolescents as young as fifteen in times of conflict. This has been the accepted practice until recently. However, this approach is inadequate because children under eighteen are entitled to further protections under other provisions of the Convention on the Rights of the Child.[316] In response to inadequate legal protections and the widespread use of child soldiers, the Alliance to Stop the Use of Child Soldiers was established as a global network of non-governmental organizations dispersed across various regions. The alliance began advocating for more stringent legislation to restrict the use of child soldiers in the 1990s.[317] The 1998 Rome Statute of the International Criminal Court, ratified by 120 governments, classified the use, recruitment, or conscription of minors under the age of fifteen during armed conflicts as a war crime.[318]

The Worst Forms of Child Labor Convention (Convention No. 182), adopted by the International Labor Organization in June 1999, made it illegal to coerce adolescents under the age of eighteen into recruitment for armed conflict.[319] In May 2000, the United Nations adopted the Optional Protocol to the Convention on the Rights of the Child concerning the Involvement of Children in Armed Conflict. This protocol established an eighteen-year minimum age for joining armed non-governmental organizations, participating in armed conflict, and being recruited under coercion.[320] Despite being a regional agreement, the African Charter on the Rights and Welfare of the Child established eighteen as the minimum age for enlistment and participation in armed conflicts.[321]

[315] Ilene Cohn & Guy S. Goodwin-Gill, Child Soldiers: The Role of Children in Armed Conflict, 23 (1993), at p. 55
[316] Art 7, 1577 U.N.T.S. 3, Convention on the Rights of the Child, Nov. 20, 1989.
[317] P.W. Singer, Talk is Cheap: Getting Serious about Preventing Child Soldiers, 37 Cornell Int'l L.J. 561, 573(2004), at P. 569
[318] Rome Statute of the International Criminal Court, July 17, 1998, art. 8 (xxvi), U.N. Doc. A/CONF.183/9, at 8,9, 17, 37 I.L.M. 999 [hereinafter Rome Statute.]
[319] International Labor Organization Worst Forms of Child Labour Convention 182, S. Treaty Doc. No. 106-S (1999), 38 I.L.M. 1207, available at http://www.ilo.org/public/english/50normes/whatare/index.html
[320] Conflict, GA Res. 54/263, Annex I (May 25, 2000), S. TREATY DOC. NO. 106-37 (2000), https://treaties.un.org/doc/source/docs/a_res_54_263-e.pdf.
[321] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf.

THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

The 1989 Convention on the Rights of the Child (CRC) offers protection for children both in times of peace and during conflicts. It is the most widely ratified human rights treaty in history, with 191 out of 193 participating countries having approved it. The CRC stipulates that "State Parties undertake to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflicts that are relevant to the child," which includes prohibitions against the recruitment of minors as soldiers.[322]

Numerous actions are prohibited under both national and international law, even when the principles of customary international law are unclear. While the Convention on the Rights of the Child (CRC) is globally accepted, it falls short of protecting children during armed conflicts. The Convention has faced criticism in various aspects, notably for being the only provision that deviates from the universal eighteen-year age limit.[323] Article 38 of the Convention specifies that a child is anyone under fifteen who recruits or participates in armed conflict, despite Article 1 of the Convention defining a child as anyone under eighteen. Additionally, Article 38 of Additional Protocol I to the Geneva Conventions reaffirms the recruitment and participation ban outlined in Article 77. However, this reassertion does not introduce new measures and may detract from the stricter provisions in Additional Protocol II, which prohibits the use of child soldiers in all forms of armed conflict, not just international conflicts.[324] Moreover, the CRC's obligations are diminished by several reservations.[325]If states governed by international human rights law can selectively choose which provisions to follow, then international human rights legislation—particularly regarding global children's rights—becomes ineffective. Furthermore, the enforcement of the CRC depends on each nation's domestic laws, as the Convention lacks its enforcement mechanisms.[326]

OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT

In response to growing global awareness of the suffering endured by child soldiers, there was a push for a Protocol to the Covenant on the Responsibility to Protect (OCR) that would raise the legal age for

[322] Art. 38 (1), Convention on the Rights of the Child.

[323] Daniel Helle, Optional Protocol on the Involvement of Children in Armed Conflict to the Convention on theRights of the Child, International Review of the Red Cross, (2000) at P.797-809, https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-involvement-children#:~:text=Each%20State%20Party%20shall%20deposit,recruitment%20is%20not%20forced%20or.

[324] Protocol II, at art. 4(3)(c).

[325] Marsha L. Hackenberg, Can the Optional Protocol for the Convention on the Rights of the Child Protect theUgandan Child Soldier? 10 Ind. Int'l & Comp. L. Rev. 417, 418 (2000)., at 429.

[326] Amy Beth Abbott, Child soldiers-The use of Children as Instruments of War, 23 Suffolk Transnat'l L. Rev499,

enlistment and combat to eighteen.[327]

The Optional Protocol on the Involvement of Children in Armed Conflict, ratified on May 25, 2000, marks a significant advancement in protecting children during armed conflicts. It establishes a legal standard that states are required to follow, setting an international norm that restricts the use of minors as combatants. The Protocol introduces a minimum age requirement that makes it more difficult for governments and non-state actors to falsely claim that minors engaged in combat are older than they are. It also encourages states to enforce existing domestic laws or adopt new ones that align with the standards set by the Protocol, while raising awareness about the issue of child soldiers. Despite these improvements, the Optional Protocol faces challenges, largely due to its ambiguities, which undermine its overall effectiveness.

AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

The Organization of African Unity adopted the African Charter on the Rights and Welfare of the Child in 1990.[328] Children involved in armed conflicts are protected by the Charter's article that states, "State Parties to this Charter shall undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflicts which affect the child."[329]

State Parties must also "take all necessary measures to ensure that no child shall take a direct part in hostilities" and "refrain, in particular, from recruiting any child."[330] The CRC is less comprehensive compared to the regional Charter. Unlike the CRC, which has a broader international scope, the Charter explicitly defines everyone under eighteen, including those involved in armed conflict, as a child. Additionally, the Charter prioritizes the rights and well-being of children above the type of conflict they are involved in, as stated in Article 22. This includes addressing internal conflicts, tensions, and other challenges.

The CRC's "feasible measures" are less stringent compared to the "necessary measures" outlined in the Charter. The Charter's implementation system allows complaints from non-party states, individuals, organizations, and NGOs, and includes a reporting mechanism similar to that of the CRC. However, the Charter has limitations. It only applies to ratifying states and, as per Article 1(3), any customary, traditional, cultural, or religious practices that contradict the Charter's rights and obligations are deemed invalid. This allows states to potentially justify non-compliance with cultural or religious arguments. Nonetheless, the Charter supports both the CRC and international humanitarian law in its stance on child

[327] Optional Protocol on the Involvement of Children in Armed Conflict, https://childrenandarmedconflict.un.org/tools-for-action/opac/.
[328] African Chapter, supra note 182
[329] Id at art. 22(1)
[330] Id. At art. 22(2)

soldiers, especially those involved in internal conflicts.[331]

CONVENTION CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOR

A convention about the prohibition of the worst types of child work and the fast steps toward their extinction was passed by the International Work Organization in June 1999.[332]

The Convention requires all ratifying governments to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labor," as soon as possible.[333] Under Article 2 of the Convention, anyone under eighteen is classified as a juvenile. The Convention defines "the worst forms of child labor" to include any form of slavery or similar practices. This encompasses child trafficking and sale, debt bondage, forced or compulsory labor, and includes the recruitment of minors into the armed forces.[334]

Additionally, the "worst forms of child labor" include any work that, due to its nature or the conditions under which it is performed, poses a risk to the health, safety, or morals of children. When implementing the Convention's standards, state authorities must consult worker and employee groups to determine what constitutes hazardous, immoral, or harmful labor for individuals under eighteen.[335]

The Convention was the first international agreement to formally recognize child soldiering as a form of child labor, setting a minimum age limit of eighteen years for the practice.[336] A key limitation of this Convention is that it only prohibits forced or coerced recruitment, leaving voluntary recruitment unaddressed. As a result, children under eighteen who voluntarily participate in armed conflict are not protected by this Convention.[337]

PREVENTION, DEMOBILISATION, REINTEGRATION OF CHILD SOLDIERS

Children have historically been among the most vulnerable victims of violence and, at times, its most brutal enforcers. They have supported violent extremism in various ways, including committing violent acts, such

[331] Art. 2, Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.
[332] International Labour Organization Worst Forms of Child Labour Convention 182, S. Treaty Doc. No. 106-S (1999), 38 I.L.M. 1207, available at http://www.ilo.org/public/english/50normes/whatare/index.html,
[333] Id at Article 1
[334] Art. 3(a), Conventions, Protocols and Recommendations, International Labour Organisations, https://www.ilo.org/international-labour-standards/conventions-protocols-and-recommendations.
[335] Art. 6, 7. "Each Member shall design and implement programs of action to eliminate as priority the worst forms of child labour." (Article 6). "Such programs of action shall be designed and implemented in consultation with relevant government institutions and employers' and workers' organizations, taking into consideration the views of other concerned groups as appropriate." (Article 7).
[336] Ann Davison, Child Soldiers: No Longer a Minor Issue, 12 Willamette J. Int'l L. Disp. Resol. 124, 141 (2004), at 135.
[337] Mark Drumbl. "Reimagining Child Soldiers in International Law and Policy; available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921527,

as killings, and disseminating propaganda online. The approach to these children within the criminal justice system should be guided by juvenile justice principles, rather than a separate philosophy.

While the process of demobilization and reintegration of child soldiers is often viewed negatively, these young individuals can transition into positive civilian lives and build healthy social relationships.[338] Integrating child soldiers into demobilization plans, and peace agreements, and supporting their reintegration into families and communities is a complex task that heavily depends on financial resources and political will.

A fundamental principle of children's Disarmament, Demobilization, and Reintegration (DDR) is that the release and reintegration of child soldiers should occur before the end of hostilities, regardless of their intensity. These processes should not be delayed until official peace negotiations or DDR programs are established. Legally, State Parties to the Convention on the Rights of the Child are required to address the issue of minors in armed conflict in addition to their policy obligations, as outlined in the Optional Protocol.[339]

In practice, many young soldiers are only released from military or armed groups after conflicts have ended or peace has been achieved. While it is crucial to actively seek ways to disengage children from conflicts whenever possible, significant obstacles, limited successes, and temporary improvements often hinder these efforts.

Disarmament, Demobilization, and Reintegration (DDR) programs are typically carried out in unstable and volatile environments, even in post-conflict settings where residual tensions might reignite hostilities. These areas often suffer from weak or nonexistent government authority, poor rule of law, economic instability, and divided communities. For DDR programs to be effective and for both adult and child former combatants to successfully reintegrate into society, these issues must be addressed. DDR initiatives should be seen as a critical component of a broader strategy for social, political, and economic reconstruction.

According to the Paris Principles, child reintegration is defined as "the process through which children transition into civil society and assume meaningful roles and identities as civilians who are accepted by their families and communities" in the context of regional and national reconciliation.[340]

According to the principles, sustainable reintegration is achieved "when the political, legal, economic, and social conditions necessary for children to sustain their lives, livelihoods, and dignity are in place." This approach aims to ensure that children can fully exercise their rights, which include protection from harm, family unity, safe and respectful livelihoods, and access to both formal and informal education.[341] The UN's Integrated DDR Standards indicate that child reintegration should span at least five years to offer children a viable alternative to military life.[342]

However, funding for nationwide DDR programs is often limited to the first year or two after a conflict, during which time participants are demobilized and reintegrated into their communities. It is rare for

[338] Verthey, Beth. 2001. "Child Soldiers: Preventing, Demobilizing and Reintegrating." Africa Region Working Paper Series, Available at http://www.worldbank.org/afr/wps/index.htm

[339] Optional Protocol, Article 6(3) requires State Parties to take all feasible measures to ensure that children illegally recruited or used in hostilities are demobilized or otherwise released and receive appropriate support fortheir reintegration.

[340] The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (Paris Principles)

[341] Id

[342] UN Integrated DDR Standards, Section 5.30: Children and DDR, Sub-section 3.4: Reintegration

former child soldiers and other ex-combatants to receive the extended support needed to play meaningful and positive roles in their communities.

While extended funding is crucial, even the most well-designed and well-funded DDR programs may fall short in addressing the long-term rehabilitation and reintegration needs of children displaced by war. Therefore, long-term rehabilitation and development efforts should incorporate DDR processes. There is a need for institutional mechanisms to connect organizations and donors responsible for short- and medium-term aid for veterans with those managing long-term community support and economic development.[343]

Once a peace agreement is signed by the warring parties, DDR programs for former combatants become crucial to the peace process. These programs aim to disarm and demobilize former fighters while assisting them in reintegrating into their communities or joining a new national army or police force. DDR seeks to ensure a safe and orderly transition from military to civilian life.[344] As a result, the DDR process for child soldiers differs significantly from that for adult ex-combatants. According to the UN DDR Resource Center, "Child soldiers cannot be legally recruited, and efforts to prevent their recruitment or reintegrate them into their communities should not be seen merely as standard components of DDR. Instead, these efforts should be regarded as attempts to prevent or address violations of children's human rights."[345] The World Bank outlines specific guidelines for DDR programs to protect the rights of child soldiers and address their unique needs. It recommends: "Establishing special reception centers and ensuring that child soldiers are kept separate from military authorities to minimize the time they are separated from their families and communities during demobilization."[346] Reintegration programs must focus on three key components: mental health support and education, family reunification, and employment opportunities.

Initially, under UNICEF's guidance, child protection workers at disarmament and demobilization centers will separate children from adults. This separation aims to ensure that child soldiers receive age-appropriate reintegration services and to break the power and control dynamics imposed by their commanders.[347] Once the child's condition has stabilized, they can either enrol in an education program focusing on basic math, reading, and writing skills or, if they are older and have been out of school for a while, they can be gradually reintegrated into a local school.[348] Finally, ICCs must locate the families and communities of the child soldiers to prepare for their reintegration. Once identified, a brief awareness campaign will be

[343] LEONTINE SPECKER, The R-Phase of DDR processes: An Overview of Key Lessons Learned and Practical Experiences, Netherlands Institute of International Relations "Clingendael", September 2008.

[344] United Nations Disarmament, Demobilization, and Reintegration Resource Centre (n.d.). Available at http://www.unddr.org/whatisddr.php.

[345] Id

[346] Knight, M., &Özerdem, A. (2004). Guns, Camps and Cash: Disarmament, Demobilization and Reinsertion of Former Combatants in Transitions from War to Peace. Journal of Peace Research, 41(4), 499-516.

[347] Williamson, J. (2006). The Disarmament, Demobilization and Reintegration of Child Soldiers: Social and Psychological Transformation in Sierra Leone. Intervention, Vol. 4(3), 2006, at p. 185-205.

[348] Zack-Williams, Child Soldiers in Sierra Leone and the Problems of Demobilisation, Rehabilitation and Reintegration into Society: Some Lessons for Social Workers in War-Torn Societies. Social Work Education, Vol. 25(2), 2006 at p.119-128; Boothby, N., Crawford, J., and Halperin, J. Mozambique Child Soldier Life Outcome Study: Lessons Learned in Rehabilitation and Reintegration Efforts. Global Public Health, Vol. 1(1), 2006, at p. 87-107

conducted to inform these families and communities about the children's experiences during their military service and the support needed for their transition back to civilian life (The Save the Children Fund, 2007). These programs will also introduce and promote the concept of children's rights. In many cultures, a child's reintegration involves traditional rites of passage, such as washing ceremonies, for which the ICC typically assists with planning and funding. After reintegration, an ICC staff member will visit the family to provide follow-up support, addressing any challenges such as aggressive behaviour, PTSD symptoms, disobedience, or exclusion from community events. Young soldiers are influenced by a combination of domestic and international factors during their military service and their transition back to civilian life. Therefore, it is essential to bridge the gap between conflicting viewpoints. Both sides need to adapt their goals and consider the broader context. This can be achieved by uniting experts from various fields to offer a clearer picture of the state of war, a deeper understanding of the complex causes of conflict, and the dynamics involved in rebuilding communities' post-conflict. Additionally, more research is needed on the perspectives of former child soldiers themselves to better understand their experiences and preferences for reintegration into post-conflict society.

CASE STUDY

MIDDLE EAST - SYRIA

This region has experienced numerous severe human rights violations, with countries such as Iraq, Syria, Israel, Palestine, and Yemen recently beginning to recruit minors into their armed forces. This paper aims to present a case study focusing on Syria and Israel.

In Syria, human rights organizations report that rebel groups have enlisted minors as young as fifteen in the civil war, according to investigations by UNICEF and Human Rights Watch. Human Rights Watch, based in New York, has noted that these rebels use youths as suicide bombers, soldiers, and stretcher-bearers.

The ongoing crisis has severely impacted the Syrian population, with two million people have fled to neighboring countries and one-third displaced internally. Children of all genders are coerced into joining rebel groups. Estimates from "Save the Children" indicate that around two million children have been killed in the Syrian Civil War. These children face extreme conditions enforced by both rebel and official forces, including violence, illness, and starvation. As a result, they are separated from their families and schools. Struggling to survive, Syria's youth have lost their innocence and childhood. They endure severe poverty and lack access to essential resources such as food, shelter, healthcare, and safety. Heavy artillery and constant gunfire have forced many Syrians to flee, leaving them with no place to go. The exact number of child combatants in Syria remains uncertain. Local monitoring groups, such as the Violence

Documenting Center, have reported casualties among child soldiers since the conflict began.[349] The research suggests that the International Criminal Court should prosecute teenagers recruited into the armed forces for war crimes.[350] These children are vulnerable and unable to discern right from wrong on their own. Despite their situation, they still have the potential to contribute to global harmony. In Kurdish-controlled regions, child recruitment is prevalent, exacerbated by the use of children as suicide bombers or human shields.

Access to Syrian conflict zones is limited, making it challenging to collect precise data on local casualties. Nonetheless, UN bodies, NGOs, news agencies, and activists have reported instances of sexual abuse, brutality, and even murder involving Syrian children. Currently, these children are being held in violation of UN treaties and international law. While opposing the recruitment of minors by both government and rebel forces is crucial, implementing effective restrictions is challenging. To ensure that these children can build better and more peaceful lives after demobilization, international actors must provide sustained support in areas such as finance, technology, education, health, and employment.

ISRAEL AND OCCUPIED PALESTINIAN TERRITORIES

The recent escalation in violence between Israel and the Occupied Palestinian Territories (OPT) has once again highlighted the eagerness of young people to engage in acts of resistance. These youths have actively protested against military occupation by organizing demonstrations and throwing stones at Israeli soldiers. This activism heightens their risk of abuse, detention, injury, or even death at the hands of occupying forces, with refugee children facing particularly severe threats. Additionally, detained children are at risk of being kidnapped and coerced into espionage by the Israeli military.

The exact number of Palestinian children involved in combat remains unclear. However, over the past three years, more than 65% of children in Israel have been processed through juvenile courts and detention centres. Currently, 373 Palestinian children are held in Israeli prisons and detention facilities.[351] Of these detainees, 167 children—about 45%—are being held for allegedly using weapons during their attacks. Among those suspected of weapon use, 40% are from the northern West Bank. Approximately 60% of the children, or around 100, are not affiliated with any resistance groups. Additionally, 17 children, or 4.5%, are under close supervision due to suicide attempts.[352] There is no indication that any of the children accused of attempting to stab an Israeli soldier or settler are affiliated with resistance organizations.

Customary international humanitarian law mandates that civilians must be protected from the dangers of

[349] Syrian child soldiers asked to commit suicide, Al-Jazeera, 2014, http://america.aljazeera.com/articles/2014/6/20/report-syrian-childsoldiersaskedtocommitsuicide.html,

[350] Sherlock, Ruth. Syria using child soldiers as young as 14., The Telegraph, Published on September 25, 2013, http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9711971/Syria-using-child-soldiers- as-young-as-14.html.

[351] Child soldiers in the firing line". BBC, published on 8 April 2001.

[352] Id

armed conflict and cannot be targeted. A civilian is defined as someone who does not engage in hostilities or combat. While Israel asserts that there is an "armed conflict" involving its military and the PA's forces, Palestinians argue that even armed police officers retain their "civilian" status, viewing the struggle as a civilian uprising against occupation. Given this perspective, unarmed children, who epitomize the concept of "civilians," should undoubtedly be safeguarded under this principle.

The plight of Palestinian children under occupation is dire, with daily violations of their fundamental human rights. Since the beginning of the second Intifada, by the end of June 2004, 595 Palestinian children have died in the OPT.[353] Whether they were killed by tank shells fired by Israeli forces, shot by Israeli soldiers, or succumbed to tear gas inhalation, all these deaths were a direct result of the occupation. Israeli travel restrictions further prevented these children from accessing hospitals and other medical services. Daily, children witness the deaths or severe injuries of friends and family members. They also endure the trauma of seeing their parents humiliated and mistreated during nighttime raids and at checkpoints. Since September 2000, the Israeli government has detained approximately 2,800 children, with a similar number of children having family members in custody.[354]

For many children, inadequate education, unemployed parents, and bleak career prospects paint a grim picture of the future. They understand that their adult lives will likely be more challenging than those of their parents, especially as conditions worsen. This discouraging outlook often drives children towards political involvement. Contrary to claims by some groups and interests, these children are not simply "brainwashed" by adults.[355] Only a small fraction of children believe that becoming a martyr will alleviate their despair and exact revenge on those they blame for their situation. While some of these children have been recruited by Palestinian political groups to carry out violent attacks, there is no evidence that such recruitment is widespread within these organizations. Senior leaders of these groups acknowledge that such cases exist, but they assert that their organizations and the broader community oppose using child recruitment as a political strategy.[356] Therefore, it is insufficient for the leaders of these groups to merely publicly condemn the use of minors in conflict. Despite these criticisms, they must take decisive action to end the practice of recruiting and training young people for military roles.[357]

Leaders of all resistance organizations must ensure the adoption of a mandatory agreement that prohibits the recruitment of Palestinian children into armed resistance. Additionally, political parties should offer thorough education on relevant international laws to all members, regardless of their rank.

[353] Child Soldiers Global Report 2004; Child Soldiers International at p. 292
[354] Id. At p. 292-293
[355] Jihad Shomaly, Use of Children in the Occupied Palestinian Territories, Way back Machine, Published on 30 October 2007, available at http://www.dci-pal.org/english/publ/research/2004/ChildrenPerspective.pdf
[356] Id
[357] Id

CONCLUSION

Children continue to be exploited as soldiers, enslaved, and abused in conflicts, losing their innocence and childhood in the process. Raised amidst violence and destruction, these children often have scant memories of a normal life. Even when they are allowed to leave, they face communities that are hostile and unwelcoming, making reintegration into their hometowns extremely difficult. Although the issue of child soldiers has garnered public attention, the understanding of the problem has not kept pace with the depth of research conducted. Much of the existing literature is produced by activists rather than scholars, leading to issues such as overgeneralization and disorganized analysis. Consequently, the value of this research may lie in its ability to contribute to the collection of comparative data.

For academic and policy work to be effective, there must be a concerted effort to understand and address the factors driving the recruitment of child soldiers. Short-term objectives should be integrated into long-term strategies to foster effective solutions. Public perception of child soldiering needs to change significantly, with states formally acknowledging that recruiting minors is illegal. Addressing this issue is complex and culturally challenging, but it is essential for setting future goals. The international community should continue to provide support in finance, healthcare, and education without direct interference.

International law has seen a notable shift regarding the involvement of children in armed conflict, with the Optional Protocol on the Involvement of Children in Armed Conflict gaining widespread acceptance. However, despite these advances, conflicts persist, and new ones may arise, necessitating ongoing vigilance from the international community. Enhancing and refining current mechanisms for implementing, documenting, and enforcing regulations protecting young soldiers is crucial. Addressing the root causes of child soldiering is essential to bridge the gap between evolving legal standards and actual practices. Building relationships with informed authorities, understanding the specific circumstances of child recruitment, and evaluating the effectiveness of interventions are key strategies. Utilizing practical insights into child soldiering to develop viable alternatives can help the international community better understand the underlying issues and identify successful programs. Strengthening national and global networks will be vital in encouraging armed groups to comply with regulations.

Preventing child recruitment should always be a priority, even as efforts to secure the release and reintegration of affected children continue. The challenges in places like the Democratic Republic of the Congo and Sri Lanka highlight the difficulty of achieving release during emergencies. Therefore, while securing release is important, prevention remains the most effective long-term strategy for protecting children from harm.

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EVALUATING & RE-IMAGINING JUVENILE JUSTICE: FROM ITS INSTITUTION TO ITS FUTURE

Falak Munaf Solkar[358]
Ayush Mishra[359]

ABSTRACT

The Juvenile Justice System of any country is crucial in shaping the future of delinquent youth. Juvenile offenders are considered separately in the criminal justice system because of their age and developmental stage. Their immaturity, vulnerability, and capacity for growth are acknowledged, leading to a different approach in the legal treatment of their cases compared to adult offenders. When appropriate measures are implemented, it helps the delinquent child to constructively progress towards a positive future rather than propelling them to a lifestyle of recidivism. The first legislation in accordance with Juvenile Law was enacted in 1986 in pursuance of the Beijing rules 1985. This legislation was replaced in 2000 by the Juvenile Justice Act, 2000 after the Government of India ratified the United Nations 'Convention on the Rights of the Child' in 1992 to postulate the best interest of the child and focus on social re-integration and from then on, the act has been evolved. It has been more than 20 years, allowing us to evaluate the system, laws and policies and re-imagine the approach if needed. This paper will delve into the evaluation of current Juvenile Justice Policies, laws and the outcomes produced by it and re-imagine certain aspects of the Juvenile System to prioritize positive development and empower youth to build successful futures after they have served and come anew. The research would be based on quantitative and qualitative methods of research to investigate alternative ways of restorative justice, holistic support, and positive development principles through a critical review of current practices, research findings, and case study. Future of any country lies in the hands of its youth, so, it is an imperative for the community and government to look after its youth population and its mindset, to secure the country's future. A country with high rates of juvenile offenders with recidivism shows that there is a dire need to amend the system to adapt to such situation.

KEYWORDS: Juvenile, recidivism, India, re-imagine, evaluation.

[358] 3rd Year - BBA. LLB (Hons.) Kirit P. Mehta School Of Law, SVKM'S NMIMS, MUMBAI
[359] 4th Year - BBA. LLB (Hons.) Kirit P. Mehta School Of Law, SVKM'S NMIMS, MUMBAI

INTRODUCTION

Juvenile Justice, a principle based on providing rehabilitation rather than punishment for young offenders, has evolved over the years. The term "juvenile" has derived from the Latin word "juvenis" which means "young", underscoring the attention given to meeting the distinct requirements of individuals below the age of 18[360]. Historically, the concept of reforming a young offender can be traced back to Pope Clement XI, who established institutions for reformation of young offenders/children in conflict with law. The first juvenile court was established in Chicago in 1899, paving the way for a centralised and considerate legal approach. England followed the path of rehabilitation by setting up a juvenile court in 1905 along with probation statutes, thus acknowledging the need to shield the young offenders from the same punitive measures as adults. The foundation belief behind the establishment of the juvenile justice system is to safeguard juvenile criminals from facing the same punishments as their adult counterparts. The juvenile justice system aims to implement corrective and reformative measures by recognising the distinct psychology and malleability of young minds when compared to that of adults. This approach is crucial, especially in the modern era, where children are exposed to a plethora of information through social media and the internet, which in real sense, may not be appropriate for their age. In the context of juvenile delinquency, it is imperative to understand the factors contributing to young individuals engaging in criminal behaviour. Increased exposure and unsupervised access to multitude of information on the internet, coupled with societal changes, has influenced the thinking patterns of children.[361]

The Doctrine of *Parens patriae* serves as a symbolic representation that the state is the ultimate guardian of the well-being of the children. The doctrine encapsulates the nation's paramount duty, answerability, and ultimate responsibility in safeguarding and protecting children at all costs. In recognising the economic potential of children and their pivotal role in shaping the nation's future, it becomes crucial to address the societal attitudes towards them. Despite their economic potential, families sometimes view them as financial burdens, potentially resulting in inadvertent neglect of their nurturing and well-being, thereby increasing the risk of juvenile delinquency. In this context, the *doctrine of parens patriae* assumes heightened significance, as it underscores the state's pivotal role not only in protecting children from external threats which is posed from the internet but also within the family unit.

Consider the scenario of sentencing a 16-year-old juvenile to jail. Serving the same punishment as adult offenders and placing them in the same institution as adult offenders without proper guidance and a chance to reform poses a greater risk to society after they have served their sentence. However, the current trends in

[360] Goldson, Barry. "Excavating youth justice reform: Historical mapping and speculative prospects." The Howard Journal of Crime and Justice 59.3 : 317-334.(2020)

[361] Shivam S. Mallick et al., *A CRIMINOLOGICAL LEGAL STUDY ON JUVENILE DELINQUENCY*, 7 INDIAN POLITICS & LAW REVIEW JOURNAL (IPLRJ) 51–79 (2022).

recidivism show a high rate of young re-convicts along with multitude of new cases being registered for juveniles, somehow pointing towards the evaluation of the current Juvenile Justice System and the possibility of considering strict deterrence in hand with rehabilitation while reimagining the Juvenile Justice System.

RESEARCH METHODOLOGY

The research has gathered existing data, detailing the current state of affairs as presented in relevant statutes. The authors, in line with other ex-post facto studies, have undertaken or planned similar endeavours. Additionally, the authors have endeavoured to elucidate the underlying causes of these occurrences. Employing analytical research methods, the authors have systematically utilised available materials, critically assessing information and data to enhance their evaluation. The paper relies on secondary data, books, news articles, National Crime Record Bureau reports, and reputable articles across various databases. Furthermore, the authors have consulted numerous judgments rendered by the Hon'ble Courts of India.

RESEARCH OBJECTIVES

1. To analyse the historical growth of Juvenile Justice System around the world and causes of the Juvenile Delinquency.
2. To analyse the historical growth of Juvenile Justice System in India.
3. To evaluate the current Juvenile Justice System in India along the lines of ideals set out in UNCRC & Indian Constitution, and analysis of data report of NCRB.

LITERATURE REVIEW

(Singh, 2019) The paper stands as a forefront of a contemporary debate surrounding the juvenile offenders in India. The author had critically examined the Juvenile Justice Act, 2015, focusing its departure from the development ethos of its predecessor, the juvenile justice act 2000. This study unveils systemic shortcomings, ranging from delayed enquiries to instances of abuse within juvenile institutions. The author raised a concern regarding the act's transformation from a rehabilitative to a managerial framework, with a particular focus on the transfer provision. This shift, could be a potential setback, diluting the sui generis status afforded to children within the legal sphere. The study further scrutinized the impact of subjecting juveniles to adversarial court proceedings, underscoring communication challenges and erosion of trust in legal representation. The paper advocated for a return to a treatment-driven system, emphasizing early interventions targeting the root causes of delinquency through bolstered educational and familial institutions. The author culminates in a call for judiciousness in trying juveniles as adults, proposing model rules to guide

such decisions, and prioritizing rehabilitation over punitive measures for the holistic development of law-abiding citizens.[362]

(Chitereka & Mangwiro, 2021) The paper studied the crucial impact of international laws on juvenile justice act globally. The study highlighted the instrumental role of international laws in ensuring equitable treatment for children involved in legal conflicts. Upon historical evaluation, it was revealed that before the emergence of juvenile justice systems in the late 19th century, young offenders were often perceived as trouble makers and societal threats. The United Nation Convention on the Rights of the Child (UNCRC), which was established in 1989, plays a significant role by defining children as individuals below 18 and obligating the state to establish robust child protective system. The study focused on 3 articles, namely article 37 and 40 of the UNCRC as it addressed the rights of the juvenile offenders, emphasizing protection against torture and inhumane treatment and advocating for the use of prison as the last resort. Moreover, the authors stressed upon the alternative measures and distinctive juvenile justice mechanisms which focused on rehabilitation by the UNCRC rather than punitive punishments. The study also focused on the United Nations Minimum Rules for Administration of Juvenile Justice, known as the Beijing Rules, which was enforced in 1985, as it further guides member states in tailoring juvenile justice system in a way that caters to the needs of the children in conflict with law, whilst considering the cultural factors and promoting the overall well-being of juveniles and their families.[363]

(Yao, 2021) This paper examined the influence of family dynamics on juvenile delinquency. Through a thorough examination of interview data, authors found a correlation between family dysfunction as a manifestation of offensive behaviour in juveniles. A notable factor in this dynamic is the absence of the father's role, elucidated by instances wherein there was a communication barrier, abusive father or conflicts which impeded their education. This absence, influenced by cultural and societal factors, can result in potential conflicts during a child's puberty. The study found that apart from absent fathers, poor communication between teenagers and parents further exacerbates the issue. Parents leaving their child before the age of 6, leads to disruption of early attachment relationships, thus resulting in increased probabilities of future offensive behaviour. Further, the study identified deviation of teenager's life courses, particularly during 16-18 as a manifestation of criminal offenses. This period is marked by the pursuit of personal space, friendships, onset of challenges, becoming a turning point where formation of coping strategies remains absent due to the lack of stable family, often leading to conflicts. The absence of internalised orders and family love contributions lead to detachment from normal life and emergence of

[362] Deepak Singh, *An analysis of section 15 of the juvenile justice act, 2015*, 8 CHRIST UNIVERSITY LAW JOURNAL 1–23 (2019).
[363] Chipo Chitereka & Vongai P. Mangwiro, *Juvenile justice and social work*, *in* PROFESSIONAL SOCIAL WORK IN ZIMBABWE, PAST, PRESENT AND THE FUTURE 180–207 (2021).

offensive behaviours and criminal offenses. The study propounded on theory of self-identity, which was proposed by Erik Johnson as the connection between these deviations and adolescent quest for self-identity. This theory underscores the impact of family dynamics on shaping behaviour during critical development stages, thus highlighting the need for a stable foundation to foster positive life outcomes[364].

(Nanjunda, 2019) In the context of India, the social problem of delinquent children encompasses housing issues, peer group dynamics, limited medical services, social detachment, and insufficient personal relations. The emergence of a 'culture of indifference' and the prevalence of negative traits among modern youth, including aggression, violence, haughtiness, and irresponsibility, contribute to the deepening deviation among juveniles. Experts depict a nuanced view of contemporary society, pointing to factors that provoke youth towards criminal behaviour. In summary, juvenile delinquency is portrayed because of social changes and maladjustments, with age as an independent factor. Emerging aspects such as family status, violence within families, childhood violence, and peer group interactions further contribute to the vulnerability of young minds. The paper concludes that addressing juvenile delinquency requires a new normative approach and highlights the significance of rehabilitation. Success in rehabilitating juvenile delinquents' hinges on the commitment of various stakeholders involved in the rehabilitation process, emphasizing the need for changes and sacrifices to ensure the successful reintegration of the juvenile into society as a responsible citizen.[365]

ANALYSIS

Chapter 1

The origins of the Juvenile Justice System (JJS) spans centuries and has been impacted by cultural, social, and legal events all around the world. This historical assessment tries to offer a succinct review of major events, treaties, and conventions relating to the JJS, showing both its critiques and advantages over time.

Prior to the nineteenth century, there was barely any distinction between juvenile and adult criminals. Children were frequently subjected to the same legal procedures and penalties as adults in this era. In ancient Rome, for instance, the *Doctrine of Parens Patriae* (the state as parent) arose, allowing the state to interfere in instances involving children. This method of approach, however, was more punishing than rehabilitative.

[364] Feng Yao, *Retracted: Analysis on psychological and social causes of juvenile delinquency–a study based on grounded theory*, 60 INTERNATIONAL JOURNAL OF ELECTRICAL ENGINEERING & EDUCATION 2315–2329 (2021).
[365] Devajana Chinnappa Nanjunda, *Juvenile Delinquents And the Juvenile Justice System In India: A Perception After the Fact*, 19 HUMANITIES, ARTS AND SOCIAL SCIENCES STUDIES 256–270 (2019).

In the 19th Century, The New York House of Refuge became the first facility in the United States dedicated to the rehabilitation of juvenile delinquents in the year of 1825.[366] It was formed in response to the efforts of Thomas Eddy and John Griscom, pioneering penal reformers, who founded the Society for the Prevention of Pauperism to oppose putting juveniles in adult jails and prisons and to advocate for the establishment of a new type of institution. The concept of a distinct legal system for juveniles gained traction in the **late nineteenth century**, leading to the founding of the first Juvenile Court in Chicago in 1899 under the judgeship of Judge Julian Mack. The goal of the court was to act *in loco* parentis and give rehabilitation rather than punishment. Other nations quickly followed the concept, including Canada and the United Kingdom (1908), France (1912), Russia (1918), Poland (1919), Japan (1922), and Germany (1923). The Progressive Era lasted from the **early to mid-twentieth century** as the juvenile court paradigm spread extensively during this era, thus Progressive Era. The Geneva Declaration on the Rights of the Child, adopted in 1924, emphasized the importance of specific attention in treatment and consideration for juveniles in the court system. With the 1959' Declaration of the Rights of the Child, the United Nations reinforced the concept of juvenile justice as a unique subject. By the **late twentieth century**, critics of the JJS had gained significant traction. In the 1980s and 1990s, the *"get tough on crime"* campaign resulted in legislative reforms that permitted more adolescents to be prosecuted as adults. This punitive trend ran counter to the juvenile court model's rehabilitative aims.

Criticism:

- Some believe that the early JJS's paternalistic approach lacked due process and frequently resulted in arbitrary conclusions.
- Despite these treaties and declarations at international level, imbalances in juvenile treatment continued.
- Lack of uniform processes and different definitions of who qualified as a juvenile within the jurisdiction of application.
- Concerns were being made concerning the justice and appropriateness of exposing minors to adult sentences as the number of transfers to adult court was increased.

Benefits:

- The introduction of juvenile courts was a significant step towards recognizing developmental distinctions between juveniles and adults.

[366] Juvenile justice history, CENTER ON JUVENILE AND CRIMINAL JUSTICE, https://www.cjcj.org/history-education/juvenile-justice-history (last visited Jan 5, 2024).

- The emphasis on rehabilitation indicated a forward-thinking strategy to dealing with adolescent misbehavior.
- International declarations emphasized the need of protecting juvenile offenders' rights and well-being.
- The criticism sparked a rethinking of juvenile justice policies and Restorative justice programmes grew in popularity, with the goal of healing harm and reintegrating youth into their communities.

CAUSES

The juvenile justice system has a significant impact on the lives of young offenders, seeking not only to punish but also to rehabilitate and reintegrate them into society. This part dives into the reasons of juvenile criminality and recidivism in India:

1) **Socio-economic Reasons:** A major source of adolescent delinquency in India stems from the socio-economic factors of the person's family. The lack of basic necessities, along with a scarcity of economic prospects, frequently drives people to engage in criminal activity as a way of survival. According to the National Institute of Public Cooperation and Child Development (NIPCCD), 60% of juveniles in conflict with the law (JCLs) come from low-income families.
2) **Family Environment:** The family is the major social institution that shapes a child's development, it is the first place where a child learns and understands. Lack of emotional support, inconsistent discipline, and exposure to marital violence can lead to adolescents seeking belonging and identity outside of the home, frequently with disastrous results.
3) **Peer Influence:** Peer influence is a strong component in adolescent criminality. Adolescents are often vulnerable to peer pressure, and the urge to fit in can lead to illegal behaviour.
4) **Educational Obstacles:** Inadequate access to basic qualitative education, high dropout rates, and poor educational institutions can lead to juvenile criminal behaviour. Most of the juveniles were illiterate or had just completed basic school, and a handful had never ever seen the inside of a school as per the report of National Crime Records Bureau, 2018.[367]
5) **Substance Abuse:** Substance addiction among adolescents is a big problem in India. Many adolescents are drawn into the cycle of addiction due to easy access to drugs and alcohol, as well as a lack of understanding and protective measures.
6) **Juvenile Justice System:** Contrary to popular belief, the juvenile justice system in some situations also leads to recidivism. Inadequate rehabilitation programmes, overcrowded jail facilities, and a lack of personalised care all fail to treat young offenders' underlying concerns.

[367] See supra note 5

7) **Urbanisation and Migration:** Rapid Urbanization & migration provide further issues. Juveniles who are removed from established support structures are more prone to delinquency.
8) **Media and Technology:** The impact of media and technology on adolescents cannot be overstated. Violence, unreasonable expectations, and mistaken notions of achievement all lead to aggressive behaviour and a proclivity for criminal behaviour.

Chapter 2

Prior to British rule in India, the acts of children were monitored through the personal laws of Hindu & Muslims, the parents were held responsible for the activities of their children.

Under British rule

The need for laws regulating offenses committed by children was addressed by enacting laws such as the Apprentice Act (1850), the Code of Criminal Procedure (1861) and the Reformatory School Act (1876 & 1897). The Apprentice Act, 1850 mandated child offenders between the age of 10 to 18, to be handled distinctly. Convicted children under this act were mandated to serve as apprentices in various businesses. The legal recognition of the special status of children offenders was established in the Indian Penal Code, 1860 wherein Section 82[368] of the act laid down that children below the age of 7 would not be held liable for any offences and those between age 7-12 were recognised as capable of understanding the nature of their actions under specific circumstances. The Code of Criminal Procedure, 1861 emphasized on rehabilitation over imprisonment and on its advent, introduced special trials for individuals under age 15. The Reformatory Schools Act, 1876 and 1897 addressed the laws regarding juvenile delinquency. This act mandated the detention of offenders in reformatory schools for 2-7 years. Upon attaining the age of majority, they would be sent to adult prisons.

Post-Independence from British rule

The juvenile justice system underwent various changes and reformations under the constitutional mandates and international treaties. Furthermore, the Indian Constitution[369] guarantees citizens certain fundamental rights, including the rights and welfare of children under Article 15(3), 21, 23,24, 39(e), 45, 47 and 51. The Juvenile Justice Act, 1960 was implemented to address the issue of juvenile delinquency and it was put under the regulation of the central administration. The Juvenile laws implemented were drafted so in accordance with international legislations such as the UNCRC. To align with the treaty UN Convention on the Rights of the Child which safeguarded the children's political, economic, social, and cultural rights, India ratified the agreement in 1992 and passed the Juvenile Justice Act, 2000. Under this act, the age of juvenile was increased up to 18 years and a limitation period of 3 years in detention was imposed for both boys and

[368] Indian Penal Code, 45, § 82, (1860)
[369] The Constitution of India, 1950

girls. However, there were various gaps which were identified in the Juvenile Justice Act, 2000[370]. To address them, the act was amended twice, in the year of 2006 and second in the year 2015.

2015 Amendment

After the disturbing case of Nirbhaya Gang Rape, the act's primary defect was identified as it lacked lawful insurances, making it difficult to stop adolescent violations. The Juvenile Justice Act, 2015[371] was passed consequently to this case. The act addressed the issues of the Juvenile Justice Act, 2000 by allowing the individuals between the of 16-18 to be tried as adults in cases of heinous offences. They were to undergo preliminary investigation which was conducted by the Juvenile Justice Board who assessed if the offense committed is heinous in nature. If upon evaluation, it was determined that crime was severe, then the individual would be prosecuted as adults. The act had repealed the reformative strategy which did not take into regard the seriousness of the offenses committed. Through the act, juvenile justice boards, children courts and welfare committees were established; however, ambiguity reigned in the authority of the juvenile justice board. As the board has discretionary authority to decide if the accused juvenile must be treated as an adult or was to be sent to the rehabilitation centres for reformation. There are no provisions to regulate this authority. Further, the act also made no distinction between juveniles who commit minor crimes and those who engage in severe offenses, thus disrupting the rehabilitative underpinning of the juvenile justice system. The act also lacked provisions which refrained the juvenile delinquents from recidivism. The primary objective of the act was to safeguard children, however, by treating minors over the age of 16 as adults for horrific acts undermines the rehabilitative effort of the juvenile justice system, as such treatment could develop juveniles into hardcore criminals. Such an approach is also in violation of article 14(3) and 15(3) of the constitution.

2021 Amendment

Several of the 2015 Juvenile Justice Act (JJA) provisions were changed by the Juvenile Justice Amendment Act of 2021. One of the modifications is the categorization of offences carrying sentences ranging from three to seven years in jail as non-cognizable offences. The phrase *"Claim of Juvenility"* is commonly used in legal contexts, particularly in cases where the Supreme Court has summarised concepts pertaining to the resolution of such claims under the Juvenile Justice Act of 2015, as in the case of *Rishipal Singh Solanki v. State of Uttar Pradesh, 2021*[372]. The allegation of juvenility basically has to do with defining who qualifies as a juvenile. The accused can raise a claim of juvenility during the trial or following adjudication, according

[370] Juvenile Justice Act, 56, 2000
[371] Juvenile Justice Act, 2, (2015)
[372] LL (2021) SC 667

to Section 9 of the Juvenile Justice Act of 2015. The court decided in the *Rajni Bhati v. State of UP*[373] that a report proving a person's juvenility should be taken as definitive evidence of their birthdate. Nonetheless, if there are any questions, the court may mandate an investigation to ascertain the accused's age.

Chapter 3

To evaluate the Indian Juvenile Justice System, its laws - Juvenile Justice (Care and Protection of Children) Act, 2015 (JJA) and principles along with its results that it are set out to be achieved, this chapter would delve into analysing whether the Indian Juvenile Justice System incorporates the ideals set out in the treaty United Nations Convention on the Rights of the Child (UNCRC) and Indian Constitution, then the comparison between the Belgium Juvenile Justice System, to that of Indian along with analysis of data reports of the NCRB on Juvenile Delinquency and Recidivism.

The United Nations Convention on the Rights of the Child (UNCRC)

Certain principles and ideals enshrined in the UNCRC have significant effect on the treatment of juvenile offenders. It is to evaluated whether the Indian Juvenile Justice System incorporates all such ideals.

1. **Best Interests of the Child (Article 3):** The child's best interests should be the first priority in all acts and decisions involving children, including those within the juvenile justice system. The welfare concept is stated in Section 3 (iv) of the JJA, which stipulates that the best interests of the child must be prioritised at all stages of the juvenile justice system.
2. **Right to Life, Survival, and Development (Article 6):** Every kid has an inalienable right to life, and the juvenile justice system should help the youngster survive and flourish. Section 3 lays of JJA lays down various principles for its subjects.
3. **Non-Discrimination (Article 2):** All children have the right to be treated equally and without discrimination, regardless of race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, handicap, birth, or other status of their parents. Section 3 (x) of JJA prohibits discrimination against any child on any basis.
4. **Right to be Heard (Article 12):** Children have the right to voice their opinions on any issue that affects them, including legal actions. Section 3(iii) of JJA provides for the Right to be Heard under Principle of Participation.
5. **Protection of the Dignity of the Child (Article 37):** No child should be tortured or subjected to any cruel, inhuman, or degrading treatment or punishment. Section 3 (ii) of JJA provides for the Principle of Dignity & Worth.

[373] (2016) 12 SCC 744

6. **Right to Privacy (Article 16):** Children have the right to privacy, which should be protected throughout the juvenile justice system. Section 3 (xi) of JJA provides for the principle of right to privacy and confidentiality.

So, Juvenile Justice System in India incorporates all the ideals of the UNCRC required for an ideal Juvenile Justice System in its laws.

THE CONSTITUTION OF INDIA

Certain principles and ideals have been enshrined in the Indian Constitution which guided the formation of JJA. It is to evaluate whether the Indian Juvenile Justice System incorporates all such ideals and is not in conflict with any article.

Right to Equality (Art. 14): The Juvenile Justice System in India emphasises equality before the law. It guarantees that every kid, regardless of their origin, is treated fairly and without prejudice under Sec. 3 (x) of JJA.

Child's Best Interest (Article 15(3), Article 39(e) and (f)): The notion of the child's best interests is central to the Juvenile Justice System. It assures that in the instance of a juvenile, decisions and actions are directed by their welfare and well-being under Sec. 3 (iv) of JJA.

Protection of Children's Rights (Article 21): Article 21 preserves the right to life and personal liberty and this is also enshrined under Sec. 3 (ii) of JJA.

Prohibition against Cruelty (Article 21): The Juvenile Justice System maintains the constitutional clause against cruel and inhuman treatment towards juveniles under Sec. 75 of JJA.

Right to Privacy (Derived from Article 21): The Juvenile Justice System respects juvenile offenders' right to privacy and seeks to protect them from unwarranted publicity under Sec. 3 (xi) of JJA.

Non-Discrimination (Article 15): Discrimination based on caste, religion, colour, gender, or place of birth is prohibited in the Juvenile Justice System. Under Sec. 3 (x) of JJA, it guarantees that all children are treated similarly, regardless of their background.

Principle of Rehabilitation (not explicitly mentioned in the Constitution but implied): The Indian Juvenile Justice System emphasises on the rehabilitation and reintegration of juvenile offenders into society, which aligns with the Constitution's greater purpose of social justice.

The Juvenile Justice System of India does follow the ideals of the Indian Constitution.

Evaluating the Juvenile Justice System progress based on NCRB' data on Juvenile crimes:

The analysis of the effectiveness of the current Indian juvenile system is based on NCRB data. Noteworthy trends in the data suggest a potential need for reformation in the Indian juvenile law.

1. Heinous Crimes:

- Murder cases committed by juveniles increased from 806 in 2021[374] to 819 in 2022[375].
- Kidnapping rates rose from 838 in 2021 to 906 in 2022.
- Rape cases witnessed a decline from 1137 in 2021 to 1037 in 2022.
- Culpable homicide decreased from 66 in 2021 to 53 in 2022.

2. Recidivism:

- The most alarming change in juvenile crime data was the increase in recidivism.
- Repeat offenses rose from 1187 in 2021 to 1539 in 2022.
- This sharp increase in recidivism raises concerns about the effectiveness of current rehabilitation and intervention programs.

3. Implications of Recidivism Increase:

- The consistent rise in severe crimes like murder and kidnapping suggests a need for urgent attention.
- The slight decrease in crimes like rape and culpable homicide does not offset the alarming increase in recidivism.
- This indicates that current rehabilitation and intervention efforts may not be adequate in preventing repeat offenses.

4. Need for Thorough Revision:

- The data points towards a need for a thorough revision in the existing juvenile system.
- Reformation in the Indian juvenile law should be considered to address the identified deficiencies.

5. Focus Areas for Reformation:

- The reformation should prioritize enhancing rehabilitation and intervention strategies along with stricter version of justice in case of heinous crimes.
- There is a need to address the root causes of juvenile crime to prevent recidivism effectively.
- A comprehensive approach to juvenile justice should be adopted, considering the nuanced nature of juvenile offenses.

These trends highlight the urgency for a comprehensive reimagination of the Indian juvenile law, with a

[374] National Crime Bureau Report – Ministry of Home Affairs, 2021
[375] National Crime Bureau Report – Ministry of Home Affairs, 2022

specific focus on improving rehabilitation and intervention programs to effectively reduce repeat offenses and create a more robust juvenile justice system.

CASE STUDY: The Jubilee Hills Gang Rape Incident and Juvenile Justice

1. **Incident Summary**:

   In May 2022, a 17-year-old girl was subjected to a gang rape by six people, five of whom were minors, in Jubilee Hills, Hyderabad, following her participation at a social event at a nearby bar.

2. **Investigation and Arrests:**
   - A thorough investigation led by Banjara Hills ACP M Sudarshan revealed that the gang rape occurred near the Sri Peddamma Thalli Temple.
   - The perpetrators used a Toyota Innova Crysta with transparent windows, employing temporary screens during the commission of the offence.
   - Law enforcement apprehended all accused parties, including Saaduddin Malik, Umair Khan, and the underage offenders.
3. **Along the legal lines under Juvenile Justice System:**
   - The Jubilee Hills police compiled a comprehensive 600-page chargesheet against the accused in July 2022, incorporating detailed statements from 65 witnesses, DNA reports, CCTV footage, and telecommunications evidence.
   - The legal pursuit included an effort to have all minor offenders tried as adults, seeking the imposition of the maximum permissible penalties under the law.
   - During the final week of July 2022, five Juveniles were given bail, causing public outrage and sparking arguments about the effectiveness of the juvenile justice system.
   - On September 30, 2022, the Juvenile Justice Board decided to send four Juvenile to adult trial processes, while the fifth was scheduled for adjudication within the juvenile justice scope.
   - This decision was driven by the need to hold the accused accountable for the seriousness of their illegal activities.
   - In October 2022, the son of AIMIM MLA Mohammad Moazam Khan filed a discharge petition, professing innocence.
   - In December 2022, during a hearing before the Juvenile Justice Board, he rejected the claims and indicated a desire to face a fair trial.
   - On April 25, 2023, the Telangana High Court intervened, overturning the juvenile court's order designating one minor accused as an adult, requiring a new preliminary inquiry.
4. **Comment**

This development prompted significant questions about the implementation of juvenile justice principles in circumstances involving serious criminal offences. Further, questioning the rehabilitation aspect for heinous crimes by juveniles with significant *mens rea*, opening the door of debate on Punitive Measures considerations in Juvenile Justice System of India.

SUGGESTIONS

10 Points to Reimagining Indian Juvenile Justice System

The Reimagined Juvenile Justice System should anticipate an innovative approach that carefully balances the requirement for responsibility in serious juvenile offences with a strong commitment to rehabilitation.

1. **Offence Categorization and Accountability:**

   Implement a tiered system for categorising offences based on severity, with a particular emphasis on heinous crimes. In such circumstances, lower the age barrier for treating juveniles as adults to ensure a more mature understanding of accountability.

2. **Specialised Fast-track courts:**

   Establish specialised fast-track courts for minor matters to accelerate judicial procedures while ensuring thoroughness. This provides a speedy settlement without jeopardising the evidence examination.

3. **Mature Offenders Face Strict Penalties:**

   Introduce explicitly harsh and age-appropriate sanctions for mature juveniles who commit horrific crimes. This involves a careful examination of the nature of the offence and ensuring that the penalties correspond to the increased level of responsibility anticipated of any ordinary mature persons.

4. **Comprehensive Rehabilitation Centres along with Educational & Skill Development Initiatives:**

   Establish cutting-edge rehabilitation facilities manned by skilled personnel. Customise rehabilitation programmes, such as education, counselling, and mental health care. In rehabilitation centres, emphasise excellent education and combine skill development programmes. Giving juveniles practical skills improves their chances of effective reintegration into society.

5. **Community Involvement and Service Programmes:**

   Encourage community involvement by creating service programmes that enable young offenders to actively participate. This improves society while also instilling a feeling of duty and accountability.

6. **Mental Health Assessment and Support:**

Make mental health assessments a priority in order to discover underlying conditions that contribute to criminal behaviour. Create a network of mental health specialists to provide continuing assistance throughout and after recovery.

7. **Family Reintegration and Counselling:**

   Reconnect juvenile offenders with their family while also offering counselling and assistance. Recognise the importance of families in the recovery process.

8. **Post-Release Monitoring System:**

   Establish an effective post-release monitoring system to track the development of rehabilitated juveniles. Relapses into criminal behaviour can be avoided with ongoing help and monitoring.

9. **Public Awareness and Perception Shift:**

   Conduct public awareness campaigns to refute myths and build empathy for juvenile offenders in the rehabilitation process. Encourage people to see that rehabilitation is an essential component of a fair and functional judicial system.

10. **Continuous Evaluation and Adaptation:**

    Commit to the juvenile justice system's continual evaluation and improvement. To maintain its efficiency and fairness, stay abreast of changing social requirements and international best practices.

A dynamic, adaptable system that recognises the fluid character of juvenile justice is required in the future. The reinvented system aspires to establish a climate in which the interests of justice and the possibility for good transformation in young lives are prioritised concurrently by merging responsibility with rehabilitation.

CONCLUSION

Finally, an analysis of juvenile justice systems indicates the critical necessity for a balanced strategy that includes both rehabilitation and strict sanctions for grave offences. The future of juvenile justice necessitates a paradigm change towards a more comprehensive and individualised approach, with rehabilitation serving as a pillar and punishment as ground. It is critical to recognise the potential for positive development in young offenders to divert them away from a criminal cycle. To address the core causes of delinquency, effective rehabilitation programmes should include education, counselling, and skill development. Simultaneously, a clear position on accountability and punishment is required for severe acts. It is critical to strike the proper balance between rehabilitation and punishment for significant offences to achieve justice and safeguard society. Punitive measures must be appropriate to the gravity of the offence, delivering a clear message that behaviours will not be accepted.

In reimagining juvenile justice, society must strive for a system that is not only punishing but also

rehabilitative, supporting the possibility of good transformation in the lives of young people. We can develop a more compassionate and successful juvenile justice system that tries to rehabilitate while holding individuals accountable for their acts by investing in evidence-based policies, continuing research, and community participation. The future of juvenile justice resides in this delicate balance, where rehabilitation coexists with harsh sanctions for terrible crimes, eventually leading to safer communities and the enrichment of young lives.

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GREEN TAX: A TOOL TO CONTAIN CORPORATE ENVIRONMENTAL CRIMES IN INDIA

Ms. Radha[376]
Mr. Brajesh Kumar[377]

"Taxation is the price which civilized communities pay for the opportunity of remaining civilized"

--Albert Bushnell Hart[378]

ABSTRACT

Notwithstanding the presence of a wide range of legislation to contain corporate environmental crimes in India, such crimes continue unabated. The penal nature of the legislative framework has miserably failed to deter the perpetrators of such crimes owing to various factors (e.g., poor enforcement, shoddy investigation, legal loopholes, corruption, meagre conviction rate etc.), rather, it ends up giving an open licence to pollute. In such a situation, a question is often asked as to whether the criminal law alone, or even in combination with the civil laws, can deter corporations from committing environmental violations. While one school of scholars answers this question in affirmative seeking stricter provisions and punishments, the other argues against any such step as that may impede our economic development and supports exploring other alternative measures (other than civil proceedings) instead keeping criminal prosecution for a minimum number of cases where nothing else works. If the concern for the former is environment, for the latter, it is development. But the country needs both- a healthy environment as well as a robust development, i.e., a sustainable development. Can it be, therefore, said that an appropriate answer to the above question lies in Green tax, one of the economic measures (which also include green financing, green investment etc.) and still an emerging concept, which incentivises environmentally sustainable conduct (and, consequently deters environmentally harmful behaviour) on the part of not only the corporations but also various other stakeholders including consumers?

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[376] Research Scholar, Faculty of Law, University of Delhi.
[377] Research Scholar, Faculty of Law, University of Delhi.
[378] Aarattrika Chanda, 'Comprehensive Evaluation of Total Income', *available at*: https://www.goldensparrowngo.com/post/comprehensive-evaluation-of-total-income#:~:text=Albert%20Bushnell%20Hart%3A%20%E2%80%9CTaxation%20is,understand%20is%20the%20income%20tax.%E2%80%9D (last visited on Aug., 2, 2024)

The present paper seeks to find the answer by digging deeper into the concept of corporate environmental crimes and consequent criminal liability, taking a look at the existing constitutional and legal framework in India and analysing their effectiveness, along with related issues and challenges, in containing such crimes, assessing the concept of green tax and its objectives in order to see how effective it would be as a tool to contain corporate environmental crimes in India.

INTRODUCTION

In this industrial age, various industrial activities (e.g., *emission of toxic gases in air*) pollute as well as cause severe damage to the environment. Apart from that, companies also trade in *inter alia* various species of plants, herbs as well as body parts of wild animals. However, all such activities and conducts are not environmental crimes in the eyes of law, which permits certain polluting or environmentally damaging activities (e.g., *emission within permissible limits*, *dumping of hazardous wastes after treatment at designated places*, *legally authorised wildlife trade*) treating them necessary for human survival and development. Only when such activities breach the legal boundaries, they are treated as crimes inviting appropriate sanctions prescribed under the law. But some pertinent questions still arise: "*Whether these sanctions are enough to deter the charged as well as potential offenders (industries/corporations) against indulging in these crimes?*"; Further, "*Is it appropriate to uniformly invoke criminal law in each and every environmental crime committed by corporations (corporate environmental crime)?*"; If not, "*Can an economic measure like imposing green taxes, in addition or as an alternative to criminal law mechanisms, be a way out?*".

It is these questions that the present paper seeks to answer. *First*, it elaborates the concept of 'environmental crimes' using the definitions of some prominent environmental jurists. *Second*, it attempts to see why corporations indulge in such crimes and what legal consequences they face for the same. *Third*, corporate environmental crimes and the resultant liability under the Indian laws are analysed to assess the effectiveness of those laws and the issues and challenges, if any, faced by them in attaining their objective of containing such crimes. *At las*t, the concept of green taxes (one of the economic measures, which include green financing, green investment etc.) is looked at to see if it can be a handy economic tool, in addition or as an alternative to criminal law, in deterring corporate environmental offenders under the Indian legal set-up from committing environmental crimes.

ENVIRONMENTAL CRIMES

'Environmental Crimes', also known as 'Green Crimes', is a difficult term to define. Several day-to-day human activities such as littering, smoking, discharging sewage water in rivers or streams pollute the environment. Similarly, various industries also cause pollution as they emit smoke in the atmosphere or discharge chemical effluents in soil, air and/or water bodies. These acts produce pollutants, either some natural substances (e.g. phosphate in soil in excessive amounts) or synthetic compounds (e.g. detergents, pesticides etc.)[379], which contaminate different components of nature (air, water, forests and wild-life etc.). The environmental equilibrium is also tampered with by way of felling of trees, killing of wild animals and so on and so forth. However, each and every such activity of ours is not an 'environmental crime' as law today permits certain activities treating environmental pollution through them as inevitable, especially in this industrial age. Therefore, the question arises: "*What are the 'environmental crimes' then*?"

Lynch and *Long*[380] have defined 'environmental crimes' in terms of a wide range of human behaviours that generate environmental harms and produce ecological disorganization or the disruption of the normal organization and operation of the natural world. These ecologically destructive behaviours can include, for example, air, water, and land pollution, deforestation, and various forms of mining as well as the wildlife trade and illegal wildlife trafficking. These crimes may also include other harms against non-human species, including those that victimize pet animals, farm animals, and laboratory animals.

Therefore, this definition is wide enough to take into consideration all sorts of human behaviours which disrupt the normal course of the natural world and are ecologically destructive. It talks about the impact of such behaviours on not only the humans themselves but also the non-human species.

Some other scholars have also attempted to define it. According to *M. Clifford*, an 'environmental crime' is:

> "*an act committed with the intent to harm or with a potential to cause harm to ecological and/or biological systems and for the purpose of securing business or personal advantage*."[381]

In other words, whether the act is done intentionally to harm or in itself is potentially harmful for the environment and has been done with an objective to make some personal or business gains, it will be treated as an offence. Thus, the definition takes into account both- the '*fault'* as well as the '*no fault*' liability apart from the motive of the doer.

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[379] D. Prasad, 'Environmental Pollution and Living Beings' in Rais Akhtar (ed.), *Environmental Pollution and Health Problems* 57 (Ashish Publishing House, New Delhi, 1990).

[380] Michael J. Lynch, Michael A. Long, 'Green Criminology, Capitalism, Green Crime and Justice, and Environmental Destruction', Annu. Rev. Criminol, 2022, p.256.

[381] Stuart Bell and Donald McGillivray, *Environmental Law* 254 (Oxford University Press, Oxford., 7th edn., 2008).

On the other hand, *Y. Sit*u and *D. Emmons* go a step ahead and define it as, "*an unauthorised act or omission that violates the law and is therefore, subject to criminal prosecution and criminal sanction*."[382]

"This offence", they add further, "*harms or endangers people's physical safety or health as well as the environment itself.*"[383]

Thus, *Situ* and *Emmons* hold that if an illegal and unauthorised act or omission harms or endangers public as well as environmental health and safety, it will be an environmental offence inviting criminal proceedings and sanction against the offender. Therefore, 'criminal sanction' is an important requirement in their definition.[384]

On the basis of above-mentioned definitions, we conclude that environmental crimes are *illegal or unauthorized acts or omissions, which harm the environment as well as public interest, are committed, intentionally or otherwise, for personal or organisational benefits and invite criminal sanctions*.

The definition clearly suggests that these crimes are committed not only by individuals but also by organisations, which include corporations[385] and when environmental crimes are committed by corporations, they are known as *corporate environmental crimes*.

CORPORATE ENVIRONMENTAL CRIMES

In today's world, corporations play a key role not only in shaping up a country's economy but also in structuring its social and political dynamics. They are no longer limited to running businesses but also contribute in legal and policy changes in a way which suits their ends.386 This wide influence enables them inter alia to have an easy access to a country's natural resources, especially those in developing and under-developed countries, wherein multinational corporations (MNCs) based in developed countries connive with the local governments and exploit these resources much to the detriment of the interest of the local populace.387 Apart from this, they also indulge in other kinds of environmental crimes such as illegal disposal of toxic wastes,388 corporate crime in the forestry sector (e.g., illegal logging) and trafficking of

[382] *Ibid*.
[383] *Ibid*.
[384] Brian Wolf, ''Green Collar Crime': Environmental Crime and Justice in the Sociological Perspective" 5 (7) Sociology Compass 499 (2011).
[385] Duncan Brack, "Combating International Environmental Crime" 12 *Global Environmental Change* 143 (2002).
[386] Brian Roach, "Corporate Power in a Global Economy." An ECI Teaching Module on Social and Environmental Issues, Economics in Context Initiative, (Global Development Policy Center, Boston University, 2023).
[387] David O. Friedrichs, Dawn L. Rothe, "State-Corporate Crime and Major Financial Institutions: Interrogating an Absence" 3 (2) State Crime Journal 160 (Autumn 2014).
[388] Paulette L. Stenzel, "Environmental Law and American Business: Dilemmas of Compliance, by Joseph F. DiMento" 26 NAT. RES. J. 906 (1986).

hazardous waste,[389] taking advantage of weak laws,[390] poor enforcement thereof[391] and rampant corruption[392]. Accordingly, many countries, *including India*,[393] have enacted legislation to prosecute and punish such corporate offenders.[394]

CORPORATE ENVIRONMENTAL CRIMES IN INDIA

India has long been a victim of corporate environmental crimes having witnessed and suffered one of the world's worst environmental disasters[395] in *Bhopal*[396], where a big multinational company, in collusion with the State,[397] poisoned the environment, killed scores of people instantly and left many others to die a slow and painful death for years to come.[398] It is also alleged by some scholars[399]that judiciary also failed the victims by denying them the justice they needed, and deserved, at that moment. Even after *Bhopal*, many such incidents, though less in severity, have kept happening at regular intervals pointing towards lacunae in law and policy mechanism to check such crimes.[400]This is just one side of the story as even though these environmental disasters get reported and discussed, many other environmental crimes involving companies (e.g., *wild-life trafficking, illegal logging, dumping of hazardous wastes*) remain unaccounted for as they neither get reported by media nor by official agencies. There is no official data on such crimes in the country, unlike, for example, in U.S.,[401] because the National Crime Records Bureau (NCRB) of India, which is the official database of all the recorded crimes across the country, compiles and publishes data on

[389] "UNEP-INTERPOL Report: Value of Environmental Crime up 26%" *UNEP News*, June 4, 2016, *available at: https://www.unep.org/news-and-stories/press-release/unep-interpol-report-value-environmental-crime-26#:~:text=The%20report%20recommends%20strong%20action,sustainable%20development%3B%20and%20economic%20incentives* (last visited on Aug. 3, 2024).

[390] *Ibid*.

[391] Axel Luttenberger, Lidija Runko Luttenberger, "Challenges in Regulating Environmental Crimes" *7th International Maritime Science Conferenc*e, Apr. 20-21, 2017, Solin, Croatia, 213, *available at:* https://typeset.io/pdf/challenges-in-regulating-environmental-crimes-xyxwwdoqiv.pdf (last visited on Aug., 3, 2024).

[392] *Supra* note 12.

[393] Sairam Bhat, "Civil, but Criminal" *India Together*, Nov. 1, 2004, *available at:* https://indiatogether.org/civilcrim-environment (last visited on Aug. 3, 2024).

[394] Sean J. Bellew & Daniel T. Surtz, "Criminal Enforcement of Environmental Laws: A Corporate Guide to Avoiding Liability" 8 *Vill. Envtl. L.J.* 205 (1997); Sandy Moretz, "The Rising Cost of Environmental Crime" *Occupational Hazards* 38 (March, 1990).

[395] Hannah Ellis-Petersen, "Bhopal's Tragedy has not stopped: The Urban Disaster still Claiming Lives 35 Years on", *The Guardian*, Dec 8, 2019, *available at:* https://www.theguardian.com/cities/2019/dec/08/bhopals-tragedy-has-not-stopped-the-urban-disaster-still-claiming-lives-35-years-on (last visited on Aug., 3, 2024).

[396] Upendra Baxi, "Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?" 1 *Business and Human Rights Journal* 21 (2015).

[397] Shruti Rajagopalan, "Bhopal Gas Tragedy:Paternalism and Filicide" 5 Journal of Indian Law and Society 201 (2012), *available at: http://docs.manupatra.in/newsline/articles/Upload/54419DA8-C305-4D5C-A8F3-3B4633CEEA5B.pdf* (last visited on Aug. 3, 2024).

[398] *Supra* note 20; Apoorva Mandavilli, "The World's Worst Industrial Disaster Is Still Unfolding" *The Atlantic*, July 10, 2018, *available at:https://www.theatlantic.com/science/archive/2018/07/the-worlds-worst-industrial-disaster-is-still-unfolding/560726/* (last visited on Aug. 3, 2024).

[399] Satinath Sarangi, "Bhopal Disaster: Judiciary's Failure" 30(46) *Economic and Political Weekly*, Nov. 18, 1995.

[400] Apoorva, Shreeja Sen, "Industrial Disasters: Is India better Prepared than it was in 1984?" *The Mint*, Dec. 2, 2014,(updated) *available at: https://www.livemint.com/Politics/NtYcWmazGAis6CEpj4yAkP/Industrial-disasters-Is-India-better-prepared-than-it-was-i.html* (last visited on Aug. 3, 2024).

[401] United States Sentencing Commission, "Organisational Offenders" (2022), *available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Organizational-Offenders_FY22.pdf* (last visited on Aug. 6, 2024).

environmental crimes committed by individuals only.[402]It reflects failure to give due seriousness to these crimes despite being aware of their severity as well as harmful effects on the environment, the life of human and non-human species and the existence of the very planet itself. Consequently, it also emboldens the corporate offenders to keep doing their business as usual at the cost of public and environmental health without any fear or shame. Moreover, the government is also unable to thoroughly analyse and make the required changes in the plethora of legislation that it has to deal with such crimes.

CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK: ISSUES AND CHALLENGES

There is no gainsaying the fact that India has a comprehensive Constitutional and legislative framework to deal with environmental violations. The following sub-sections briefly discuss this framework:

A. Constitutional Mechanism

The Indian Constitution has some key provisions (including Art. 21, which has been judicially interpreted to bring '*Right to safe environment*' within its ambit),[403] obliging the government as well as the citizens of this country to preserve and protect the environment.[404] To fulfil this objective, it has also given wide powers to the union as well as the state legislatures to make appropriate laws on the subject.[405] These provisions are wide enough to empower the government to do all that is necessary to do by legislative and administrative action to protect the human environment. The use of the word "environment" indicates the width of the power assigned to the State. It means aggregate of

[402] National Crime Records Bureau, "Crime in India, 2022", Vol. II, 917 (Ministry of Home Affairs, 2023).

[403] *Om Govind Singh* v. *Shanti Swarup*, AIR 1979 SC 143; *Ratlam Municipality* v. *Virdhi Chand*, AIR 1980 SC 1622; *Rural Litigation and Entitlement Kendra, Dehradun* v. *State of U.P.*, AIR 1985, SC 652; *M.C. Mehta* v. *UoI*, AIR 1988 SC 1037 (Also known as *Ganga Pollution (Tanneries) Case*); *Consumer Education and Research Centre* v. *UoI*, (1995) 3 SCC 42; *T. Damodar Rao* v. *Special Officer, Municipal Corporation of Hyderabad*, AIR 1987 A.P. 171; *Kinkri Devi* v. *State of H.P.*, AIR 1988 H.P. 4.

[404] Paras Diwan, "Environmental Protection: Issues and Problems" in Paras Diwan, Peeyushi Diwan (eds.), 1 *Environment Administration, Law and Judicial Attitude* 13 (Deep & Deep Publications, New Delhi, 2nd edn., 1997). Probably, ours is the only Constitution which contains a specific provision for the protection of the environment. The 42nd Amendment has inserted .Art 48A which runs:

> *"The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country."*

In addition to Art. 48A, Art. 47 provides for the improvement of public health as one of the duties imposed on the State. Our Constitution, U/Art. 51A, also lays down the fundamental duty of every citizen "*to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.*"

[405] The Constitution of India, 1950, sched. 7. The environmental legislative powers, under the constitutional scheme, have been divided into three lists, namely, the Union List (List I), the State List (List II) and the Concurrent List (List III). There are 5 entries (52-55, 57) in the List I whereas the List II and III have 11 (6, 10, 14-18, 21, 23-25) and 8 (17A-B, 20-A, 29, 36-38) entries respectively. Although, none of the entries under these lists specifically uses the word 'environment' as such, it is obvious from the different heads under these entries that they refer to environment. For example, 'Industries' (Entry 52, Union List) are something which deeply affect the environment whereas 'Water' (Entry 17, State List) and 'Forests' (Entry 17A, Concurrent List) are integral components of the environment.

all the external conditions and influences affecting life and development of human beings, animals and plants, including various external factors, such as air, climate, culture, water, noise, temperature, soil, etc., which affect the health and development of life. The State is empowered not only to adopt a policy for the protection of the environment but also to take effective steps to improve polluted environment, and to prevent pollution of the environment. In furtherance of this objective, the State can take measures to lay down restrictions on the use of factors adversely affecting the environment.[406]

B. Legislative Framework

Using the aforementioned Constitutional powers, the government has enacted more than 200 statutes at the central and the State level to give shape to the constitutional mandate, its commitments at various international fora[407]and the judicial directives. In fact, India was among the first few countries to have anti-pollution and protection of environment law existing even in the first-half of the 20th century.[408] The Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981, the Environment Protection Act, 1986 are some of the prominent legislation aimed at checking different kinds of environmental crimes, whether committed by individuals, companies or government institutions. Out of all of these statutes, the Environment Protection Act, 1986 holds a special significance as it is an umbrella legislation to deal with all kinds of environmental crimes and has enhanced punishments for offenders as compared to earlier enacted special legislation (e.g., the Water Act and the Air Act).[409] The Indian Penal Code, 1860 (IPC) itself contained several provisions which made pollution a crime. Thus, sections 277 (Fouling water of public spring or reservoir) and 278 (Making atmosphere noxious to health) were related to water and air pollution respectively whereas sections 426 (Punishment for mischief), 430 (Mischief by injury to works of irrigation or by wrongfully diverting author), 431 (Mischief by injury to public road, bridge and river) and 432 (Mischief by causing an obstruction or inundation to public drainage) dealt with general pollution. Section 268 dealt with public nuisance under which *inter alia* noise pollution could be controlled. The sections 133 (Conditional order for removal of nuisance) and 144 (Power to issue order in urgent cases of nuisance or apprehended danger) of the Code of Criminal Procedure, 1973 (Cr.P.C.) provided instant relief in cases related to public nuisance. Though these Codes have now

[406] *Supra* note 29.
[407] *Supra* note 29 at 7.
[408] *Ibid*.
[409] The Environment (Protection) Act, 1986 (Act 29 of 1986), s. 15; The Water (Prevention and Control of Pollution) Act, 1974 (Act 6 of 1974), ss. 41, 42, 43, 44, 45A; The Air (Prevention and Control of Pollution) Act, 1981 (Act 14 of 1981), ss. 38, 39. The Water (Prevention and Control of Pollution) Amendment Act, 2024 now decriminalises several violations.

been replaced by the newly enacted *Bharatiya Nyaya Sanhita*, 2023[410] (BNS) and the *Bharatiya Nyaya Suraksha Sanhita*, 2023 (BNSS)[411] respectively, these provisions continue to hold their place albeit under re-numbered sections. Further, section 12 of the Factories Act, 1948 regulates the disposal of industrial waste and effluents. Noise, Air and visual pollution can be controlled under the Motor Vehicles Act, 1939.[412]

Notwithstanding these wide constitutional and legislative provisions, the corporate environmental crimes continue unabated in the country. Therefore, it's natural to ask, "*Whether the presence of multiple laws deter corporate offenders from committing environmental crimes*?" And if the answer is negative then the question arises: "*What are the obstacles that they come across in attaining their desired objective(s)?*"

C. Issues and Challenges

The laws mentioned above make corporate environmental crimes punishable with imprisonment and/or fine. However, as far as the effectiveness of these punishments legislative enactments is concerned, according to *Paras Dewan*[413], "*These statutes are not faultless. Yet much more faulty is their implementation.*" *Abraham and Rosencranz*[414] see the Indian pollution control system as primitive and largely ineffective to deal with its enormous pollution problems. They consider these laws as *weak* and their enforcement *haphazard*. The opinion of these scholars is substantiated from the situation at ground as one witnesses continuously degrading air, water and soil qualities and spread of pollution-caused diseases afflicting hearts, lungs and other organs of humans and non-humans (animals and birds) in the country. While some of the prominent Indian cities[415]find themselves listed among world's worst polluted cities to live in, India is placed at the bottom (176) in the Environmental Performance Index (EPI), 2024[416]. The unabated industrial disasters[417] are also

[410] The Bhartiya Nyaya Sanhita, 2023 (Act 45 of 2023). For example, s. 277 ((Fouling water of public spring or reservoir) and 278 (Making atmosphere noxious to health), IPC have now been renumbered as ss. 279 and 280 respectively under the BNS.
[411] The Bhartiya Nagrik Suraksha Sanhita, 2023 (Act 46 0f 2023). S. 133, Cr.P.C. is now s. 152, BNSS.
[412] *Supra* note 29 at 7.
[413] *Ibid*.
[414] C.M. Abraham, Armin Rosencranz, "An Evaluation of Pollution Control Legislation in India" 11 *Columbia Journal of Environmental Law* 101 (1986).
[415] Shikha Gautam, '10 of World's Most Polluted Cities Now; 3 are in India', *The Times of India*, Nov.7, 2023, *available at*: https://timesofindia.indiatimes.com/travel/web-stories/10-most-polluted-cities-right-now-3-are-in-india/photostory/105031261.cms (last visited on 6 Jan., 2024). The 3 metropolitan cities namely, Delhi, Kolkata and Mumbai feature in this list.
[416] Environmental Performance Index, 2024, *available at:* https://epi.yale.edu/measure/2024/EPI (last visited on Aug., 5, 2024); Akanksha Mishra, "India at 176 among 180 Countries in Environmental Performance Index, 2024, High Emissions Flagged again", *The Print*, June 12, 2024, *available at*: https://theprint.in/environment/india-ranks-5th-from-bottom-in-environment-performance-index-2024-high-emissions-flagged-again/2128391/ (last visited on Aug., 5, 2024).
[417] Adil Bhat, "India's Deadly Industrial Workplaces in the Spotlight", *Business India*, Jan. 9, 2024, *available at: https://www.dw.com/en/deadly-industrial-accidents-in-india-kill-and-disable-thousands/a-67930230* (last visited on Aug., 5, 2024).

results of such ineffective and poorly implemented laws, aided by unsustainable business practices by the companies and absence of any accountability.

Another problem with implementing penal laws, in letter and spirit, is the nature of sanctions and corporations' fictional as well as complex character. As corporations are nothing but merely a legal fiction, they can be fined but can not be jailed even when law prescribes both imprisonment and fine as punishment for a particular crime. The Supreme Court of India has also unequivocally and emphatically said so.[418] But the experience suggests that fear of imprisonment, *which would have otherwise deterred corporation*s,[419] not being there, imposing fines only hardly proves to be an effective deterrent for these wealthy corporations as for them, fines are nothing but merely a cost of doing business which, eventually, is to be passed back to consumers.[420] And, if we try to find out the individuals responsible for the corporate act/omission but who are hiding behind the corporate cloak, the complex corporate structure and legal immunities make it too difficult to pierce that veil and catch hold of the culprits.

All these issues convert law into a toothless snake which can be easily played with and they also raise some serious questions on its deterrent effect. At the same time, they create a lingering doubt as to whether the uniform application of criminal law in all cases involving corporations is appropriate or there is a need to look at some alternative measures too. While some scholars support *strict enforcement* of criminal law against corporations holding that environment is more important than development,[421] some others oppose uniform application of criminal law against corporations for environmental violations as it will harm the economic development of poor nations and also hold that the criminal sanctions may have a limited deterrent effect in these cases as corporations themselves find these sanctions appropriate only for extreme and repeated violations.[422] They assert that strong enforcement techniques are necessary but such techniques are *not sufficient in and of themselves*.[423]

In this debate, while one group gives prime importance to the environment and supports criminal sanctions, the other one gives primacy to development opposing the blanket use of criminal law. However, as the need of the hour is a development in sync with the environment i.e., sustainable development, therefore, there is a

[418] Standard Chartered Bank & Ors v Directorate of Enforcement (2005) 4 SCC 530.
[419] Judson W. Starr, "Turbulent Times atJustice and EPA: The Origins of Environ-mental Criminal Prosecutions and the Work that Remains" 59 *Geo. W.ash. L. Rev*. 900 (1991).
[420] G. Nelson Smith, III, "No Longer Just a Cost of Doing Business: Criminal Liability of Corporate Officials for Violations of the Clean Water Act and the Resource Con-servation and Recovery Act*"* 53 *LA. L. Rev.* 119 (1992).
[421] Vijay Kumar Singh, "Criminal Liability of Corporations- An Environmental Perspective", *available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2972053* (last visited on Aug. 10, 2024).
[422] *Supra* note 13 at 907.
[423] *Ibid*.

need to create a balance between these two conflicting approaches by taking a middle path. Since the issue is to deal effectively with corporations, which do business on cost-benefit analysis, resorting to economic measures and reserving criminal sanctions for egregious violations can be quite fruitful under the circumstances. It will incentivise compliance of environmental laws and also keep the developmental process on track, particularly in poor countries which need corporations for their social and economic development, thus addressing concerns of both the groups.

Now a days, there are a number of economic measures (such as, *green financing*, *green investment*, *carbon trading* apart from *levying green taxes*) which are increasingly being used in many jurisdictions because of the limitations that the conventional environmental regulations have and also due to the belief that major environmental problems facing the world today can not be resolved merely by use of specific abatement technologies and setting emission limits rather, a substantial change in consumption and production pattern is required but which, though, will come at a substantial cost and to minimise this cost, economic tools are needed.[424] This paper, however, concerns itself with green taxation only and assesses its objectives, advantages and disadvantages in order to see how effective an economic tool it would be to contain corporate environmental crimes in a country like India, where other legal measures have failed to bear fruits.

GREEN TAXES

Tax is a turning point and a benchmark for a country's overall development, livelihood transformation and improvement of its per capita income as there is quite an interesting saying by Benjamin Franklin that *only things that are certain are death and taxes*, meaning thereby that every person is subject to the tax laws and has to recompense taxes from his or her earned income.[425] Further, taxes do play a crucial role in carrying out various developmental work (e.g., building infrastructure) to enhance social and economic wellbeing of a country and its people as they are an important source of revenue for any government. In modern times, taxes are also being used by several countries across the world (e.g., European Union, U.K.)[426] to strictly control environmental hazards by discouraging industries and businesses from being involved in activities that may pose a serious threat to the environment,[427]which is an essential component of any country's social and economic upliftment. Such taxes are known as 'green taxes' or 'environmental taxes' or even 'carbon

[424] Don Fullerton, Andrew Leicester etal, "Environmental Taxes", Working Paper (Cambridge, July, 2008), *available at*: https://www.researchgate.net/publication/5189204_Environmental_Taxes?enrichId=rgreq-9493fe0b4b905e935fb813ad5b6f7561-XXX&enrichSource=Y292ZXJQYWdlOzUxODkyMDQ7QVM6MTAzMjQ3MTYzNDI4ODcwQDE0MDE2Mjc0NTA1NDc%3D&el=1_x_2&_esc=publicationCoverPdf (last visited on Aug. 16, 2024).

[425] Srishti Bansal, "Tax Evasion: A Critical Analysis with respect to the Case of *Make My Trip (India) Pvt. Ltd.* v. *Union of India & Others*", *available at:* https://ssrn.com/abstract=4335179 (last visited on Aug. 14, 2024).

[426] *Supra* note 49.

[427] Arun Pal, "Green Taxation: Its Impact and Necessity in India", *available at*: *https://www.researchgate.net/publication/341726100_Green_Taxation_-_Its_Impact_and_Necessity_in_India?enrichId=rgreq-a6cb20d1b9761e1737b8ce8547e018f0-XXX&enrichSource=Y292ZXJQYWdlOzM0MTcyNjEwMDtBUzo4OTY0MzQwNzMyNTU5MzdAMTU5MDczNzk0NjI5OQ%3D%3D&el=1_x_2&_esc=publicationCoverPdf* (last visited on Aug. 14, 2024).

taxes' (because of being levied on carbon emission by industries)[428]. According to the Organisation for Economic Co-operation and Development (OECD) Guidelines,[429] these taxes can directly address the failure of markets to take environmental impacts into account by incorporating these impacts into prices and environmental pricing through taxation leaves consumers and businesses the flexibility to determine how best to reduce their environmental footprint.

a. Origin

The concept of using taxation to correct negative externalities, such as pollution, is generally credited to *Pigou* (1920), and therefore, these corrective taxes are sometimes also referred to as *Pigouvian taxation*.[430] Further, it is also linked to the *polluter pays principle* (i.e., You Pollute, You Pay),[431] which happens to be one of the strong pillars of sustainable development.

b. Objective

The main objective behind imposing green taxes on industries (as well as other stakeholders including consumers) is to watch closely and regulate the production and use of non-environment friendly products and services so that their negative impact can be offset. Hence, by levying 'green tax' in proportion to the damage done by the negative externalities, generated either from the production/consumption/extraction behaviour in an economy,[432] the government makes them internalize the negative impacts that their activities have on the environment.[433] By internalizing those external costs, such a tax could reflect the real environmental cost of the activity and build that cost into private-sector decision making.[434] These taxes are also intended to discourage the overuse of natural resources that damage the ecology.[435]

c. History

The idea of levying environmental taxes was first mooted in the Rio Declaration, which established that to internalize environmental problems, prices must be internalized along with products and services. Subsequently, it was also included in other environmental conferences and treaties, such as the Green

[428] P. Vinutha, R. Ajay, "A Study on Green Tax in India: Its Effectiveness and Challenges" 15 *Journal of Seybold Report* 1798 (2020).
[429] Organisation for Co-operation and Development, "Environmental Taxation: A Guide for Policy Makers" (2011).
[430] Roberton C. Williams III, *Environmental Taxation* Working Paper (Cambridge, June, 2016) 22303, *available at*: http://www.nber.org/papers/w22303, (last visited on Aug. 14, 2024).
[431] Janet E. Milne, "Green Taxes and Climate Change: Theory and Reality", *available at*: https://www.ifo.de/DocDL/dicereport407-forum2.pdf (last visited on Aug. 16, 2024).
[432] Mohanish Verma, "Environment-driven taxes: An interesting challenge for policymakers" *Business Standard* Sep. 07, 2022 (Updated), *available at*: https://www.business-standard.com/article/opinion/environment-driven-taxes-an-interesting-challenge-for-policymakers-122090700709_1.html (last visited on Aug. 16, 2024).
[433] *Supra* note 52.
[434] *Supra* note 56.
[435] *Supra* note 57.

Economy Report of the United Nations Environment Program (UNEP), the OECD and the European Environment Agency.[436]

d. Advantages

Although green taxes are viewed by many non-economists as taxes whose revenue is used to address environmental goals, to most economists, however, they are taxes on pollution emissions playing a corrective role.[437] However, the fact is that environmental taxes are not only meant to correct externalities, they also generate *additional* revenue, which can be used *inter alia* to reduce or prevent an increase in other taxes, to reduce the budget deficit, to pay for public goods.[438] At the same time, interactions between environmental taxes and other pre-existing taxes (primarily income tax) can significantly raise the efficiency costs of environmental taxes (or any other similar tax or policy).[439]Moreover, they also provide, as against the traditional command-and-control environmental regulations, a cost-effective way to reduce emissions of greenhouse gases and other air pollutants and also promote energy security.[440]

e. Disadvantages

Undoubtedly, green taxes produce environmentally beneficial and economically effective results. Nevertheless, they also have certain disadvantages. *First*, a uniform tax rate may prove to be inefficient if the damage caused by pollution varies with sources of emission. Therefore, ideally, a source-based differential rate should be fixed. However, it may also result in lobbying from industries. *Second*, the consequences of environmental taxes, at times, may be adverse, if the taxpayers respond in a way that is more damaging to the environment than the taxed emissions. For example, a tax on toxic waste may provide a powerful incentive to reduce waste, but it may also induce illegal dumping or burning. *Third*, as such taxes may be applicable to energy, transport and carbon content of fuels, a significant chunk of income of people with low earnings will go in paying these taxes making them unwilling to pay. In this way, these taxes are regressive. *Fourth*, taxes on industrial inputs may increase the cost of production and also affect the local producers if they are competing against foreign producers, who are not subject to paying such taxes.[441]

[436] Venkat Raj, "Environmental Law: You Pollute, You Pay" 11 *Arabian J Bus Manag Review* 1 (2021).
[437] *Supra* note 55.
[438] *Ibid.*
[439] *Ibid.*
[440]*Ibid*. *See also*; *Supra* note 49 & note 56.
[441] *Supra* note 49.

Having analysed the objective, advantages and disadvantages of levying green or environment taxes, we can now address the main issue at hand i.e., whether these taxes can play an effective role in abating corporate environmental crimes in India.

GREEN TAXES AND INDIA

India, being an OECD member-state, has introduced different types of environment or eco taxes, also termed as Environment Compensation Charge (ECC), at central and regional level. The Constitution of India[442] confers legislative powers upon the Parliament (Art. 248 r/w Sch. VII, List I, Entry 97) and the State Legislatures (Art. 245 r/w Sch. VII, List II, Entry 6) to bring laws imposing such taxes. Accordingly, while States like Tamil Nadu[443] and Bihar[444] adopted the legislative path to levy green taxes on motor vehicles, Goa[445] passed a law to levy green cess on environmentally hazardous products. Further, the 'Clean Energy Cess' (a kind of carbon tax) by the Government of India imposed on coal, peat and lignite, entry tax on vehicles in Himachal Pradesh, tax on old vehicles in 6 States, including Delhi, for discouraging old vehicles which affect ecological balance are some other examples of eco taxes imposed in India.[446] It is also worth mentioning here that even under the Forest (Conservation) Act, 1980, it has been provided that an entity, which diverts forest land for non-forest purposes, must provide financial compensation for afforestation in non-forest or degraded land.

The Judiciary has also been quite vocal and supportive of such measures. The Supreme Court had first ordered for levying a green tax of Rs. 700 and Rs. 1300 on the light commercial vehicles and the trucks entering Delhi respectively and then subsequently doubled it in a later decision.[447]A Compensatory Afforestation Fund (CAF) was also created, following the direction of the apex court itself in 2002,[448] for the preservation of forests under the Forest (Conservation) Act, 1980 which is managed under the Compensatory Afforestation Fund Act, 2016 (the CAF Act).[449] Again it was the Supreme Court of India which, through its directions,[450]led the way for CNG-based public transport in India. Such vehicles are exempted from green taxes. The High Courts are not far behind in supporting such initiatives through their decisions. For example, the Madras High Court saved S. 3A of the Tamil Nadu Motor Vehicle Taxation Act, 1974 (which introduced a 'green tax' for the more than 15 years old motor vehicles plying in the State through an amendment in 2003) when its Constitutional validity was questioned. The challenge was raised

[442] The Constitution of India, 1950.
[443] The Tamil Nadu Motor Vehicles Taxation Act, 1974 (Act 13 of 1974), s. 3A.
[444] The Bihar Motor Vehicles Taxation Act, 1994 (Act 8 of 1994), s. 6.
[445] The Goa Cess on Products and Substances Causing Pollution (Green Cess) Act, 2013 (Act 15 of 2013).
[446] *Supra* note 57.
[447] Shreeja Sen, Mayank Aggarwal, "SC Doubles Green Tax on Commercial Vehicles Entering Delhi", *The Mint*, Dec. 16, 2015.
[448] *T.N. Godavarman Thirumalpad* v. *Union of India* (1997) 2 SCC 267.
[449] The Compensatory Afforestation Fund Act, 2016 (Act No. 38 of 2016).
[450] *M.C. Mehta* v. *Union of India* (1998) 8 SCC 648.

on the ground of legislative competence of the State to pass a law on a subject like "pollution" which is neither in the State nor in the Concurrent List of Schedule VII of the Constitution. However, the Court read the said legislative power within Entry 6 of the State List which deals with "public health" and held that as any environmental 'pollution' also affects 'public health', the State Legislature is well within its powers to enact a law to regulate it hence, the provision is constitutionally valid.[451] In another such case, the Bombay High Court upheld the Constitutional validity of the Goa Green Cess Act, 2013.[452] Quite recently, the Himachal Pradesh High Court has suggested the State Government to collect green tax from the tourists coming to the State, the way it is done in Sikkim and Bhutan, so as to maintain the State's cleanliness.[453]

However, the presence of these legal and policy measures as well as judicial initiatives are yet to produce the desired result, unlike in the case of the UK and many European Union countries cited above. The reasons are not too far to sight and can be described as follows:

i. According to Draft Guidelines, 2021,[454]for example, green tax imposed on older vehicles (including those owned by transport companies) is not uniform across all States and UTs which enables a vehicle registered in a State/UT, without any provision for such tax, to ply across the country, thus, negating the impact of these taxes. Moreover, the rate of such taxes is quite nominal (Rs. 200-500 p.a.) in some States (e.g., Telangana, Karnataka) which fails to act as disincentive for polluters.

ii. A large part of taxes collected by the government have either not been properly utilised or have not been used for the intended purposes. For example, an inquiry into the use of Clean Energy Cess and Forest Development Tax (FDT) collected by the Government of Karnataka revealed ineffective use of money, corruption and mismanagement of funds.[455]

iii. The above problems are also due to absence of an appropriate legislation, which covers different aspects of green taxation and fixes accountability for any violation;

iv. Lack of comprehensive research on the effectiveness of eco taxes poses another roadblock in knowing how far these measures are effective, what impediments are there on their way and how those obstacles can be removed.

v. There is also lack of awareness on the part of enterprises and the general public about the advantages of green taxes which comes in the way of encashing those advantages as producers and consumers of goods

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[451] *K.M. Vijayan* v. *State of Tamil Nadu*, AIR 2005 (NOC) 408 (MAD).

[452] Sharmeen Hakeem, "Bombay High Court Upholds Constitutional Validity Of Goa Green Cess Act For Reduction Of Carbon Footprint", *Live Law*, Sep. 21, 2023, *available at*: https://www.livelaw.in/high-court/bombay-high-court/bombay-high-court-upholds-constitutional-validity-goa-green-cess-act-carbon-footprint-fee 238346#:~:text=Sharmeen%20Hakim&text=The%20Bombay%20High%20Court%20at,2013%20or%20the%20Green..(last visited on Dec. 2, 2024).

[453] "High Court Suggests Green Tax to Rid Himachal of Waste", *The Hindustan Times*, July 26, 2024, *available at*: https://www.hindustantimes.com/cities/chandigarh-news/high-court-suggests-green-tax-to-rid-himachal-of-waste-101721939554157.html (last visited on Dec. 2, 2024).

[454] Government of India, "Draft Guidelines for Imposition of Green Tax on Older Vehicles by State/UT Governments" (Ministry of Road Transport and Highways, 2021).

[455] *Supra* note 61.

and services keep carrying on their business as usual without worrying much about the environmental impact of their choices.

CONCLUSION & SUGGESTIONS

Environmental crime has many forms (pollution, illegal logging, wild-life trafficking etc.) and is committed by individuals as well as organisations, including corporations, for personal or organisational benefits. Such crimes committed by corporations i.e., *Corporate environmental crimes* have been rampant in India, some of which get reported while the rest remain unreported. Though there are many penal provisions in statute books, they have, by and large, remained ineffective and failed to have the desired deterrent effect on corporate offenders due to reasons such as weak enforcement, corruption and so on. There is also an absence of proper official data on various environmental crimes committed by companies as the NCRB publishes data on environmental crimes committed by individuals only. Further, the need for social and economic development of the country and a crucial role played by corporations such development also discourages the government from going hard against corporate offenders for the fear of losing businesses and investment. In such a situation, many scholars have also argued in favour of balancing things by relying more on economic measures and using criminal law only in selective and appropriate cases.

Green taxation is one such measure which has proved to be quite useful in containing corporate environmental crimes, for example, in the UK, and many European Union countries. India has also adopted it but the desired result is yet to be achieved due to reasons such as lack of uniformity in tax rates, mis-utilisation and under-utilisation of taxes so collected, absence of a comprehensive legislation, dearth of detailed research as well as lack of awareness.

In this light, the paper suggests that a proper **central** legislation on the subject be enacted (**by the Parliament using its powers under Art. 248 r/w List I, Entry 97)** and it be strongly enforced, a comprehensive research be carried out on time to time to check its effectiveness and make appropriate amendments in the law or its enforcement mechanism as and when needed, awareness be created through different media so that business entities and general public can avail of its benefits and most importantly, '*sustainable development*' becomes the new *life and business mantra* for them.

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IS THE INDIAN POLITICAL OPPOSITION STRUCTURALLY WEAK? - ADVOCATING FOR OPPOSITION RIGHTS

Ahzam Anwar[456]
Devvrata Purohit[457]

ABSTRACT

Role of Opposition plays a key role in the health of any democracy. Formal Political Opposition in India has been marked with inconsistency and ambiguity. The Question as to whether any statutory provision be enacted to recognize this position was answered in negative by the Constitutional makers as they felt such can be developed later. The later developments in Recognition are marked with controversy as the directives issued by the Speaker and that of the Salary and Allowances of Leaders of Opposition in Parliament Act are at loggerheads, further the absence of a Supreme Court ruling has left the matter still in muddied waters. Recognition as Leader of the Opposition gives the opposition more concrete and authoritative support to the voice of opposition. Such is even more important in the Indian context in contemporary times where the government has time and time again used its numerical strength to circumvent and silence opposition and their concerns. It is thus obvious that the opposition is not only structurally weak but is weak in its essence too. This is an alarming situation as democratic traditions are increasingly changing with authoritative ones. Therefore, this paper argues for an urgent need to address the problems associated with opposition to enable it to play its role in ensuring the smooth and healthy functioning of democracy. Firstly, we can start by making a constitutional post like that of the President. Secondly, the opposition in India can and shall consider following the British tradition of shadow cabinet wherein the working of each ministry is observed by a designated member of the opposition. Furthermore, reserving certain days in a session of parliament for the opposition wherein they take charge can be an effective method.

KEYWORDS: Opposition Rights, Supreme Court, Constituent Assembly, Opposition leader.

[456] 2nd B.A. LLB. (Hons.) Student at the National Law University, Jodhpur
[457] 2nd B.A. LLB. (Hons.) Student at the National Law University, Jodhpur.

INTRODUCTION AND BRIEF HISTORY

Robert A. Dahl stated that there were

> "*three great milestones in the development of democratic institutions – the right to participate in governmental decisions by casting a vote, the right to be represented, and the right of an organized opposition to appeal for votes against the government in elections and Parliament*"[458]

The word opposition has its root in Latin, in political terms, it may be regarded as a system of constitutional checks and balances guarding against power abuse and modifying the actions of government.[459] In the words of Gilbert Campion, Parliamentary Opposition *is the party for the time being in the minority organised as a unit and officially recognized, which has had experience of office and is prepared to form a government when the existing ministry has lost the confidence in the country. Furthermore, it must have a positive policy of its own and not merely oppose destructively to ruin the game for the sake of power".*[460] It is thus clear that the opposition party is the party next to only the ruling legislature party in terms of the support it enjoys or has the highest numerical strength barring the legislature party forming the government. According to political philosopher Jeremy Waldron, there are two main functions of the opposition[461] -

1. To hold the government accountable for policies that they pursue in the parliament, this is achieved through debate, deliberation and questioning of the government by the opposition[462]
2. To act and to serve as "government in waiting" i.e. to be ready to form government when and if the current government before the expiration of its term due to some reason collapses. This has to be achieved by criticizing the government wherever such criticism is warranted and by presenting an alternative agenda of governance.[463]

Such an institution of opposition is by large a modern concept and is a characteristic of democracy i.e. one may not find an organised opposition in other types of government like monarchical or dictatorial forms of government, it is on the other hand discouraged and viewed with contempt.

The concept finds its origin in the British system of parliamentary democracy even though it existed in some rudimentary form even in the earliest democratic states like Greece and Rome. It existed in the form of intercession rights which empowered the tribune of plebeians the right to veto. The modern concept began to take shape following the glorious revolution in 1688 when the parliament was established as the

[458] E Spencer Wellhofer and Timothy M Hennessey, 'Political Party Development: Institutionalization, Leadership Recruitment, and Behavior' (1974) 18 *American Journal of Political Science* 135 https://doi.org/10.2307/2110658.
[459] Devendra Kumar, 'Role of Opposition in a Parliamentary Democracy' (2014) 75(1) IJPS 165 http://www.jstor.org/stable/24701093 accessed 15 July 2024.
[460] Ibid.
[461] Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016).
[462] Ibid.
[463] Ibid.

ruling power of England.[464] The leader of opposition first emerged in the year 1807 when Lord Granville became the inaugural holder of the post, for there to be a leader of opposition there is a prerequisite of sufficient cohesive opposition which was in this situation present. The phrase 'his majesty's opposition' was coined by John Cam Hobhouse in the year 1826 thus giving the office more credibility and popularity.[465]

Though the existence of the office through the practice of convention was since the year 1807, it was not till the year 1937 that it was statutorily recognised through the Ministers of the Crown Act 1937[466]where the provision relating to his salary was incorporated[467] along with the provision defining the meaning of the term Leader of opposition[468]. It also laid down the provision to decide who will hold the office if that is in doubt.[469] Development of the post inspired many a democracy, mainly those of the commonwealth nation. In order to grasp the concept of Opposition in India, it is impertinent that a reference to constituent assembly be made to understand the background which will further help us in understanding the position of Leader of Opposition in India. We shall also delve into the role played by the Judiciary. In the end, we shall put forth some suggestions as to how to strengthen the opposition.

CONSTITUENT ASSEMBLY DEBATES

In India during the constituent assembly debates, there were demands for the post of Leader of Opposition to be statutory recognized by way of amendment to Article 86 of the draft constitution[470] by incorporating the provision that would have empowered the leader of the opposition to be entitled to receive a salary payable to a minister without a portfolio. This proposal was moved by Z.H. Lari, a member of the United Provinces. According to him codification of the post of leader of the opposition would have four benefits-

1. It would promote parliamentary opposition which would in his view along with the rule of law and a strong press constitute a bulwark of democracy
2. Will provide statutory recognition to the institution of parliamentary opposition which had been tarnished as being seditious and by this clear up this misconception
3. Will create conditions that will bring the dead chamber (legislature) to being a lively legislature.
4. Will complete the edifice of parliamentary democracy which is being transplanted from the surroundings of England to Indian environments

[464] 'Glorious Revolution' (Encyclopædia Britannica, 26 February 2024) https://www.britannica.com/event/Glorious-Revolution accessed 31 March 2024.
[465] 'The Official Opposition' (Erskine May - UK Parliament) https://erskinemay.parliament.uk/section/5986/the-official-opposition accessed 1 April 2024.
[466] Jack M and May TE, *Erskine May: Parliamentary Practice* (LexisNexis 1120).
[467] Ministers of the Crown Act 1937, s 5.
[468] Ministers of the Crown Act 1937, s 10(1).
[469] Ministers of the Crown Act 1937, s 10(3).
[470] Constituent Assembly Deb (20 May 1949). https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-20 accessed 15 July 2024.

T.T. Krishnamachari rejected such an amendment by emphasizing the point that there existed no opposition at the moment and it cannot be said that by stipulating salary for the Leader of the opposition, parliamentary opposition can be created. He was also of the view that the position of Leader of the opposition has in England been developed over the years and it should also develop in India before any legislation is done over the matter. [471]

He found support from Ayyangar who argued that the language of the draft article was wide enough to incorporate a provision for a salary of the leader of the opposition at a later date, Furthermore, he opined that there is no similar provision in any Act, in any Constitution in any part of the world saying that you must make provision for the Leader of the Opposition in the body of the Constitution itself. He also raised the question of what would happen if the government later removed the post of minister without portfolio. He went on that in the 2 years that the assembly was in session no healthy opposition existed, there were only some keen debates regarding the issue of Hyderabad. He also expressed apprehension that if the opposition party in question is of communal or socialist or communist nature, should they pander to them while they continue to destroy the nation through their politics. In the end, he summed up by stating that there is no opposition with a better manifesto than Congress.[472]

Kazi Syed Karimuddin supported the amendment stating that in India "we find that opposition is not tolerated, it is neglected and generally it is punished, the Constitution must create a Statutory Opposition. There is no democracy in the world that can function efficiently without opposition. The mistakes and failures of the Party have to be pointed out by the Opposition and the party in power has to be vigilant because the Opposition is not tolerated and is treated with scant courtesy. if it is to be left to the party in power to decide what is healthy criticism, and what is unhealthy criticism, then, in my opinion, every criticism of the party in power will be treated as unhealthy, and every opposition against the party in power will be treated with scant courtesy."[473] In the end, the amendment was rejected and Article 86 of the draft constitution was incorporated into the Indian Constitution unamended in the form of Article 106.[474] Now we shall turn our attention towards the status of opposition in the current era.

[471] Ibid.
[472] Ibid.
[473] Ibid.
[474] The Constitution of India 1950, art 106.

SITUATION OF OPPOSITION RIGHTS IN INDIA

A. STATUTORY PROVISIONS

As discussed earlier, the constituent assembly rejected the appeal to statutorily recognize the Leader of the Opposition at that point in time instead leaving the matters in the hands of the legislature to formulate rules, and act as and when they deem fit. The first such recognition to the opposition was first awarded by the first speaker of the Lok Sabha when Directions 120 and 121 were issued by him under rule 389 of "Rules of Procedure and Conduct of Business in the House of People" in the year 1956.[475]

Direction 120[476] is related to the "recognition of association of members as a Parliamentary Party or Group" for the purpose of the business of the house. It also laid down that such a decision for recognition solely rests with the speaker and his decision is final.

Direction 121[477] laid down various conditions that are to be considered by the speaker when awarding recognition such as that the association of members shall at the time of election have had a distinct ideology and programme and that they shall also have an organisation both inside and outside the House.

The most important of this direction was that it required that the party demanding to be recognized as the opposition must have at least equal strength to the quorum fixed ie. Is one-tenth of the total number of members of the house. The Quorum as it currently stands requires a party to have at least 55 members. This has been followed in India almost religiously as till 1969 there was no Leader of opposition in India and such was also the case in the 5th, 7th, 8th, 16th and 17th Lok Sabha.[478]

The post of Leader of Opposition was given statutory recognition in the year 1977 when the Parliament enacted Salary and Allowances of Leader of Opposition Act[479]. The Act defines the position as "being the Leader in that House of the party in opposition to the Government having the greatest numerical strength in the respective Houses." Further explaining that in case of a deadlock where more than 1 party is in opposition and has the same numerical strength, any one of the leaders can be regarded as the Leader of Opposition by the speaker and here to like the directions issued the decision of speaker will be final and conclusive.[480]

An interesting point to be noted here is that the definition as provided under this act does not necessitate a quorum or one-tenth of the members of the House and only talks about the opposition party having the "greatest numerical strength" in the House. This has become a point of contention as to which criterion is to be followed.

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[475] Rules of Procedure and Conduct of Business in the House of the People 1952, r 389.

[476] Lok Sabha Secretariat, Directions by the Speaker of Lok Sabha, Parliament of India (Lok Sabha) (Apr 2019) http://oksabhaph.nic.in/direction/direction.pdf accessed 15 July 2024.

[477] Ibid.

[478] NI Centre, 'Leader of Opposition' (Digital Sansad) https://sansad.in/rs/about/leader-of-opposition accessed 31 March 2024.

[479] Salary and Allowances of Leader of Opposition Act 1977.

[480] Ibid.

There has not been a supreme court decision on the matter but a reference to Karpoori Thakur vs State Of Bihar can shed some light on the matter, in this case, the petitioner's party had 42 seats which was above the 10% mark in the Vidhan Sabha and as such the petitioner's party was recognized as the Leader of Opposition. Later there was a split in the party and it was left with only 31 seats which was less than the 10% mark in the assembly and they lost their status as Leader of Opposition. They moved to court demanding to be recognised as they remained the largest party in opposition. Patna High Court held that the Speaker's decision was not based on anything mentioned in the Act, but based on established practice. Since the established practice was followed, there was no question of any illegality or unconstitutionality.[481]

In another case AK Subbaiah v Karnataka Legislature Secretariat, the court dismissed a petition questioning the appointment of the Leader of the Opposition despite not having 10% seats opining that the decision of the speaker is final in recognizing the Leader of the Opposition.[482] Only one thing can be ascertained from these decisions the role of the speaker in appointing of Leader of the Opposition is supreme and essential.

The Leader of Opposition in India apart from playing an imminent role in parliamentary democracy has also been made a member of the panel of various bodies that make appointments to various statutory bodies like the Central Vigilance Commission, Chief Information Commissioner, National Human Rights Commission and Lokpal and Lokayukta. Out of which selection committee of the Central Vigilance Commission[483], the Chief Information Commissioner[484] allows the leader of the largest party or group in opposition will be made a member of the selection committee if no Leader of the Opposition is recognized in Lok Sabha. The situation becomes even more tricky when considering the provision for selection committees for NHRC[485] and Lokpal and Lokayukta[486]which does not provide for any exception to the Leader of Opposition and further states that no want of vacancy in the selection committee will invalidate the selection. This further muddies the water as the government can easily appoint any person to such bodies whose functions are of immense importance as no official say of opposition can be present in such.

B. SUPPRESSION OF MINORITY VOICES IN THE CURRENT REGIME

The current regime has built a rightful reputation for suppressing dissenting voices and indulging in the destruction of opposition. The government recently suspended 146 MPs belonging to parties in opposition

[481] Karpuri Thakur v State of Bihar, (1983) 1 SCC 438.

[482] AK Subbaiah v Karnataka Legislature Secretariat 1993(1)KARLJ638.

[483] Central Vigilance Commission Act 2003, s 4.

[484] Right to Information Act 2005, s 12(3).

[485]Human Rights Protection Act 1993, s 4.

[486] Lokpal and Lokayukta Act 2013, s 4.

in December 2023 in a span of just 8 days. Their offence was just that they refused to budge on their demand for a statement from the Union Minister on the matter regarding the security breach of the Parliament which had occurred earlier. The opposition was within their rights to seek at least a reply from the Home Minister. The issue was after all of national importance. Not only the suspensions but the government also passed some key legislation without facing virtually any opposition during the mass suspension period. Such as the Indian Penal Code, Code of Criminal Procedure and the Indian Evidence Act; the Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Bill, Telecommunication Bill and Press and Registration of Books Act. All these bills are of significant importance and have far-reaching effects on citizens' lives, Passage of these with the absence of opposition is ethically wrong and a scam on Constitution.

Another instance is of passing of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 ("Aadhar Act") could have been legitimately passed as a money bill, where the government to circumvent the opposition it might have faced in the Upper House introduced the Bill as a money bill as the Rajya Sabha does not have the power to veto money bill passed by the lower house, it can recommend changes and in absence of that it, the bill is deemed passed after 14 days.[487]

JUDICIAL APPROACH IN SAFEGUARDING OPPOSITION RIGHTS

Opposition rights have been trampled by the ruling party in numerous different ways. It would be completely wrong to consider it a gross violation of the Constitution as the Constitution itself does not have enough safeguards to protect its basic ethos.

The judiciary has time and again come up to take moral responsibility to protect constitutional principles. But it had also many times failed in its duty. Through this section, we are trying to show the response of the judiciary vis-à-vis protecting the rights of opposition parties.

A. SUSPENSION OF MEMBERS OF THE HOUSE/ LEGISLATORS

Suspension from the House is considered a disciplinary measure against the member of the House who either disregards the Chair or in any way disrupts the business of the House. The ruling party is in part responsible for this as it with the help of the speaker tries to stifle debate and discussion on the floor house. It also completely disregards opposition demands. This can aptly be understood from the fact, that in the 2023 winter session of the Parliament, none of the bills were referred to a standing committee[488]. As a result of that opposition to make their voice heard, has no other option except to disrupt the proceeding of the house. Disruption helps in bringing those public issues that the ruling party in power tries to skirt away from.

Maharashtra Legislative Assembly through its resolution dated 05.07.2021, suspended 12 Members of

[487] The Constitution of India 1950, article 117.

[488] Winter Session 2023 <https://prsindia.org/sessiontrack/winter-session-2023/bill-legislation> accessed on 11th July 2024.

Legislative Assembly ("MLA") of the opposition party for a period of 1 year in relation to "indiscipline and unbecoming behaviour resulting in maligning the dignity of the House". Respondent came up with the argument that the Supreme Court ("SC") lacks authority to interfere because of the specific bar in Article 212[489]. The SC went through a catena of its previous judgements to come up with the already proven fact that the court can interfere in the proceedings of Parliament that are tainted by substantive or gross illegality[490]. In the case of *Raja Ram Pal v The Hon'ble Speaker, Lok Sabha & Ors*[491], SC concluded that the ouster clause does ouster court authority to review decisions but not in excess of illegality, violation of constitutional mandate, malafide, and violation of the principle of natural justice. Further, in the case of *Amrinder Singh v Special Committee, Punjab Vidhan Sabha & Others*[492], it was observed that the Constitution doesn't does not provide unfettered powers to any of the organs of the government. The court in this case held that the resolution was completely irrational to extend suspension beyond the remaining sitting of the current session. Recently in the case of *Raghav Chadha v Rajya Sabha Secretariat and Ors*[493], the court deplored the indefinite suspension of an MP and its cascading impact on his/her constituency.

B. MISUSE USE OF ANTI-DEFECTION

Anti-defection was introduced by Parliament as a safeguard measure to curtail the evil practice of "political defection". It is the speaker who decides upon the disqualification of a member under anti-defection. Therefore, it is of utmost importance for him to remain impartial and free from any bias. Though the same is not mentioned in the Constitution but it is a part of the constitutional convention[494].

In the case of *Kihoto Hollohan v Zachillhu And Others*[495], two main contentions from Petitioner were that the speaker was part of the ruling party being given the power to decide for disqualification and the second was the finality of the speaker's decision.

The majority claim that it would be wrong to put such aspersions on the chair and some faith should be reposed on the authority of the speaker. But the minority cast its doubts and rightly did so. The minority opinion was based on constitutional assembly debates regarding Articles 102[496], 103[497] and 192[498] which relate to the disqualification of members. It was argued during the process of drafting that power under Articles 103[499] and 192[500] should be given to the Speaker but the power was ultimately reposed in the hands

[489] The Constitution of India 1950, art 212.
[490] Ashish Shelar v. Maharashtra Legislative Assembly, (2021) SCC OnLine SC 3152.
[491] Raja Ram Pal vs The Hon'Ble Speaker, Lok Sabha & Ors, (2007) 3 SCC 184.
[492] Amrinder Singh v Special Committee, Punjab Vidhan Sabha & Others (2010) 6 SCC 113 (5-Judge Bench) (paras 47,62,64 and 65)).
[493] Raghav Chadha v. Rajya Sabha Secretariat And Ors. W.P.(C) No. 1155/2023.
[494] Harsimran Kalra, 'Decisional Analysis and the Role of the Speaker' (2013) 1 The Hindu Centre for Politics and Public Policy accessed 28th March 2024.
[495] Kihoto Hollohan v. Zachillhu And Others [1992] SCR (1) 686.
[496] The Constitution of India 1950, article 102.
[497] The Constitution of India 1950, article 103.
[498] The Constitution of India 1950, article 192.
[499] Ministers of the Crown Act 1937, s 10(1).

of the President and Governor in the case of Parliament and House of Legislature respectively[501].

With regard to the second contention, the court came up to the conclusion with the help of its previous judgments in *Indira Nehru Gandhi v. Shri Raj Narain*[502] and *Brundaban Nayak v. Election Commission Of India*[503] that finality clause doesn't bar judicial scrutiny. But it created a loophole in the form that the question of judicial review will come into the picture only after the Speaker's decision in the disqualification matter. This allowed the Speaker to delay its decision in the matter of disqualification proceeding. Recently, in the case of *Jayant Patil vs. Speaker, Maharashtra Legislative Assembly* the SC directed the Speaker to quickly decide in the matter of disqualification proceedings. It took the Speaker more than 6 months to give its decision.

Over time, through judicial pronouncements, SC has tried to solve this issue. With the joint reading of *Kihoto Hollohan v. Zachillhu And Others*[504] and *Rajendra Singh Rana and Ors v. Swami Prasad Maurya and Ors*[505], in the case of *Keisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly and Others*[506] judicial review can even be done before the Speaker decision. The court also made some recommendations regarding setting up special tribunals which would be headed by retired Chief Justice.

C. SPEAKER CLASSIFICATION OF BILL

Different kinds of bills are defined by Articles 107-117 of the Constitution.

1. General Bill (Article 107)[507]
2. Money Bill (Article 110)[508]
3. Appropriation Bill (Article 114)[509]
4. Financial Bill (Article 117)[510]

Article 198[511] relating to the state legislature is analogous to Article 110.

In the case of *Saeed Siddiqui vs State of Uttar Pradesh*[512], the SC upheld the Speaker's certification of the bill amending law related to Lokayukta as a money bill. It concluded that the Speaker's certification of the bill is final and binding. This allowed the State Government to make Legislative Council recommendations nugatory.

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[500] Ministers of the Crown Act 1937, s 10(3).
[501] Kihoto Hollohan v. Zachillhu and Others [1992] SCR (1) 686.
[502] Indira Nehru Gandhi v. Shri Raj Narain [1976] 2 SCR 347.
[503] Brundaban Nayak v. Election Commission of India [1965] 3 SCR 53.
[504] Kihoto Hollohan v. Zachillhu and Others [1992] SCR (1) 686).
[505] Rajendra Singh Rana and Ors v. Swami Prasad Maurya and Ors (2007) 4 SCC 270.
[506] Keisham Meghachandra Singh v. Hon'ble Speaker Manipur Legislative Assembly and Others 2020 SCC OnLine SC 55.
[507] The Constitution of India 1950, article 107.
[508] Article 110 of the Constitution of India 1950.
[509] The Constitution of India 1950, article 110.
[510] The Constitution of India 1950, article 117.
[511] The Constitution of India 1950, article 198
[512] Mohd. Saeed Siddiqui v. State of U.P., (2014) 11 SCC 415.

Article 110[513] lists out 6 provisions and a bill can only be classified as a Money Bill should it have only these provisions along with a few other incidental provisions. In the year 2016, the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 ("Aadhaar Act")[514] was introduced as a Money Bill. It contained 59 sections out of which only section 7 referred to the Consolidated Fund of India and makes Aadhar mandatory only when the source of expenditure is the Consolidated Fund of India.

In the case of *Justice K.S. Puttaswamy v Union of India*[515], Aadhar Act as Money Bill was upheld with a ratio of 4:1 with present Chief Justice D.Y. Chandrachud writing a dissenting judgement. The majority grossly failed to address the term "only" in Article 110 and its implications have completely been sidelined. It tries to uphold the act as a social welfare measure targeted towards the delivery of public goods to the poor.

However, the majority in the case upheld the court's right to scrutinize the Speaker's classification of a bill as a Money bill. Therefore, summarily removing the bar created in Article 110(3)[516] but on the other hand, its basis for judicially reviewing the act was completely flawed. This would further reduce the role of Raj Sabha in keeping an effective check on majoritarianism.

D. MISUSE OF THE GOVERNOR'S POWERS BY WITHHOLDING ASSENT TO BILLS

Recently, the State of Kerala has filed a writ petition under Article 32 of the Constitution against the President for withholding assent to four out of seven bills reserved by the Governor[517]. They contended that it is wrong on the part of the Governor to keep the bills pending for more than 24 months. This is not an isolated incident, in the last six months Punjab[518] and Tamil Nadu in the case of *The State of Tamil Nadu v Governor of Tamil Nadu*[519] have also filed cases in SC over the issue of pending bills.

Article 200[520] comes into play when a bill is passed by the legislature and is presented to the Governor for their assent. In this case, the Governor has three options at his disposal to assent, withhold or reserve the bill for the President's consideration. If the Governor wants to make legislature some changes, in the case of a non-money bill, the bill needs to be sent back to the Assembly as soon as it reaches for assent. If the Assembly return the bills with or without any modifications, the Governor has no other option but to give his assent. For the bill to be reserved for the President's consideration, it can only be done if it in the opinion of the Governor derogates the power of the High Court ("HC").

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[513] Salary and Allowances of Leader of Opposition Act 1977.
[514] Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 ("Aadhaar Act").
[515] Retired. Justice K.S. Puttaswamy v Union of India AIR 2017 SC 4161.
[516] The Constitution of India 1950, article 110(3).
[517] Kerala government moves SC against President, governor over pending bills<https://indianexpress.com/article/india/kerala-govt-sc-president-withholding-assent-bills-9230205/> accessed on 31st March 2024.
[518] As Punjab govt moves Supreme Court over pending Bills, Governor Purohit says ready to examine them < https://indianexpress.com/article/cities/chandigarh/punjab-govt-moves-sc-pending-bills-9004805/> accessed on 31st March 2024
[519]State of Tamil Nadu v. Governor of Tamil Nadu, Writ Petition(s)(Civil) No(s). 1239/2023
[520] The Constitution of India 1950, article 110.

There are grey areas in two aspects – What happens if the bills are sent back to the President after it is reconsidered? And for how many days can the governor keep the bill before sending it for Presidential consideration? The Court in the case of *Purshothaman v State of Kerala*[521], held that the phrase "as soon as possible" in Article 200 is limited only to return the bill.

In the case of *The State of Tamil Nadu v Governor of Tamil Nadu*[522], the Governor tried an artificial difference between returning of bill and withholding assent. SC concluded that if the Governor is withholding his assent to the bill, there is no other option except to send it back to the legislature for reconsideration. The absence of such an express provision causes confusion regarding the next step after the Governor withholds assent to the bill. The SC took strong note of the fact that it was only when the case was filed, that the Governor withheld his assent to bills after keeping it pending for 34 months. Moreover, the fact that the constitution does not provide a timeline in Articles 200 and 201, has made it a source of abuse by the ruling party in the Centre. This has also created a sense of deep distrust among states against the Centre.

WHO IS THE LEADER OF OPPOSITION?

After 10 years Lok Sabhas would finally have a Leader of Opposition as Rahul Gandhi assumed the role[523]. According to Section 2 of The Salary and Allowances of Leaders of Opposition in Parliament Act, 1977, the leader of the largest opposition party in terms of numerical strength and recognised by the Chairman of the Council of States or Speaker of the House, as the case may be. But from the last ten no one recognised as Leader of Opposition in the Parliament. The reason often cited to justify this action is that the party claiming the post does not have the requisite number of 10% of the total number of seats either in Lok Sabha or Raj Sabha, as the case may be but no such rule is mentioned in any statute. In the 1950s, a practice was started by the speaker to recognise the parliamentary parties as 'parties' or 'groups'. This was for ensuring the proper allotments of seats in the house, time duration allotted in a debate etc. This rule somehow transposed in an erroneous belief that a parliamentary party having more than 10% of the seats can lay their claim for the position of Leader of the Opposition[524]. This rule is a complete violation of the statutory norms by the speaker of the house.

[521] Purshothaman v State of Kerala 1962 AIR 694.
[522] State of Tamil Nadu v. Governor of Tamil Nadu, Writ Petition(s)(Civil) No(s). 1239/2023.
[523] The Hindu, 'Opposition's larger demography, Leader of the Opposition's big responsibility' (The Hindu, 15 January 2024) https://www.thehindu.com/opinion/lead/oppositions-larger-demography-lops-big-responsibility/article68337114.ece accessed 15 July 2024.
[524] The Wire, 'Leader of Opposition in Parliament: Why It Matters and Why We Need It' (The Wire, n.d.) https://thewire.in/government/leader-of-opposition-parliament-lok-sabha accessed 15 July 2024.

PRACTICES FOLLOWED IN OTHER COUNTRIES

In many Westminster-model democracies, there is a concept of "shadow cabinet" which was developed in the United Kingdom around the 19th century. It can be understood as the counterpart of the Government but constituted of members of the largest opposition party. Just as the government is constituted of different ministries, similarly members of the shadow cabinet hold specific responsibilities. In the United Kingdom, for example, the health secretary (minister of health) will be shadowed by a shadow health secretary, generally a senior parliamentarian from the largest opposition party. Similarly, in Canada, for example health secretary is shadowed by the health critic which scrutinizes government action concerning polices regarding the health of the populace of the country. Their duties are not limited to criticising or scrutinising the government's action but also act as government-in-waiting.

Opposition parties in the United Kingdom are allotted "opposition days". Under Common Standing Order No. 14, it is 20 days in each parliamentary season, in which they choose the topic of business and table motions. Out of these 20 days, 17 days are allotted to the official opposition party, and the remaining three go to other small opposition parties. In 2020, the Labour Party, which was the official opposition, introduced a motion to extend free meals that were provided in schools. Though this proposition was initially rejected later government reversed its action.

A convention like the leader of official opposition heading the Public Accounts Committee("PAC") which was developed in the United Kingdom was also adopted by India in 1967[525]. The PAC evaluates public spending to ensure value for money by assessing its economy, efficiency, and effectiveness and holds the government and its civil servants accountable for delivering public services[526]. This practice is followed in other Westminster-model democracies like Trinidad and Tobago [527]. A similar arrangement is in place in Tunisia.

RECENT RESURGENCE OF OPPOSITION IN INDIA

Opposition parties in India were written as too feeble to even provide serious competition to the ruling party Bhartya Janta Party in the run-up to the general election to the 18th Lok Sabha. But the election result showed a completely different picture with the opposition party's alliance Indian National Developmental Inclusive Alliance (I.N.D.I.A.), a multi-party coalition, secured 232 seats while the ruling National Democratic Alliance (NDA), which includes Bhartiya Janta Party, won 293 seats[528]. In the run-up to the election, opposition leaders and parties faced a slew of legal and financial challenges. This came on the face

[525] Lok Sabha Secretariat, 'Introduction to the Public Accounts Committee' (Lok Sabha Secretariat, n.d.) https://loksabhadocs.nic.in/LSSCOMMITTEE/Public%20Accounts/Introduction/intro.pdf accessed 15 July 2024.

[526] Parliament UK, 'Role of the Public Accounts Committee' (Parliament UK, n.d.) https://committees.parliament.uk/committee/127/public-accounts-committee/role/ accessed 15 July 2024.

[527] Constitution of Trinidad and Tobago, c 1, s 119.

[528] The Indian Express, 'Explained: Why 'Alliance of Parties' Is the New Buzz in Indian Politics' (The Indian Express, n.d.) https://indianexpress.com/article/explained/explained-politics/explained-india-alliance-parties-9376525/ accessed 15 July 2024.

when Arvind Kejriwal, Chief Minister of Delhi and Hemant Soren, Chief Minister of Jharkhand were lodged in jail on charges of corruption[529].

CONCLUSION

Recently, the Indian National Congress, the largest opposition party, got a tax notice amounting to Rs 3,567 crore just 20 days before the 2024 Lok Sabha elections[530]. This is not an isolated incident but a chain of events that the present ruling dispensation is employing to coerce opposition parties to toe the line ruling coalition.

In our opinion, it is not possible to have every provision that can structurally strengthen our opposition. We also have to repose faith in our political leaders as Ambekar rightly highlighted that even a good constitution can be ineffective if those responsible for implementing it are bad. But still, there are certain ways to ensure that the opposition can fulfil its task to ensure the government's accountability towards the public at large.

Indian parliamentary model is largely based on the British parliamentary system. Therefore, we can adopt certain practices that would suit our Indian System as suggested in the previous section. The concept of Shadow Cabinet is also known as "His Majesty's Official Opposition". It provides a sense of responsibility and official recognition to the opposition. It helps them to efficiently discharge their function to scrutinize government policies and to act as people's spokespersons. It also helps the government to keep the opposition party in the loop before taking any decision of national importance. This could be understood as before imposing the lockdown UK's PM Boris Johson consulted Leader of His Majesty Official Opposition Keir Starmer who is also the leader of the Labour Party.

Therefore, there is no doubt that the opposition is not structurally weak. Its weakness lies not only concerning one or two areas but as a whole. Moreover, the main question arises why would a ruling dispensation, which is very sure of getting elected in the next election, would attempt to strengthen the opposition? As has already been mentioned above, it is not the Constitution that is good or bad, it is those whom we elect for its implementation turn it good or bad.

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[529] Associated Press, 'India's Opposition Sees Hope in Modi's Falling Popularity' (Associated Press, n.d.) https://apnews.com/article/india-election-opposition-modi-0fdadcf9aaa0d80072c3f15b6759969c accessed 15 July 2024.

[530] Congress gets tax notices for three more years, total I-T demand Rs 3,567 crore <https://indianexpress.com/article/india/congress-gets-tax-notices-for-three-more-years-total-i-t-demand-rs-3567-cr-9242515/> accessed on 14th July 2024.