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Constitutional Norms, Urban Governance and Sharing of City Space: Challenge of Building an Inclusive and Equal Society

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Introduction

Cities are constructed human settlements with a high population density, which requires 'urban governance' or 'city governance'. In most cases, including India, they are designed to accommodate most persons and also satisfy most of the human requirements such as food, shelter and clothes, at a single place.[1] The importance of cities like Delhi, Chennai, Mumbai, Kolkata, Pune, Ahmedabad, Bengaluru, Kochi, etc., can be seen from the fact that in the past many years, they have become the potential hub of growth and development. Therefore, their rise can largely be attributed to many factors, including the New Economic Policy (NEP) of 1991, which led them to be the epicenter of globalisation in India. Therefore, they deserve to to be termed as the new centers of the power structure due to their sheer

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1. The term 'City' includes any town or village, any city, capital and locality. It is also inclusive of the suburbs and other human settlements that are similar or are institutionally organised as a local unit of Municipal or Metropolitan Government. It is inclusive of both the urban and the rural and the semi-rural portions of its territory (World Charter on the Right to Cities, art. 1.5.).

number, which is increasing with every passing day.[2] Because of the number of people they accommodate, their governance needs an altogether different approach for maintaining peace and harmony in the society and their sustainability, allowing future generations to groom and flourish. And, when we are talking of grooming, we are not merely talking of the city's buildings and infrastructure, but the point of discussion here is the people living in these cities and therefore, their well-being is the crucial area of concern. These people are either indigenous or have migrated, shifted or dislocated from the other states of the country in search of a better and dignified life. The shift of population can be from the villages or it can also be from city to city.[3] This migration of people from rural centres (villages) to cities puts pressure on urban governance, especially the governance of city resources and shared common spaces. Slowly and steadily, due to changes in the composition of cities, both in terms of the number of persons and the accommodation of various communities in it, these cities are posing urgent questions for their sustenance, such as how to govern these cities in the light of the fact that the composition of these cities is pluralistic and vibrant and also varies from city to city. Though the Constitution of India provides provisions to harmonise these city spaces[4], we have seen that on various occasions, these cities have miserably failed to regulate the elements that directly affect their peace, harmony and sustenance.[5] These cities have also

2. As per United Nations Report, Urban Population of India Estimated to Reach 675 Million by 2035, Behind China's 1 Billion.
3. In the case of megacities, people are also found to have migrated from outside national borders due to economic necessity and are working in India.
4. The chapters on Fundamental Rights, Directive Principles of State Policy and Fundamental Duties, along with the Preamble, comprehensively create a tailor-made social web necessary for governing India and its States and Union Territories, including urban centres of growth, i.e. Cities.
5. In Delhi in 2020, riots suddenly broke out, which led to mass violence and the killing of 54 people, especially in places where both the density of population was very high and where two clearly visible communities were living. See Ujwal Jalali, *North East Delhi Riots: So, What Did They Do in 2020?*, The Indian Express (June 13, 2024, 06:32 AM), https://www.newindianexpress.com/cities/delhi/2024/Feb/26/north-east-delhi-riots-so-what-did-they-do-in-2020. More often, the examples of the city of Delhi are taken as a referring point while referring or flagging various issues.

failed to maintain equality in terms of sharing common spaces. Therefore, the question of survival of slum-dwellers, street hawkers, persons living in JJ Clusters[6], pavement dwellers, LGBTQ+[7], and Persons with Disabilities (PWDs) etc. in the city of brick and mortar immediately hits the mind. These 'Cities' which sparkle in the night and where days are filled with the glory of the present times, where one can see and feel the success of mankind written on the walls of the buildings, which were built here to showcase the success story of the industrial revolution and also to highlight the transforming lives of the people through the urban designs and the urban governance, are in actuality for whom? The answer to this question lies in the evolution of the cities, how common space of the cities has been shared and by whom. 'Whom' here is crucial, as it will decide whether the spaces are shared equally by all or are controlled by the elite class. Are these Cities the victory signs of mankind or the new hub of exclusion of the marginalised from the mainstream? The 'Cities', 'Citiness' or 'Urbanity' is a work in progress. Creating happy cities[8] is a progressive dream or a utopian ideology that needs examination, especially in light of the fact that day by day, inequality is increasing on a global basis, including in India,[9] which is not an exception to that effect. Therefore, it is necessary to understand the intricacies of the cities, how they are built and how they have been governed for centuries. There is a need to understand this more with respect to societies that are multicultural in nature. In countries like India, where both religion and culture occupy most of the common spaces and the margin between the

6. *Jhuggi* and *Jhopri* clusters (JJ Clusters) are constructed on public land.
7. It consists of Lesbian, Gay, Bisexual, Transgender, Queer and other diverse gender identities.
8. Charles Montgomery, Happy City: Transforming Our Lives Through Urban Design 41 (1st ed. 2013).
9. Nitin Kumar Bharti et al, *Income and Wealth Inequality in India, 1922-2023: The Rise of the Billionaire Raj,* World Inequality Lab, Working Paper No. 2024/09, at 30 (Mar. 2024). They argued that from 2000 to 2001 and up to 2019 to 2020, there was 50% growth in the top 10%'s income share, and there was an increase of two-thirds of the share of the top 1%. Hence, the top 10% captures 67.8% of India's aggregate national income.

rich and the poor is also clearly visible which is evidently increasing with each passing day, it is necessary to examine as to how these common spaces of the cities have been shared by the communities, which are already marginalised, vulnerable and disadvantaged and who are already struggling for their existence. There is a need, therefore, to build cities where all of them can live together while acknowledging the presence of the other and where they share the spaces and sustainable societies are in fact built for the future. Therefore, the very question of designing an 'Equal Society' is not an achieved objective but an idea in practice, which requires the collective effort of all (the people), irrespective of one's religion and of which community one belongs to in sharing the public space. Cities are small units of an urban setting, which, because they are the byproduct of the industrial and information revolution, require a different design than is required in villages in the rural sector. The cities are more multicultural because of their structure. Their design, therefore, is crafted to cater to society's unique needs. But, can we say that the space is equally shared with all, irrespective of caste, colour, religion, gender identity, faith etc.? The relevance of the above question in the present times is more significant because the present-day cities, are getting bigger and bigger. They are more multicultural than before, mingling more with each other on a day-to-day basis, and they share a substantial common space of nation. Soon, the world will have more population in cities than in villages.[10] The United Nations has projected that by 2047, India will have a 51% urban population.[11] The fact is, in 1911, India had only one mega city- Calcutta- and by 2011, India had 23 megacities. India's megacities, such as Delhi, are growing at their peripheries, which have subsumed most of the rural to urban migrated

10. Neil Khor et al., World City Report 2022: Envisaging the Future of Cities iii(U.N. Human Settlements Programme, 2022). According to the report, 55% of the world's population already lives in urban areas. It is estimated that by 2050, 68% of the population of major cities will live in cities.
11. Department of Economic and Social Affairs, *68% of the World Population Projected to Live in Urban Areas by 2050,* United Nations, https://www.un.org/hi/desa/68-world-population-projected-live-urban-areas-2050-says-un. (last visited May 19, 2024)

population and the reason of this trend is that Cities are termed as engines of growth[12]. There are five parameters used by the Oxford Economics Global Cities Index (OEGCI) 2024: (i) Economic (ii) Human Capital (iii) Quality of life (iv) Environment and (v) Governance for scaling the place of cities in the world.[13] Almost three-fourths of the cities discussed in the report are in 22 world-developed nations. India ranks 800 on the list, and the major reason for that is (a) a large deficit in human capital and (b) poor quality of (i) life and (ii) the environment.[14] These are only the broad parameters, but many other regional and local factors also affect the quality of life in the cities which ought to be looked into. The cities should have the following principles along with its strategic initiatives (i) full participation as a citizen in a democratic management (ii) The common social functions of the city must take priority over the individual right of the property (iii) The cities must follow equality and non-discrimination as the public policies and encourage access to city space without any discrimination. (iv) The cities should build policies for providing special protection to vulnerable and marginalised persons and groups; (v) The cities should direct the private sector social undertaking to build and enhance economic prosperity and solidarity by developing progressive public policies.[15]

1. Share of the Marginalised and Vulnerable Communities in the Urban Employment

Employment in urban cities lacks inclusivity, leading to lopsided development which directly affects the balance of sharing the public urban space. More than ninety per cent of the migrant population[16] living in the cities'

12. Dinesh Mehta, *A Perspective on Urbanisation in India*, LIX(19) Econ. & Pol. Wkly.31 (May 2024)(reviewing Om Prakash Mathur, Changing Paradigms of Urbanisation: India and Beyond (1st ed. 2024)).
13. Though the report was prepared considering 27 indicators, these were broadly covered under the five broad heads.
14. *Global Cities Index*, LIX(22) Econ. & Pol. Wkly.7(June 1, 2024)
15. World Charter on the Right to the City, art. II (2005).
16. Gautam Bhan et al, *Reimaging Urban Employment Programmes*, LIX(22)Econ. & Pol. Wkly 14 (June 1, 2024)

sub-hubs lack dignified infrastructure, as they do not have adequate public services, such as access to safe and clean water, secure electricity, proper drainage and sewerage services, etc. Such vulnerable housing keeps giving them life-threatening shocks, such as the COVID-19 pandemic which though was a global issue but affected this class of people the most. In such a scenario, they occupy informal employment spaces. In this way, their share in the cities is limited only to (i) being waste collection workers in the Cooperative Group Housing Societies and other types of societies (ii) hawkers in the streets (iii) street vendors (iv) participant in the gig economy (v) working in construction activities and other related works (v) E-rikshaw pullers etc. The condition of LGBTQ+ persons and persons with disabilities is more vulnerable in the context of their share in the urban cities' employment. Therefore, there is a strong need to have Urban Employment Programmes (UEPs) for an inclusive approach to employment that includes vulnerable, marginalised, backward communities, alongwith persons with disabilities, LGBTQ+ and the *dalit* persons into its fold[17]. Urban employment has the flair to recharge cities by bringing joy and happiness into their lives since they constitute a substantial segment of society.

1.1 City and its Constituents

A city can be considered as the most dynamic entity in human history. Only 9 percent of the world's population lived in cities by 1900, but this proportion phenomenally rose to 30 percent by 1950 and then climbed much higher to more than 50 percent by 2009. According to the United Nations estimate, this will touch 68 percent by 2050.[18] This shift in terms of habitation is because the city comprises of a large and permanent human settlement, which is both regulated and governed by the State, to perform various activities necessary for the sustenance and growth of these cities. Cities can be distinguished from other towns in terms of their size, the

17. *Id* at 8.
18. United Nations Department of Economic and Social Affairs, *2018 Revision of World Urbanization Prospects*, UN.ORG, https://www.un.org/development/desa/en/news/population/2018-revision-of-world-urbanization-prospects.html. (last visited Jun.11,2024)

number of people living there and the facilities provided to them. A city is a part of an urban space comprising of people who have access to almost all the necessities of life such as food, clothing, housing, water and medical facilities, within it and also in its vicinity. There is no objective definition of the city available in law books. Still, there are certain statutes, such as the Criminal Procedure Code 1973, which, while defining the jurisdiction of the Metropolitan Magistrate (MM), defines that the MM can be appointed for a city comprising more than one million people.[19] The city comprises of the persons who live there and those who shifted, migrated or dislocated to these cities, sometimes by choice and often by default. Therefore, the composition of the cities changes with the passage of time. It also, from time to time, affects the dynamics of sharing common space in the urban set-up. The growth of cities in this way and its relative expansion poses many questions, such as, who are these people who shifted, dislocated or migrated to the cities? Have they migrated from other rural areas or other cities or are they from different countries but reached there in order to secure their life[20] or for a better and more dignified life? When they join these city spaces, they carry with them, sometimes all together, a new culture alongwith new traditions and religious practices but if they join the city space due to constraints, then in such a scenario, they also carry a dislocation trauma with them which might continue for a long time. The dislocation thus requires re-contextualization, allowing them to be integrated into the new social space of the cities. Sometimes, this dislocation is a continuous process. The outcome of the industrial revolution and capitalism, which was born in Europe, followed the 'continuous dislocation' process and expanded itself into an altogether new economic order called as globalization

19. See Criminal Procedure Code, 1973 § 8 (India). The new Bhartiya Nagarik Suraksha Sanhita, 2023, which will replace Cr.P.C. 1973 from 01.07.2024, does not differentiate between the Metropolitan Magistrate and the other Judicial Magistrate, therefore, it has not defined the term 'city' in terms of number.
20. Rohingyas have taken refuge in India due to the threat of persecution in their own country (Burma).

which stretched to the non-European states such as, India, China and Japan[21]. This further altered the meaning of the term capitalism, both contextually and epistemologically[22]. This also means that cities are not only the destinations for persons with means but also places for many others such as slum-dwellers, pavement dwellers, street hawkers, and other disadvantaged, marginalised and vulnerable persons who live in the *jhuggis* and *jhopris*[23], at the marginal level. This mix-match of the population, which lives together in the cities, creates a melting pot where people from different cultures, traditions, religions, nationalities, regions and villages live and craft a vibrant socio-economic-politico-religious social structure, which has vibrancy but often it fails in providing an equal society. Thus, this poses a further existential question as to how can we have an equal and inclusive city, keeping in mind that most of the world's population will be absorbed by these cities in the future? Hence, it is necessary to discuss urban governance, as that is the only hope for the survival of cohesive, inclusive and sustainable cities of the future.

1.2 The Ideology and the City Space

Cities have triumphed over the world[24] and this fact can easily be judged by the sheer increase in the number of cities across the globe. Right from Texas in the west to Delhi, Mumbai, and Shanghai in the east, people are flooding the cities or their vicinities. Delhi has also expanded in the past to include National Capital Regions (NCRs) into it. But is this a triumph of

21. Slavoj Žižek, *Sublimation and Dislocation*: A False Choice, in Global Manifestos for the Twenty-First Century: Rethinking Culture, Common Struggles, and Future Change 10 (Nicol A. et al eds., 1st ed. 2024).
22. The changes that occur in cities due to these continuous dislocations affect the existing literature on the understanding of capitalism as constructed and understood in different contexts. The integration challenges posed by the refugees, migrants and dislocations due to economic reasons, etc., in the cities led to altogether new academic inquiry about how capitalism works in these multicultural settings.
23. These are temporary and *kutcha* (loosely built with mud and brick) living places.
24. Edward Glaeser, Triumph of the City 2 (1st ed. 2011).

the city, or is it that only cities have triumphed and not the people living there? Since the 1950s, there has been a trend of 'missing ideologies' for sharing common space and the foremost reason for this is the pace with which the composition of cities is changing. The Constitution of India provides a platform for the governments to execute laws within their constitutional limits. Constitutional ideologies and dialogues play a huge role in bonding societies. Western societies formulated ideologies such as 'secularism' to govern urban spaces but when it comes to the tryst of Indian Cities with ideologies, one can easily find complications. They, on the one hand, have the 'caste and religion' aspect to tackle, while on the other, it is more complicated, 'language and religion'.[25] The voice of the persons with disabilities and the LGBTQ+ often goes unnoticed when it comes to sharing common space with them, as there is lack of sufficient infrastructure to take care of their needs to provide a barrier-free environment to them. Because all these are powerful and independent ideologies, issues and forces, they pull and push the urban city governance throughout. Though it is expected that the urban city space is governed by the constitutional ideology only but we have seen the trend that many a times, due to a shift in the ideological base of the State, the usage of common city space also changes and at times, it is seen to be shrinking for many, which is sowing the seeds of an unequal society. In the present times, it is not easy to find out which ideology is uniting the city's social space or which ideological base is bonding them together. Without a constitutional ideology, it is also becoming difficult to find out the classes that are being excluded from sharing the common city space. Indian democracy, unlike other democracies, is different in its operation. Here, alongside the Constitution, religion and culture also play a huge role in shaping the city space. The Constituent Assembly of India had debated the differences in the context of religion and culture to build a Constitution that can spread the constitutional fraternity across the nation. In fact, by analysing the Constituent Assembly debates, in the light of (i)

25. Chinki Sinha, *Return to Ideology*, LXIV(11) Outlook 4-5 (Apr. 11, 2024)

justice (ii) secularism (ii) national unity (iii) democracy (iv) unity and (vi) development framework, one can analyse the nationalist argument over group rights. In fact, Rochana argues, the Indian Constitution intentionally excluded the 'religious minorities' from those provisions that were providing 'group preferences', because as per the nationalist opinion prevalent during the Constituent Assembly debates, the resort to 'group-preferred' safeguards are only for enabling the backward strata of the society, so that they can overcome their disabilities and this safeguard is not to preserve the distinct cultural identities[26]. Articles 29[27] and 30[28] of the Indian Constitution, though, provide fundamental rights to minorities, such as the protection of their language and the administration of their educational institutions, but, for building a more coherent and vibrant Indian city, it is necessary to discuss the place of minorities, in terms of sharing common space in the cities. It is necessary to understand that the cities' economic development largely depends on their access to technology and their talent and also on how they inculcate tolerance as a policy in their social sphere.[29] The present urban crises are fundamentally different from the 1960s crises, as those crises were more or less economic in nature. In contrast, the present urban crises, in the absence of industries in the cities, revolve around growing poverty, increase in crime and violence, lack of dignified housing, and increase in other social problems such as drug abuse, sexual violence against women[30], violence against backward and vulnerable communities and therefore, has largely to do with building a coherent and equal social web where the marginalised and the vulnerable are protected together and where grow with dignity and to their fullest potential.

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26. Rochana Bajpai, *Constituent Assembly Debates and Minority Rights*, 35(21) Econ. & Pol. Wkly 1837-45 (May 27–Jun. 2, 2000).
27. India Const. art 29.
28. India Const. art. 30.
29. Richard Florida, The New Urban Crisis: How Our Cities Are Increasing Inequality, Deepening Segregation, and Failing the Middle Class—and What We Can Do About It xv (1st ed. 2017).
30. *Id* at 5.

2. Oxford Global Cities Index Report (OGCIR), 2024 and Indian Cities

Various parameters have been adopted by the OGCIR, 2024 to give city rankings. However, this does not in any way give a true reflection of how the Indian cities are evolving rather it can certainly give a fair reflection on how the parameters discussed herein are being followed by the Indian cities. The economic factor (first) is crucial for the sustenance of cities and this also shows as to how much a city contributes to the country's Gross Domestic Product and is also a global engine of growth. US Cities, such as New York and San Jose, are at the top of the list, whereas Delhi is at 350th place, Mumbai at 427 and Chennai at 472, out of one thousand cities which were compared. The human capital factor (second) encompasses both the knowledge and skills of the human capital in cities. Essentially, in today's economy, which is knowledge-based, the cities with multicultural tones and diversity are also known for their (i) skilled workforces and also (ii) innovative businesses, as these qualities increase the adaptability of the cities to absorb the technological change in order to be able to compete at the world level. Cities that invest in education and business and promote diversity are best positioned to use human capital to its maximum potential. Indian cities also rank lower in this category. When it comes to the parameter of quality of life (third) in the cities, the trend is that the top on-list cities have less inequality amongst the residents and the people there have longer life-span. Quality of life encompasses the reflection of various social and economic factors, which increase the city's livability conditions and attract others towards the city. This plays a pivotal role in both (i) the migration patterns and (ii) the retention of talent. The urban policies here play a crucial role in building resilient cities and their duty is to evaluate the quality of life from time to time. The city's environment is the *fourth* parameter which directly affects the building of healthy and happy cities. The city's commitment towards the environment shows how sustainable the city is and how much it is taking care of the rights of future generations. Fiji leads

in this category because of the best air quality index it carries.[31] The *fifth* factor is city governance, which helps in building integrated societies. This factor is ranked based on how the country is overall performing in terms of governance. Good governance fosters growth and well-being and also builds trust. In this category, the top cities are from New Zealand which are Auckland, Christchurch, and Wellington. New Zealand is considered one of the most politically stable countries in the world. However, OGCIR, 2024 is not the only way to identify happy cities. The cities, after accomplishing the basic necessities such as food, clothing and shelter, should strive for happiness and healthy lives, build resilience against environmental and economic catastrophes and also strengthen bonds between the members of the cities.[32] Thus, we can say this is the holistic development of a city.

3. Inclusiveness, Equality and Urban Cities: Building Pluralistic Cities

When humans live in cities, they build a society with their collective efforts and self-determination for the well-being of all. Ever since people have been categorized by various identities such as caste, religion, gender, etc., it has become difficult to live in harmony with others to build a truly united and equal society. The question then is how to build a united society with more equality. For building the social infrastructure[33], which is a condition that determines how the social capital[34] develops in the cities, it is necessary to foster relationships, bonds, and mutual support. By ignoring the necessity of building social infrastructures, the cities would fail to promote civil engagement, which is a powerful way of engaging the people. Different types of social infrastructures thus play a different type of role in the local environment. For example, places such as public libraries, Youth

31. Mark Britton et al., *Oxford Global Cities Index Report 2024*, Oxford Economics, https://www.oxfordeconomics.com/global-cities-index/. (last visited June 13,2024)
32. Charles Montgomery, *supra* note 7, at 42
33. Those physical places and the institutions and organisations that shape as to how people interact with each other and the State.
34. This concept is used to evaluate the people's relationships.

Men Christian Association (YMCA), public schools, etc., are places where durable relationships develop among people. These structures allow interaction and the formation of strong ties among the community members.[35] The language of the cities[36], differs in content and governance and also requires time-to-time introspection. The language of cities is defined by the design of buildings and structures and the social, economic and political infrastructures possessed by it. The buildings of Parliament and North Block, the infrastructure of Delhi Metro, the ancient monuments such as, Qutub Minar, Law Quila, Purana Quila, the religious places like Hanuman Temple, Bangla Saheb and Jama Masjid, etc., are classic examples of those infrastructures which define Delhi, and which determine the nature and character of the Delhi as a city. Similarly, Sadar Bazaar and Chandani Chowk are the historical markets of old Delhi and the court buildings, Supreme Court, Delhi High Court, Tis Hazari Courts Complex, Patiala House Court Complex, etc., depict the structures that showcase the seats of justice in Delhi. The mandate of the Constitution of India is to share these city spaces equally by all. That is why it is necessary to work on the policy of affordable housing[37] so that inclusive cities can be a reality. Similarly, by constructing accessible public transportation systems, such as Delhi Transport Corporation (DTC) and Delhi Metro, where a large number of people travel per day, we can say that equal access to public infrastructure would be a reality in near future.

4. Building Gated Societies for the Cities: Cooperative Group Housing Societies and After

Gated societies, such as Cooperative Group Housing Societies (CGHS), rose during the 1980s due to their endurance in providing a safe and secure place where like-minded people could live in harmony. The composition

35. Eric Klinenberg, Palaces for People: How to Build a More Equal and United Society, 17-18(Penguin 2018).
36. Deyan Sudjic, The Language of Cities, (Penguin Books 2016).
37. Pradhan Mantri Awas Yojna (PMAY).

of the cities is not restricted only to one type of community or religion or the persons speaking a particular language. It portrays a composite new culture, the 'City culture', which in many ways evolves with time. The role played by CGHS is phenomenal in this regard, as they came into existence in order to cater the modern needs of the cities, where the people with common objectives not only live together but, they also learn the art of living together in diverse culture and build common dreams for a better sustainable city. In the Indian context, the CGHS was a new phenomenon that developed with the growing cities and later, the 'cooperative culture' and 'cooperative manners also developed in a short span of time. This cooperativeness further nurtures tolerant behaviour among the people as they not only start living in a particular apartment or a building and also start sharing their lives with each other. Accordingly, the legislature defines the basic rules of cooperative conduct in the case of Delhi in the Delhi Cooperative Societies Act (DCS) 2003 and Delhi Cooperative Society (DCSR) Rules 2007. These CGHSs are formed with a shared purpose and objective and include like-minded persons. Therefore, there are many societies that comprise of people belonging to a particular business or profession such as there are cooperative societies where only the doctors[38] are the occupants. This cooperativeness is not gender sensitive and often follows certain unwritten rules, such as, in many societies, the house is not available to one type of community or religion, in fact, even there are societies where the house is not available for the single woman. The Supreme Court, in the *Punam Co-operative Housing Society Ltd*[39] case, observed that it is completely "impermissible" for cooperative societies to deny membership to single women, individuals belonging to a particular community, or persons eating a specific type of food. This is against the constitutional mandate of Article 19(1)(c) of the Constitution of India, which

38. Charak Sadan is a Cooperative Society in Vikaspuri, New Delhi, where only Doctors can live.
39. Punam Co-operative Housing Society Ltd. v. Alog Agarwal and Others, SLP (C) No. 1122 of 2020, decided on 12.11.2021.

provides for the fundamental right to form associations.[40] In this way, the courts are taking the initiative to build constitutional norms for the shared culture of the cities. In many ways, these cooperative societies have created their own class of people, shrunk the commonplace and excluded many who join such cooperative societies, from the main city. However, it is easier for the State to regulate such societies to tackle the housing demands of the cities. Some of the big societies primarily provide all the necessities of life within the gated place. But, with the passage of time, the State realised that these cooperative housing societies are facing challenges in forming inclusive societies and more so, the city's cooperative housing societies are beyond the affordability of the major population. These societies are small governance units that can regulate themselves and fulfil the needs of the Sustainable Development Goals (SDGs) also. For instance, these societies have to do rain harvesting mandatorily.[41] The DCS Act, 2003 provides for inclusiveness when it comes to the Managing Committee (MC) of the CGHSs, where it is mandatory to have one-third female members. However, these societies are beyond affordability for the vulnerable or the marginalized persons also and therefore, are out of their reach. Thus, the State launched Affordable Housing Schemes, which primarily focus on housing for all, so that a large number of people from lower-income groups would not feel deprived of the city's infrastructure and could fulfil their dreams of sharing the city space with others. But, these affordable housing schemes have failed to muster the trust of the lower income groups, marginalised, vulnerable and backward groups for various reasons. Therefore, they showed their reluctance in choosing Affordable Housing units. Hence, this programme

40. Mehal Jain, *It Is Impermissible For Co-operative Societies To Deny Membership To Single Women, Members of Particular Community, People Who Eat Particular Food: Supreme Court*, LIVELAW.IN, (Nov. 14, 2012), https://www.livelaw.in/top-stories/supreme-court-maharashtra-cooperative-societies-act-open-membership-single-women-particular-community-185512, (last visited Apr. 8, 2023).
41. See Rule 102(1)(d) of the Delhi Cooperative Society Rules, 2007, according to which it is the duty of the Cooperative Societies to install a Water Harvesting system and to maintain the green areas.

is facing a resistance as the demand for affordable housing is decreasing every day. Therefore, the developers are now doubling down on the premium housing segment.[42] In this way, the housing scheme for all, may find a jolt in its execution. As an outcome, the density of the population may increase more in the slums, which are not only unhygienic and health disasters but also a hub for various types of heinous crimes, such as those related to drug abuse. The sharing of city space in terms of housing is unequal, as most of the regulated housing belongs to the haves and unregulated housing belongs to the have-nots, which has further widened the gap between the rich and poor and the same continues to increase. The inclusiveness is also lacking in terms of housing for minorities, disadvantaged and backward communities and also the LGBTQ+ and PWDs. This is not a healthy trend for the cities, as everyone has an equal sharing right over the city space. The future smart cities are expected to have more inclusiveness but concerted efforts will be required to ensure the same.

5. Slums, Judiciary and the City of Delhi: Upholding the Law at the cost of people

The courts have played a huge role in building 'Slum Demolition Jurisprudence' in India. The first phase of slum demolition in the city of Delhi began in the year 2000, when Justice B N Kirpal turned the case filed in 1996 by an Engineer to act on Municipal Solid Waste Management in 300 largest cities of India, towards the unrelated issue of slums in Delhi. He observed that slums are responsible for the problem of solid waste, whereas the fact is that only 80g of solid waste comes from the JJ clusters in comparison to 420g from the high-income groups and 240g from middle income groups.[43] And this bull of slum demolitions did not stop here. It is

42. Aggam Walia, *Developers Double Down on Premium Housing as Affordable Launches Stagnate*, The Sunday Express 16(Apr. 21, 2024).
43. See Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 J. Envtl. L. 293-321.

noteworthy that subsequent to the directions issued by the Delhi High Court in the case of *Sudama Singh*[44], the Delhi Urban Shelter Improvement Board Act, 2010 ('2010 Act') was passed and the Delhi Urban Shelter Improvement Board ('Board') was established. A Rehabilitation Policy was also accordingly framed, according to which the JJ colonies that existed before the first of January 2006 could only be removed by providing an alternate accommodation and this was also applicable to *jhuggis* which came up in such JJ Clusters before the first of January 2015. However, this benefit was not extended to any jhuggi which came up after 01.01.2015. In another instance, the Supreme Court in 2020, in the *M C Mehta*[45] case, directed the concerned Authorities to prepare an extensive plan for the removal of 48,000 jhuggis, which cover a large area along the length of a railway track in the NCT region. It further directed to remove all encroachments within a period of three months as also directed that there shall be no kind of interference by any political party or stay order by any Court in this regard. In the case of *Manoj Kumar*[46], the slum dweller of Janta Colony, *Naveen* (New) Shahdara, claimed their residence on the land in question for the past 25 years and approached the Delhi High Court on being aggrieved by the demolition drive and eviction by the Board, which left them high and dry. The occupants claimed absence of notice by the Authorities as well as lack of any rehabilitation efforts by them. The slum dwellers contended that their clusters were situated in the vicinity of Jhuggi Jhopri clusters (JJ Cluster), which stood identified by the Board under the 2015 Rehabilitation Policy and accordingly, they are also entitled to rehabilitation. The interpretation of 'nearby areas' under proviso to Section 2(g) of the 2010 Act was also considered. The said writ petition was dismissed by the Single Judge on a technical issue that the Petitioners therein failed to prove the existence of

44. WP(C) Nos. 8904/2009, 7735/2007, 7317/2009 and 9246/2009, Order dated Feb. 11, 2020.
45. Order dated Aug. 31, 2020, passed in Writ Petition(s)(Civil) No(s). 13029/1985.
46. Manoj Kumar & Ors. v. Delhi Urban Shelter Improvement Board & Ors., Judgment dated Oct. 19, 2022, passed by Single Judge, Delhi High Court in W.P. (C) 14781/2022.

their individual cluster with an identified JJ Basti under the 2015 Rehabilitation Policy prior to the cut-off date, i.e 01.01.2006. Further, there was no document to prove that their cluster fell under the list of identified properties prepared by the Board. The Single Judge considered 3 km as the coverage area to interpret the term 'nearby areas'. The said dismissal order was assailed before the Division Bench in Letters Patent Appeal[47]. The requirements for rehabilitation under Section 2(a)(i) of the 2015 Rehabilitation Policy were noted by the Division Bench and the appeal was dismissed on the premise that these slum dwellers are required to establish the facts by leading evidence before the competent court and disputed facts cannot be decided in the exercise of writ jurisdiction. *Ajay Maken* case[48] also could not come in their rescue since the land in question was not included in the list of identified properties prepared by the Board's. The Order passed by the Division Bench was upheld by the Supreme Court[49] and it declined to accept the argument that the term 'nearby areas' should be extended to at least 5 km to widen the scope of the coverage area. These judgements are certainly as per the law, but, failed to delve into the larger problems of the societies and the cities in particular. The families evicted from these places included persons of all age groups. They had limited access to local medical institution for the upkeep of their family health and had set up those JJ clusters with hard earned monies and extremely small

47. Manoj Kumar & Ors. v. Delhi Urban Shelter Improvement Board & Ors., Judgment dated Feb. 21, 2023, passed by Division Bench, Delhi High Court in LPA No. 71/2023.
48. Ajay Maken v. Union of India, (2019) 260 DLT 581 (Div. Bench). In this case, the matter was related to the demolition order of 1200 jhuggis in Shakur Basti (JJ cluster in Delhi) and the Delhi High Court had held that no authority shall carry out any demolition without conducting a survey and consultation with the population which resides in the Basti. In fact, the Court further directed that no authorised persons, as per the survey, be evicted without rehabilitation. The Court further directed that the person supposed to be evicted shall have the right to have 'meaningful engagement' with the Authorities.
49. Order dated 17.07.2023 passed by Supreme Court in Special Leave to Appeal (C) No(s).7393/2023 titled Manoj Kumar & Ors. v. Delhi Urban Shelter Improvement Board & Ors.

savings and everything was demolished at a single stroke without any notice or prior information and the same also received the stamp of the courts, without any rehabilitation plans in place for most of the cases. The question which comes to mind is that what shall be contribution of these people in the growth of cities and will these people who are already living at the margins, be able to share the city spaces where there is no place for them to accommodate? Interestingly, the initial slum demolition jurisprudence was built for two important reasons, *one*, a perceptible shift in the nuisance law and *second*, aesthetics[50]. In most cases, judgements were delivered mostly by simply looking at the pictures of the slums. It is worthwhile to mention that encroachment of the public land by JJ clusters is taken very seriously by the Courts, ignoring the fact that almost all the colonies of the cities are encroaching on the public land in one way or another. Take the example of parking. In the city of Delhi itself, almost all the colonies have encroached on public roads to park their vehicles. And in many more cases, the neighbourhood parks, whose purpose is to provide fresh oxygen to the residents, is encroached on to cater for parking needs. The street roads, service roads, and the vacant place attached to the roads, meant for either walking purposes or other small works have also met the same fate and are being illegally encroached upon for the purpose of parking.[51] A similar situation can be found in the CGGS also, because of lack of direct interference from the State, people are rampantly doing unauthorised construction[52] and also building illegal floors,[53] and balconies, which leads

50. Anuj Bhuwania, Courting the People: Public Interest Litigation in Post-Emergency India, 81 (Cambridge University Press 2017).
51. Refer Express News Service, *Delhi MCD Commissioner Told to Act on Illegal Parking*, The Indian Express (May 13, 2024, 6:45 AM), https://www.newindianexpress.com/cities/delhi/2024/May/13/delhi-mcd-commissioner-told-to-act-on-illegal-parking-report-sought.
52. Press Trust of India, *Rise in Unauthorised Constructions Due to Flaws in Urban Housing Policies: Supreme Court*, Deccan Herald (Mar. 1, 2024, 9:05 AM), https://www.deccanherald.com/india/rise-in-unauthorised-constructions-due-to-flaws-in-urban-housing-policies-supreme-court-2917968.
53. See Satya Prakash, *SC Takes Tough Stand on Illegal Floors in Societies*, The

to both danger to the buildings as well as to the aesthetics of the society. Yet, most of the cases are not reported at all and if reported, are going on for years in the courts without any result having been compromised or withdrawn with the permission of the courts.[54] Then, why is high-handedness only shown against the slum dwellers? This is a question that needs introspection. Slum dwellers are those have-nots of the State who are working for the State for a meagre sum, which is not even enough to sustain their lives. Any chance of having a better life through rehabilitation is also taken away from them by not rehabilitating them after eviction. This led to a high dropout rate among their children from the schools. These forceful evictions leaves them with no choice and compel them to shift miles away. But, the new place where they shift poses another existential question, whether they have a share in this new city space or not? This question is a challenge even for the present times. Supreme Court has established in *Tukaram Kana Joshi*[55] that the right to the city is gaining importance and which is the right of all the urban persons or the inhabitants and this right is not limited to the citizens. All have the right to participate in the urban space and its resources. It is necessary that all urban inhabitants participate in the decision-making of urban governance, particularly in cities and be able to access and occupy city space. The right to the City is not an individual right but a common right, which has the collective power to reshape the whole urbanisation process.[56] The right to city consists of broader issues related to (i) urban equity and (ii) social justice necessary for making urban governance and its planning to make it more inclusive and participative. In

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Hindustan Times (May 2, 2013, 6:55 AM), https://www.hindustantimes.com/delhi/sc-takes-tough-stand-on-illegal-floors-in-societies/story-MJlpihkjatb9kPUD6EDN3I.html.

54. Order XXIII of the Civil Procedure Code allows for the compromise decree, where parties may settle civil cases with each other.
55. Tukaram Kana Joshi & Ors. through Power of Attorney Holder v. M.I.D.C. & Ors., (2013) 1 SCC 353.
56. David Harvey, Rebel Cities: From Right to the City to the Urban Revolution, 3(Verso 2012).

fact, in the case of *Gainda Ram*[57], the Supreme Court had held that hawkers had a fundamental right to carry on business. Thus, it is clear that everyone has a right to city which includes right to stay, right to work and right to enjoy basic amenities, without any discrimination based upon gender, race, ethnicity, and also based on religious and political orientation. Right to city is all about respecting the principles of sustainability.[58]

5.1 Sharing Public Space in the City of Delhi

Historically speaking, the space in the cities (habitation) was constantly being designed by the dominant culture prevalent in the society. One can witness the same when one sees the prevalence of 'Monument Designs' in the spaces where people live together. During the Mughal times, one can see how the people lived in the cities and what types of designs of cities were in practice, alongside the designs and patterns of the types of buildings[59]. Similarly, one can see the influence of culture, design and the impact of science on both the cities' design and the making of the monuments in the regions of Swai Raja Jai Singh of Rajasthan.[60] Sharing the spaces on similar grounds in the cities also shows the placement of excluded classes of that time in the societies. In the Indian context, the sharing of public spaces was mainly influenced by the religious practices prevalent in the societies and cities. Therefore, one can easily identify why the marginalised, vulnerable and disadvantaged communities always shared the public space outside the exterior walls of the cities or villages. Here, one can also witness the shrinking common city spaces for women, persons with disabilities,

57. See Gainda Ram & Ors. v. Municipal Corporation of Delhi & Ors. (2010) 10 SCC 715. This fundamental right is subject to reasonable restrictions under Article 19(6) of the Constitution of India.
58. Article 1 of the World Charter on the Right to City, 2005.
59. Taj Mahal and Red Fort are classic examples of Mughal Monumental Designs.
60. During the reigns of Jai Singh, the Buildings such as Jantar-Mantar were designed, which in many ways, can be termed as path breaking, as contextually, they show the signs of both, the evolution and development of science and also show the pattern of cultural growth in the society and the cities.

LGBTQ+ Communities[61], etc. In fact, even after ten years of *NALSA's* judgement recognising the rights of transgenders, there is no change can be noticed in the mindset of people with whom they are sharing the public space, such as, in employment.[62] The question that needs urgent addressal is who is afraid of Gender?[63] and therefore, is it because the cities worldwide are not even in 2024 ready to share public spaces with the different gender identities? Thus, the question arises that despite achieving independence and the lapse of 74 years from the adoption of the Constitution of India, why does the problem of 'sharing common spaces' persist when the Constitution strictly prohibits the practice of untouchability and also obligates the Government not to legislate any discriminatory laws? Dr B R Ambedkar dedicated his life to the legitimate claim of the shared space for society's marginalised and disadvantaged classes. In fact, one can witness that the most crucial incident in the life of Dr B R Ambedkar, which forced him to aim at changing the rules of sharing spaces, was also when he found that the actual sharing of common space for the Shudras[64] to live in the cities was not permitted by the upper-class Hindus. Firstly, he was humiliated at the Parsi Hotel, where he was forced to leave the room even though he was paying a

61. The Supreme Court in National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (NALSA Judgement) recognised the identities of Transgenders. Accordingly, the Parliament had also later passed, Transgender Persons (Protection of Rights) Act, 2019. Despite ten years of passing of the NALSA Judgement, one can see that nothing major has changed in the lives of transgenders and their share in the city space is still at the margins.
62. Udbhav Seth, *10 Years of NALSA Judgment: What Has Changed for Transgender Community A Decade After the Supreme Court Judgment That Recognised the Rights of Transgender People in India, the Community Tells Us What Has Changed in Their Lives – and What Hasn't*, The Indian Express (June 10, 2024, 7:31 AM), https://indianexpress.com/article/express-sunday-eye/nalsa-judgement-transgender-community-9381017/ 2024).
63. Seer Judith Butler, Who's Afraid of Gender?, 83 (Farrar, Straus and Giroux 2024). Judith argues that it is the religious institutions that spread bad words/rumours against the 'transgender'. They call these people destructive for humans, nations and society and therefore, their share in the city spaces decreased.
64. The lowest class in the Hindu hierarchical system.

higher rental amount per day than others and *secondly*, when the *Dalits* were not allowed to have a shared space in the common resources of the land and water.[65] One can examine the share of women in public spaces in reference to the increase in violence against women in the Cities. Therefore, the dream of having a feminist city is itself an experiment for living differently and better and preparing a justly urban (feminist) city[66]. People often talk about the safety and security of women in public spaces, hence asking for an increase in the police/security but, the question is that is there any evidence that the violence against women has decreased, despite an increase in police/security and also increase in the punishment[67], because in most case, the police themselves are the ones causing sexual offences to the women, even in cities.[68] It has to be borne in mind that urban governance, requires a comprehensive overhaul at the grassroots and not superficial changes at the peripheries.

6. Sharing Common City Spaces and Food Practices: Sharing Cuisine of All

The cities are often reborn in the light of various events that change the city's culture forever. The city of Delhi is a classic example of a city that was reborn[69] after the partition of India. A new city culture had developed thereafter. The public space is always shared by the prevalent food practices of the cities and therefore, it also plays a huge role in cultivating the city's culture. In cities, people come from various parts of the world and along with them, comes their food recipes, which they share

65. See Ashok Mahadevan & Sushan Shetty, *Discovering Babasaheb*, Reader's Digest 75-81(Apr. 2024)
66. Leslie Kern, Feminist City, x (Verso 2021)
67. Refer to Section 376(2)(a) of the Indian Penal Code, 1860, which provides a minimum rigorous punishment of not less than ten years and can be extended upto imprisonment for life in cases where the Police Officer causes rape. A similar provision is also in Section 64(2) of the Bhartiya Nayaya Sanhita, 2023.
68. Leslie Kern, *supra* note 66 at xiii.
69. Rotem Gena, Delhi Reborn: Partition and Nation Building in India's Capital,4-15(Stanford University Press 2022). See also Chapters 4-5 for further discussion on citizens' rights.

with others. Slowly and steadily, this process of sharing creates a feeling of community, which further leads them to share common spaces equitably. In Punjab, to remove the prevalent caste practices of his times, Guru Nanak ji, started *Sanjha Chulhas*[70] so as to create a shared space. Similarly, the *langars*[71] at Gurudwaras all over the world on the occasion of Baisakhi, complete the festival celebration.[72] The question of which food is superior, vegetarian or non-vegetarian, has been a hot topic of discussion for years. But urban governance has safeguarded both in many ways. Due to the shift in the State's ideological stance, one can see the change in the prevalent food practices also across the cities. But, here also, one can see the challenges. In various parts of India, instances of discrimination are reported in the preparation and distribution of mid-day meals across the schools in India. In 2015, in Jodhpur, Rajasthan, a Dalit (backward class) student was beaten for just touching the utensils used for serving the upper caste students in the government school. In many cases, they are also asked to come with their own plates.[73] The Dalit cuisine is often not part of the shared city space. Tolerance, which is the essential ingredient of the success and endurance of many cities worldwide, is missing in Indian cities, especially when it comes to sharing Dalit cuisine[74].

70. In undivided Punjab, there is a tradition where the females cook their rotis in the 'common oven' in their villages. This helps in building a feeling of fraternity amongst the communities.
71. In the Gurudwaras, cooked food (without any cost) is regularly distributed throughout the year to the public at large, irrespective of their caste, culture, gender, religion, or gender orientation, which is termed as *Langar.*
72. Kaushik Das Gupta, *A Time to Sow and a Time to Reap: As the Country Celebrates Regional New Years, a Look at How the Kinship of Food Ties Communities and Languages, One Ingredient Is Time*, The Sunday Express, 1(Apr. 14, 2024).
73. Akhileshwari Reddy, *How Caste Is Marring Mid-Day Meals: Discrimination Against the Dalits Is Still Pervasive in Our Society, and This Is Seriously Marring the Potential of the Mid Day Meal Scheme*, Down to Earth, (June 30, 2018), https://www.downtoearth.org.in/news/governance/how-caste-is-marring-mid-day-meals-60898, (last visited June 14, 2024).
74. Shahu Patole & Bhushan Korgaonkar, Dalit Kitchens of Marathwada, 24(Harper Collins 2024)

7. Sharing the Common Work Space and Transgender Persons: Where is the Inclusiveness?

In India, transgenders received their constitutional identity only a few years back in 2014, when the Supreme Court of India in the *NALSA* case recognised their identity and rights. Later, the Transgender Persons (Protection of Rights) Act, 2019 was passed. This Act aimed at building an inclusive society consisting of transgender persons. But, in effect, the core issue to be addressed is that how many of them can share the common spaces, especially the workplaces, which provide financially self-reliant assistance in maintaining one's dignity? Barring a few corporate houses, such as Tata Steels[75], which recently inducted fourteen transgender persons as trainees for the Heavy Earth Moving Machinery Operators and has increased the strength of transgender persons to one hundred and twenty in their business group.

7.1 Transfer of Property Act, Delhi Rent Control Act and Urban Governance: Sharing Common City Space

Cities need legislative guidance for their transformation from the States to create inclusive cities. In this regard, various regional development authorities look after the design of the cities. In Delhi, this design work is entrusted to the Delhi Development Authority (DDA), which has designed Delhi's dynamic master plan, which is subject to revision and modifications from time to time. Sharing common spaces, such as parks (both district and neighbourhood), public roads, public toilets, religious places, etc., are subject to redefinition from time to time. The major hurdle before metropolitan cities like Delhi is (i) the already built structure in the common city space and (ii) inculcating habits amongst the people to not change the design of the cities as per their own whims and fancies. Illegal or

75. Satya Prakash Bharti, *Tata Steel Empowers Transgender Community, Deploys New Batch of 14 as Heavy Earth Moving Machinery Operator Trainees*, The Mook Nayak (Apr. 1, 2024), https://en.themooknayak.com/lgbtq-news/tata-steel-empowers-transgender-community-deploys-new-batch-of-14-as-heavy-earth-moving-machinery-operator-trainees.(last visited June 14, 2024)

unauthorised construction is a menace to city life, affecting the city's quality of life. The Bench of Justice Manmohan and Manmeet Pritam Singh Arora at Delhi High Court[76] in a Public Interest Litigation (PIL) observed that illegal and unauthorised construction in Delhi is taking place at an unprecedented scale. DDA and Municipal Corporation of Delhi (MCD) are using age-old methods of sealing.[77] They are using (i) tapes and (ii) the seal for the purpose of sealing during the demolitions, which lack a deterrent effect and only maintain the status quo of unauthorised or illegal constructions, whereas the requirement is to overhaul these development laws so as to keep the designs of the common city space intact. This leniency in tackling unauthorised constructions from the hands of the government further not only shrinks the city space but also affects the city's dignified life, which later can affect the goal of sustainable cities. The Transfer of Property Act of 1882 is applicable while transferring immovable property or giving property on lease. The sale deed only comprises a formal projection of the terms agreed upon by the parties i.e. the buyer and the seller. Interestingly, it also failed to build an inclusive society. Suppose a Company had identified land in the city to construct a housing complex in it and the land belonged to the marginalised communities for years through customary rights. The Company purchases the land through the sale deed and the landowners who entered into the agreement do not represent the interests of all the community members. Because these community members do not have title deeds, they will lose the land and due to lack of affordable legal access, they will be evicted without any compensation. In a way, the cities are vulnerable to the already vulnerable and marginalized persons in the cities.

76. Jamia Arabia Nizamia Welfare Education Society v. Delhi Development Authority, W.P.(C) 638/2024 and CM Applications 2793-2794/2024, CM Application 6077/2024 and CM Application 10223/2024, order dated Feb. 22, 2024.
77. Section 31A of the Delhi Development Authorities Act, 1957 authorised them to seal the unauthorised construction.

8. Designing Happy Cities: Constitution, Fraternity and Sharing Spaces in the Cities

In the modern sense, law is the expression of the general will [78] which is created by the authority vested in the collective (will of the people).[79] And therefore, the design of modern governments, based on democratic principles, is more like an artistic work, where 'the people' can decide how they want to design the form and structure of their State and also the rules of sharing the common space, the city space. India crafted its constitutional design in 1950 when the Constituent Assembly enacted the Constitution for independent India. For designing happy cities in India, it is essential that everyone, irrespective of their caste, class, colour, gender, or sexual orientation, etc., has access to the common city space and to achieve this objective, it is necessary to work at the fundamental level with the help of the Constitution of India, not in its letter only, but also in its spirit. And, when we say that in a diverse country like India, we all belong to one another, we say that because of the Constitution of India, where in the Preamble itself, which is key to the Constitution of India, a constitutional norm, fraternity has been mentioned for maintaining the unity and integrity of the nation. And it is necessary to remember that fraternity is not just a constitutional norm but a dire human need, without which it is difficult to think of building inclusive cities where common space is shared by all. The sustainable growth and development of cities is more of an economic aspect, but the true success of cities depends upon whether the constitutional winners of society[80] have all the gains or losers also have a share in them.

78. This assertion of the general will was used for the first time in the 1789's American Declaration of Independence which has structured in many ways, the edifice of the modern understanding of the law that it is created and not prior to but, is instituted by the collective (will of the people).
79. Federico Szczaranski, *The Authority of Constituent Power*, 00(0) Mod. L. Rev. 1, 1-30 (2024).
80. See Upendra Baxi, *Constitutionalism as a Site of State Formative Practices*, 21 Cardozo L. Rev. 1183, 1186 (2000). Prof Baxi discussed the reading of constitutional development from the standpoint of constitutional losers and winners while discussing

8.1 Urban Governance and Heat Proofing of the Cities: Where the Poor Will Go?

One can easily see the divide between the rich and poor whenever the cities face the brunt of the climate. It is common that during the winters, the people living in the margins (in the JJ Clusters or *kutcha* houses) die due to excessive cold and during the summers due to excessive heat. The summers of the cities are no longer the same due to climate change, which has increased the intensity of heat in the city. Therefore, a consistent and long-term sustainable policy is required to increase the green and shaded areas and have a holistic heat vulnerability mapping of the cities.[81]

8.2 Persons with Disabilities and Cities

The persons with disabilities are one of those vulnerable classes whose interests are generally not kept in mind while designing the cities. In fact, social infrastructures, such as schools and colleges, are not constructed in a disability-friendly way and do not provide a barrier-free environment for them. The Courts, despite being called the least dangerous branch[82], are taking the lead in executing disabled-friendly policies and law is in place in this regard[83]. Recently, the Bombay High Court, in a suo moto Public Interest Litigation (PIL)[84], took note of the difficulties faced by disabled persons due to bollards constructed on the footpaths in Mumbai and granted

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the place of subalterns in constitutional development. For him, the subalterns are the 'Constitutional losers', whose voices were not adequately represented in the constitution-making.

81. See Anumita Roychowdhury, *Heat Proofing the City: Urban Plans Must Go Beyond Emergency Response to the Heatwave*, The Indian Express, (June 4, 2024). She argues that urban planning needs to go deeper and must not be subject to one or the other disaster, as occurred in Delhi this year when a person died (due to heat stroke) in the City of Delhi when his body temperature reached 107 degrees Fahrenheit.
82. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics,1(Bobbs-Merrill Company 1986)
83. The Rights of Persons with Disabilities Act, (RPWD), 2016
84. High Court of Judicature at Bombay on its own Motion v. Municipal Corporation for Greater Mumbai and Anr. being Suo Moto PIL (L) No. 27145 of 2023

time, as sought by Brihanmumbai Municipal Corporation (BMC), to remove them. The United Nations Convention on the Rights of Persons with Disabilities, 2006 has made it obligatory for the Member States 'to promote, protect and ensure'[85] that the PWDs enjoy human rights with dignity. The cities need to address the issue of providing a barrier-free environment to persons with disabilities since only then they will be able to enjoy their employment meaningfully, which many a times they leave due to issues of accessibility. The RPWD Act directs the State to properly utilise the capacities and talents of PWDs[86] and also provide community life so that they can access community support services.[87]

9. Conclusion

Cities are a work in progress. We start with a plan and encounter various events during the course, but not all of them are as per the plans. These may also be scary, but we must acknowledge them while building cities,[88] as today's events will be the poetries of tomorrow. Events like partitions and riots affect the shared space of cities and the real effects are witnessed only later. The idea of India is more than a territory, specifically when it is subject to the constitutional trajectories prescribed by the Constitution, where sharing of the public place is subject to secularism[89] and removal of the practice of untouchability[90] also, which set the tone and tenor of the social space of the nation and particularly the Cities, where people live in a close proximity with each other. Article 17 of the Constitution of India also restrains the people of India to practice untouchability. The public sphere

85. Refer Paragraph 1 of Article 1 of the United Convention on the Rights of Persons with Disabilities (UNCRPD) 2006.
86. Read Section 3(2) of RPWD Act, 2016.
87. See Section 5(2) of RPWD Act, 2016.
88. Gayatri Chakravorty Spivak & Romila Thapar, The Idea of India: A Dialogue, 65 (Seagull Books 2024).
89. See Preamble of the Constitution of India, whereby vide 42nd Constitutional Amendment of 1976, the words 'Socialist and Secular' were added.
90. See Article 17 of the Constitution of India, which provides for the abolition of untouchability.

of the cities is related to religion, culture, and language and therefore, it sometimes takes a shift from post-modern to para-modern.[91] And therefore, Urban Governance must be subject not only to the constitutional mandate but should also be run on the basis of constitutional morality so that the social web of cities can, on the one hand, be regulated and on the other, the liberal space of the people remains intact, so that people's identities would be very much protected and preserved. The term 'Indian society' generally comprises of individuals with some common traits defining their Indian membership. This membership can be defined in various ways. It can consist of ascriptive identities such as religion, race, ethnicity, caste, etc., or it can be a case of acquired membership, such as sports club members, etc. Members can also be identified by cards such as Aadhar Card, Voter ID Card, Passport, etc. The difference between them is that the former is non-legal, whereas the latter is legal. But, when we define the composition of 'Indian Society', it comprises of, all of the above as people of India irrespective of the type of membership they have. The sense of belongingness is humans' most fundamental experience[92] in the context of the country, state, and cities they belong to. This sense of belongingness is defined by the Constitution in various ways, which, on the one hand, gives freedom to profess, practice and propagate any religion[93] of one's choice while on the other, it also talks of secularism as a method of coexistence in the society with others. Hence, it is necessary to construct 'We' first to understand both belongingness and coexistence. The term 'We' is a much wider and broader term than as is stipulated in the Constitution. This 'We' is an invention of mass cooperation, as human cooperation primarily rests on the two pillars of *trust* and *recognition.*[94] The Indian Constitution is both prescriptive and

91. Aditya Nigam, Decolonizing Theory: Thinking Across Traditions, 175(Bloomsbury 2020))
92. Gopal Guru & Sundar Sarukkai, Experience, Caste and the Everyday Social,87 (Oxford University Press 2019)
93. See Article 25 of the Constitution of India.
94. Refer Wim Voermans, The Story of Constitutions: Discovering the We in Us, 45,65(Cambridge University Press 2023).

regulatory in nature. Prescriptive[95] because it institutionalises the various elements of democracy, such as Election Commission, etc. and regulatory as it regulates policy formulation and its implementation and adjudication, which insulates it against the majoritarian forces.[96] The success and growth of Cities thus depend upon the trust on each other while cumulatively recognising oneself alongwith the others as 'We'[97]. Fraternity, the constitutional norm enshrined in the Preamble to the Constitution of India, is a norm that can be used while designing the social web of cities, as this is a human need. Indian secularism has already reshaped India in the past 74 years of existence of the Constitution of India and so, the city space.[98] Building inclusive cities is no doubt a challenge, but with a strong political will, it can be a reality. Ordinary lives live in these disordered cities and with better arrangement of social materials available[99], which are today organised to suffocate the vulnerable and marginalised people, PWDs, LGBTQ+, backward classes, etc. but one can change the social conditions to make it conducive for all. Who has the right to a city[100] needs to be answered through a constitutional lens so as to see the place of slum dwellers and other people in it or else the day is not far when these modern cities will completely exclude the marginalised and the vulnerable. The question of building equal societies is possible through

95. Vijay Kumar, The Theory of Basic Structure Doctrine, (Aakar Books 2023), at 5. At the time of its framing, the Indian Constitution was descriptive, but later, it became prescriptive due to the Preamble and Directive Principles of State Policy. And, the constitutional adjudication of various provisions of the Indian Constitution by the Courts, in past many years, has scaled it towards prescriptiveness only.
96. Neera Chandhoke, We, the People and Our Constitution, 16,66 (Speaking Tiger, India 2024)
97. Amit Chaudhuri, On Being Indian,42 (Centre for the Creative and the Critical . 2023). The substantial participation of the majority population in the protests (farmers' agitation) has reshaped the religious inheritance of India.
98. Nalini Ranjan, Secularism: How India Reshaped the Idea, 37(Speaking Tiger, India.2024)
99. Richard Sennett, The Uses of Disorder: Personal Identity and City Life,189 (Verso, London 2021).
100. Mathew Idiculla, *A Right to Indian City? Legal and Political Claims over Housing and Urban Space in India*, 16(1) Socio-Legal Rev. 1 (2020).

urban governance and through which it would be easy to define the rules of cities which are necessary for its endurance thus it is clear that it needs an urgent constitutional introspection.

9.1 Statutory Inadequacies and Policy Paralysis in Building an Inclusive Society: Addressing Urban Governance by Developing Shared City Space for All

Building an inclusive and equal society in the urban setting will not be a distant dream if we address statutory and policy inadequacies in light of the constitutional normative framework. Below, certain specific policy and statutory inadequacies have been discussed, along with possible solutions.

9.1.1 74th Constitutional Amendment Act of 1992 and Policy Paralysis: Tackling Inadequacies

The 74th Constitutional Amendment, 1992 to the Constitution of India was made with a broad vision of empowering the urban local bodies (ULBs) to develop a decentralised governance structure. However, many States were slow in transferring powers and finances to the bodies formed under the aegis of this Amendment. This lethargic attitude of the State hampers the local government's work efficiency and ability to plan and execute effective policies for building an inclusive society and promoting equal access to city spaces, which leads to uneven development and on most occasions, marginalised communities are excluded. Classic examples of ULBs with stressed finances are Rajasthan, Uttar Pradesh, Haryana, Jharkhand, and Uttarakhand, etc.

However, the problem is not the same everywhere, as in the case of the State of Karnataka, where in the recent past, Bruhat Bengaluru Mahanagara Palike (BBMP) Act, 2020 was passed. But, unlike other States, here, the ULBs are entrusted with the power to tax on professions and entertainment, which makes them financially empowered to perform urban governance and promote equal access to city spaces for all. In 2011, an Expert Committee was formed to look after the Urban Infrastructure of Karnataka, which recommended the mapping of eighteen functions,

including land use regulation, urban planning and slum upgradation. Though, an overlap is found in the functions assigned to them and the State, yet, BBMP Act 2020, can be termed as a step in the right direction.[101] This shows that it is only about executing policies in spirit with the constitutional norms. By following the BBMK model, other States can also address the larger issues of sharing and governing city space equally and inclusively.

9.1.2 Affordable Housing Policy and Real Estate (Regulation and Development) Act, 2016 (RERA): Statutory Inadequacies

RERA was primarily enacted to regulate the real estate sector in order to protect the home buyers from the arbitrary actions of the developers. However, it does not address the issue of affordable housing adequately especially for the low-income groups, majority of which lives in the sub-urban cities. Unfortunately, this policy has resolved the issue of affordable housing for the upper-income groups only. The affordable housing projects, whose main objective is to provide housing for all have thus failed to achieve the desired objectives and instead contribute to the exclusion of the economically weaker sections of the society from the urban city spaces, which constrain them to live either in the unauthorised colonies or in the slums.[102] The policy of affordable housing, therefore, needs reconsideration in the light of constitutional norms.

9.1.3 Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014 (SVPLRSV Act) and Issues of Inclusiveness

SVPLRSV Act, 2024 was enacted to protect the rights and dignity of the street vendors by providing them with designated zones for vending.

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101. Prachi Kaur & Shruti Gupta, Examining Urban Local Governance in India through the Case of Bengaluru, PRSIndia.org (Dec. 24, 2020), https://prsindia.org/theprsblog/examining-urban-local-governance-in-india-through-the-case-of-bengalurua, (last visited Sept. 1, 2024).
102. Manav Khaire & Shishir Kumar Jha, *Analysing the Housing Affordability Discourse within the Indian Urban Housing Policy*, Ashok Desai Centre for Policy Studies, Working Paper Series, 2024-003 (Apr. 2024), https://www.cps.itb.ac.in/wps-2024-003 (last visited Sept. 1, 2024).

However, the implementation of this Act is different in different states, so it lacks uniformity in efficiency across the States. Consequently, vendors still face harassment from the Authorities, who evict them. This lack of effective and efficient implementation marginalises the street vendors and limits their access to the common city spaces. Also, it affects their right to livelihood which is one of the most essential ingredients of building an urban society with inclusiveness.[103] For example, in Delhi, the power is entrusted to the Town Planning Committee to regulate street vendors, but it has miserably failed to take necessary steps despite the fact that vending and hawking have an ancient linkage with the ancient Indian trade and shopping.[104] There is a strong need to address the problem of the Steet Vendors, in the present statutory setup, where it is difficult for them to compete equally with other trade and professions, which affects the broader goal of building an equal society.

9.1.4. Pradhan Mantri Awas Yojana (PMAY) – Urban and Affordable Housing

PMAY-Urban, was formed to provide affordable housing to all by 2022 but this policy suffered policy paralysis, as it faced serious challenges right from the beginning such as land scarcity and slow implementation of the housing projects. There is also a mismatch between affordable housing demand and supply. One can easily gauge the impact of this policy paralyses on building an inclusive society, as a large section of the Indian urban society excluded the large sections of the urban poor from accessing 'adequate housing', which also perpetuates the spatial inequality in cities.[105] One of the reasons for the failure of the metropolitan policy is the width of the towns which is growing like never before.

103. Aravind Unni, *Planning the Informal: Locating Street Vending in Master Plans Post 2014*, 58(8) Econ. & Pol. Wkly. (Feb. 25, 2023).
104. Ajay Gautam & B.S. Waghmare, *The Plight of Street Vendors in India: Failure of Urban Governance and Development*, 56(45-46) Econ. & Pol. Wkly. (Nov. 6, 2021).
105. Dr. Rajiv Kumar, *Reforms in Urban Planning Capacity in India*, NITI Aayog, Government of India 33(Sept. 2021), https://www.niti.gov.in/sites/default/files/2021-09/UrbanPlanningCapacity-in-India-16092021.pdf, (last visited Sept. 1, 2024.

9.1.5 Building Exclusive Smart Cities

A Smart City is a mission that focuses on renewing and retrofitting the urban setting. Thus, more weightage is given to high-tech solutions and infrastructure development, particularly to those that cater to the needs of disadvantaged, marginalised and vulnerable communities. However, due to statutory inadequacies, this not only creates hindrances in implementing inclusive society policies but also leads to the 'gentrification of city spaces', which has pushed out the lower-income groups, in phases, out of the city to which they belong. Pune is the classic example to explain this,[106] where 'Gentrification' was done under the aegis of the Smart Cities Mission. The advent of Metro raised the prices of houses in Pune. Thereafter, it became almost next to impossible for the marginalised to own a home there. Further, marginalised and vulnerable communities are forced to live in slums only because 'Slum rehabilitation' at Aundh, which was announced in 2017, has not seen the light of the day.[107] The result being an exclusive smart city due to policy paralysis.

9.1.6 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (SCSTPA) and Urban Cities: Discrimination and Exclusion of SC/ST from Urban Spaces

Although the SCSTPA Act, 1989 provides a robust statutory framework for protecting the Scheduled Castes and Scheduled Tribes from various types of atrocities[108], its implementation and enforcement in urban city

106. Pune Municipal Corporation, *Pune Smart-City Vision Document*, Government of Maharashtra, https://smartnet.niua.org/sites/default/files/resources/pune_towards_smart_city-_vision.pdf, (last visited Sept. 1, 2024).
107. Prasad Kulkarni, *7 Years after Announcement Aundh Slum Rehabilitation Project Yet to Take Off*, *The Times of India* (Aug. 1, 2023), https://timesofindia.indiatimes.com/city/pune/7-years-after-announcement-aundh-slum-rehab-project-yet-to-take-off/articleshow/102295808.cms, (last visited Sept. 1, 2024).
108. Section 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, provides a comprehensive list of atrocities as prescribed offences, which are then subject to stringent punishment.

spaces is often very weak, particularly when it comes to accessing public spaces and public services[109]. Therefore, this has led to discrimination and exclusion of the SC and ST communities from urban city spaces, which has further limited their access to public and private opportunities thereby creating an unequal urban society.

9.1.7 National Urban Transport Policy (NUTP), 2006 and Challenges of Equitable Access

The NUTP 2006 is committed for providing safe, sustainable and equitable access to transport.[110] However, its infrastructure somehow allows access to only private vehicles, so improving public transport does not effectively improve access to transport for all sections of society. This policy inadequacy has led to an unequal access to mobility for all, which then disproportionately affects the marginalised and vulnerable communities, women and low-income groups. This has further led to limited access to urban city spaces and economic opportunities. Due to increasing reliance on private vehicles, the public space is crunched to run public transport and marginalised and vulnerable communities, which rely on public transport, are facing difficulty in accessing it. The need is to address these issues on an urgent basis to build an inclusive society comprising all.

9.1.8 Flexible Environmental Laws and Regulations in the Urban Areas

Urban governance is at its worst as the environmental laws and regulations, such as those under the Environmental Protection Act, 1986[111] and other laws are applied quite leniently. The quality of air is deteriorating day by day. Industrial pollution and waste management are at their peak in urban areas. This degradation of the environment leads to many harmful

109. Section 4 of the SCSTPA Act, 1989, penalises public servants who neglect their duties under this Act.
110. National Urban Transport Policy (NUTP), 2006, https://mohua.gov.in/upload/uploadfiles/files/TransportPolicy.pdf, (last visited Sept. 1, 2024).
111. See Sections 3, and 6 – 8 of Environment (Protection) Act, 1986.

and incurable diseases. The marginalised communities face the brunt of this polluted environment as their quality of life is reduced to a minimum. While the marginalised communities are equal with the others in sharing the city space but when it comes to access to health, education and living life with dignity, due to their vulnerability, they have to face the impact of the environment alone. Recently, the Supreme Court has instilled the Right Against Adverse Effects of Climate Change, a new right in *M K Ranjitsinh's*[112] case, whose equitable implementation will be a challenge for the State. The effects of climate change equally affect all, but the impact on marginalised persons is more due to a lack of resources to tackle it effectively. In Delhi, more than 100 persons (marginalised persons) lost their lives due to excessive heat in the summer of 2024.[113]

9.1.9 Lopsided Implementation of Right to Education Act, 2009 in Cities

Statutory inadequacies can easily be seen in implementing the Right to Education (RTE) Act 2009 in urban areas. The RTE Act provides free and compulsory education[114], especially to children between the age of 6 to 14. Still, its implementation in urban areas is very inconsistent, particularly in the slums and informal settlements. There is an urgent need for a holistic educational programme to be prepared for all children. In fact, inequitable access to quality education in low-income families, limits their abilities and capabilities.

9.1.10 Inadequate Enforcement of the Rights of Persons with Disabilities Act of 2016

The Rights of Persons with Disabilities Act of 2016 mandates the

112. See M.K. Ranjitsinh and Ors. v. Union of India & Ors, 2024 INSC 280.
113. Mitali Mukherjee, *The Heat Will Kill the Economy. But It Will Kill Us First*, The Frontline (June 23, 2024), https://frontline.thehindu.com/columns/india-heatwave-2024-deaths-crop-failures-economic-impact-climate-change/article68320074.ece,(last visited Sept.1, 2024).
114. Section 3 of the Right to Education Act 2009 provides the right to free and compulsory education. This right is equally available to all the students irrespective of the caste, class and religion, etc.

creation of accessible urban infrastructure[115] for persons with disabilities (PWDs). However, even after the lapse of eight years, implementation of the RPWD Act, 2016 is inadequate, as many public buildings and open spaces including transport systems,[116] are inaccessible to PWDs.

Addressing these statutory and policy inadequacies requires reforming the existing laws and ensuring their effective implementation. According to constitutional norms, this is essential for creating an equitable urban environment where city space should be shared equally.

115. Section 3 of the Rights of Persons with Disabilities Act, 2016 provides for Equality and Non-Discrimination.
116. See Section 41 of the Rights of Persons with Disabilities Act, 2016. (India)

Legal Evolution and Enforcement Challenges of Dynamic Blocking Injunctions in India: Balancing Copyright Protection with Public Interest

Joyson Sajan* & Dr Vishnu Sankar P.**

Introduction

The early 1990s, with dial-up internet, witnessed the rise of online copyright concerns. The first Clinton administration, led by Vice President Al Gore, formed the Information Infrastructure Task Force (IITF).[1] A 1995 working group report under this initiative explored the impact of the nascent internet on copyright law. Recognizing the internet's potential to disrupt the balance between copyright owners and users, the report believed this challenge could be met with minor adjustments and amendments to existing copyright legislation.[2] Fast forward to 2024, the internet has revolutionised the way we communicate and access information. The openness and

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1. Arpan Banerjee, *Contemporary Challenges of Online Copyright Enforcement in India*, *in* Innovation, Economic Development, and Intellectual Property in India and China 174, (Kung-Chung Liu & Uday S. Racherla eds., 2019).
2. Bruce A. Lehman, Intellectual Property and the National Information Infrastructure. The Report of the Working Group on Intellectual Property Rights (1995).

interconnectedness that define the internet have created an environment prone to spreading harmful or unlawful content. The revolution that encourages creativity and information exchange also presents difficulties, especially when it comes to preventing the online diffusion of pirated content.

Digital piracy, i.e., the unauthorised copying and dissemination of copyrighted material in a digital environment[3], emerged from 1970s computer hobbyists who shared software and games, driven by a belief in open information access.[4] This practice of physical media distribution became the foundation for today's widespread digital piracy. A 2018 report by The Statistics Portal estimated that global piracy in the television and movie industries resulted in a staggering USD 37.4 billion in lost revenue.[5] A 2022 study by the data research firm Ampere reported that movie and TV piracy in India amounted to a significant revenue loss of $2.3 billion in that year.[6] The emergence of digital piracy platforms like Napster and BitTorrent was significantly reducing revenue in media industries, with studies showing a 50% decline in global recorded music sales after Napster and a 27% drop in DVD/VHS sales as BitTorrent adoption was increasing.[7]

Today, piracy has become more prevalent due to easy access to large online networks and high-storage capacities. In contrast to physical piracy, digital piracy is more common because it can be done anonymously, it is

3. David Y. Choi & Arturo Perez, *Online Piracy, Innovation, and Legitimate Business Models*, 27 Technovation 168 (2007).
4. Jason R. Ingram, *Digital Piracy*, *in* The Encyclopedia of Criminology and Criminal Justice 1 (Jay S Albanese ed., 1 ed. 2013).
5. *Global online TV and movie piracy revenue 2010-2022*, Statista, https://www.statista.com/statistics/778338/global-online-tv-movie-revenue-loss-piracy/. (last visited May 24, 2024)
6. *Pirates of entertainment content! Digital piracy leads to losses in revenue and viewership,* Financial express (Mar. 14, 2024), https://www.financialexpress.com/business/brandwagon-pirates-of-entertainment-content-digital-piracy-leads-to-losses-in-revenue-and-viewership-3423063/.
7. Brett Danaher, Michael D. Smith & Rahul Telang, *Copyright Enforcement in the Digital Age: Empirical Evidence and Policy Implications*, 60 Commun. ACM 68 (2017).

harder to track down, and pirated content can quickly resurface on the internet in the event that it is blocked.[8] Concerns also arise from the need to protect intellectual property rights, especially copyright, a key aspect threatened by digital piracy. In response to these concerns, governments and online platforms may sometimes take steps to restrict access to certain content, aiming to create a safer and more trustworthy online space.[9] The anonymity of online infringers and the dependence on online intermediaries for content-blocking measures complicate enforcement efforts within the internet's decentralized architecture.[10]

In the digital age, copyright holders facing online piracy have traditionally wielded the Notice and Takedown (N&T) system as a weapon. This approach functions by empowering rights holders to report infringing content directly to the online platforms – the internet intermediaries – responsible for making such content accessible to users. [11] The N&T system operates on a notification basis: to trigger the removal of allegedly infringing material, copyright holders must provide the service provider with sufficient information to pinpoint the content in question. This typically involves supplying a Uniform Resource Locator (URL) or any other identifier that allows for the swift location of the infringing material. [12] Additionally, they

8. Chadha & Chadha Intellectual Property Law Firm - Divanshi Gupta, *Dynamic Injunctions: A Novel Species of Injunctions in the Realm of Digital Piracy*, Lexology (2022), https://www.lexology.com/library/detail.aspx?g=57662522-8a2e-445d-8ae4-4637b1b146f9. (last visited May 24 ,2024)
9. Council of Europe, Comparative Study on Blocking, Filtering and Take-down of Illegal Internet Content (2017).
10. Berdien B E Van Der Donk, *How Dynamic Is a Dynamic Injunction? An Analysis of the Characteristics and the Permissible Scope of Dynamic Injunctions under European Law after CJEU C-18/18 (Glawischnig-Piesczek)*, 15 Journal of Intellectual Property Law & Practice 1, (2020).
11. Althaf Marsoof, *The Blocking Injunction – A Critical Review of Its Implementation in the United Kingdom Within the Legal Framework of the European Union*, 46 IIC 632, 1 (2015).
12. Kristofer Erickson & Martin Kretschmer, *Empirical Approaches to Intermediary Liability*, *in* Oxford Handbook of Online Intermediary Liability 103, (Giancarlo Frosio ed., 2020).

provide an undertaking indicating their authorised capacity to act on behalf of the owner of the exclusive right that is purportedly infringed. Because of the way the underlying legal framework is designed, a major criticism of Notice and Takedown (N&T) procedures is that they may allow online intermediaries to function as de facto arbiters of content legality.[13] Because of this framework, takedowns are frequently encouraged to avoid facing copyright infringement penalties.[14] The most dependable way to reduce legal risk when intermediaries receive takedown notices is to remove content right away. Nevertheless, this strategy puts intermediary self-defence ahead of a careful evaluation of the content's legitimacy. As a result, an excess of caution may lead to the incorrect removal of legitimate content. The integrity of the N&T procedure is further compromised by the lack of an impartial, independent system for judging whether content that has been flagged is lawful.[15]

In response to the seemingly apparent deficiencies of the Notice and Takedown system, a novel legal strategy emerged, primarily within the European Union copyright regime, termed "blocking injunction".[16] In EU copyright law, a "blocking injunction" is a court order compelling internet intermediaries to disrupt access by users within the court's jurisdiction to websites deemed to infringe intellectual property rights.[17] This is achieved through technical measures like Domain Name System (DNS) blocking, Internet Protocol (IP) address blocking, or Uniform Resource Locator (URL) filtering.[18] However, the effectiveness of certain injunctions, particularly those targeting website blocking, was being hampered by the emergence of "mirror

13. Notice and takedown process is flawed, says analysis of Google notices, Pinsent Masons (2024), https://www.pinsentmasons.com/out-law/news/notice-and-takedown-process-is-flawed-says-analysis-of-google-notices.
14. Althaf, *supra* note 11.
15. *Id.*
16. *Id.*
17. European Union Intellectual Property Office. & Centre for International Intellectual Property Studies (CEIPI)., Study on Dynamic Blocking Injunctions in the European Union. 16 (2021).
18. *Id.*

websites." These mirror sites, replicating the infringing content but operating under different domain names or IP addresses, were circumventing the original injunction. This phenomenon necessitated a more adaptable legal response.

Dynamic blocking injunctions emerged as a potential solution to this concern.[19] Unlike traditional injunctions that are confined to specific URLs, dynamic injunctions encompass the infringing content itself, regardless of its location.[20] This broader scope allowed courts to address mirror websites without requiring repeated legal proceedings for each iteration.[21] The ability to dynamically adapt the injunction fostered a more robust enforcement mechanism for intellectual property rights in the ever-evolving online landscape.

Dynamic injunctions present a unique legal conundrum. Their inherent dynamism, while intended to address the challenges of online infringement, unwittingly creates uncertainty regarding the precise content subject to restriction at the time of issuance.[22] This ambiguity poses difficulties for both rights holders and alleged infringers. Rights holders may struggle to define the scope of the injunction with sufficient clarity, while alleged infringers face difficulty understanding the exact parameters of the restrictions placed upon them. A further layer of difficulty exists where there may not have been a properly established legal framework for Dynamic Blocking Injunctions (DBIs) in certain jurisdictions.[23] Without clear legal footing, questions about the validity and enforceability of such injunctions arise. Without a solid legal framework, the rationale underlying DBIs is also called into question. Dynamic Injunctions require a very careful design to differentiate

19. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, (2017).
20. *Supra* note 17, at 17.
21. *Id.*
22. Berdien, *supra* note 10, at 2.
23. *Id*

between infringing material and legitimate material.[24] Failure to do this results in a high risk of over-blocking lawful material. However, such over-blocking would directly contradict the goal of ensuring access to information.

This paper attempts to analyse the enforcement challenges of dynamic blocking injunctions in India. Part I discusses the Indian legal framework, which includes the Copyright Act of 1957 and the Information Technology Act of 2000, highlighting mechanisms for combating online copyright infringement. Part II explores the evolution from static to dynamic blocking injunctions, contrasting the proactive stance of the Delhi High Court with the cautious, evidence-based approach of the Bombay High Court. Part III focuses on the rise of dynamic injunctions in India and landmark cases like UTV Software Communications Ltd. v. 1337x.to, illustrating judicial reasoning and procedural frameworks. The manuscript concludes with recommendations for improving dynamic injunctions, emphasizing detailed guidelines, periodic reviews, and a neutral verification agency to balance copyright protection with the public interest.

1. The Indian Legal Landscape: Copyright Act, IT Act, and Enforcement Mechanisms

The legal framework of Indian copyright law acknowledges the applicability of core economic rights, such as reproduction, distribution, and communication to the public, within the digital domain.[25] This recognition ensures the extension of copyright protections to the online environment. However, the question of end-user liability for downloading infringing content remains a grey area in Indian copyright jurisprudence, lacking definitive judicial pronouncements on the extent of such liability. The relative paucity of Indian case law regarding end-user liability for online

24. Nikhil Purohit, *Delhi High Court's Dynamic Injunction in Favour of Disney: An Unclear and Overbroad Exercise?* Spicy IP (2020), https://spicyip.com/2020/08/delhi-high-courts-dynamic-injunction-in-favour-of-disney-an-unclear-and-overbroad-exercise.html; (last visited May 24 ,2024)
25. The Copyright Act, 1957, § 14, No. 14, Acts of Parliament, 1957 (India).

copyright infringement likely stems from several factors. One significant consideration is the global unpopularity and controversy surrounding such actions.[26] Rights holders in India, perhaps cognizant of this issue, have seldom pursued this strategy.

India's legal framework for addressing online copyright infringement is primarily governed by two key pieces of legislation - the Copyright Act, 1957 and the Information Technology Act, 2000, along with their respective rules and amendments. These legislations provide an array of mechanisms and thresholds that enable the rights holders to counter the threat posed by the unauthorized use of copyrighted works in the digital environment. Leading in this provision is the "notice and takedown" guidelines, which allow copyright owners to have a right to remove works on various internet sites and service providers. However, how these enforcement tools may be implemented, including concerning end-user liability for downloading infringing materials, is a relatively complicated and developing area of Indian copyright jurisprudence. This subsection examines the provisions of the law and the rules in great detail to trace out, mark by mark, the legal architecture of online copyright enforcement in India under the Copyright Act, Copyright Rules, Information Technology Act, and the Information Technology Rules.

1.1 Copyright Act, 1957 and Copyright Rules, 2013

Copyright law offers a "safe harbour" provision for intermediaries regarding online content. Intermediaries like websites are generally not liable for copyright infringement if they simply host links or provide access to copyrighted works, so long as the copyright owner hasn't explicitly forbidden it.[27] This protection hinges on the intermediary's lack of knowledge of infringement. However, as previously discussed, the copyright owners can leverage a "notice and takedown" mechanism. The Indian copyright law's N&T system originated from the Copyright (Amendment)

26. Arpan Banerjee, *supra* note 1, at 180.
27. The Copyright Act, 1957, § 52(1)(c), No. 14, Acts of Parliament, 1957 (India).

Act of 2012, specifically sections 52(1)(b) and (c) of the existing Copyright Act from 1957.[28]

Rule 75 of the Copyright Rules, 2013 outlines a mechanism for copyright owners to address online copyright infringement through a "notice and takedown" procedure.

- *Complaint Requirements*: Copyright takedown notices require specifics. Owners must detail the copyrighted work, prove ownership, and explain why the material infringes (excluding fair use). They also need to pinpoint the location and, if known, the infringer. To solidify the claim, a commitment to sue within 21 days is vital.[29]
- *Intermediary Obligations*: Intermediaries receiving a valid takedown notice must act within 36 hours. This means reviewing the claim and, if it seems legit, blocking access to the flagged content for 21 days (or longer with a court order). They also need to explain this restriction to users.[30]
- *Content Restoration and Repeat Notices*: Failing to sue within 21 days allows the intermediary to restore access and ignore future notices for the same content. This discourages misuse of the takedown system.[31]

The copyright enforcement framework established by the Copyright Act of 1957 and its accompanying 2013 Rules offers a solid foundation for addressing online infringement. However, certain aspects merit closer scrutiny and potential reform. The "safe harbour" provisions for intermediaries and the N&T mechanism achieve a commendable balance between safeguarding intellectual property and shielding intermediaries from excessive content policing burdens. The requirement for specific details

28. Avishek Chakraborty, *Online Copyright Enforcement Through Graduated Response Schemes: An Analytical Study of the Legal Framework in India*, 9 IJLJ. (2018).
29. *See* The Copyright Rules, 2013, § 75(2).
30. *Id.* at § 75(3).
31. *Id.* at, § 75(5) and (6).

in takedown notices, including proof of ownership and infringement, helps deter misuse of the system. Nevertheless, the 21-day window for copyright owners to initiate legal action after a takedown notice might be deemed insufficient, particularly in intricate cases where gathering evidence and preparing litigation can be time-consuming. The longer window will provide more time for the rights holders to prepare better cases and act as an excellent deterrent to the submission of frivolous requests.

A further grey area might be the lack of guidelines on how the intermediaries should handle counter-notifications by users who assert fair use or non-infringement. A more clearly spelt-out dispute-resolution process will give better direction and ensure justice to both copyright owners and users. Finally, the Copyright Act and Rules could be strengthened by incorporating clearer provisions concerning the use of automated content recognition (ACR) technologies by intermediaries for proactive identification and removal of infringing content. While the "safe harbour" incentivizes such measures, more explicit guidance on best practices and limitations would be valuable in mitigating concerns about potential over-blocking.

1.2 Information Technology Act, 2000 and Information Technology Rules, 2021

The Information Technology Rules, 2021 establish clear guidelines for intermediaries to maintain safe harbour status and for content takedown procedures under the Information Technology Act, 2000. Intermediaries must acknowledge complaints within a day (24 hours) and aim to resolve them within 15 days, with stricter timelines (72 hours) for sensitive information.[32] Legal takedown requests from courts or government agencies require content removal within 36 hours. Intermediaries are required to notify users before removing content unless a court or government order dictates otherwise.

32. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, §3(2)(a).

The Information Technology Rules 2021 compels large social media platforms to combat specific types of harmful content proactively.[33] These platforms must utilize automated tools or other technological measures to identify and remove content that is identical to information they've previously taken down under clause 3(1)(d) of the rules, which specifies that intermediaries must not host, store, or publish any unlawful information. It doesn't explicitly require automated tools to remove copyright-infringing material. However, a compact reading of the clause suggests that the legislature has left the approach to copyright infringement takedowns by automated technology open-ended.

The Information Technology Act (2000) and its accompanying Rules (2021) establish a complementary legal framework for online content moderation, encompassing copyright infringement. A significant aspect of these regulations is the mandated timeframe for intermediaries to acknowledge user complaints (within 24 hours) and subsequently resolve them (15 days for standard issues and 72 hours for sensitive content). This requirement fosters prompt action and accountability within the content takedown process. A good part of these regulations specifies a time frame within which the intermediaries must receive user complaints—24 hours at most upon receipt—and further address them; standard issues must be resolved within 15 days, but sensitive content must be resolved within 72 hours. This provision encourages speed and responsibility in taking down content.

Similarly, the more stringent 36-hour limit on the removal of content following a legal takedown order from a court or government agency illustrates the gravity and legal authority such orders carry. However, the guidelines on automated tools in specific cases for proactive detection of infringement by large social media platforms are not clear. However, this automation works well only if safeguards and oversight mechanisms are clear to prevent over-blocking and ensure user due process.

33. *Id.* § 4(4).

Both the Copyright Act/Rules and the IT Act/Rules offer valuable tools for combating online copyright infringement in India. Yet, opportunities exist for improvement in areas such as extending timeframes for legal action, addressing counter-notices and fair use claims, providing guidance on automated detection technologies, and fostering a more consistent notice-and-takedown process. Ongoing refinements informed by stakeholder input can strengthen these legal frameworks and achieve a more balanced environment that protects intellectual property while safeguarding online freedoms.

2. The Evolution of Website Blocking Injunctions in Indian Copyright Enforcement

The Indian Copyright Act establishes the civil remedies available to copyright owners in cases of infringement.[34] The provision grants copyright owners a broad range of legal options, including injunctions, damages, and accountings, mirroring the remedies typically awarded for other legal rights infringements. Online copyright infringement presents a multi-layered challenge for rights holders. Oftentimes anonymous and operating from foreign jurisdictions, these individuals prove difficult to locate and prosecute. Furthermore, targeting individual infringers who operate on existing websites proves largely ineffective. The ease with which new websites can be created allows infringers to simply relocate their operations[35], rendering takedown efforts akin to a game of whack-a-mole. Website blocking orders address this by requiring ISPs to block infringing sites and any mirror sites that emerge, effectively disrupting infringers' operations.

34. The Copyright Act, 1957, § 55(1), No. 14, Acts of Parliament, 1957 (India).
35. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.
    Website Blocking Injunctions: an effective tool in tackling online infringement, Mishcon de Reya LLP (2024), https://www.mishcon.com/news/tv/an-effective-tool-in-tackling-online-infringement. (last visited May 24 ,2024)

Studies have revealed that the efficacy of website blocking orders in curbing online copyright infringement demonstrates a principle of diminishing returns.[36] While targeting a singular piracy website may yield limited success due to the ease with which users can locate alternative infringing platforms, the effectiveness of this strategy demonstrably increases when implemented in a coordinated fashion to disrupt access to multiple infringing websites simultaneously.[37] A 2012 UK court order mandating Internet Service Providers (ISPs) to block access to The Pirate Bay, a prominent file-sharing website, serves as a cautionary tale in website blocking strategies. While the order aimed to curb online copyright infringement, its effectiveness proved limited. Heavy users of The Pirate Bay readily migrated to alternative piracy platforms or employed virtual private networks (VPNs) to circumvent the block.[38] Consequently, the overall piracy rate remained relatively unchanged. Furthermore, the data did not indicate a significant increase in traffic directed towards legal streaming services, suggesting the blocked website may not have been a primary source for users seeking legitimate content.

This suggests that website blocking orders might be a limited tool in the fight against online copyright infringement if it is static in nature with a single target point to attack. That's a reason why courts across jurisdictions have moved towards issuing injunctions that are dynamic in nature. This part explores the evolution of website blocking injunctions in India and the approach shown by the Delhi High Court and Bombay High Courts in combating the concerns of copyright holders.

2.1. Delhi High Court's Approach towards Static Blocking Injunctions

In Indian civil copyright infringement actions, plaintiffs often prioritize securing interim injunctions.[39] Indian courts have always explored

36. Brett, *supra* note 7, at 74.
37. *Id.*
38. *Id.*
39. Arpan Banerjee, *supra* note 1, at 183.

mechanisms to combat piracy and copyright infringement online. The Delhi High Court, known for its liberal approach, facilitated this by readily granting ex parte "John Doe" orders, targeting unidentified infringers.[40] "John Doe" order, an order issued to prevent infringement of intellectual property rights against unidentified defendants, made its way into India in the early 2000s. Courts use the pseudonym "John Doe" to identify unknown defendants suspected of intellectual property infringement. This allows lawsuits to proceed while the plaintiff investigates the true identities of the infringers. Once identified, "John Doe" is replaced with the actual defendant's name, and the case continues through the usual legal process.

In the 2002 case of *Taj Television Ltd.* v. *Rajan Mandal & Ors*.[41], the Delhi High Court considered the unauthorized transmission of its new sports channel, "Ten Sports." Concerned about revenue loss and reputational harm, Taj Television sought to target unknown cable operators alongside identified defendants. The court, citing the "extraordinary facts" and practices of other countries, asserted its authority to issue "John Doe" orders to address these unidentified parties. This decision hinged on the ability of such orders to target relevant actors, even when their identities remained unknown at the outset of the case.

In *E.S.P.N. Software India Pvt. Ltd.* v. *Tudu Enterprise and Ors*.[42], before the Delhi High Court, the concept of "John Doe" orders was leveraged to safeguard exclusive broadcast rights. Here, the plaintiff held exclusive rights to broadcast International Cricket Council (ICC) events until 2015. Anticipating potential infringement, the plaintiff sought a *quia timet* injunction to prevent unauthorized broadcasts of the 2011 Cricket World Cup by the defendants. This proactive approach was justified by documented instances of illegal transmission during practice matches. By

40. *Id.*
41. Taj Television Ltd. & Anr. v. Rajan Mandal & Ors., (2003) FSR 22
42. E.S.P.N. Software India Pvt. Ltd. v. Tudu Enterprise and Ors., C.S.(OS)No. 384 of 2011.

establishing a pattern of piracy during preliminary events, the plaintiff successfully demonstrated a well-founded apprehension of similar infringement for the main tournament.

To secure a "John Doe" order, courts typically require plaintiffs to demonstrate several key elements:

- *Transparency:* The plaintiff must disclose all relevant information about their rights to the protected work, including how they acquired those rights, any past infringements, and actions taken to address them.[43]
- *Substantial Evidence:* The plaintiff needs to demonstrate widespread copyright infringement or a strong likelihood of it happening.[44]
- *Strong Case:* The plaintiff must present a compelling case that establishes their legal claim and potential harm.[45]
- *Irreparable Harm:* The plaintiff must convince the court that allowing the infringement to continue would cause them significant and irreversible damage.[46]

The use of "John Doe" orders in India to combat online copyright infringement was being continuously debated. While these orders empowered authorities to act against unidentified infringers, they raised concerns regarding adherence to due process. Critics pointed to the potential infringement on free speech rights and the lack of a standardized legal framework for ISPs implementing website blocks pursuant to "John Doe" orders.[47] This ambiguity created a risk of arbitrary decision-making by

43. Madhu Gadodia et al, *History and Development of "John Doe" Orders in India*, (2023), https://www.livelaw.in/law-firms/law-firm-articles-/john-doe-order-fifa-world-cup-quia-timet-civil-procedure-code-delhi-high-court-non-fungible-token-220689 (last visited May 24 , 2024)
44. *Id*
45. *Id*
46. Ajay Sharma, *John Doe Orders in Indian Context*, The RMLNLU Law Review Blog (2017), https://rmlnlulawreview.com/2017/10/25/john-doe-orders-in-indian-context/ (last visited May 24,2024)
47. *Supra* note 24

authorities. Proponents argued for their use in exceptional circumstances, where the potential harm to copyright holders outweighed the impact on internet freedom and ISP rights.

In the case of *Star India Pvt. Ltd.* v. *Sujit Jha and Ors*.[48], the Delhi High Court acknowledged that Star India had exclusive broadcasting rights for the India-Australia (2014-15) cricket series. These rights included live, delayed, highlights, on-demand, and repeat broadcasts. The court found that the defendants were illegally streaming these matches on their websites without authorization. Many of these websites were anonymous and operated behind domain privacy services, making it difficult to trace the owners. Identified as "Rogue Websites," these platforms were primarily engaged in providing illegal content. To protect Star India's exclusive rights and revenues, the court issued an injunction to prevent further illegal activities. Given the short duration of the cricket series, any delay in granting relief would have rendered the suit and injunction application moot. The court reasoned that blocking individual URLs was impractical due to the ease with which infringing websites could change their URLs to circumvent orders, necessitating the blocking of entire websites. Consequently, internet service providers were directed to block access to these Rogue Websites.

Following a successful challenge, the Division Bench of the Delhi High Court refined the parameters of the initial ruling. This shift involved a move away from the wholesale blocking of entire websites towards a more targeted approach focusing on specific online locations associated with the disputed material. Unfortunately, this refined legal intervention ultimately proved ineffective due to its timing, as implementation only occurred after the conclusion of the relevant sporting event.

In the case of the *Department of Electronics and Information Technology (DEITY)* v. *Star India Pvt. Ltd*.[49], Star India, a dominant sports broadcaster in India, battled online piracy of their copyrighted sports content.

48. CS (OS) 3702/2014
49. Department of Electronics and Information Technology (DEITY) v. Star India Pvt. Ltd, FAO (OS) 57/2015, Order dated 29th July, 2016.

They sued 73 websites accused of illegally hosting and streaming their content and initially secured a court order blocking these websites entirely. However, the DEITY challenged this decision, arguing for a narrower injunction targeting only specific infringing URLs within the websites.

The core legal debate revolved around the effectiveness of website blocking methods. DEITY argued that blocking specific URLs would be sufficient. Star India, on the other hand, countered that pirates could easily bypass such measures by simply changing the URLs. Recognizing the limitations of URL-specific blocking and the extensive copyright infringement on the targeted websites, the Delhi High Court ultimately sided with Star India, upholding the broader initial injunction.

The court's decision carefully weighed competing interests. While acknowledging Star India's right to protect its copyrighted content, the court also considered the potential impact on legitimate internet service providers (ISPs). However, the court prioritized curbing the rampant piracy, concluding that website blocking was necessary to prevent pirates from easily evading the injunction through URL changes. The court further brushed aside the submission made by DEITY that its contracts with bona fide website owners would be breached and, in any event, emphasized the government's duty to carry out the court's directives. It did indicate that an exception might possibly be made concerning sites for which lawful activity was the primary use. In that case, the block could be ordered at identified infringing URLs to the extent that legal content existed on such sites.

The Delhi High Court has harboured a highly entrenched stance on fighting online copyright infringement, putting the rights of copyright holders at a very aggressive and pre-emptive edge. The court's approach has not hesitated to grant interim injunctions, including ex parte "John Doe" orders, to meet the widespread problem of piracy and infringement. This judicial approach itself shows a lofty commitment toward the protection of intellectual property rights, even with the cost of being an overreach. In

Star India Pvt. Ltd. v. *Sujit Jha and Ors*.[50], the court's decision to block entire websites rather than specific URLs was driven by the ease with which infringing sites could alter URLs to bypass orders. This broad approach can be seen as an attempt to protect the economic interests of copyright holders despite the potential for collateral damage to lawful online activities. The *DEITY* v. *Star India Pvt. Ltd*.[51] case further underscores the court's entrenched view, where the broader injunction against entire websites was upheld despite arguments for more precise measures. The court prioritized curbing rampant piracy over potential breaches of contracts with legitimate website owners, reflecting a prioritization of copyright protection over internet freedom.

2.2. The Bombay High Court's Approach towards Static Blocking Injunctions

The Bombay High Court has been at the forefront of articulating what might be termed as a jurisprudence of website blocking orders in India, particularly on online copyright protection. Under the stewardship of Justice G.S. Patel, the court has tried to strike a delicate balance in securing the interests of rightful copyright holders and broader public law principles, especially freedom of expression and access to legal online content.

A spate of path-breaking orders of the Bombay High Court has brought out the importance of a thorough verification exercise and the necessity of actual material before issuing sweeping "John Doe" orders or directions for blocking websites. The Courts have always flagged serious concerns over the obvious possibility of misuse of such sweeping orders issued on mere pleadings and contentions without there being an iota of actual proof or material. It is for this reason that the court gives absolute priority to injunctions with a target against particular infringing URLs. This becomes obvious in multi-layer verification by independent assessments, cross-checking of the facts by the legal team, and

50. *Supra* note 48.
51. *Supra* note 49.

taking affidavits that ensure both balance and accuracy in protecting copyrights and representing broader public interests.

In a copyright infringement case filed before the Bombay High Court of Judicature, Balaji Motion Pictures Ltd. sought a pre-emptive injunction to prevent unauthorized distribution of their upcoming film.[52] The plaintiffs sought a "John Doe"/Ashok Kumar" order against a vast number of websites (approximately 800), alleging they hosted or linked to infringing content. However, the Judge, G.S. Patel, declined to issue a blanket order blocking these websites. The court's reasoning centred on the lack of concrete evidence demonstrating that the entirety of the targeted websites' content was illicit or specifically infringed upon the plaintiff's copyright. While the plaintiffs presented a potentially infringing Torrent link and a concerning Twitter post, the Judge noted the defunct nature of the Torrent link and the absence of a verified active download link. The court offered the possibility of revisiting the application if the plaintiffs could provide a technically verified list of specific infringing download links. This decision highlights the court's insistence on precise and compelling evidence to justify broad injunctions that could have disruptive consequences.

In the subsequent hearing of *Balaji Motion Pictures Ltd.* v. *Bharat Sanchar Nigam Ltd*.[53], concerning copyright infringement of the film," the Bombay High Court, under Justice G.S. Patel, adjudicated on the plaintiffs' revised application. This application, filed on July 4, 2016, addressed the court's prior concerns by providing a comprehensive list of infringing links. The plaintiffs, collaborating with anti-piracy agencies, identified a total of 482 URLs facilitating illicit downloads of the film.

In light of this detailed evidence, the court granted an ad-interim injunction. This injunction mandated the blocking of the aforementioned

52. Balaji Motion Pictures Ltd. & Anr. v. Bharat Sanchar Nigam Ltd. & Ors., Suit No. 694 of 2016, Order dated 1st July, 2016.
53. Balaji Motion Pictures Ltd. & Anr. v. Bharat Sanchar Nigam Ltd. & Ors., Suit No. 694 of 2016, Order dated 4th July 2016.

482 URLs, along with any future infringing links reported to the designated Cyber Police authority. Additionally, the court extended the injunction to encompass intermediaries and cable/DTH operators, prohibiting them from unauthorized broadcasts of the film. The court emphasized the temporary nature of this injunction, setting an expiry date of October 4, 2016.

In *Eros International Media Ltd.* v. *Bharat Sanchar Nigam Ltd*.[54] (2016), the Bombay High Court addressed a matter where plaintiffs, seeking to pre-empt online piracy, sought a "John Doe" injunction to block websites or URLs that might facilitate the unauthorized downloading or streaming of their film.

However, Judge G.S. Patel declined to grant a broad injunction. Emphasizing the necessity for concrete evidence, the court expressed its reluctance to issue sweeping website-blocking orders absent proper verification and a sworn affidavit from the plaintiffs. The court's reasoning underscored concerns about potential overreach, highlighting the need to balance the plaintiffs' copyright protection with broader public law rights, including access to legitimate online content. Ultimately, Judge Patel mandated a more rigorous verification process. The plaintiffs were directed to refile their application with a verified and attested list of specific infringing URLs, ensuring these did not encompass legitimate content such as trailers or authorized downloads.

Following the initial rejection, the plaintiffs renewed their application with a more detailed and verified list of URLs and secured a "John Doe" injunction to block specific URLs.[55] The court, emphasizing a balanced approach, established a three-step verification process to ensure the accuracy of targeted URLs.

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54. Eros International Media Ltd. & Anr. v. Bharat Sanchar Nigam Limited (BSNL) & Ors., Suit (L) No. 751 of 2016, Order dated 22nd July 2016.
55. Eros International Media Ltd. & Anr. v. Bharat Sanchar Nigam Limited (BSNL) & Ors., Suit (L) No. 751 of 2016, Order dated 26th July 2016.

- *Verification by Aiplex:* Aiplex Software Private Limited, a third-party verification agency, assessed the URLs for potentially illegal content related to the movie involved in the case. They provided supporting evidence like screenshots and confirmed verification via written documentation.
- *Cross-checking by Plaintiffs:* The plaintiffs' legal team reviewed all URLs and supporting documents from Aiplex. They confirmed each URL's association with potential illegal downloads or film streaming. This step was documented in a sworn affidavit.
- *Affidavit and Oath:* The entire verification process and confirmed information were presented on the affidavit, sworn under oath by the deponent. This affidavit provided legal weight to the verification process, ensuring reliable information for the court's order.

The tripartite verification process, put forward by Justice Patel, therefore, may be said to constitute independent verification accompanied by a letter in writing, followed by personal cross-checking of the verification by the General Counsel and the advocates on behalf of the plaintiffs, and after that, an affidavit confirmation of the material that has been verified. The court's worries regarding possible overreach were allayed by this meticulous verification process, which made sure that only unlawful URLs were blocked. The intent was to balance the plaintiffs' rights of copyright and the more significant public interest regarding freedom of speech and access to bona fide online content. The Judge allowed a targeted injunction for 134 verified URLs, with provisions for escalation and measures in a necessary situation.

The Bombay High Court, particularly under Justice G.S. Patel, has taken a careful and balanced approach to blocking websites for copyright infringement. They require strong evidence before issuing these website blocking orders and make sure they are very specific. This means they only block the exact web addresses that are infringing, not the entire website. They do this to avoid blocking the wrong things and to make sure their

orders are precise. Cases such as *Balaji Motion Pictures Ltd.* and *Eros International Media Ltd.* illustrate this methodology. By insisting on a rigorous verification process and concrete evidence, the Court aims to protect copyright holders without infringing on broader public law principles, such as freedom of expression and access to legitimate online content. This approach serves as a counterbalance to the more aggressive tactics seen in other jurisdictions, emphasizing precision and caution in addressing online copyright infringement. By refusing to issue blanket orders without proper verification, the Court ensures that injunctions are narrowly tailored to target specific infringing content, thereby preventing the overreach and unintended consequences often associated with broad website blocking measures. This meticulous strategy highlights the Bombay High Court's commitment to a fair and balanced legal framework in the digital age.

Aspect	Delhi High Court	Bombay High Court
Judicial Philosophy	Proactive and aggressive	Balanced and cautious
Key Approach	Frequent use of broad interim injunctions, including ex parte "John Doe" orders	Insistence on rigorous verification and concrete evidence before granting injunctions
Deterrence v. Freedom	Emphasis on creating a strong deterrent against piracy	Balances copyright protection with freedom of expression and access to legitimate content
Verification Process	Less rigorous, often relying on plaintiffs' claims and potential evidence of widespread infringement	Multi-layered verification process: independent assessments, legal team cross-checking, and sworn affidavits

Impact on Public Law	Potential for overreach, impacting freedom of expression and access to lawful content	Avoidance of overreach and unintended consequences, ensuring only infringing content is targeted
Effectiveness	Effective in deterring piracy and protecting the economic interests of copyright holders	Ensures accurate targeting of infringing content, balancing protection with public interest
Criticism	Concerns about due process, arbitrary decision-making, and infringement on internet freedom	Emphasis on precise evidence and verification process

"John Doe" orders, which can also be termed ex parte interlocutory injunctions, function as a mechanism to address the challenge of anonymous online infringement. They are inherently static in nature. Unlike traditional injunctions that target a specific defendant and the location of infringing content, such orders prioritize the identification of unknown infringers. Their primary objective is to compel Internet Service Providers (ISPs) or other relevant intermediaries to disclose the identities of these anonymous parties. This information can then be used to pursue further legal action, potentially culminating in a dynamic blocking injunction that directly targets the infringing content. They serve as a crucial investigative tool in copyright infringement cases involving anonymous actors.

3. Dynamic Blocking Injunctions in India

In response to growing societal demands for enhanced online access to copyrighted works, and dissatisfaction with traditional remedies, copyright holders have successfully lobbied courts to develop novel forms of injunctive relief.[56] One such innovation is the "dynamic injunction,"

56. N.S Gopalakrishnan et al., *Social Dimensions of Copyright Infringement and Enforcement: a Quick Reflection in the Context of Sci-Hub Litigation*, Banana IP

designed to proactively combat unauthorized access to copyrighted material.[57] The genesis of dynamic blocking injunctions, as noted in the introduction, lies within European jurisprudence. This legal strategy subsequently migrated to various global jurisdictions, ultimately finding fertile ground in India. Notably, the judicial pronouncements granting the first such injunction within the Indian legal landscape explicitly acknowledged this foreign influence.[58] Foreign courts, in crafting balancing principles for dynamic blocking injunctions, demonstrably considered their unique socio-economic contexts.[59] A pertinent inquiry arises: have Indian courts demonstrably undertaken a similar examination in light of India's distinct socio-economic landscape? To address these challenges and assess the efficacy of dynamic blocking injunctions in the Indian context, it is crucial to examine the judiciary's reasoning and the balance they strike between protecting copyright holders' rights and safeguarding public interests.

The pivotal distinction between a general blocking injunction and its dynamic counterpart resides in their treatment of subsequent infringements.[60] While a general injunction remains tethered to the specific infringement that precipitated the initial legal action, a dynamic injunction possesses the capacity to be extended, encompassing additional infringements that materialize post-order.[61] This essentially means that it can be overly broad, potentially blocking legitimate websites or content that unintentionally resembles the infringing material. While the robust protection of copyright holders' economic rights remains an incontestable imperative, courts must navigate this terrain with due caution to avoid compromising the larger public interest. Proactive enforcement,

(2021), https://www.bananaip.com/social-dimensions-of-copyright-infringement-and-enforcement-a-quick-reflection-in-the-context-of-sci-hub-litigation/.

57. Manmeet Kaur Sareen & Kanika Kalra, *Dynamic Injunctions – Internet "Injunctions 2.0,"* 2 Ili L.rev. (2019).
58. UTV Software Communications Ltd. v. 1337x.to, CS(COMM) 724/2017
59. N.S Gopalakrishnan et al., *supra* note 56.
60. Berdien, *supra* note 10, at 3.
61. *Id*

though seemingly attractive, should not come at the expense of essential safeguards. This part attempts to examine how Indian courts have fared with regard to the awarding of dynamic blocking injunctions. This section will look into some of the cases of awarding DBIs in India and will analyse the impact of those pronouncements.

3.1. *UTV Software Communications Ltd. v. 1337x.to*

In a battle over online copyright, UTV Software Communications and others (plaintiffs) sued websites like 1337x.to (defendants) for enabling illegal access to copyrighted material, primarily movies.[62] This case tackled several critical legal issues that have a significant impact on the digital world. A key question was whether copyright protection should be applied differently to online content compared to physical media. The court also examined the potential conflict between efforts to stop websites that infringe copyrights and the idea of an open and free internet. Furthermore, the case explored how to define and potentially block "rogue websites" – websites whose main purpose is to help people infringe copyrights. This debate about defining these websites focused on whether the type of infringing content (qualitative) or the amount of infringing activity (quantitative) should be the most important factor. Additionally, the court considered the legal justification for issuing website blocking orders against entire "rogue websites" and explored strategies to combat "hydra-headed websites" that use tactics like mirror sites to get around such blocking efforts.

The plaintiffs argued these websites facilitated infringement through streaming and downloads, profiting from ads alongside the content. They highlighted the challenge of "mirror websites" that emerge when a primary infringing website is blocked, necessitating broader action. The court, examining international legal precedents on website blocking, emphasized "dynamic injunctions" as a flexible tool to tackle new instances of infringement arising from these mirror websites. However, they acknowledged the need to balance

62. *Supra* note 58.

copyright enforcement with fundamental rights like freedom of expression and access to information. Dynamic injunctions were viewed as a proportionate solution, allowing copyright holders to protect their work without excessively restricting legitimate online activity.

The court in the case outlined a specific procedure to obtain dynamic injunctions:

i) *Application for impleadment:* Plaintiffs must file an application under Order I Rule 10 CPC to implead mirror, redirect, and alphanumeric websites that emerge after the initial injunction. This application is based on the inherent powers of the court under Section 151 CPC.

ii) *Affidavit Submission:* Along with the application for impleadment, the plaintiffs must submit an affidavit confirming that the newly identified websites are indeed mirrors, redirects, or alphanumeric websites of the previously injuncted rogue websites. The affidavit must include sufficient supporting evidence.

iii) *Judicial Scrutiny:* The Joint Registrar, to whom the court has delegated the power, examines the affidavit and the supporting evidence. The Registrar must be satisfied that the newly identified websites are providing access to the same primary infringing content as the original rogue websites.

iv) *Issuance of Directions:* Upon being satisfied that the websites in question are indeed mirrors, redirects, or alphanumeric websites of the original infringing sites, the Joint Registrar issues directions to Internet Service Providers (ISPs) to disable access to these websites within India.

v) *Delegation of Power:* The court has delegated the power to pass such orders to the Joint Registrar under Section 7 of the Delhi High Court Act, 1966, read with Chapter II, Rule 3(61) and Rule 6 of the Delhi High Court (Original Side) Rules, 2018.

vi) *Appeal Process:* If any person is aggrieved by the order passed by the Registrar, they have the right to appeal. The appeal must be filed within fifteen days of the order to the Judge in Chambers and should be in the form of a petition bearing the requisite court fee.

In summary, the *UTV Software Communications* case showcases the Indian judiciary's proactive and adaptive stance against online copyright infringement through the innovative use of dynamic injunctions. By tackling the persistent issue of "rogue" and "mirror" websites, the court has effectively empowered copyright holders to protect their intellectual property in the digital age. However, the question remains whether these carefully crafted procedures ensure a balance between the right holder's interests and societal interests.

3.2. *Warner Bros. Entertainment Inc. v. http://Tamilrockers.Ws & Ors*

In another case before the Delhi High Court, Warner Bros. sued various websites, including Tamilrockers.ws, for infringing their copyrights by offering unauthorized copies of their movies online.[63] The lawsuit centred on two key legal issues: copyright infringement and the use of dynamic injunctions. The court acknowledged the need for dynamic injunctions – which can block not just the main infringing website but also any mirror sites, redirects, or similar variations – due to how online pirates constantly create new domains to evade static injunctions. The court referenced the case of *UTV Software Communication Ltd*., where dynamic injunctions were deemed necessary.

While there's no specific law in India directly addressing dynamic injunctions (unlike Singapore's Copyright Act), the court used its inherent powers under the Civil Procedure Code to grant them. This aims to free the court from constantly monitoring new infringing sites and lessen the burden on Warner Bros., which wouldn't need to file separate lawsuits for each new website.

63. Warner Bros. Entertainment Inc. v. http://Tamilrockers.Ws & Ors, CS(COMM) 369/2019

The court established a procedure for blocking these additional infringing sites. Warner Bros. must file an application with evidence showing a new website is a mirror, redirect, or variation of the originally blocked sites. If the court is satisfied, the Joint Registrar can order ISPs to block the new site. However, the court emphasized the importance of judicial oversight to prevent overly broad injunctions and to uphold the principle of ISPs remaining neutral intermediaries, not responsible for deciding which sites to block. Ultimately, the court granted Warner Bros. the right to use dynamic injunctions and assigned the Joint Registrar the responsibility of handling future applications and issuing blocking orders to ISPs based on verified evidence.

The Delhi High Court's decision in the Warner Bros. case marks a significant, albeit contentious, expansion of copyright enforcement through dynamic injunctions. While these injunctions provide a robust tool for combatting persistent online piracy, the reliance on executive oversight to block websites raises concerns about potential overreach and the balance of interests. The court's use of inherent powers under the Civil Procedure Code highlights a judicial willingness to adapt to modern challenges, yet the absence of specific legislative guidance on dynamic injunctions underscores the need for clearer statutory frameworks to ensure equitable enforcement and protection of digital freedoms.

3.3. *Universal City Studios LLC. and Ors. v. Dotmovies.baby and Ors*

In *Universal City Studios LLC. and Ors.* v. *Dotmovies.baby and Ors.* [64]A group of Hollywood studios, including Universal City Studios and Warner Bros., sued several websites like Dotmovies.baby and tamilvip.city for copyright infringement. These websites allegedly allowed users to stream and download the studios' movies and TV shows without permission. The lawsuit focused on two main legal issues: copyright infringement and the use of dynamic injunctions. The studios argued that the websites were

64. Universal City Studios LLC. and Ors. v. Dotmovies.baby and Ors., CS(COMM) 514/2023

infringing on their copyrights and requested a dynamic injunction. This type of injunction would block not only the initial websites listed in the lawsuit but also any future mirror sites, redirects, or similar variations that pop up. The court acknowledged the challenges of online piracy, where infringers can easily create new websites to evade static injunctions. They referenced previous cases to support the need for dynamic injunctions.

The court established a procedure for implementing the injunction. The studios would need to provide evidence that a new website is a variation of an already blocked site. If the court is satisfied, a designated official (Joint Registrar) can order ISPs to block the new site. However, the court emphasized the importance of judicial oversight to prevent overly broad injunctions and to protect ISPs from being unfairly burdened. The court ultimately granted the dynamic injunction, allowing the studios to go after future infringing websites. The decision also included specific directions for ISPs, requiring them to block access to the infringing websites. Additionally, the court instructed government bodies (MeitY and DoT) to issue blocking orders and Domain Name Registrars (DNRs) to lock the domain names and provide the studios with registrant information.

This was another instance that underscored the Indian judiciary's commitment to combating online piracy through dynamic injunctions. While this approach strengthens copyright enforcement and aids rights holders in protecting their intellectual property, as mentioned earlier, it raises critical concerns about the potential for overreach and the burdens placed on ISPs. The reliance on judicial oversight is crucial, but the absence of specific legislative guidelines risks inconsistent application and challenges to due process.

3.4. Reasoning of Indian Courts *vis-a-vis* award of dynamic injunctions

An analysis of the dynamic blocking injunctions awarded by the Delhi High Court reveals that it has justified the granting of dynamic blocking injunctions primarily on the grounds of addressing the evolving nature of online piracy and ensuring effective protection of intellectual property rights. The courts have emphasized several key points:

- *Evolving Nature of Piracy*: Piracy websites frequently change domains and create mirror sites to evade detection and blocking. The courts have recognized that traditional static injunctions are insufficient to combat this dynamic and adaptive threat.[65]
- *Judicial Efficiency and Burden*: Dynamic injunctions reduce the burden on the judiciary and plaintiffs by eliminating the need for continuous filing of new suits for each new mirror or redirect site. This streamlines the enforcement process and allows for a more efficient response to piracy.[66]
- *Inherent Powers of the Court:* The courts have invoked their inherent powers under Section 151 of the CPC to grant dynamic injunctions, drawing on the principle that such measures are necessary to meet the ends of justice and effectively combat piracy.[67]
- *Global and Comparative Jurisprudence:* References to international cases, such as those from the Singapore High Court and the UK High Court of Justice, have supported the rationale for dynamic injunctions. These cases have shown that dynamic measures are effective and necessary in a global context where piracy is a widespread issue.[68]

3.4.1 Consideration of India's Socio-Economic Landscape

While the courts have focused on the legal and technical aspects of dynamic injunctions, there is less explicit discussion on how these measures align with India's socio-economic landscape. However, some considerations can be inferred:

- *Impact on Content Creation and Economic Loss:* The courts have acknowledged the significant investments made by content creators

65. *Supra* note 58.
66. *Supra* note 63.
67. *Supra* note 58
68. *Supra* note 63.

and the economic loss caused by piracy. By protecting these investments, the courts aim to support the creative industry, which is an important part of India's economy.[69]

- *Access to Legitimate Content:* The injunctions aim to promote the use of legitimate channels for accessing content, which could, in turn, support local content distribution platforms and legal streaming services, contributing to the formal economy.[70]

3.4.2. Expansion of Copyright Through Court Orders

The courts' approach to dynamic injunctions can be seen as expanding the scope of copyright protection in several ways:

- *Proactive Protection:* By allowing for the blocking of future mirror and redirect sites[71], the courts have extended copyright protection beyond the immediate infringing entities to any potential future infringers. This proactive stance broadens the scope of enforcement.
- *Inclusion of Future Works:* The courts have permitted the inclusion of future works in dynamic injunctions[72], ensuring that new content created by the plaintiffs is automatically protected. This pre-emptive measure significantly expands the temporal scope of copyright protection.

Conclusion and Suggestions

India's legal landscape for intellectual property (IP) has undergone a period of adaptation to confront the realities of online copyright infringement. This evolution hinges on a two-pronged approach. First, a "notice and takedown" system empowers copyright holders to flag infringing content directly with online platforms. Second, "safe harbour" provisions shield

69. *Supra* note 64.
70. *Supra* note 63.
71. *Supra* note 58.
72. *Supra* note 64.

these platforms from liability, striking a crucial balance between safeguarding valuable IP and avoiding excessive burdens on internet service providers (ISPs). However, a key question mark remains regarding the extent of liability for individual users who download infringing material. This area of Indian copyright law has yet to be comprehensively explored by the courts, with a dearth of definitive judicial pronouncements.

The Indian judiciary has emerged as a key player in shaping the landscape of online copyright enforcement. Two High Courts, the Delhi High Court and the Bombay High Court have taken distinctly different approaches. The Delhi High Court has adopted a proactive stance, wielding broad interim injunctions and dynamic injunctions as weapons against online infringement. This aggressive approach reflects a strong commitment to protecting copyright holders but could lead to potential overreach and unintended consequences for internet freedoms. Conversely, the Bombay High Court prioritizes a more measured approach. Here, rigorous verification and concrete evidence are essential prerequisites for granting injunctions. This approach strives for a more balanced outcome, safeguarding copyright interests while upholding fundamental principles of public law.

Dynamic injunctions, a novel legal tool, have emerged as a crucial instrument in combating the ever-evolving threat of online piracy. The Delhi High Court has justified its utilization by highlighting the adaptive nature of online infringing activities, the need for judicial efficiency, and relevant international precedents. The rationale behind dynamic injunctions is that they seek to relieve the courts and copyright owners from the burdens associated with repetitive litigation targeting each mirror or redirect website. This logic finds some comfort in international jurisprudence, mirroring a proactive logic broadening the conceptualization of the front in this enforcement strategy beyond immediate infringing entities to include potential future infringers.

While the courts have made significant strides in addressing online piracy, there are areas where improvements could be made:

1. *Detailed Guidelines and Transparency:* Establishing comprehensive guidelines for the application of dynamic injunctions would enhance transparency and ensure these measures are not excessively broad. Defining clear criteria for what constitutes a mirror or redirect site, along with rigorous verification processes, would help strike a balance between copyright protection and internet freedom. Notably, India still lacks a robust framework for awarding both static and dynamic blocking injunctions, though it continues to draw inspiration from various jurisdictions that have established frameworks within their Copyright Law.
2. *Periodic Review and Adjustment:* Periodically reviewing the impact of dynamic injunctions and adjusting the approach based on empirical evidence would ensure that the measures remain effective and proportionate. This adaptive management approach would help address any unintended consequences and improve the overall effectiveness of the injunctions.
3. *A Neutral Verification Agency and Ombudsman:* This was suggested by Prof. Shamnad Basheer[73] back in 2016, even before the awarding of the first dynamic injunction in India. It still holds significance, considering the fact that powerful plaintiffs have continued to secure blanket orders from courts, and the ambiguity surrounding the verification process of claims by IP owners remains a source of contention within the legal landscape.
4. *Educational and Preventive Measures:* Alongside legal measures, investing in public education campaigns about the importance of intellectual property and the consequences of piracy could reduce the demand for pirated content. Preventive measures, such as encouraging the use of legitimate platforms through incentives and awareness, could complement the enforcement efforts.

73. Shamnad Basheer, *Of Bollywood "Blocks" and John Does: Towards an IP Ombudsman?*, SpicyIP (2016), https://spicyip.com/2016/08/of-bollywood-blocks-and-john-does-towards-a-neutral-ombudsman.html (last visited May 24 , 2024)

India's legal framework for enforcing copyright in the digital age remains a work in progress. Despite its strengths, it requires ongoing adjustments, contributions from all stakeholders, and vigilant oversight by judges. The essential challenge lies in achieving a balance that protects creative works, preserves online freedoms, and ensures access to legitimate content. This equilibrium is further complicated by the occasional aggressive actions of the courts, contrasted with the more cautious approach of the legal framework itself.

Dissemination of Laws of Humanity during Armed Conflict: Reconstructing Humanitarian Education under the Pedagogy of Mercy

Parvathavarthinie B*

Introduction

Scripturally, Humanitarian education humanizes the armed conflict ensuring harmony and prosperity among human beings. The inclination to war naturally breaks apart the human family. The nature-depicted violence is only for self-defense, thus ensuring the sustenance of human life.[1]This would assert no collateral damage and overall disturbance. But, the innovative evils behind the modern-day warfare, say, ideological manipulations tend to be the causative factors that take humans against laws

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1. The substance of laws of nature like interdependence and characterization of human family can be reasoned only with the limitation of the element of necessity. The philosophical search of the creation design of the Earth and the inhabitants in it would unravel the rationale behind the coexistence of human family and nature. But, the purpose of this set up can be comprehensively probed only in the forgotten knowledge of theology. Sadly, this kind of inquiry has been conveniently obliterated in the state-built fragmented international law. This has emerged at the cost of international life oriented international law, thus accommodating violations based international law. To put it contextually, the former comprehends laws of war with laws of peace in line with laws of nature. Contrarily, the latter law of armed conflict has evolved circumstantially to regulate violence without identifying its root-causes.

of nature. Only when nature takes its turn and retaliates against inhuman qualities, the world will weigh its actions in hindsight. So, there comes the sensible approach to tackle the violent consequences of human deeds in the form of 'Prevention'. The prevention approach for conflict-based disabilities or injuries necessarily warrants the education of humanitarian principles. Ironically, the concerns associated with these evil notions of war have increased manifold now amidst the flourishing of modern international humanitarian laws (IHL). The disseminators of IHL date back to various religious scriptures where the war is so exceptional to protect and prevent humans from war related impairments. The modern positivist disseminators are the International Committee of Red Cross (ICRC), National Red Cross and Red Crescent Societies, and the NGOs. The evolutionary facets of the IHL including Additional Protocols I & II (AP I & II) of the Geneva Conventions (GC)[2] and Customary International Humanitarian Law (CIHL) Rules[3]also seek to reaffirm trust in humanity and limit the victims' sufferings during armed conflict. Although the inviolability of the CIHL rules offers greater protection against human sufferings during armed conflict, the struggles to implement the IHL through education and to protect human

2. Refer, ICRC, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 U.N.T.S. 31 (hereinafter GC I)); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 U.N.T.S. 85 (hereinafter GC II); Geneva Convention relating to the Treatment of Prisoners of War 75 U.N.T.S. 135 (hereinafter GC III); and Geneva Convention relating to the Protection of Civilians in Time of War 75 U.N.T.S. 287 (hereinafter GC 1V), opened for signature Aug. 12, 1949 (entered into force Oct. 21, 1950). Their additional protocols are: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Jun. 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) (hereinafter Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) (hereinafter Protocol II).
3. 1 Jean-Marie Henckaerts & Louise Doswald-Beck ,Customary International Humanitarian Rules (Cambridge University Press 2005).

dignity is complicated by asymmetric warfare.[4]This invites a prudent human to ponder upon the philosophical dimensions of increasing IHL violations: Is it a result of lack of awareness or respect of rules amongst those who ought to observe them? If so, then what should be the content of dissemination? Does the character of the law-makers determine the attitude of reverence? How logically can the dissemination of laws regulating armed conflict be suffice to prevent war? Since the beneficiaries of humanitarian education are mostly unlettered groups such as mercenaries, rebels, and unlawful combatants, can an intuitive training on morals coupled with disarmament education comes in handy in the battlefield when war becomes imperative? The issues to be addressed undoubtedly question the relevancy of these responsive approaches in terms of identifying a hopeful future for humankind. This paves way for the soulful search in identifying the most fitting law to fill the void in modern IHL.

1. Evolutionary Character of Humanitarian Education

The idea of war is an elimination of 'total war' in ancient days.[5]The

4. "An Asymmetric conflict is characterized by the imbalance between the military capacity of the warring parties in terms of weapon technology, equipment, intelligence information, etc." See, *Asymmetric Warfare,* ICRC, https://casebook.icrc.org/a_to_z/glossary/asymmetric-warfare (last visited May 25, 2024).

5. The conceptualization of war in scriptures varies substantially from the IHL codified in 19th century. The attitude towards armed conflict in religions is primarily to avert war during war (condemnation of vengeance, degradation, humiliation). The ethical vision relating to wartime conduct is emboldened in theology since this exclusively speaks about the life's purpose by acknowledging the fleeting nature of conflict. It articulates the rulers' virtues of dignity, compassion and skillful use of power to avoid colossal loss of life and ensure harmony. The observance of laws governing war reflects one's faith in religion which is reinstated through the phrase "He who does not treat others as he expects them to treat him is not a believer" (Sarakhsi, Sharh-i Siyar al Kabir 44). In Judaism, war can be fought only by those who are courageous and possessing faith in God (Deuteronomy verses 1-10). Wartime compassion was a source of pride for Israelite kings unless it undermined the object of the war. In Hinduism, righteous war (Dharma Yuddha) obliges the warrior to do his duty of holding the human race together without expecting any reward. This single exhortation epitomized the entire foundation of military ethics. It ensures the increased compliance

non-recognition of this order of nature has derailed human virtues, thereupon resonating with the importance for humans to gain knowledge of life-principles. Now, the primary question lies in what is the purpose in acquiring knowledge? Is it essential for survival? Has it anything to do with the betterment of human family? Can this knowledge factor better influence the prevention or humanization of warfare? Needless to say, they elicit an affirmative answer. When the psychological traits of humans rooted in greed, zeal, and paranoia, they exacerbate the humane behavior especially during inevitable armed confrontations. Hence, dissemination of laws of armed conflict (LoAC) is a likely tool to prevent war or regulate the armed personnel's conduct during war.[6]The balance between the principles of military necessity and humanity is possible only through education of the LoAC guaranteeing their effective application. Knowledge of humanitarian laws, in all likelihood, alleviates the risks of new impairments suffered during war including for persons with disabilities (PwD).[7]Humanitarian education, in line with religious principles,

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of humanitarian principles during war and mitigates the sufferings of the people. Though the IHL finds its source in sacred books, its legal framework is very much compromised based on the whimsical interests of powerful states. There lies the actual challenge in dissemination of modern laws of armed conflict deviating from the promotion of alternatives of war which is the core concern of scripture based humanitarian laws.

6. The word "Dissemination" has its root in the Latin term *"disseminare"*. The dictionary meaning is to scatter abroad, as in sowing seed or to disperse (things) so as to deposit them in all parts. Its figurative expression is to spread abroad, promulgate opinions, statements, knowledge, etc. Contextually speaking, the instruction of humanitarian laws, if appealing to the heart and mind of armed groups, will definitely promote the integrity and dignity of human beings during war. This espouses the idea of sowing seeds, thus not limiting to the role of spreading information unlike its French version "Diffusion". Refer, *Dissemination,* Etymonline, https://www.etymonline.com/word/disseminate (last visited May 25, 2024).
7. Art. 8(a) of the AP I state that the terms 'wounded' and 'sick' mean persons with disabilities in need of medical care and assistance and refrained from any act of hostility. They must be protected and respected at all times (GC I, arts. 5 and 12; GC II, arts. 5 and 12(1); GC IV, art. 16(1); AP I, art. 10(1); CIHL, Rule 110). See also, Convention on the Rights of Persons with Disabilities, art. 11, opened for signature Mar. 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008) (hereinafter CRPD).

resurrects lasting peace and trust among humans during war. Thus, the deviance from spiritual teachings of humanitarian precepts put at stake the universal responsibility of protecting human family.

1.1 Modern Disseminators of Laws of Armed Conflict

In modern IHL, the disseminators of laws trace back to 19th century when the world reeled under the traumatic experience of war. The two eminent personalities, Henry Dunant in Europe and Francis Lieber in America, contributed to the contents of contemporary IHL without knowing of each other's existence.[8]In 1880, Gustave Moynier, one of the founders of the ICRC prepared an Oxford Manual (Laws of War on Land) for guiding the behavior of soldiers and addressing breaches of the IHL due to ignorance of its contents. Besides promulgating domestic laws and regulations, he entails responsibility of national governments and societies to disseminate among soldiers and general public. The Hague Convention 1907 and the annexed Hague Regulations instruct rules for conducting military operation and treating prisoners of war.[9]The advent of International Criminal Law (ICL) infused fear of accountability for breaches of the IHL when Nuremberg

8. The nightmare of Battle of Solferino propelled Henry Dunant to call for neutralization of medical personnel in the war field and creation of an organization for humanitarian assistance. The former led to the Convention for the Amelioration of the Condition of Wounded in Armies in the Field, 1864. The latter saw the founding of ICRC which inherited principles of impartiality, independency, humanity, and neutrality. Moreover, Francis Lieber prepared Lieber Code in 1863 to regulate the troops' conduct in the American Civil War. The Lieber Code inspired the Declaration of St.Petersburg of 1868 banning certain projectiles that aggravate human sufferings during war. See ICRC, Instructions for the Government of Armies of the United States (US) in the Field, opened for signature Apr. 24, 1863 (hereinafter Lieber Code); ICRC, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, opened for signature Dec. 11, 1868 (entered into force Dec. 11, 1868) (hereinafter St.Petersburg Declaration).
9. ICRC, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, opened for signature Oct. 18, 1907 (entered into force Jan. 26, 1910) (hereinafter Hague Convention 1907).

Tribunal recognized Hague Regulations as the CIHL.[10]This necessitated the teachings of the IHL among military personnel and civilian population.[11]F.D.Martens, a Russian disseminator, in the preambular paragraph to Hague Convention 1907 and followed in Art. 1(2) of the AP I, stipulates the reliance on principle of humanity when the positive law remains *non-liquet*. Fridtjof Nansen, a Norwegian explorer and diplomat, played a vital part in providing humanitarian assistance by repatriation to the prisoners of war suffering from massive violations of the IHL. He developed and disseminated key principles for international protection of refugees including principle of non-refoulement to aid them during conflict.

The ICRC's role of dissemination of four Geneva Conventions gained momentum after the disastrous Second World War and intensifying arms race.[12]The AP 1 reaffirmed the strong message of dissemination by making the contracting parties to undertake the study in military pedagogy and civilian instruction, both in times of peace and armed conflict.[13]The ICRC and National Societies are called upon to aid the contracting parties to instruct legal advisers and commanders who are instrumental in the IHL implementation. The Humanitarian institution has also planned various activities, depending on the target group, ranging from standard activities such as: (i) publications in International Review of Red Cross (IRRC); (ii) visual telecasts, radio broadcasts, pamphlets including massive communication campaign and multi-disciplinary approach; (iii) training

10. Art. 8 of the Rome Statute reads that the willful killing or causing serious injury to these persons constitutes grave breaches of the IHL and thus are war crimes. See, Rome Statute of the International Criminal Court, opened for signature July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) (hereinafter Rome Statute).
11. Rules 142 and 143 of the CIHL explain dissemination of the IHL within armed forces and among civilian population.
12. GC I, art. 47; GC II, art. 48; GC III, art. 127; GC 1V, art. 144. All the four conventions mandate the instructions of the IHL to the target groups (military personnel, national societies, police officials, medical corps, press, etcetera) who, during wartimes, assume responsibilities towards protected groups, particularly women, children, persons with disabilities, elderly persons, as they are highly vulnerable during armed conflict.
13. AP I, arts. 83, 6, 82, 84, 87; See also ICRC Res. XX1 (Oct. 2-9, 1965).

courses at Geneva Academy of the IHL and Human Rights, International Institute of Humanitarian Law; (iv) adoption of military manuals by States; to narrative versions including cartoons, fictional or real-life stories of protected people under Geneva laws. During the period of decolonization in Africa, the ICRC undertook dissemination driven by the principles of cultural diversity and humanitarian diplomacy which facilitate the intuitive compliance of the IHL. The United Nations (UN) has also contributed in promoting the spirit of GCs and promulgating dissemination related resolutions among the troops in consonance with its prime objective of maintaining world peace and security.[14]The 1975 Tansley Report urges the National Societies to base its teachings on usefulness of laws, patterns of violence and the use of weapons.[15]Thus, dissemination is recognized as an indirect means of protection of armed conflict victims deterring disabilities or injuries and also enhancing the qualities of human beings. Nonetheless, the experience of the ICRC shows that it is little interested in bridging the gap between the teachings of positive laws and human values which encourage compassion, altruism and respect for fellow beings. This could possibly be overcome by engaging religious scholars who are the legitimate interpreters of religion, to supplement the laws' shortcomings and ensure compliance with the IHL, a proven outcome.[16]

14. G.A Res. 2444 (XXIII) (Dec. 19, 1968). The resolution complements the two branches of international law, namely, International Human Rights Law (IHRL) and the IHL, thus eventually reducing the institutional divide between the UN and the ICRC. This led to the grant of observer status to the ICRC considering its special mandates in international humanitarian relations and promoting cooperation between them.
15. Marion Harroff-Tavel, *The International Committee of the Red Cross and the promotion of international humanitarian law: Looking back, looking forward,* 96 IRRC 817 (2014); Refer, *The Obligation to Disseminate International Humanitarian Law,* ICRC, https://www.icrc.org/en/document/obligation-disseminate-international-humanitarian-law-factsheet (last visited May 30, 2024).
16. Being the messengers of universal values, religious leaders can awaken the combatants about their moral duty vested in the religious texts, to respect and protect human dignity during armed conflict. Ioana Cismas & Ezequiel Heffes, *Can religious leaders play a role in enhancing compliance with IHL*, Icrc Blog (Dec. 20, 2017), https://blogs.icrc.org/law-and-policy/2017/12/20/can-religious-leaders-play-a-role-in-

2. Disarmament based Disability Prevention

Humanitarian Initiative is the most significant advancement for disarmament in a generation.[17] Disarmament education complements the culture of non-violence and peace.[18]Needless to say, knowledge of Weapons of Mass Destruction (WMD) and its non-proliferation is instrumental in the promotion of disarmament regime and ameliorates the human sufferings. The legitimate object of any State during war is to disable the greatest possible number of men. Thus, the war conduct is regulated by limiting the methods and means of warfare to prevent infliction of disproportionate harm, thereby mitigating conflict based disabilities.[19]Article 57(2)(ii) of the

enhancing-compliance-with-ihl-2/.(last visited May 30, 2024)

17. For example, Hibakusha Stories is a Japan based organization with the mission to pass the lessons of the atomic bombings of Hiroshima and Nagasaki to a new generation of high school and university students to empower them to build a nuclear-free world. HIBAKUSHA STORIES: WORKING TOGETHER FOR A NUCLEAR-FREE WORLD, https://hibakushastories.org/mission/ (last visited May 31, 2024).
18. Art 26 of the UN Charter emphatically propose a system for regulation of armaments in order to promote international peace and security. In pursuance of this, the UN Institute for Disarmament Research, 1980, Disarmament Commission, 1952 and the UN Office for Disarmament Affairs, 1998 were established. The UNESCO World Congress on Disarmament Education adopted a report and final document in 1980 containing measures to promote disarmament education. The UN World Disarmament Campaign which was launched in 1982 was later taken as "United Nations Disarmament Information Programme". See, G.A. Res. 71/74 (Dec. 5, 2016). This resolution commends the report of the Secretary-General which undertook efforts in disseminating information on arms regulation and disarmament to Governments, media, NGOs, educational institutions and in carrying out a seminar and conference programme. Refer, G.A Res. 1653 (XVI) (Nov. 24, 1961); U.N. General Assembly, *United Nations study on disarmament and non-proliferation education: Report of the Secretary-General*, U.N. Doc. A/57/124 (Aug. 30, 2002). Accordingly, a Treaty on Prohibition of Nuclear-Weapons was adopted in 2017 with the concern of preventing catastrophic humanitarian consequences but yet to come into force. See, *Resource Guide on nuclear disarmament for Religious Leaders and Communities,* RELIGIONS FOR PEACE, https://www.rfp.org/wp-content/uploads/2020/10/Nuclear-Disarmament-Resource-Guide-English.pdf (last visited June 2, 2024).
19. The following are the significant treaties affirming the limited choice for States in adopting the means and methods of warfare: Hague Convention 1907, art. 25; AP I, art. 35. This rule was recognized as customary in *Nuclear Weapons Case.* See, Legality

AP I recognizes that State parties should be precautious in exercising their modes of attack to minimize incidental injury or damage to civilians and their objects.[20]It also prohibits the usage of weapons, projectiles and any methods causing "Superfluous Injury or Unnecessary Suffering" (SIrUS) for the health of the victims.[21]Robin Coupland, a surgeon and former coordinator of ICRC surgical activities, examined the determining factors of weaponry effects on health relating to design and use of the weapons, that is, design-dependent and user-dependent.[22]He deduced various propositions such as: (i) the nature of injury is attributed to the design of the weapon, whereas number of people injured is determined largely by the

of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8). The fall out of nuclear weapon tests on the health of the Marshall Islands people can be referred in Beatrice Fihn, *Unspeakable suffering: the humanitarian impact of nuclear weapons,* Reaching Critical Will (June 3, 2024, 6:46 AM), http://www.reachingcriticalwill.org/images/documents/Publications/Unspeakable/Unspeakable.pdf. See, Obligations Concerning Negotiations relating to Cessation of the Nuclear Arms Race and Nuclear Disarmament (Marshall Islands v. Ind.), Judgement, 2016 I.C.J. 255 (Oct. 5).

20. CIHL Rule 17 explains that according to State practice, this rule is customary international law applicable during international and non-international armed conflicts. This has to be applied independently of principle of proportionality. It is incorporated in military manuals of various States like Argentina, Australia, Croatia, Canada, etcetera. See, CIHL Rules, *supra* note 3.
21. Refer, the ICRC commentary on AP I, arts. 35, 36. *IHL Databases*, ICRC, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId =2F157A9C651F8B1DC12563CD0043256C (last visited June 3, 2024).
22. He proposed some parameters to describe the collective effects of Conventional Weapons which includes: (i) the proportion of large wounds; (ii) mortality; (iii) the relative proportion of central and limb injuries; (iv) the duration of hospital stay; (v) the number of operations required; (vi) the requirement of blood transfusion; and (vii) the nature of severe and permanent disability in the survivors. These parameters do not examine the effects of anti-personal mines. For better understanding on weapons and health, refer, Robin M. Coupland, The Sirus Projecr: Towards A Determination Of Which Weapons Cause "Superfluous Injury Or Unnecessary Suffering" (ICRC 1997); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III), opened for signature Apr. 10, 1981, 1342 U.N.T.S. 137 (entered into force Dec. 2, 1983) (hereinafter Conventional Weapons Convention).

weapon usage; (ii) the distinguishable effects of conventional and other weapons; (iii) the prohibition must be on the foreseeable effect of weapons on human beings and not the technology; and (iv) the foreseeable effect of the harm results from the weapon design. But, when the weapon is inherently indiscriminate, the foreseeable effect of the injury includes user-dependent factors such as proportion of wounded with limb injuries.[23]Also, there are various treaties being adopted relating to the dependent design but devoid of any objective analysis of injury against which weaponry effects could be measured.[24]As understanding of bodily harm limits health related issues, medical professionals analyze on objective criteria as to what injury and suffering is deemed superfluous or unnecessary.[25]Thus, health professionals

23. Point-detonating anti-personnel mine, when triggered by foot pressure, causes traumatic amputation of the foot or leg. It is a foreseeable design-based effect. As it is indiscriminate in its nature, the weapon usage also plays a vital in the determination of the number of people injured. See Convention on the Production of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, opened for signature Dec. 3, 1997, 2056 U.N.T.S. 211 (entered into force Mar. 1, 1999) (hereinafter Anti-Personnel Landmines Convention).
24. St.Petersburg Declaration, *supra* note 8. It had renounced the employment of any projectile weighing below 400 grammes, which is either explosive or charged with inflammable substance; The Hague Declaration 1899 banned the use of dum-dum bullets which easily flatten in the human body. See Declaration (IV,3) concerning Expanding Bullets, opened for signature July 29, 1899 (entered into force Sept. 4, 1900) (hereinafter Hague Declaration); The Geneva Protocol 1925 prohibited the use of biological and chemical weapons culminated in the adoption of the Biological Weapons Convention of 1972 and the Chemical Weapons Convention of 1993. Refer, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, opened for signature June 17, 1925 (entered into force Feb. 8, 1928) (hereinafter Geneva Protocol); The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, opened for signature Apr. 10, 1972 (entered into force Mar. 26, 1975) (hereinafter Biological Weapons Convention); Convention on the Prohibition of the Development, Production, Stockpiling, and the Use of Chemical Weapons and on Their Destruction, opened for signature Jan. 13, 1993 (entered into force Apr. 29, 1997) (hereinafter Chemical Weapons Convention). These means of warfare were outrightly deemed abhorrent and inhuman.
25. He put forth four criteria to determine the substance of "superfluous injury or

with the aid of medical data tend to be the significant disseminators on weaponry and health to the groups of law- makers and general public as recognized by World Medical Association.[26]The hospitals for war-wounded are set up when the existing health care system is disrupted during war. The organizational structure and patient management of these hospitals acquire its distinctiveness because of its treatment of war-related disabilities or injuries unleashed by unnatural devices.[27]

2.1 Challenges of Innovative Warfare

The contemporary warfare takes different modes ranging from human shield to drone attacks. The modern battlefield, along with the employment of lethal weaponry system, has significantly augmented the civilian casualties by using them as a human shield. The prohibition of using

unnecessary suffering" in law: (i) specific disease, specific abnormal physiological and psychological state, specific and permanent disability or specific disfigurement; or (ii) field mortality of more than 25% or hospital mortality of more than 5%; or (iii) Grade 3 wounds as measured by the ICRC wound classification; or (iv) effects for which there is no well-recognized and proven treatment. Blinding as a method of warfare, "point-detonating" anti-personnel mines, and the possible effects of new weapons are assessed with the support of these criteria. Refer, Protocols to the Conventional Weapons Convention, *supra* note 22.

26. Coupland , *supra* note 22. Forms of disability inferred from the cause of injury inflicted during war are: (i) "Fragment injury" are wounds from shell, bomb, grenade or mortar; (ii) "Bullet injury" indicates any gunshot wound; (iii) "Mine injury" refers to sufferings caused by mine explosion, whether by anti-tank or anti-personnel mine; (iv) "Burn injury"; and (v) "Mine causing amputation", a subset of mine injury, encompasses those who have stepped on a point-detonating anti-personal mine. The Red Cross has compiled a war-wound database based on the activities of the Independent ICRC hospitals. The following information of each patient is recorded to effectively deal with weapon-inflicting disabilities: (i) cause of injury; (ii) the time lapse between injury and admission; (iii) the Red Cross wound classification; (iv) the injured regions; (v) hospital mortality; (vi) the number of operations performed; (vii) the number of units of blood required; (viii) the number of days spent in hospital; and (ix) whether the patient was discharged with amputation of one or both lower limbs.
27. Jenny Hayward-Karlsson et al., Hospitals For War-Wounded: A Practical Guide For Setting Up And Running A Surgical Hospital In An Area Of Armed Conflict (ICRC 2005).

civilians as human shields is widely acknowledged under the GC and attained CIHL status.[28]In modern asymmetric warfare, the weaker forces (shielding party) neutralize its stronger adversary (impeded party) by exploiting civilians as shields.[29]Consequently, this tactic can either prevent impeded party from attacking its enemy or compel it to violate *jus in bello*. The terms "attack" and "shield" have to be understood based on *jus in bello* to a specific attack rather than *jus ad bellum.* The real challenge lies in only focusing on the devastation caused by impeded party and ignoring shielding party's obligation to remove military targets from protected population. Moreover, the non-recognition of war crime nature of human shield by International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and Rome statute has aggravated the challenge of protection of civilian population and preventing disabilities or injuries.[30]Recently, Unmanned Aerial Vehicles (UAVs) or drones are also considered as a deadly means of warfare resulting in high

28. Arts 23 and 28 of the GC III and IV expressly prohibits the deployment of prisoner of war and protected groups in order "to render certain points or areas immune from military operations". The specific prohibition of using civilians as human shield is clearly articulated in art. 51 of the AP I. While the failure to comply is sufficient to constitute a breach of the precautionary obligation under art. 58, specific intent to shield military objects is required in order to breach the obligation under art 51. Refer, CIHL Rule 97, *supra* note 3.
29. History shows that the concept of human shield is not a novelty. The civilian population has been exploited as a human shield since American Civil war and Second World War. The practice of human shield has also been documented in the Korean Conflict and the Vietnam War. Unfortunately, peace activists were used as human shields during Iraqi freedom movement. Iraq's use of human shields during the first Gulf War was described by the UN as the "most grave and blatant violation of International law" in G.A. Res. 46/134. Refer, U.N.H.R.C., *Report of the United Nations Fact-Finding Mission on the Gaza Conflict headed by Richard Goldstone,* at 218, U.N. Doc. A/ HRC/12/48 (Sept. 25, 2009). For a holistic understanding on human shields, refer Amnon Rubinstein & Yaniv Roznai, *Modern Armed Conflicts: The need for a proportionate proportionality*, 22 Stan.L. & Pol'y Rev. 93, 93-108 (2011).
30. The ICTY had recognized human shielding as a war crime for other IHL violations only, such as inhumane or cruel treatment, an outrage upon personal dignity, or hostage-taking. See The Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

civilian casualties due to its precision-less targets.[31]Drones are not unlawful in themselves but their use is subject to international law. That is, States are obliged to examine the humanitarian consequences of new technology or weapon before deploying them for mitigating the ill effects of war on protected groups.[32]Particularly, the 2008-2009 Israeli military operation 'Cast Lead' has launched indiscriminate air strikes including helicopter missile attacks and the missile-mounted UAVs in the Occupied Palestinian Territories (OPT) of Gaza strip to further its settler colonial project. This has ensued in the wide scale destruction of human lives, properties including hospitals and religious institutions, and environment.[33]The inhumane use

31. For better understanding of the massive violations of IHL due to drone attacks, see, *2,714 people killed in 409 US drone attacks in Pakistan since January 2004: Report,* THE ET (Nov. 9, 2018), https://economictimes.indiatimes.com/news/defence/2714-people-killed-in-409-us-drone-attacks-in-pakistan-since-january-2004-report/articleshow/66554333.cms?from=mdr. (last visited June 3, 2024) See also, F.M.Sabir v. Federation of Pakistan, (2013) WP No. 1551-P/2012, (Pak.), https://www.peshawarhighcourt.gov.pk/image_bank/Mr_Justice_Dost_Muhammad_Khan/wp1551-12.pdf. (last visited June 3, 2024)
32. U.N.H.R.C., *Ensuring use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law,* U.N. Doc. A/HRC/25/L.32 (Mar. 24, 2014).
33. The World Health Organization reported different types of long-term disabilities, namely brain injuries, hearing deficiencies, spinal injuries, amputations, and mental health problems by mid-2009 owing to severe injuries and lack of adequate and timely medical attention and rehabilitation. Sadly, the persons with disabilities had experienced sheer fear by exposing to even worsening hardships, such as evacuation amidst the rubbles of destructed buildings, shelter to be equipped for their special needs, impact of frequent power disruptions on their medical assistance, closure of educational, medical, social and psychological programmes, and stoppage of assistance like wheel chairs and other aid. See Goldstone (n 29). With regard to environment, the adverse effects of escalation of hostilities in West Bank and Gaza include destruction of orchards, agricultural, and grass lands, loss of livestock, groundwater pollution, sewage contamination, outbreak of water-borne diseases, air pollution, drought and frost, and water crisis, refer, *Environmental Assessment of the Gaza Strip following the escalation of hostilities in December 2008-January 2009,* , UNEP, https://wedocs.unep.org/bitstream/handle/20.500.11822/8736/UNEP_Gaza_EA.pdf?sequence=2&isAllowed=y (last visited June 6, 2024).

of chemical weapons like smoke projectiles with White Phosphorous (WP), flechette missile, dense inert metal explosive (DIME) munitions, the depleted uranium by Israeli troops, aerial and artillery shells, and infantry brigades made the lives of the civilians in the OPT a living hell.[34]The Israeli weapon warfare in the name of self-defense is completely disproportionate to the arsenals of the OPT's resistance movement which includes rocket, mortar, and booby troops.

Since October 7, 2023, the potent of weaponry used by Israel in its recent genocide against Gaza is very lethal with its upgraded armory of dumb bombs, bunker buster bombs, WP, and Artificial Intelligence-enabled military technologies.[35]Ruthlessly, this war is also utilized to test unknown weapons by Israel. The usage of powerful weaponry with its innate indiscriminate impacts and the unprecedented death toll is a clear indication of the Israel's intent of incessant war until total annihilation of Palestinians on earth. The bombardment and complete siege of Gaza resulted in over 31,000 casualties and 70,500 injured of which majority are women and children; displacement of nearly two million natives; over hundreds of Palestinian journalists, medics, UN staff killed; and thousands are still

34. According to the Arms and Conduct of Hostilities Unit Head of the ICRC, WP has a potential to cause horrific injuries causing slow painful death with severe flesh burning, breathing difficulties and throat spasms as reported in Gaza hospitals. The use of 155 mm artillery shells inflicts blast causing damage up to 300 meters away. The flechette shell, a type of anti-personnel ammunition is usually fired from a tank exploding in the air and scattering 5,000-8,000 tiny darts in a conical pattern over an area around 300 meters wide and 100 meters long. Refer, *The Humanitarian Monitor: Occupied Palestinian Territory*, U.N.: THE QUESTION OF PALESTINE, https://www.un.org/unispal/document/auto-insert-202815/ (last visited June 7, 2024).

35. For detailed description of the nature and impact of the dangerous weapons used by Israel in Gaza war, see, *Beyond Maghazi: What controversial has Israel used in Gaza war*, AL JAZEERA (Dec. 29, 2023), https://www.aljazeera.com/news/2023/12/29/beyond-maghazi-what-controversial-weapons-have-israel-used-in-gaza-war. Though the ICJ in its provisional order has directed Israel to prevent its genocidal acts in Gaza, it is still wreaking havoc on Palestinian people. Refer, Application of the Convention on Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, 2024 I.C.J. (Jan. 26).

trapped under the rubble.[36]Such egregious violations in the facade of self-defense after October 7 Hamas attack killing nearly 1000 Israelis, is just a smokescreen to bolster its Zionist ideology of Land for Israel movement. Another catastrophic event adding to the infamous warfare list is the Russia-Ukraine conflict which started off in February 2022 with Russia's ideology of expanding its territories through the invasion of Ukraine. This conflict has decimated at least lakhs of people on both sides by deploying many controversial weapons including cluster munitions with high-end technologies.[37]Truly, these wars are anything but beneficial to a particular national or religious or ethnic groups as claimed by the conflict-mongering State leaders with materialistic goals.

3. Sexual Violence as a Weapon of War

One of the foremost principles of the IHL is the distinction between the civilians and combatants and their respective objects.[38]Nonetheless, when civilians become the actual target of hostilities, like modern day ethnic conflicts, the basic rules intended to protect them are totally skewed. Women, in particular are subjected to myriad forms of violations including rape, sexual mutilation and humiliation, and forced impregnation and prostitution. The motivations of these crimes had ranged from treating them as spoils of war, shaming the community pride through their dehumanization, to bring about the ultimate destruction of an entire group of people. Seemingly, the sexuality of women became a conscious and organized weapon of, especially

36. *OPT Emergency Situation Report,* World Health Organization, https://www.emro.who.int/images/stories/palestine/WHO_Sitrep_11.pdf (last visited June 7, 2024); *Gaza: UN Experts call on international community to prevent genocide against the Palestinian people*, Office Of The High Commissioner For Human Rights, https://www.ohchr.org/en/press-releases/2023/11/gaza-un-experts-call-international-community-prevent-genocide-against (last visited June 7, 2024).
37. U.N.H.R.C., *Report of the Independent International Commission of Inquiry on Ukraine*, U.N. Doc. A/HRC/52/62 (Sept. 25, 2023); Human Rights Watch, Cluster Munition Use In Russia-Ukraine War 3 (2023).
38. Arts. 48(1), 51 of AP I state that "Civilians shall enjoy general and specific protection from military operations and indiscriminate attacks".

genocidal conflict constructed around the masculine privilege. With the criminalization of sexual violence during armed conflict, rape has long been prohibited by the LoAC under various national military codes.[39]This influenced Article XLVII of the Lieber Code punishing the crime of rape of inhabitants of a hostile country. Article 46 of the Hague Regulations ensuring respect for lives and family honour can be broadly interpreted to cover rape, but seldom acknowledged. Despite the high incidence of rape during the Second World War, it was neither mentioned in Article 6 of the Nuremberg Charter as a war crime nor prosecuted under customary international law. The International Military Tribunal in Tokyo, however, found some Japanese military and civilian officials guilty of war crimes including rape for their failure to ensure subordinates' compliance with international law. Its normative development could be perceived in Control Council Law No. 10 of 1945 adopted by the allied occupying powers in Germany for the trial of suspected Nazi war criminals not dealt at Nuremberg, by their national courts. Although this law stood out in recognizing rape as a crime against humanity, no charges were actually undertaken pursuant to it. Being hailed as the important instruments protecting the victims during armed conflict, the four GCs and their Additional Protocols contain certain provisions protecting women.[40]Though prohibiting rape in international armed conflicts, these provisions suffer serious limitations on two grounds. Firstly, the gravity of the crime is neglected by not expressly designating it as a grave breach in which States are obliged to seek out and punish the perpetrators.[41]Secondly, rape is just

39. Theodor Meron, *Rape as a Crime under International Humanitarian Law,* 87 Am.J.IL. 424 (1993).
40. Christine Chinkin, *Rape and Sexual Abuse of Women in International law*, 5 E.J.IL. 326 (1994).
41. Significantly, art. 27(2) of the GC IV protects women "against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault". Art. 76 of the AP I reiterates the same provision considering women as an "object of special respect" and extending its application to all women of the conflicting States. Interpretatively, the ICRC, in its commentary on GC IV, declared that the categories of grave breaches in art. 147 including "wilfully causing great suffering

categorized as depriving victims' honour but do not impose a blanket prohibition against sexual abuse. Unfortunately, these instruments departed from the precedence of Control Council Law which listed rape among the grave breaches subject to universal jurisdiction. It reflects the failure of the international community to acknowledge the seriousness of sexual violence in spite of it being regarded as an inevitable reality of armed conflict.

Rape has been recognized as a grave breach of the IHL with the institution of the ICTY and its statute by the Security Council.[42]Responding to the widespread IHL violations including sexual violence against women in former Yugoslavia, rape is designated as a crime against humanity. To constitute such a crime, it must be directed against the civilian population as a whole and is necessary to establish systematic government planning. Regrettably, this crime cannot be easily established with such high standard of proof. That apart, the tribunal has jurisdiction over the breach of the laws or customs of war including prohibition of employment of weapons calculated to cause unnecessary suffering. This higher degree threshold, thus can be minimized in the light of rape being practiced as a strategic weapon of war, notably as a national instrument of ethnic cleansing in Bosnia.[43]The decisional laws of the ICTY categorically inferred the

or serious injury to body or health" and "torture or inhuman treatment" should be constructed so as to cover rape with respect to art. 27. Refer, *IHL Databases*, ICRC, https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-147/commentary/1958?activeTab=undefined (last visited June 8, 2024). Though AP I includes "degrading practices involving outrages upon personal dignity based upon racial discrimination" amongst its list of grave breaches, it spells no reference to sexual violence or gender discrimination. For non-international armed conflict, art. 3 of the GCs stipulates a minimum standard of behaviour for the conflicting parties without explicit prohibition. Whereas, art. 4(2)(e) of the AP II prohibits outrage upon personal dignity including rape.

42. S.C. Res. 808 (Feb. 22, 1993); S.C. Res. 827 (May 25,1993).

43. Ethnic cleansing (cisenje as used by the Serbian Forces) denotes cleansing or purification of an ethnic group by wiping out foreign elements to create an ethnically homogenous society. It can be executed either by forcibly displacing or killing non-Serbs with the aim of acquiring full control of the conquered territory. This was an infamous genocidal strategy relied upon to create Greater Serbia. To develop a multi-

genocidal intent of Serbia from its widespread practice of ethnic cleansing killing lakhs of Bosnian Muslims.[44]Strangely, the ICJ, both in *Bosnia* and *Croatia Cases,* failed to confirm the settled international criminal jurisprudence of the ICTY as to the circumstantial evidences of specific intent of Serbia.[45]The substantive law on rape in armed conflict has further evolved with the contribution of the ICTR defining and recognizing it as a means of perpetrating genocide.[46]Recently, the world court in the *Gambia Case* has observed that since 2016, Rohingyans in Myanmar have been subjected to prohibited acts under Genocide Convention, such as mass killings, widespread sexual violence including rape, thereby threating their right to existence.[47]The existing corpus of the IHRL had also progressed in attempting to recognize the violence against women in armed conflict.[48]

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dimensional understanding on the concepts of ethnic cleansing and genocide in Srebrenica, refer, Tadeusz Mazowiecki (Special Rapporteur of the Commission for Human Rights on Situation of Human Rights in the territory of former Yugoslavia), *Second Periodic Rep.,* U.N. Doc. E/CN.4/1994/4 (May 19, 1993). See also, U.N. Secretary-General, *Rape and Abuse of Women in the Territory of the Former Yugoslavia,* U.N. Doc. E/CN.4/1994/5 (June 30, 1993).

44. See, The Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Judgement, 196 (Int'l Crim. Trib. for the Former Yugoslavia (Aug. 2, 2001).
45. Refer, Case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgement, 2007 I.C.J. 43 (Feb. 26); Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgement, 2015 I.C.J. 3 (Feb. 3).
46. Refer, The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998).
47. Refer, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, 2020 I.C.J. 3, 21-26 (Jan. 23). For a clear outlook on Rohingyans in Myanmar, consult, U.N.H.R.C., *Report of the Independent Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018).
48. See, G.A. Res. 3318 (XXIX), Declaration on the Protection of Women and Children in Emergency and Armed Conflict, preamble (Dec. 14, 1974); World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23, art. 38 (June 25, 1993); G.A. Res. 48/104, Declaration on the Elimination of Violence against Women, art. 2 (Dec. 20, 1993); Fourth World

3.1 Physical and Psychological Injuries of Victims of Genocidal Sexual Violence

The ICTY, for the first time, had constructed the sufferings of the killed under 'serious bodily or mental harm'[49]as to constitute genocide.[50]Further, it declared that such grievous harm would be a grave and long-term disadvantage to a victim to a lead a normal and constructive life. Particularly, rape deserves special mention because of its complete depersonalization of women by destructing their soul.[51]In its *Blagojevic* judgement, the trial chamber explicated the traumatic experience through psychological injuries like terrible nightmares, feeling of fear and depression of the survivors of genocide.[52]Unbearably, the Bosnian Muslim women were systematically

Conference on Women, *Beijing Declaration and the Platform for Action*, U.N. Doc. A/CONF.177/20/Rev. 1 (Sept. 15, 1995). For the appointment of Special Rapporteurs with mandates covering women in armed conflict, consult, Walter Kalin (Special Rapporteur on the Situation of Human Rights in Kuwait under Iraqi Occupation), U.N. Doc. E/CN.4/1992/26 (Jan. 16, 1992); Ms. Linda Chavez (Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during periods of armed conflict), *Preliminary Report,* U.N. Doc. E/CN.4/Sub.2/1996/26 (July 16, 1996); Ms. Radhika Coomaraswamy (Special Rapporteur on violence against women, its causes and consequences), U.N. Doc. E/CN.4/1998/54 and E/CN.4/1998/54/Add.1 (Jan. 26, 1998 & Feb. 4, 1998).

49. Convention on the Prevention and Punishment of the Crime of Genocide, art. II (b), opened for signature Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (hereinafter Genocide Convention).
50. See, The Prosecutor v. Vidoje Blagojevic Dragan Jokic, Case No. IT-02-60-T, Judgement, 238-39 (Int'l Crim. Trib. for the Former Yugoslavia Jan.17, 2005).
51. *Supra* note 44, at 181.
52. S*upra* note 50, at 237-41. The psychological injuries are the following: (i) the fear of being captured; (ii) the sense of utter helplessness; (iii) distressing moment of familial separation; (iv) the fear of their own safety as well as of their families and friends. The Chamber observed that the recoupment from the traumatic experience takes time and is not a quick process. Additionally, (v) the taking away of identification document and giving false assurance that they will be exchanged would inflict severe mental harm on the Bosnian Muslim men. Contrarily, the prisoners were directed to the execution sites only as their ultimate destiny; (vi) the mental agony faced by the survivors when they were directed towards the killing fields, where they witnessed the murder of their own family members, friends, and relatives and suffered themselves with injuries; (vii) severe mental anguish of lying hidden under the dead bodies out

raped by executing the evil practice of forced impregnation.[53]Rape and forced impregnation were appallingly deployed as the methods of ethnic cleansing intended to humiliate, shame, degrade and terrify the entire Bosnian group.[54]Most significantly, biological genocide is exercised to ethnically Serbanize the future generation through women being the carriers of children. The ICTR noted that rape as a measure when intended to prevent births could inflict a physical and a great psychological trauma decimating the ability of women to procreate.[55]In Rwandan genocide, the extremist Hutu perpetrators used sexual violence and rape to seriously harm, humiliate and kill Tutsi women. This tribunal bears testimony to a series of rape and sexual acts so as to constitute serious unimaginable mental harm and pain for women survivors and non-survivors.[56]Agonizingly, the survivors of

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of fear and listening to the sounds of killings, digging of mass graves and screams of the injured humans. Many survivors covered themselves under the dead bodies for several hours or pretended to be dead till it became dark in the day; (viii) the undertaking of painful search to know the details about their loved ones, mostly to confirm their deaths. For victims or non-survivors, the sufferings they underwent before their executions like detention, abuses, familial separation, last sight of witnessing the killing of the men brought to the execution site before them and eventually knowing their ultimate fate.

53. For a useful guidance and arguments on the policy of forced impregnation, generally refer, Siobhan K. Fisher, *Occupation of the Womb: Forced Impregnation as Genocide,* 46 Duke L. J. 91 (1996).
54. The sadistic features of rape, such as raping multiple times, making the women pregnant and detaining them until the termination becomes impossible have been unleashed with great enormity. This was with the clear intention to inflict maximum humiliation on the victims, their family and the whole community. Apparently, rape constituted a strategic weapon of war serving the ultimate aim of the Greater Serbia. Refer, Rep. of the S.C. by Dame Warburton, *European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia: Report to the European Community Foreign Ministers*, U.N. Doc. S/25240, annex I (Feb. 3, 1993). Besides, in the cruelest detention camp of Omarska, the houses were named as white and red in which physical abuses, rapes, torture were committed in the former and killing in the latter. For detailed evidence on the horrible experiences of a witness in Omarska camp, refer, Bosnia, *supra* note 45, at172.
55. *Supra* note 46, at 131.
56. The following are the heart-wrenching and traumatizing accounts of physical and

psychological injuries of Rwandan genocidal sexual violence victims. In Akayesu trial, the victim of rape described her feeling of near-death experience and losing the counts of being raped. Another victim told that the mere thought about the humiliation of being made publicly nude and raped before her children was making the war come alive within her. A witness testified that though she had remarried, her life had never been the same because of the beatings and rape she suffered. She said that the pain in her ribs disallowed to pursue farming on which she survived. From (i) being forced to parade naked and perform a gymnast while Interahamwe men laughing; (ii) inserting a wood piece into the woman's sexual organs before she died; (iii) gang raping a pregnant woman who went into a premature delivery during rapes; to (iv) a begging mother who rather wanted the Interahamwe perpetrators to kill her daughters than to rape them in front of her and their awful reply was that the principle is to make them undergo pain and subsequently, raped them in an atrocious manner by mocking them; (v) recalling by a girl about bleeding in private parts after several men had raped her; (vi) placing women one by one on their stomach after raping and hitting them with sticks and killing them; (vii) giving Bible to her rapists saying, "it is their memory because they do not know what they are doing". These spine-chilling and tormenting narratives cannot be conceived by normal human minds as the evil spewing perpetrators have stopped being humans. The reports of the international and non-governmental organizations also documented nightmarish and moving facts of the Rwandan victims of sexual violence. Notably, (i) a sexually mutilated woman lived in constant terror because her attackers who had been and continued to be her neighbours, still passed freely every day; (ii) a woman who was lashed to bed for several months and gangraped continuously, said a hideous fact that "For the rest of my life, whether I am eating or sleeping or working, I shall never get the semen smell out of my nostrils"; (iii) a victim said that she was being allowed to live only to make her die of sadness; (iv) rapes were sometimes followed by sexual mutilation of, including the vagina and pelvis with machetes, knives, sticks, boiling water, and even acid. For detailed study of the physical and psychological injuries suffered by the Rwandan genocidal rape victims, generally consult, Human Rights Watch, Shattered Lives: Sexual Violence During The Rwandan Genocide And Its Aftermath (1996); African Union, Rwanda: The Preventable Genocide (2000). The grave psychological injuries would tend to repeat again to the rape victims when the deliverers of justice itself treat them with utter disrespect, insensitivity and lack of care in the courtroom. At times, the judges were asking some outrageous questions to the survivors including the most intimate details of the violations they endured. During the infamous Butare trial in 2001, the judges suddenly burst out laughing while a victim of multiple rapes was being cross-examined by the defense lawyer. One of the offensive questions put forth by the defense lawyer included, "since the witness had not bathed, she could not have been raped because of the way she smelled". Other questions asked were, "Did you touch the penis of the accused?";

sexual abuse during genocide had suffered persistent health problems, especially sexually transmitted diseases including HIV/AIDS, syphilis, gonorrhea and vaginitis. This led to the frequent reporting of pregnancies and child birth among extremely young girls along with several health problems. In truth, the stigma surrounding sexual abuse deters women from seeking the medical assistance and make them suffer from extreme guilt for surviving the rape. Broadly, their overwhelming problems because of the genocidal upheaval include social stigmatization, poor physical and psychological health, unwanted pregnancy, and poverty.

Dreadfully, Tamil Eelam, Rohingyan, and Palestinian genocides add to the worst form of ethnic cleansing that the world has witnessed in the recent past. The Eelam genocide accounts for the horrifying reports of sexual violence perpetrated by the security forces of Sri Lanka against ethnic Tamils for their alleged links with the secessionist Liberation Tigers of Tamil Eelam (LTTE) since 2006.[57]The general pattern of these victims is the difficulty of acknowledging that one is being raped and sexually abused. The Human Rights Watch's interview with the Tamil women detainees stated that they suffered vaginal rape at least once, but some repeatedly, especially during interrogation sessions.[58]Resultantly, the medical examination identified

"How was it introduced into your vagina?"; "Were you injured in the process of being raped by nine men?". The witness replied, "If you were raped by nine people, you would not be intact". Condemningly, the judges never apologized to the rape victim nor were they reprimanded for their inhumane behaviour. This sort of problem within the judicial systems coupled with the reluctance of women to come forward because of stigma and fear would greatly reduce the likelihood of rape prosecutions. For a brief outlook on rape victims of the ICTR, refer, Binaifer Nowrojee, *Your Justice is Too Slow: Will the ICTR fail Rwanda's rape victims?*, U.N.R.I.S.D Occasional Paper 10 23-24 (2005). For a complete documentation of Rwandan genocide, refer, Alison Desforges, *Leave None to Tell the Story: Genocide in Rwanda,* Human Rights Watch (Mar. 1999), https://www.hrw.org/sites/default/files/media_2020/12/rwanda-leave-none-to-tell-the-story.pdf. (last visited June 3, 2024)

57. Coomaraswamy, *supra* note 48, 3, UN Doc. E/CN.4/1997/47/Add.4 (Jan. 30, 1997).
58. The sexual violence often began with forced stripping, sexual humiliation, verbal sexual threats and abuse, and mocking in an intoxicated state. Upon a medical review of a hundred Sri Lankan asylum seekers in the UK, the doctor said that the victims

physical effects, such as extremely heavy bleedings, miscarriages, pregnancy. And, psychological effects showed marked signs of Post-Traumatic Stress Disorder (PTSD) including depression, difficulty in getting to sleep, irritability, nervousness, waking with nightmares. The psychiatrist attested that with the high level of trauma, years of counseling is imperative for the victims to lead normal lives. In Myanmar, sexual violence is a consistent pattern of its military forces since it launched 'clearance operations' against ethnic Rohingyans in 2016.[59]The psychological and emotional toll of the brutal sexual violence range from anger, anxiety, fear, depression, bitterness, utter helplessness, hopelessness, powerlessness, loss of self-confidence, resentment, sadness, shock, shame, suicidal thoughts, feeling dead, hearing voices in head, aversion to social life, and impurity, to not knowing how to be alive. The reported physical impacts include insomnia, crying, fatigue, bruises, weakness, weight loss, lack of focus, amnesia, breathlessness, brain fog, gynecological injuries, physical pain, pregnancy, and tonic immobility.[60]

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have their genitalia assaulted with cigarette or other burns; being forced to have oral sex; and suffering kicks, bites, scratches, squeezes and other wounds to their breasts, buttocks, and other organs. In the reported cases, a young women narrated the ordeal of countless days of sexual torture in detention cells with multiple physical scars inflicted through the following means: (i) burns on inner thighs with cigarette butts; (ii) tied the legs with nylon ropes, hung upside down, submerged the head in water, and beat the soles of the feet with batons and thick nylon ropes; (iii) punched on the chest and suffered breathlessness; (iv) hit on the head with heavy plastic pipes; (v) covered her face with emptied chili powder sack to suffocate her; and (vi) being raped in her unconscious state with heavy bleeding from the vagina resulting in a sore lower abdomen. The psychological trauma was explicated through the following statements of the victims: (i) feeling guilty, embarrassed and humiliated of being reaped; (ii) fear of being outcast by the society; (iii) fear of the sound of approaching footsteps of any man; (iv) battling with the memory to forget the painful incidence of rape; and (v) terrorizing scenes of the screams of loved ones. Refer, Human Rights Watch, We Will Teach You A Lesson: Sexual Violence Against Tamils By Sri Lankan Security Forces (2013).

59. U.N.H.R.C., *Sexual and gender-based violence in Myanmar and the gendered impacts of its ethnic conflicts*, U.N. Doc. A/HRC/42/CRP. 4 (Aug. 22, 2019).

60. A few coping mechanisms of the survivors of rape are the following: (i) prayer; (ii) meditation; (iii) maintaining resilience and attempting to forget the incident; (iv) reminding constantly that they were not at fault and their value remains intact; (v)

The Palestine genocide is the classic illustration for appalling human sufferings, physical destruction and collective trauma due to Israel's relentless illegal occupation of Palestine and immeasurable terrorist activities resulting in massive human rights violations against its people.[61]Distinctly, the genocidal policies of Israel takes the shape of biopolitical violence against Palestinian women's rights considering their experiences of pregnancy and child birth in occupied East Jerusalem (oEJ). This is a part of Israel's colonial settlement project by taking control over native's demography through women's reproductivity. Framing Palestinian woman's womb as a weapon to decimate its population, Israel has constructed a biopolitical surveillance upon the birthing process through complex system of military checkpoints and possession of Jerusalem identity card (geopolitical constraints) in the occupied West Bank. This military occupation not only renders their journeys to medical centers extremely horrendous and traumatic but also force them to give birth at checkpoints in some instances. Here comes the importance of social support, community assistance and psychosocial interventions in navigating the militarized spatial and time hardships for delivering a child in Jerusalem. The birthing in Jerusalem is insisted by all pregnant women as this only ensures that the child gets its birth certificate and ID card and stays with the mother. In one way, this attitude enables them to subvert the oppressive system to an extent. Incidentally, the self-restriction of their movements during pregnancy forced by these intricate violences resulted in adverse physical effects including elevated blood glucose and pressure and other syndromes, and psychological

leading life for their children and family; (vi) believing in karmic retribution that perpetrators will be brought to justice one day. For an elaborate understanding of the Rohingyan victims, see, *Unheard Voices, Qualitative Research on Conflict-Related Sexual Violence in Myanmar (2016-2021)*, U.N. (June 19, 2022), https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/08/report/auto-draft/Unheard-Voices-Research-Report.pdf; *No one was left: Death and Violence Against the Rohingya in Rakhine State, Myanmar*, Medecins Sans Frontieres (Mar. 9, 2018), https://www.msf.org/myanmarbangladesh-%E2%80%98no-one-was-left%E2%80%99-death-and-violence-against-rohingya. (last visited June 3, 2024)

61. Amnon Rubinstein & Yaniv Roznai, *supra* note 29.

harms such as fear, suffocation, sudden crying, extreme irritability and loneliness. Thus, the continuous surveillance of pregnant women's bodies through biopolitical violence deeply penetrates even their dreams evoking fear and anxiety of losing their babies.[62]The recent Israeli genocidal violence in Gaza unravels the subjection of Palestinian women and girls to multiple forms of sexual assault including stripping naked, rape, and uploading obscene photos.

4. Futurological Insights of Humanitarian Studentship

War, a prerogative of State sovereignty, must ensure the road to peace. So, dissemination has to be rather aimed to the policy makers and leaders who are notorious in promoting their malicious ideology through war. Education of laws of war becomes redundant when there is an effective dissemination of laws of peace. Though AP I proved to be a path-breaking human rights framework in laws of armed conflict, value-based IHL is the need of the hour. The Knowledge of Army veterans in various signpost conflicts like Hiroshima incident, Somalia conflict, Vietnam War can be diffused to future combatants to instill the exceptional and devastating nature of war. The apologetic and hindsight realization of dos and don'ts of war must be instructed by army generals to soldiers to prevent human perversion. The modern nature of war proved that the ICRC cannot be a lone disseminator of IHL. So, the UN's universal membership can make it a potential institution to teach IHL, if it creates an agency exclusively for IHL

62. In one of the reported cases, a pregnant woman described her ordeal of standing at a checkpoint for three hours before delivery awaiting the Israeli soldiers' confirmation to allow her to pass as a near death experience. Another instance of suffering a miscarriage because of long waiting hours in a cold weather before her clearance to board the bus was very daunting. The pregnant women repeatedly stated that attending to the needs of the newborn child as a scary issue, for it demands facing and overcoming fear for Israeli authorities. Also, some has attributed premature births and weak health to such fear inducing politics of Israel. For a scholarly view on feminist criminological analysis of birthing in Occupied Palestine, refer, Nadera Shalhoub-Kevorkian, *The Politics of Birth and the Intimacies of Violence against Palestinian Women in Occupied East Jerusalem,* 55 Brit.J.Criminol 1187 (2015).

promotion. Since education of IHL is more Geneva- based, the transfer of knowledge turns out to be so costly. So, these institutions have to be made accessible to the students of IHL across the world. Besides, there must be a strong budgeting in the education department and national policies to promote the humanitarian spirit. The precedence must be taken from the military manuals and national policies of countries that did not opt for war till date. The real object of the war is to avoid actual warfare and turning it into a mere riot or skirmish, except in situations of self-defense or threat to sustenance of a State. This, in turn, will affirm the *principle of coexistence* through cross-cultural understanding and eventually limits the human vices.

4.1 Original Approach of Dissemination of Laws of Humanity

The scriptural incidents narrate basic tenets of war which is principally manifested in peace. In Hinduism, the philosophy of Dharma Yuddha has inspired many great people throughout Indian history. The epics such as Ramayana and Mahabharatha stressed the need of righteous war. The practice of stopping hostilities at sunset and returning to their respective camps tend to be the highly respected principle of war.[63] Among the most important contributions of Islamic international law were its definite rules on prisoners of war, protection of civilian populations, limitations of

63. The entire seven hundred verses of the *Bhagavad Gita,* a dialogue between Krishna and Arjuna on the battlefield of Kurukshetra, is the most influential Hindu text. The Great War in the Mahabharata began after all negotiations by Krishna and others to avert war. It was the culmination of deep enmity between two royal clans, the Pandavas and the Kauravas. The Kauravas had unlawfully seized properties belonging to the *Pandavas*. The Pandavas were left with two choices: either to fight for their right or to evade battle and accept defeat for peace. Just before the hostilities began, the warrior Prince Arjuna asked Krishna to place his chariot between the two sides so that he could take a good look at his enemy. In the adversary side, Arjuna saw his cousins, other relatives and his teachers and moved by the familial ties. That crucial moment aroused him the doubt as to the "righteousness" of the battle. He, therefore turned to Krishna for guidance, who taught him the spiritual wisdom and showed him how to rise above the limitations of his own personality so as to do what was best for humankind. Refer, Manoj Kumar Sinha, *Hinduism and international humanitarian law,* 87 IRRC 288 (2005).

belligerent activities and reprisals, asylum, pardon, safe conduct, diplomatic immunity, negotiations and peace missions. The acts forbidden in war are: (a) cruel ways of killing; (b) Killing of non-combatants; (c) killing of prisoners of war; (d) mutilation of humans and beasts; (e) unnecessary destruction of harvests and trees; (f) adultery with captive women; (g) killing of envoys in retaliation; (h) massacre in the vanquished territory; and (i) the use of poisonous weapons.[64]Buddhism's analysis of psychological realities of human beings is arguably its greatest contribution to the promotion of IHL. The need to see 'enemy' as a human being is the most important postulate that Buddhism preaches.[65]The tactics of war is permitted unless it imparts mass destructions of humankind like scorched-earth policy. In Jainism, war is considered to be a sad fact of life and a consequence of moral and intellectual failings of human beings.[66]These stories demonstrate that war should never be an ultimatum. When situations become imperative to wage war, the power should be used in the most skilled manner to minimize the sufferings of human life. When spiritual knowledge is

64. At the battle of Badr, the Prophet ordered, "Take heed of the recommendation to treat the prisoners fairly". Clothing must be provided for prisoners (Sahih AI-Bukkari 52:142). The Prophet's instructions to Abdur Rahman Ibn Auf prior to a campaign were, "Do not commit breach of trust and treachery nor mutilate anybody nor kill any minor or child" (Ibrahim, 1984, p. 133). The instructions of Caliph Abu Bakr to Usamah expressly state that after forbidding the killing of women, children and the aged: "Do not hew down a date palm nor burn it, do not cut down a fruit tree, do not slaughter goat or cow or camel except for food". For a theological conception of international law, refer, C.G Weeramantry ,Islamic Jurisprudence: An International Perspective134-39 (Palgrave Macmillan 1998).

65. In an instance, Buddha moderated between the Sakiyas, members of the republic from which he himself came and the Koliyas. The dispute is about sharing the waters of a dammed river that ran between their territories. The situation had blown out of control and they prepared to wage war. Buddha enlightened them by saying that they were about to sacrifice something of great value (the lives of warriors) for something of very little value (water). They, therefore desisted from waging war. See, *Reducing suffering during conflict: The Interface between Buddhism and International Humanitarian Law*, ICRC (Feb. 25, 2019), https://www.icrc.org/en/document/reducing-suffering-during-conflict-interface-between-buddhism-and-international. (last visited June 3, 2024)

66. Deuteronomy 23:9 (verse 14) "You shall guard yourself from every evil thing". Refer, Norman Solomon, *Judaism and the ethics of war,* 87 IRRC 302 (2005).

incorporated in the modern IHL, dissemination of peace trumps dissemination of laws of war and promotes humanity, peace, and prosperity.

5. A Humanitarian Appeal

The most abhorrent practice in the contemporary armed conflict is the denial of humanitarian assistance to civilians by the warring parties. The blockade of aid, often justified by falsely equating civilians with the combatants, completely destructs the spirit of laws of humanity and military ethics in terms of guaranteeing minimum standards of humanitarian care.[67]Forced starvation as an evil policy is widely practiced to deliberately inflict conditions which may systematically destruct a particular group by exposing them to dire living conditions. Currently. Gaza is now reeling under food, water, fuel and medicine scarcity due to unlawful and callous Israeli blockade of humanitarian assistance and turning into a "graveyard for children".[68]The unbearable pain and trauma inflicted on the survivors during armed conflict, especially children is further exacerbated by their death due to starvation, malnutrition and dehydration.[69]Since the pedagogy itself is mercy in the humanitarian studentship, humanitarian assistance is the maximum level of humanity during war to combat the sufferings of non-combatants. So, this is an earnest appeal from the researcher that all the warring parties, policy makers and combating soldiers must ensure an accessible humanitarian aid for victims as a life saving measure.

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67. Refer, GC, *supra* note 2, Common art. 3; CIHL, *supra* note 3, Rule 55; Christa Rottensteiner, *The denial of humanitarian assistance as a crime under international law*, 81 IRRC 555 (1999).
68. *Starvation as weapon of war being used against Gaza civilians,* Oxfam International (Oct. 25, 2023), https://www.oxfam.org/en/press-releases/starvation-weapon-war-being-used-against-gaza-civilians-oxfam. (last visited June 3, 2024) For the merciless genocidal statements of Israel Defence and Energy Ministers on complete siege of Gaza, see South Africa v. Israel, *supra* note 35, at 17, 18.
69. *Yemen: Coalition Blockade Imperils Civilians*, Human Rights Watch (Dec. 7, 2017), https://www.hrw.org/news/2017/12/07/yemen-coalition-blockade-imperils-civilians. (last visited June 3, 2024)

Conclusion

Broadly, the wars and its unfolding human catastrophe is just a reminder to the world to reason who is the real holder of the strings of international law. This is conspicuous in the fact that six decades of official illegal Israeli occupation of Palestine and the colossal destruction of peaceful lives of nearly five generations are uninterruptedly and daringly carried out in a broad daylight.[70] Additionally, the paradox of power struggle in international law reflects in Russia's support for Palestinian cause when the former itself engages in one of the Europe's bloodiest wars against Ukraine. Principally, the US's double standards take centerstage in weapons supply to both Israel (aggressor) and Ukraine (aggressed) in the respective conflicts and also simultaneously calling for their ceasefire. This clearly exposes the ideology driven modern day warfare engaged by the principal aggressors and their supporters with the sole motive of materialism, territorial expansion and numero uno. Thus, the commonality in these aggressors or rogue States like Israel, US, and Russia is the tendency to exhibit an attitude of non-compliance towards international law.[71]With the ideology of State leaders itself being genocide, ethnic cleansing, and annexation, the solution to regulate armed conflict lies beyond the dissemination of the IHL. This message of truth given by the overwhelming death tolls and the narratives of sexual violence victims is loud and clear. So, the cleansing of the human heart and mind afflicted by evil through dissemination of human values and principles including unity in diversity, coexistence, compassion, care, respect for humans and nature is the common sensical approach to prevent war and promote peace.

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70. C. Elaiyaraja, *The Victim State of Palestine and The Rogue State of Israel in the International Legal System: Contextual Rediscovery of Judicial Consciousness and Conscientiousness in the Wall Opinion- Science or Signs of Justice*, 7 Ambedkar L. Univ. J. 119 (2014).
71. Noam Chomsky, Rogue States: The Rule Of Force In World Affairs (Pluto Press 2000); C. Elaiyaraja, *The Concept of Self-Determination in the Jurisprudence of the International Court of Justice* 21, 231, 234, 317 (Oct.,2017) (Ph.D. thesis, The Tamil Nadu Dr. Ambedkar Law University) (on file with the Tamil Nadu Dr. Ambedkar Law University Library).

Redefining Balance in the Labour Landscape: Legal Perspectives on Childcare Leave and Gender Equality in India

Neha Agarwal*

Introduction

> "*Equality is the governing parameter. All historical perceptions should evaporate and their obituaries be written.*"[1]

Law is a living document and advancements in legal framework due to societal changes 'compel the present to have a penetrating look at the past'.[2] This becomes particularly visible in how traditional gender roles are translated into gendered benefits.[3] Most of the advanced economies have policies and programmes that recognize the need for the involvement of both parents in childcare to ensure all employees whether male or female of the reproductive age are on the same footing. In contrast, some of the emerging economies continue to practice rigid gender segregation by placing the sole burden of childcare on women by failing to provide a gender-neutral childcare leave. In India, while women are eligible for a maternity leave of

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1. Joseph Shine v. Union of India, (2019) 3 SCC 39 (per Dipak Mishra, CJI., majority).
2. *Id.*
3. Syeda Jesmin & R.R. Seward, *Parental Leave and Fathers' Involvement with Children in Bangladesh: A Comparison with the United States*, 42 J. Comp. Fam. Stud. 95 (2012).

twenty-six weeks[4], there exists no such paid childcare leave for men. The absence of gender-neutral childcare leave reinforces the view that women have the sole responsibility of childcare and imposes a 'double-day work'[5] burden on them. This cost of child-rearing which is borne disproportionately by the mother affects her wage-earning potential and subjects her to discrimination by employers in the form of 'motherhood penalty'.[6]

At the heart of the non-recognition of gender-neutral childcare framework is the normative perception wherein women are condoned to the role of primary caregiver.[7] In a study of parental leave policies in 186 countries by analyzing the World Policy Analysis Centre Adult Labour Database in 2013, 96% of countries offered some economic benefits to women while only 43.5% offered the same to men.[8] A lacuna in the legal recognition of childcare leave for fathers in India was also highlighted during the parliamentary discussions on the amendment to the Maternity Benefit Act, 1961 in 2017[9] and was recently reiterated by the Madras High Court.[10] This missing link of paternity benefit reflects the patriarchal mindset while drafting maternity relief and childcare provisions by the state. Fathers

4. The Maternity Benefit (Amendment) Act, 2017, § 5, No. 6, Acts of Parliament, 2017 (India); The Code on Social Security, 2020, *supra* note 2, at § 60.
5. Nishat Afroze Ahmed, *Work-Life Balance and Experiences of Working Women in Bangladesh: An Exploratory Study,* 41 South Asian Journal of Public Policy and Governance 1 (2017).
6. Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 Am. Sociol. Rev. 204 (2001).
7. V.V. Giri National Labour Institute, Impact on Employment of the Maternity Benefit (Amendment) Act, 2017: Identifying the Affirmative Initiative & Challenges in the Implementation of the Act 68 (2019).
8. Jody Heymann & Kristen McNeill, Children's Chances: How Countries Can Move From Surviving to Thriving (Harvard University Press 2013).
9. Press Trust of India, *Paternity Leave across All Sectors, Proposes Private Member's Bill,* The Indian Express (Sep. 17, 2017, 03:19 PM) https://indianexpress.com/article/india/paternity-leave-across-all-sectors-proposes-private-members-bill-4847778/.(last visited Jan. 1, 2024).
10. B. Saravanan v. Deputy Inspector General of Police & Ors., W.P. (MD). No. 19561 of 2023.

are forced to either avail sick leave or endure a loss of pay for being involved in childcare.

The concept of a gender-neutral childcare policy is largely opposed on the grounds because it would increase the cost of employment and undermine the economy's competitiveness. However, research has proved that countries with gender-neutral parental benefits continue to be economically competitive and have lower unemployment rates.[11] Such benefits also have a positive effect on gender equality in the labour market and within families.[12] Further, the Glass-Ceiling Index which measures the chances of a woman to equal treatment at work for ranking countries, have started utilizing the data on childcare costs and availability of parental leave amongst the other parameters.[13]

The lack of gender-neutral childcare framework has a counterproductive effect on the employment of women of reproductive age as they face barriers to access and enter labour markets. A review of protective legislation for working women beginning from the Bombay Maternity Benefit Act, 1929[14] to the Maternity Benefit (Amendment) Act, 2017[15] and the Code on Social Security Act, 2020[16] highlights their double-edged nature. These laws have proved to be deterrence to women's employment and have often become an obstacle to their opportunity to work by using these laws against them.[17] The

11. Earle A, Mokomane Z & Heymann J, *International Perspectives on Work-Family Policies: Lessons from the World's Most Competitive Economies*, 21 Future Child 191 (2011).
12. Castellanos-Serrano, *Is Universal Education and Care for Children aged 0-3 feasible?: The Case of Spain*, 3 Pol. Econ. 317 (2020).
13. Editorial, *The Economist's Glass- Ceiling Index*, The Economist (Mar. 6, 2024), https://www.economist.com/graphic-detail/glass-ceiling-index. (last visited Apr.1, 2024).
14. The Bombay Maternity Benefit Act, 1929, No. VII, Acts of Maharashtra State Legislature, 1929 (India).
15. Syeda Jesmin, *supra* note 5.
16. The Code on Social Security, 2020, *supra* note 2, at § 60.
17. Amrita Chhachhi, *Who Is Responsible for Maternity Benefit: State, Capital or Husband?* 33 EPW L21 (1998).

enactment of these laws is coupled with employer apprehension of increased cost and stable workforce in employing women in the reproductive age group. This lopsided burden explains the overall declining female labour force. As per the National Sample Survey report, the long-term trend in India suggests that the female labour force participation rate has declined from 34.1% in 1999-00 to 27.2% in 2011-12 despite steady economic growth and rising incomes.[18]

Further, India has not ratified the Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981 of the International Labour Organization.[19] This convention applies to all workers, whether men or women, in their responsibilities towards their dependent children and acknowledges the need for laws to reflect the change in traditional roles to achieve equality. It provides rights to safeguard the workers when such responsibilities restrict their participation or advancement in economic activity. Such policies acknowledge the diverse needs of individuals within the workplace irrespective of gender identity and foster inclusivity by extending respect to their roles as caregivers.

This paper aims to evaluate the gendered childcare policy on the touchstone of the Constitution. It employs a doctrinal research approach, incorporating descriptive, analytical and comparative evaluations. It explores the profound implication of a gender-neutral childcare policy on workplace dynamics, gender roles and overall gender equity. It seeks to initiate untouched discourses on childcare leave, such as violation of the right against discrimination of mothers, the right to equality and non-arbitrariness of fathers, the right to life and development of a child and the state's role in early childhood care. It argues for a recognition of childcare leave for fathers due to the rise of working parents and the replacement of extended families by

18. Sher Verick & Ruchika Chaudhary, *Women's Labour Force Participation in India: Why Is It so Low?,* International Labour Organization (2014).
19. The Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981, ILO Convention No. 156 of 1981, arts. 3, 4.

nuclear families. It also aims to bring back the contemporary discussion on the issue of who shall bear the responsibility of childcare in a household with both working parents from a comparative lens.

1. Impact of Childcare Leave on Gender Equity at Home and Workplace

Childcare leave is an employment protection benefit in the form of a paid leave of absence extended to new parents. The genesis of this protection and entitlement is to fulfill the welfare nature of the state on whom the duty is primarily imposed. While maternity leave is stipulated on countries through the International Labour Convention[20], there exists no such stipulation regarding paternity leave.[21] Due to the lack of such stipulation, paternity benefit leaves are either non-existent or form a part of a combined parental leave scheme rather than a separate right. This inequity in access to childcare leave has impacted the overall gender parity in the workplace and particularly the economic participation of women creating 'motherhood pay gap'. Having a child while building a professional career was recognized as one of the top five important challenges faced by working women.[22] Men, on the other hand, have been discouraged from childcare due to workplace norms and a lack of paternal benefit policies.

The perception of society towards care-giving is fundamental for its social well-being and gender parity.[23] The provision of care-giving can be administered by families, markets or the state depending on the welfare and gender policies. A gender-neutral childcare leave is a valuable policy of family entitlement that provides numerous advantages to both mother and father. This benefit recognizes the significance of the involvement of both

20. Maternity Protection Convention, No. 183, ILO, 2000.
21. OECD Family Database, https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf (last visited Jan. 1, 2024).
22. Lydia Dishman, *What are the Top Five Challenges for Women around the World*, Fast Company, (Oct. 13, 2015), https://www.fastcompany.com/3052181/these-are-the-biggest-work-challenges-for-women-around-the-world. (last visited Jan. 1, 2024).
23. Castro-Garcia & Pazos-Morann, *Parental Leave Policy and Gender Equality in Europe*, 22 Fem. Econ. 51 (2016).

parents in their children's upbringing and grants them the opportunity to take temporary leave from work to nurture, connect, bond and care for their newborn or adopted or commissioned child. Such a benefit initiates gender equity at home and workplace as it moves away from the traditional burden on women regarding childcare.

1.1 Gender Parity at Home and Workplace

Paternity benefit is largely aimed at redistribution of childcare work, break gender stereotypes, reduce gender-based work inequalities and enhance mutual respect and decision-making. When fathers have the opportunity to participate actively in caregiving and nurturing, it fosters a more equitable and nurturing atmosphere within the family. The spillover effect of work-family conflict[24] which arises due to incompatible demands of both the work such as absenteeism and intention to quit[25] can be addressed. Further, a positive correlation has been established between division of domestic labour and family outcomes especially in reducing adverse impact on a mother's employment.[26]

The presence of gender wage gap in many Western countries can be attributed to the extent of family-friendly policies especially the access to childcare leave at birth.[27] The effect of paternity leave has also been significant in reducing the gender wage gap as it has led to increasing woman's wages and overall household income due to division of household labour.[28]

24. R.G. Netemyer, R. McMurrian, *et.al., Development and Validation of Work-Family Conflict and Family-Work Conflict Scales*, 81 J. Appl. Psychol. 10 (1996).
25. R. Aslam, S. Shumaila, *et.al., Work-Family Conflict: Relationship between Work-Life Conflict and Employee Retention- A Comparative Study of Public and Private Sector Employees*, 1 ICJRB 18 (2011).
26. Lynn Prince Cooke, *The Gendered Division of Labour and Family Outcomes in Germany*, 66 J. Marriage Fam. 1246 (2004).
27. I. Boeckman, J. Misra, *et.al., Cultural and Institutional Factors Shaping Mother's Employment and Working Hours in Post-Industrial Countries*, 93 Social Forces 1301 (2015).
28. S.H. Andersen, *Paternity Leave and the Motherhood Penalty: New Casual Evidence*, 80 J. Marriage Fam. 1125 (2018).

Father's involvement in household and childcare has been proved as a route to further gender equality and increased financial well-being of the family.[29] Thus, a gender-neutral childcare framework can play a crucial role in bridging the gender wage gap and improving India's ranking in both the Women's Economic Participation and Opportunity Index, and the Gender Parity Index.

1.2 Correlation between Work-Family Measures on Work Performance

Work-life balance is a state of balance where both personal and professional life are treated equally. As each role demands a different set of requirements and often overlap in their demands, it leads to numerous challenges and is a significant cause of stress.[30] Studies have proven that there is a positive relationship between work-family measures and better performance at the workplace. Benefits to the employer include better commitment, lower absenteeism, skill preservation and a boost to the company's socially responsible image.[31] It facilitates a supportive workplace environment, diminishes the stigma associated with male employees taking family-related leave and fosters a diverse and inclusive workplace. The World Economic Forum has reiterated that the uptake of paternal leave could be a leverage point for reducing gender gap.[32] Further, a study revealed that each month that the father avails parental leave, has a significant positive impact on the mother's earnings, compared to shortening of the leave of the same length by the mother for the said duration.[33]

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29. *Id.* at 1143.
30. R.K. Yadav & S.S. Yadav, *Impact of Work Life Balance and Stress Management on Job Satisfaction among the Working Women in Public Sector Banks*, 26 ILSHS 64 (2014).
31. Damian Grimshaw & Jill Rubery, *The Motherhood Pay Gap: A Review of the Issues, Theory and International Evidence,* ILO Conditions of Work and Employment Series (2015).
32. N. Tochibayashi & N. Kutty, *Could Japan's Paternity Leave Policy Narrow the Gender Gap*, World Economic Forum, https://www.weforum.org/agenda/2023/10/could-japans-paternity-leave-policy-help-narrow-the-gender-gap/ (last visited Dec. 5, 2023).
33. Elly Ann Johansson, *The Effect of Own and Spousal Parental Leave on Earnings*, 4 IFAU 1 (2010).

1.3 Promoting Best Interest of the Child

The documented research highlights the critical correlation between children' experiences in their early years on their long-term well-being.[34] Parental leave ensures that parents have time to provide care for the healthy development of their child without the fear of either pay loss or replacement at work. Further research has suggested an indirect relationship between paternity leave and a child's health by providing an opportunity to minimize risk and illness during infancy.[35] This uninterrupted period cultivates a deeper and stronger emotional connection, encourages attachment and strengthens the father-child relationship. Evidence has also emerged on the improvement of a child's performance at school as a result of the father's participation in child-rearing.[36] The substantial benefit of a father's involvement in early childcare as a positive effect on children and the stability of the family is well documented in Sweden.[37] Further, paid leave also has a positive impact on the father's relations with the child.[38]

1.4 Health and Well-being of the Father

Paternity benefit enhances a father's overall well-being by enabling them to prioritize their family's requirements without the stress of work. This benefit allows fathers to assist and support their partners in facing physically and emotionally taxing post-natal challenges. Access to paternity leave diminishes stress, increases contentment and fosters mental well-being of fathers and their families. It can also protect fathers that encounter repercussions in the workplace when they defy gender norms associated

34. United Nations Children's Fund, *Paid Parental Leave and Family-Friendly Policies: An Evidence Brief,* UNICEF (2019).
35. Sara Cools, Jon H. Fiva, *et.al*., Causal Effects of Paternity Leave on Children and Parents 117 Scan J. Econ. 801 (2015).
36. *Id.*
37. Ruggie M & Haas L, *Equal Parenthood and Social Policy: A Study of Parental Leave in Sweden* 22 Contemp. Social 412 (1993).
38. Carl-Philip Hwang & Michael E. Lamb, *Father Involvement in Sweden: A Longitudinal Study of Its Stability and Correlates*, 21 World Int. J. of Behav. Dev. 621 (1997).

with masculinity and dedication to work by endeavoring to participate in care-giving and other domestic responsibilities.[39] Further, it can benefit fathers who value work flexibility and care-giving but are reluctant to seek it because of fears of stigmatization.

2. History and Evolution of Childcare Leave in the Indian Labour Landscape

2.1 Identification of Guardians of Children under the Constitution of India

The Constitution explicitly guarantees both men and women the right to equality of status and opportunity both in the preamble and as a fundamental right.[40] It also guarantees non-discrimination by the state solely based on sex.[41] Additionally, the state has been empowered to make special provisions to protect the rights and interests of women and children.[42] Further, the state has been directed to frame policies to ensure equal pay for equal work, humane conditions of work, maternity relief and provide for early childhood care respectively. [43] The legislative power to enact on the subject of 'maternity benefits' is bestowed on both legislatures under Entry 24 of List III of the Seventh Schedule of the Constitution. Pursuant to this power, gendered childcare law has been enacted.

2.2 Extent and Applicability of the Extant Maternity Benefit Legislations

The first legislation for the provision of maternity benefits can be traced to the Bombay Maternity Benefit Act, 1929[44], followed by The Mines

39. Laurie A Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma*?, 69 J. Soc. Issues 322 (2013).
40. India Const. art. 14.
41. *Id.* at art. 15.
42. *Id.* at art. 15 (3).
43. *Id.* at arts. 39, cl. (d), 42, 45.
44. The Bombay Maternity Benefit Act, *supra* note 16 at § 5.

Maternity Benefit Act, 1941[45], The Employees State Insurance Act, 1948[46] and The Plantation Labour Act, 1951[47]. These legislations are not uniform with regard to beneficiaries, eligibility criteria, period of paid leave or the quantum of benefit. To overcome these deficiencies and usher uniformity and consistency across sectors of economy and country, a central law was enacted by repealing the aforementioned laws.[48]

The Code on Social Security Act, 2020 applies uniformly to all women working in any establishment of government, in shops and other establishments with ten or more persons employed and to other establishments to which the state government extends the provisions of this law. Every woman is entitled to a maternity benefit in the form of a paid leave at the rate of her average daily wage for her absence, for the period preceding her date of delivery, date of delivery and the period after such delivery.[49] The maximum period of such paid leave was initially 12 weeks but it has been increased to 26 weeks through the 2017 Amendment for the first two surviving children and same was extended under the Code. It also extended the benefits for the first time to a woman who adopts a child below three months of age and to a commissioning mother to the tune of 12 weeks and in case of miscarriage to the extent of 6 weeks.

Maternity benefit provisions can be traced from the Central and State specific rules for public employment and public corporations, and employment contracts of various private employers. The Code encourages the employer to allow mothers an option to carry work from home based on the nature of work, after availing the paid leave.[50] It also imposes a prohibition and penalty on the employer regarding dismissal, discharge, punishment or any

45. The Mines Maternity Benefit Act, 1941, § 4, 5, No. 19, Acts of Parliament, 1941 (India).
46. The Employees State Insurance Act, 1948, § 46(1)(b), 50, 73, No. 34, Acts of Parliament, 1948 (India).
47. The Plantation Labour Act, 1951, § 32, No. 69, Acts of Parliament, 1951 (India).
48. The Maternity Benefit Act, 1961, No. 53, Acts of Parliament, 1961 (India).
49. The Code on Social Security, 2020, *supra* note 2, at § 60.
50. *Id.* at § 60 (5).

disadvantage to service conditions against an employee for absence while availing maternity benefits except in case of gross misconduct.[51]

2.3 Piecemeal Paternity Benefit Provisions in India

In 1998, a paid paternity leave was provided to male members and probationers of the All India Services officer, having less than two surviving children, to the extent of up to 15 days by a notification under Rule 18(B) of the All India Civil Services (Leave) Rules, 1955.[52] This leave was to be availed during a specific duration i.e., up to 15 days before or up to six months after the date of delivery of a child or in case of adoption of a child below the age of one year[53]. Unfortunately, the benefits under this provision were neither increased nor have been extended to other government employees at different levels. An attempt to extend the paternity benefit to all employees governed by labour laws was attempted through a private member bill, The Paternity Benefit Bill in 2019 but was met with a failure.

Some States in India have established provisions for paternity leave. In 2017, Maharashtra introduced a policy allowing male employees in the public sector whose spouses are incapacitated or deceased to take a 180 day leave until the child completes eighteen years of age.[54] Similarly, Kerala provides a paternity benefit of 10 days for the first two children at the time of delivery, while Rajasthan offers paternity benefit of 15 days, extendable twice; West Bengal and Sikkim have introduced one-month paternity benefit policies in 2016 and 2023 respectively; Uttarakhand allows for 180 days of adoption leave for single males adopting a child, and Karnataka has introduced a 6-month paternity policy for single male employees, contingent

51. *Id*. at § 68.
52. The All India Services (Leave) Rules, 1955, r. 18(B), GSR No. 71, 1988 (India).
53. The All India Services (Leave) Rules, 1955, r. 18 (C), GSR No. 707 (E), 2007, (India).
54. Sanskruti Madhukar Kale*, Lack of Paternity Leave is Negating the Purpose of Maternity Leave*, Live Law (Dec. 2, 2023), https://www.livelaw.in/lawschoolcolumn/lack-of-paternity-leave-is-negating-the-purpose-of-maternity-leave-243528.

on their not remarrying.[55] While these provisions are laudable, their application is limited and currently fragmented under various state laws.

Apart from the aforementioned provision, there exists no specific law that mandates gender-neutral childcare provisions akin to maternity benefits in either public sector or private sector in the Indian labour sphere. Some companies in the private sector have started offering paternity benefits in the form of paid leave ranging from 5 days to up to 2 weeks as a way to support working fathers.[56] This practice has been nominal and has been a largely discretionary policy of the employer. However, the pursuit of profit motives and shareholder interests may undermine genuine efforts to promote gender equity in the workplace unless mandated by law.

2.4 Judicial Approach towards Childcare Benefits

The courts have reiterated the need to include the 'best interests of the child' as a primary consideration in providing maternity relief. In consonance, the courts have interpreted the provisions of maternity benefit to extend to daily wage workers[57], ad-hoc employees[58] and children through surrogacy[59]. Courts have criticized the approach of placing a disproportionate burden of upbringing children on women as a violation of their right to non-discrimination on grounds of sex as it further reinforced gender stereotypes.[60] The court observed that a 'woman is not a pendulum and thus cannot be forced to swing between employment and motherhood'.[61]

55. *Id*.
56. Brinda Sarkar & Sreeradha Basu, *Paternity Leave Gaining Ground Among Indian Companies*, The Economic Times (Feb. 20, 2022), https://economictimes.indiatimes.com/news/company/corporate-trends/paternity-leave-gaining-ground-among-indian-companies/articleshow/89669213.cms?from=mdr. (last visited Sept.23,2023
57. Municipal Corporation of Delhi v. Female Workers, (2000) 3 SCC 224.
58. Rattan Lal and others v. State of Haryana, (1985) 4 SCC 43.
59. P. Geetha v. The Kerala Livestock Development Board Ltd, WP(C). No. 20680 of 2014 (H).
60. Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
61. T.N.S.T.C (Coimbatore) Ltd. v. B. Rajeswari, (2023) 2 LLJ 351.

Recently, the Madras High Court highlighted the necessity for a legislation recognizing paternity leave as it is a basic human right.[62]

3. Constitutional and Legal Implications of a Missing Gender-Neutral Childcare Framework

3.1 Right to Equality and Positive Discrimination against Women

Maternity benefit laws across the world have been guaranteed as a key universal human right to ensure safe maternity, care for women and children. They are aimed at promoting equality of opportunity and preventing discriminatory treatment due to their reproductive role. The Equal Remuneration Act, 1976 expressly prohibits and restricts discriminatory conditions of recruitment, promotions, training, transfer and other service conditions.[63] Despite the stipulation of protective measures in policies[64] on non-discrimination and non-dismissal in relation to maternity along with the guaranteed right to return to work, women in India continue to face discrimination due gendered childcare framework. To undo the historical and structural disadvantages faced by women due to the existence of a gendered childcare framework, a need to review such protective legislation on the substantive equality framework arises.

3.1.1 Positive Discrimination and Impact of State Paternalism

Equality is a dynamic concept and it cannot be imprisoned within the traditional and doctrinaire limits.[65] Sex-based stereotypes and discrimination have been explicitly prohibited under Articles 14 and 15.[66] Positive discrimination in favour of women was devised under Article 15(3) to remedy the disadvantages faced by them but its application remains

62. B. Saravanan, *supra* note 10.
63. The Equal Remuneration Act, 1976 § 5, No. 25, Acts of Parliament, 1976 (India).
64. International Labour Organization Maternity Protection Convention, 2000, C183.
65. Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
66. India Const. arts. 14, 15.

predominantly based on a paternalistic outlook of the state.[67] The gendered provision in such protective legislation is based on two key concepts i.e. *suitability* and *vulnerability* of women.[68] On the ground of suitability, law assigns certain tasks and occupations as more appropriate to women based on traditional gender roles whereas on the ground of vulnerability, law characterizes women as helpless victims without agency.

Recently, the Supreme Court has explicitly recognized the risk of gender stereotypes based on concepts of suitability and vulnerability and held that such paternalistic notions limiting women's autonomy cannot be employed under the guise of protectionism under Article 15(3).[69] It observed that any legislation that perpetuates oppression of women is not a beneficial legislation.[70] It rebutted a presumption that all discrimination favourable to women is protected under Article 15(3) and that an 'under-inclusive' definition is not discriminatory.[71] It affirmed that the constitutional assurance under Article 15(3) cannot be considered independently as it is interconnected with broader constitutional principles of equality under Articles 14 to 18.[72] The current gendered childcare framework is enacted on parameters of suitability and vulnerability of women towards child-rearing and hence needs review in the light of the new approach of the court towards Article 15(3) where inequity and inequality through positive discrimination are held to invite wrath of the Constitution.

3.1.2 Need for Strict Judicial Scrutiny and Proportionality Test

There is a need for deeper judicial scrutiny in reviewing legislations that give effect to the prevailing societal conditions and where the differences on

67. Unnati Ghia, *Affirmative Action under Article 15(3): Reassessing the Meaning of 'Special Provisions' for Women* 32 NLSIR 226 (2020).
68. *Id.* at 229.
69. *Supra* note 1, at 185.
70. *Id.* at 118.
71. *Supra* note 1.
72. *Id.*

the basis of sex are pronounced due to rigid and oppressive cultural norms as in the case of traditional labour sphere.[73] The positive discrimination laws shall focus on ways that can eliminate unequal consequences of sex-based differences along with state protection to withstand constitutional scrutiny. The test of *strict scrutiny* as devised by the American Supreme Court can be referred to evaluate the double-edged nature of positive discrimination laws and the notion of *romantic paternalism* by the state.[74] The test requires satisfaction of two-prongs i.e., justification of impugned legislation and proportionality of the measure. The Indian Supreme Court has applied this test in its review of several protective legislations for women.[75]

While resolving the debate between a classical counter between individual rights and community orientation of rights, the Supreme Court of India has noted that the important jurisprudential tenant at stake is not the prioritization of rights *inter se* but rather the practical enforcement challenges that compete with such guaranteed right.[76] The positive discrimination laws in favour of women end up victimizing the subject under the guise of protection. To overcome this challenge, the legislative intervention shall comply with the *proportionality test* i.e., the law for protection of women in the form gendered childcare benefits should be proportional to the legitimate aim of childcare and the criteria for evaluating such proportionality shall be standards deemed reasonable in a democratic society and shall be least intrusive of fundamental rights of individuals.[77]

Applying the *strict scrutiny* and *proportionality test* to gendered childcare leave provisions in India, it is evident that the existing framework suffers from deep-seated bias rooted in stereotypical morality and the notion

73. Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism,* 7 Women's Rts L. Rep. 178 (1982).
74. Frontiero v. Richardson, 411 U.S. 677 (1973).
75. Vishaka & Ors. v. State of Rajasthan, (1997) 6 SCC 241; Randhir Singh v. Union of India & Ors., (1982) 1 SCC 618.
76. Anuj Garg & Ors. v. Hotel Association of India & Ors., AIR 2008 SC 663.
77. Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors., AIR 2017 SC 4161.

of sexual roles. On a deeper judicial scrutiny, the framework fails the test of equality as it perpetuates gendered norms and also violates the right to autonomy, equality, opportunity and livelihood of women. Further, it fails the *proportionality test* as the means of gendered childcare framework to achieve the ends of safe motherhood and childcare are neither proportionate nor least intrusive to the fundamental rights of women. Part III places an imperative on the state to ensure the labour sphere inspires confidence in women to discharge their duty freely and such that the societal and cultural gender norms do not create oppression or impose disproportionate burden on them or restrict their fundamental rights. To fulfill its constitutional commitment to equality in a substantial sense, the state has to reconsider the invidious discrimination perpetrated on the basis of sex in the workplace with respect to childcare.

3.2 Right to Equality and Non-Arbitrariness against Fathers

Positive discrimination in favour of sex is permissible if it is not only on the grounds of sex but also based on 'other considerations'.[78] The gendered childcare framework is violative of the right to equality of fathers and is discriminatory against them both on the surface of the law as well as in its implementation. The *suitability* and *vulnerability* parameters of gendered childcare framework based on prevailing cultural practices and gendered social structures exclude fathers from care-giving responsibilities solely based on sex and not any other considerations and thus perpetuate arbitrariness.

3.2.1 Effects Test and the Doctrine of Arbitrariness

While there is a constitutional prohibition on class legislation, reasonable classification based on intelligible differentia and rational nexus has been permitted and is tested by the courts on the *doctrine of arbitrariness*. This doctrine is used as a crucial tool by the courts through a long line of

78. Dattatraya Motiram More v. State of Bombay, AIR 1953 Bom 311.

judgments of *Ajay Hasia*[79], *E.P. Royappa*[80], *Maneka Gandhi*[81], *Shayaro Bano*[82], etc. to determine the validity of a law on allegations of being arbitrary and oppressive. The gendered maternity benefit laws owing to their benevolent objective pass the preliminary test of equality on the touchstone of the constitution on grounds of reasonable classification. However, a further analysis exposes the inherent bias such laws continue to pervade in the labour markets.

Applying the *doctrine of arbitrariness*, the courts in their positivistic approach to equality, have affirmed that 'an arbitrary act' is implicitly unequal both from political logic as well as under the constitution.[83] Any discrimination on the grounds of sex is to be assessed 'not by the objectives' behind the law but by 'the effect' it has on the fundamental rights of affected individuals. Any discrimination, whether direct or indirect, founded on the understanding of the role of sex is constitutionally prohibited. A deeper evaluation of maternity benefit laws in the overall workplace environment has exposed widespread discrimination against men based on their child-caring role. This deprivation in turn perpetuates arbitrariness in the form of systemic inequalities in the workplace, disproportionate burden on men to be sole breadwinners and hinders their personal and professional development. Thus, a gendered childcare framework fails the test of arbitrariness as the effect of such laws continues to perpetuate sex-based discrimination in the workplace.

3.3 Right to Life and Overall Development of a Child

Childhood is construed as a 'golden age' and children have been recognized as those in need of care and protection for their survival and development. The right to life and development of a child beginning from

79. Ajay Hasia v. Khalid Mujib Sehravadi, (1981) 1SCC 722.
80. E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3.
81. *Supra* note 65.
82. Shayara Bano v. Union of India, (2017) 9 SCC 1.
83. *Supra* note 65, at 38.

the pre-natal period[84] to the post-natal period[85] has been recognized as a fundamental right of the child under Article 21. The role of both parents during this period is essential for proper development and survival of the child. Further, the state is empowered to make affirmative and positive discrimination laws for the benefit of children in their best interest. [86] Under Part IV of the Indian Constitution, the state is endowed with a two-fold directive in its dealing with childcare. While on one hand, Article 39(f) directs the state to evolve a policy for the security and healthy development of children, on the other hand, Article 45 directs the state to take steps to provide early childhood care for children until they complete six years of age. Lack of a gender-neutral childcare framework deprives a child of the support of both parents during the most crucial age of development. This eventuality is starker in nuclear families with working parents which is gradually becoming the societal norm.

The Convention on the Rights of Child, a binding international instrument on the human rights of children has also imposed duties on the signatory states to undertake measures to recognize and guarantee a full enjoyment to the maximum extent possible of the right to life, survival, protection, health and development of the child.[87] Recently, relying upon the mandate of the aforementioned international instrument on India as a signatory, a single-judge bench of the Madras High Court has affirmed that the act of cancellation and refusal of paternity leave amounts to violation of Article 21 as the right is a culmination of fundamental right of live, survive, health and development of a child.[88]

84. X v. Union of India & Anr., W.P. No. 1137 of 2023.
85. M.C. Mehta v. State of Tamil Nadu & Ors., AIR 1997 SC 699; Unni Krishnan v. State of Andhra Pradesh, [1993 (1) SC 645.
86. India Const. art. 15, cl. (3)
87. The United Nations Convention on the Rights of the Child, 1577 U.N.T.S, arts. 6, 24, (Nov. 1989)
88. *Supra* note 10.

4. Comparative Evaluation of Childcare Leave Provisions Across Jurisdictions

As per the International Labour Organization's data, statutory paternity leave is provided in 78 out of 167 countries by 2013[89] to support working fathers and promote gender equality. To understand the disparity among countries regarding parental leave and to discover the best practices, countries are broadly categorized into advanced industrialized economies and emerging economies. The evaluation of the first category can help in designing the policy while the latter group can help in deciding the adequate quantum of paternity leave to ensure that India ushers gender equity while retaining its economic competitiveness.

4.1 Advanced Industrialized Economies

The parental leave policies in these economies provide fathers a paid leave to encourage their involvement in childcare alongside mothers. Scandinavian countries have championed parental leave structure alongside Japan and South Korea. The specifics of these policies such as length of parental leave, father's quota of leave and level of pay vary widely.

4.1.1 Shared Pool of Childcare Leave Policy in Norway and Canada

Norway has been a pioneer in recognizing a statutory status to a gender-neutral parental leave since the 1970s.[90] It provides for a shared parental leave, common to both parents, for 49 weeks with 100% pay or 59 weeks with 80% pay at any time during the child's first three years.[91] In Canada, both parents are entitled to a standard parental benefit in the form of a paid leave for

89. International Labour Organization, *Maternity and Paternity at Work: Law and Practice across the World* (ILO, 2014).
90. S. Kamerman & P. Moss, The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market, 191 (Policy Press, 2011).
91. Global People Strategist, *An In-Depth Look at Norway's Progressive Parental Leave Policies* (July. 25, 2023) https://globalpeoplestrategist.com/parental-leave-in-norway/.

40 weeks with 55% of pay.[92] This parental leave is in addition to the maternity leave of up to 15 weeks available exclusively to mothers and it can be availed starting from the date of child's birth or placement of child through adoption.[93]

4.1.2 Exclusive 'Daddy's Month' Policy in Sweden and South Korea

Sweden is often cited as a leader in parental leave policies as it was the first country in 1974 to replace a gendered maternity leave with a parental leave provision which could be availed by both parents for childcare either during birth or adoption. Since 2021, both parents together are entitled to up to 480 days i.e., approximately 16 months of paid parental leave per child. To enhance the utilization of paternity leave among fathers, in 1995, Sweden also introduced 'the daddy month' i.e., a quota of 30 days of parental leave reserved exclusively for the father which is non-transferrable.[94] This quota was further increased to 90 days in 2016.[95] This gender-equity provision has been instrumental in the high labour force participation rate of nearly 90% in Sweden.[96] Taking inspiration from Sweden's 'daddy month', South Korea in 2014, initiated a bonus incentive scheme for fathers in the form of a paid leave for a month to encourage them to avail parental leave.[97] This period was later extended to 3 months in 2016.[98]

4.1.3 Equal Childcare Leave Policy in Spain and Japan

In 2021, Spain has become the first country to provide both the parents an equal parental leave of 16 weeks each which was non-transferrable and

92. Government of Canada, https://www.canada.ca/en/services/benefits/ei/ei-maternity-parental.html (last visited Dec. 1, 2023).
93. *Id.*
94. Ann-Zofie Duvander & Mats Johansson, *Does Father's Care Spill Over? Evaluating Reforms in Swedish Parental Leave Program*, 25 Fem. Econ. 67 (2019).
95. Work-Life Balance, https://sweden.se/work-business/working-in-sweden/work-life-balance (last visited Nov. 25, 2023).
96. *Id.*
97. Yeonijin Kim & Kundqvist Asa, *Parental Leave Reforms in South Korea, 1995-2021: Policy Translation and Institutional Legacies*, 30 Soc. Politics 1113 (2023).
98. *Id.*

fully paid, during childbirth or adoption.[99] The law also mandates both the parents to avail an uninterrupted 6 weeks leave following birth and also contains provision for extension in case of hospitalization or disability of the child or multiple births.[100] Similarly, Japan has one of the longest childcare leave reserved for fathers as they are allowed to take a paid leave up to one year i.e. till their child turns a year old.[101] To increase the uptake of paternity leave among Japanese fathers, employers are mandated to encourage fathers to take leave or face labour authority warnings.[102]

4.1.4 Non-Transferrable Childcare Leave Policy in Iceland

In 2000, the Parliament of Iceland passed a historic parental leave law wherein both parents were entitled to 3 months each of non-transferrable leave with 80% salary thereby becoming the first to offer fathers such a long leave and economic compensation.[103] This was further increased in 2021 when a new law was enacted to provide parental leave of at least 6 months for each parent with an option to transfer 6 weeks of their quota to their partner and it can availed till the child attains 24 months of age.[104]

4.2 Emerging Economies

The concept of paternity leave is at a nascent stage in emerging economies. As parental leave policies in Southeast Asia vary widely, some of these economies have been analyzed to discover the effect of such policies on gender equity and competitiveness of the economy.

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99. Ana Requena Aquilar, *Parental Leave: Sixteen Weeks are Changing Spanish Society*, The Hindu (Mar.10, 2023), https://www.thehindu.com/news/international/sixteen-weeks-are-changing-spanish-society/article66602801.ece. (last visited Jan. 5, 2024)
100. *Id.*
101. N. Tochibayashi & N. Kutty*, supra* note 32
102. *Id*.
103. Carloine la Porte, G.B. Eydal, et al, Successful public Policy in the Nordic Countries: Cases, Lessons, Challenges 370 (Oxford University Press 2022).
104. Nordic Cooperation, https://www.norden.org/en/info-norden/maternitypaternity-leave-iceland (last visited Nov. 30, 2023).

4.2.1 Singapore

The government-paid paternity leave for working fathers including self-employed individuals is up to 2 weeks which can be taken within 12 months of the child's birth or adoption.[105] This provision was further enhanced to 4 weeks from January 1st 2024. [106]

4.2.2 Indonesia

In Indonesia, male civil servants are entitled to a month-long paternity leave at basic pay.[107]

4.2.3 Thailand

A mandatory paternity leave policy provides for 15 days of paid leave in the public sector.[108]

4.2.4 Philippines

Fathers in both the private and public sectors are entitled to a paternity benefit of seven days of a fully paid leave for the first four deliveries.[109] Further, mothers are allowed to transfer up to 7 additional days of their paid leave to the child's father thereby allowing men up to 14 days of paid leave.[110]

105. Ministry of Manpower, Government of Singapore, https://www.mom.gov.sg/employment-practices/leave/paternity-leave (last visited Jan. 5, 2024).
106. Government Paid Leave, Government of Singapore, https://www.profamilyleave.msf.gov.sg (last visited Jan. 5, 2024).
107. Wayan Wiryawan, *The Rights of Paternity Leave for Husbands in Indonesian Legal Renewal*, 18 IJCJS 133 (2023).
108. Charles Chau, *Thailand Amends Law for Longer a Paid Maternity Leave*, HRM Asia (Mar. 14, 2022), https://hrmasia.com/thailand-amends-law-for-longer-paid-maternity-leave/.(last visited Jan.5,2024)
109. The Paternity Leave Act, 1996, § 2, No. 8187, Acts of Parliament, 1996 (Philippines).
110. Marian Baird, Elizabeth Hill, *et. al*., *The State of Paternity Leave in Southeast Asia*, The Diplomat *(*June. 15, 2019), https://thediplomat.com/2019/06/the-state-of-paternity-leave-in-southeast-asia/.(last visited Jan. 5, 2024)

4.2.5 Vietnam

State-sponsored paternity leave from social insurance is provided for up to 14 days.[111]

From a perusal of the abovementioned parental leave policies, it is pertinent to note that the length of paternity leave, level of pay, and eligibility criteria vary widely across different economies. A positive effect on the uptake of paternity leave has been observed in economies where fathers' are provided a separate quota and paid leave.[112] However, due to existing societal stigma and fear of delayed promotions, the utilization of paternity leave remains poor especially when shared parental leave is provided with transferrable benefits. Thus, the proposed gender-neutral childcare framework in India shall be designed such that it provides for a dedicated quota of paid leave policy for fathers in the form of 'daddy month' as in the case of Sweden and South Korea, and it shall be non-transferrable as in case of Iceland to fulfill its gender equity commitments. To retain India's economic competitiveness, following the Singapore model of 4 weeks of paid leave seems to be most appropriate as most emerging economies are on a path to match that quantum of leave. The cost of this leave can be borne through contributory social insurance as in the case of Vietnam.

5. Suggestions and Recommendations

Policy and policy design can play a significant role in encouraging fathers to avail leave. The global data shows meaningful progress in the provision of paid paternity leave from 1995 to 2015 wherein it increased from 21% to 52%.[113] Further, research indicates that a policy of non-transferrable and fully paid leave for each parent is necessary to achieve gender equality.[114] Furthermore, the

111. *Id*.
112. Sara Cools*, supra* note 35.
113. UNICEF, *Paid Parental Leave and Family-Friendly Policies*, https://www.unicef.org/documents/paid-parental-leave-and-family-friendly-policies (last visited Feb. 29, 2023).
114. Cristina Castellanos-Serrano, Lorenzo Escot, *et.al*., *Parental Leave System Design Impacts on its Gendered Use: Paternity Leave Introduction in Spain*, 73 J. Fam. Relat. 359 (2023).

gender-neutral childcare policy can help to alleviate the 'mommy tax' as it reduces their drop-out from the workforce, improves the gender wage parity and overall economic productivity.[115] The proposed gender-neutral childcare framework shall imbibe the following framework to initiate gender mainstreaming in the Indian labour sphere.

5.1 Enactment of a Gender-Neutral Childcare Framework

The potential discrimination and disadvantages faced by childbearing women or men with family responsibilities can be mitigated by creating a collective mechanism of a gender-neutral childcare framework. The responsibility can shared in the form of a contributory scheme consisting of state, employer, and employee as has been the case of other social security provisions such as insurance, gratuity, pensions, etc. The total childcare leave shall include both maternity and paternity leave to provide access to quality childcare benefits to both parents. The proposed framework shall include the following provisions in the proposed Paternity Benefit Law alongside the existing maternity benefit provisions to balance childcare and retain economic competitiveness:

a. Provision of a 'non-transferrable' paid leave for fathers in the form of a quota on a 'use it or lose it' basis.
b. Provision of 30 days of childcare leave to the father that can be utilized within one year of childbirth for the first two surviving children through birth, adoption or surrogacy.
c. Legal assurance of job security and non-discrimination in career progression for fathers availing childcare leave and employer liability in case of failure.
d. Paternity leave can be provided as a contributory social security provision.

115. UNICEF, *Redesigning the Workplace to be Family-Friendly: What Governments and Businesses can do*, https://www.unicef.org/early-childhood-development/family-friendly-policies (last visited Dec. 21, 2023).

e. Provision of increased flexibility to work from home for both mothers and fathers after exhausting the leave period.

5.2 Establishment of a Robust Co-Regulatory Enforcement Mechanism

Gender mainstreaming of the childcare system can lead to comprehensive measures to deal with multiple forms of discrimination such as parity in pay, delayed promotions, and arbitrary hiring and firing, while availing childcare benefits. To achieve maximum impact on gender equity, gender mainstreaming needs to be carried out by the state, private organizations, and at all levels of society. While gender mainstreaming is integrated as a strategy in the design of the proposed law, for such law to be effective the same outlook needs to be integrated in its implementation. By following the Japanese model, a robust implementation system can be placed wherein the labour authorities undertake regular inspections to verify the access and uptake of childcare leaves by fathers and the defaulting employers are warned and penalized in case of recurring inaction/violation.

Conclusion

The proposed gender-neutral framework on childcare would play a significant role in aiding women to balance their productive and reproductive roles. By enacting a paternity benefit law, India can achieve several significant outcomes. Firstly, it can promote gender equality by recognizing and supporting the shared responsibilities of parents in raising children. This would help break down traditional gender stereotypes and empower women to pursue their careers while ensuring that men actively participate in childcare. Secondly, a mandatory gender-neutral framework on childcare would contribute to the overall well-being and development of children. Accessible and affordable childcare facilities would ensure that children receive quality care and early education, laying the foundation for their future success. Additionally, the law would foster stronger parent-child bonds and create a nurturing environment for children, positively impacting their cognitive, social, and emotional development.

Finally, the implementation of a gender-neutral childcare framework would have positive implications for the economy. Supporting working parents, particularly mothers, to remain in the workforce, would increase female labour force participation and boost productivity. This, in turn, could lead to economic growth and development. However, successful implementation requires careful planning, comprehensive policies, and adequate resources. It is crucial to involve relevant stakeholders, including government bodies, employers, and civil society organizations, to ensure the effective implementation of gender equity and address any potential challenges.

In conclusion, a mandatory gender-neutral framework by inclusion of paternity benefit for childcare in India has the potential to bring about transformative change and positive outcomes for parents, children, businesses, and the overall economy. Redistribution of roles requires reforms not only in the policy but also at the institutional level, in practices, and in transformation of labour culture. By recognizing the importance of childcare as a shared responsibility and providing accessible and affordable childcare options, India can move closer to achieving gender equality, promoting child development, and fostering economic progress. It is a crucial step towards building a more inclusive and supportive society that values the well-being and future of its children.

Exploring the Dialectic Interplay of Law and Justice: A Dependency Theory Perspective

Dr. Arun Kumar Singh & Sabina Yasmin Saharia***

Introduction

Justice is an inherent part of law or it is simply a decision based on morality? Writers and scholars contend either as justice being a component of law or describe them as separate entities. Justice can either vehemently depend on law or stand independent and distinct from it. Society is very dynamic and hence the views on law and justice which is to regulate the functioning of a society are very abstract in nature from the beginning of society to contemporary days. However, what remains as a constant undisputable fact is that law and justice share a common path towards development of a dynamic and ever evolving entity, the society.

The idea of Law and Justice is very subjective and debatable. Although Dependency Theory is a rise from the sociological perspective, this article attempts to explore the same in the light of law and justice. Beginning with the idea of how the concept started and a brief historical background, the discussion furthers to explore extent of justice depending on law and the other factors within the periphery of the subject, criticisms and probable arguments from both theoretical and practical approach through case study.

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The study revolves around, how Dependency Theory offer a nuanced perception of the connection between justice and the law, and, what implications does this perspective have for legal theory and practice? It shall offer a fresh perspective on the dialectic interplay between law and justice, challenging traditional notions and highlighting the dynamic nature of legal systems. The examination of Dependency Theory's influence on legal studies can contribute to a deeper understanding of how sociopolitical perspectives shape our conception of justice within legal frameworks. Exploring Dependency Theory's insights into law and development sheds light on alternative approaches to addressing inequities in legal systems, specifically in the context of underdeveloped nations. This study shall delve into the ethical dimensions of legal decision-making, particularly in cases where laws may conflict with moral principles, offering valuable insights for policymakers and legal practitioners. By critically examining the strengths and limitations of Dependency Theory's perspective on law and justice, this research stimulates scholarly debate and encourage reflection on the complexities of legal theory and practice.

Historical Background

Before digging into Dependency theory of Justice in particular, it is important that we understand the Dependency theory from a broad perspective through a sneak peek into its historical origin.

1949: Dependency Theory emerged as a critical response to traditional development theories that failed to explain the persistent underdevelopment of Latin American countries in the mid-20th century.[1] The discussion on this theory began as early as in 1949 through two papers written by Hans Singer and Raul Prebisch. Here both the economists propounded an idea popularly known as *Prebisch-Singer thesis*. It was developed in the course of an attempt to understand

1. R. Prebisch & H. Singer, *The Economic Development of Latin America and Its Principal Problems*, 7(1) EBLA, 1 (1962).

the cause for lack of development in Latin America. Through this the authors for the first time exposed the inequity involved in international trade. In simple terms we can say that the economically weaker states export the primary products that is the raw materials while the industrially advanced countries manufacture the final products. In the long run this makes the underdeveloped or the Third World countries industrially dependent on the developed countries. Thus, the authors express the need of an activist state who can identify the asymmetric relationship of power between the 'Periphery' State (Agricultural state) and the industrially developed states so that they do not lag behind in the world economy forever and can built themselves to be self-sustaining in the long run.[2]

1960s: Building on the works of earlier scholars such as Raúl Prebisch and Hans Singer, Dependency Theory gained prominence in the 1960s as a comprehensive framework for understanding global inequality and economic development.[3] It underwent further refinement as scholars like Andre G Frank, Fernando H Cardoso, and Enzo Faletto expanded its scope beyond economics to encompass sociopolitical dimensions. They argued that underdevelopment was not merely a result of economic factors but also a consequence of historical colonialism, unequal power relations, and neocolonial exploitation.[4] The theory later was developed in the light of Marxian perspective in 1960s after the end of World War II. It became popular as a criticism to *Modernization Theory* which suggests that societies develop in similar ways. The path of growth in every society is similar as upheld by the Modernization Theory. However, Dependency Theory rejected this idea and stated that we cannot simply consider the underdeveloped countries to be primitive versions of developed countries. As the Singer-

2. Edgar J. Dosman, *Raul Prebisch and the XXIst Century Development Challenges*, UNECLAC, (2012).
3. *Supra* note 1.
4. A. G. Frank, *The Development of Underdevelopment*, 18(4) MR, (1966).

Prebisch thesis resounded with Marxian thinkers like Rosa Luxemberg and Lenin's arguments on the theory of Imperialism (The act, philosophy, or mindset of upholding or expanding authority over foreigners). The Theory of Dependency had two major point of view: the Latin American Structuralist and the American Marxist.

One prominent example of Dependency Theory's influence on legal studies is evident in the critique of Modernization Theory. While Modernization Theory posits a linear path of development based on Western models, Dependency Theory highlights the asymmetrical relationships between developed and underdeveloped nations, emphasizing the role of colonial legacies and neocolonial exploitation in shaping legal institutions and practices.[5]

Dependency Theory in the light of Law and Development

The evolution of Dependency Theory from an economic critique to a broader analysis of global power structures has profound implications for legal studies, particularly in understanding the interplay between law, justice, and development. Scholars like David Trubek and Marc Galanter applied Dependency Theory insights to the study of law, highlighting how legal systems often perpetuate dependency relationships and reinforce existing power imbalances. Trubek and Galanter argued that legal institutions, far from being neutral arbiters of justice, often serve the interests of dominant elites and perpetuate dependency relationships between nations and social classes. This perspective challenges traditional views of law as a neutral arbiter of justice and underscores the need for a critical reevaluation of legal frameworks within the context of global inequality.[6] After World War II the theories of law and development was significantly expanded as the existing theories failed to retrospect or put forward the contribution of the function

5. F H Cardoso & E Faletto**,** Dependency and Development in Latin America (University of California Press 1979).
6. D. M. Trubek & M. Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WLR**,** 1062 (1974).

of law in the process of growth. A new theory was required to explain the theory of under development as well with regard to law. Although the scholars were divided into having two different viewpoints on their conceptual framework and political deductions, however, they had common notions in approaching the explanation and methods.

Case studies further illustrate the practical implications of Dependency Theory for law and development. For instance, the Landless Workers Movement (MST) in Brazil provides a compelling example of how grassroots mobilization and legal activism challenge entrenched power structures and advocate for agrarian reform. By leveraging legal mechanisms and international solidarity, MST members have successfully reclaimed land and advanced social justice objectives, demonstrating the transformative potential of legal empowerment within a Dependency Theory framework. Similarly, the struggles for indigenous rights in Latin America highlight the intersection of legal advocacy, political mobilization, and Dependency Theory principles. Indigenous communities, marginalized by centuries of colonialism and capitalist expansion, have utilized legal channels and international human rights frameworks to assert their land rights and cultural autonomy, challenging dominant narratives of development and progress.[7]

> **Dependency Theory of Justice:** The main idea in which Dependency Theory (of Justice) depends upon is the central power to regulate justice and injustice. Extracting from the Social Contract Theory, there must be a coercive power to whom the subjects have willingly surrendered to be governed. It can either be the state or society but the focal idea is giving up of the 'state of nature' where there are no rights to be claimed as everyone is equal considering the absence of an authority. [8] Dependency Theory poses a formidable challenge to conventional

7. 1 Alison Brysk, From Tribal Village to Global Village: Indian Rights and International Relations in Latin America, (Stanford University Press 2000).
8. *Dependency Theories of Justices*, Dissertation http://lawdessertation.blogspot.com/2015/09/dependency-theories-of-justices.html?m=1 (last visited April 14, 2024).

notions of justice, particularly those rooted in legal positivism and formalistic interpretations of the law. Unlike traditional views that equate justice with adherence to legal rules and procedures, Dependency Theory highlights the inherent biases and inequalities embedded within legal frameworks.[9]

Since a long time, the theorists in the field of law and politics have contended whether justice is a part of law or not. Before discussing about the inherent relation between Law and Justice it's important to define the two concepts:

Law: It is the rules of a standing power consisting of rights and duties and backed by penalties.

Justice: A very subjective concept generally meaning to give or provide any person what he or she deserves.

Justice according to Law: Administering justice as per law means having certain standards of rules which is certain for every individual to follow and it becomes the source of assurance for equal treatment to all. In a legal system the issues are mathematically deduced through logic where same kind of cases shall yield same results. Even the outcome can be predicted if all the facts of the case or issue is clearly understood.[10] However, one demerit is that no matter how much a legal system is developed, constantly new issues which are not dealt with previously shall arise.[11] Yet the entire system of laws visions to develop into a set of precise and ascertainable bracket of jurisdiction. Gradually, Justice without the rule of law led to equity becoming widespread. Instead of rigorously adhering to the common law, judicial discretion became crucial, and the circumstances of individual cases were addressed accordingly. But as the legal field started converting to an

9. *Supra* note *6.*
10. Rosco Pound, Justice according to law, (1913).
11. Charles E. Phelps, Juridical Equity, (Law Bookseller, Publisher and Importer, 1894).

established system the scope of judicial discretion also narrowed down leaving justice purely dependent on law.

When justice is administered according to law we can see many advantages, for example, Law is a loosely fixed set of rules therefore administration of justice becomes predictable, it acts as a protection to discretionary biasness or errors of an individual as justice is deduced from already fixed set of rules and standards, it provides the judges with guidelines to pronounce similar result in similar cases, the judges also get the benefit of precedents. Lastly, the administration of justice according to law while trying to balance conflicting interest, individual and social interests, which are more significant, will not take precedence over current interests, which are more pressing and evident but carry less actual weight. Law hence provides a standard which is predetermined well ahead of any issues or controversy. The problem prevalent while seeking justice without law is the administration of the justice in absence of law.[12]

Laws as working hypothesis

'Justice' is the end, 'law' is the means

With the advancement of civilization people have become overly dependent on rule of law. But for proper justice to prevail it is very important for individuals to have confidence in law that it has the capacity to fulfill the catering needs of the society to apply the law and provide freedom and justice to all equally. If most of the parts of law are left to the discretion of the officials then there might be a scenario where a police officer can arrest a person based on his idea of what is justice and similarly a judge can convict an innocent person on his own idea of wrong. In the absence of a proper law, justice can be very subjective, different from person to person. Hence there would be no way to predict the circumstances and the subjects or

12. *Supra* note 10.

individuals would remain in a state of confusion as to what is just and what is unjust.[13]

Late German- American author Edgar Bodenheimer who was also a professor of law in US explained a probable scenario that might be reality in the absence of law. An administrative state where all the actions of the authorities are running on ad hoc measures and based on practical situations. In such a situation the individuals shall not be able to act freely and there shall prevail a sense of frustration in the absence of predictability in the social order.

The trail process is very hazy and the fuzziness involved makes the law indeterminate. In a particular case we can observe that both the parties, the plaintiff or the defendant shall uphold a reasonable statement in and around law which bounds the decision to be in their favor. The validity to this statement is the opposing or dissenting opinions in any case. There will always be a judge or a critic who will form arguments in favor of the losing party. To this argument Prof. Richard Hyland said that there were many times when he had changed his mind about cases which he thought to be open and shut case but students from his class advocates after research and analysis of the law and come up with convincing arguments from the other side which made Richard believe that although the other party didn't win but could have won easily and it is simply a matter of getting enough time to formulate arguments. He believes that there is always a strong argument from both the sides it's just that we need to think for long enough.

The same can also be applied to the judges. The judge stands in a position where he can easily formulate arguments in favor of either of the parties. But after giving judgement in a particular case the judge makes it appear as if the decision was determined by law and the judge is simply interpreting it.

13. D'Amato Anthony, *On the connection between law and justice*, Faculty Working Papers(2011), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1001&context=facultyworkingpapers. (last visited April 14,2024)

Benjamin Cardozo also added to this idea through his expression of how he felt while pursuing his job as a judge and giving judgments. He said that he was troubled and found himself trackless in search of certainty of laws. He described his search for fixed or settled rules to be futile. He found that justice is what his conscience and his own mind reflects and not anything external to it and finally he accepts the inevitableness of uncertainty of justice and law,[14] because society is dynamic and ever evolving and hence law is a working hypothesis rather than a fixed set of rules.

The idea of laws as working hypotheses has profound implications for the administration of justice, particularly in navigating the complexities of diverse societal contexts and competing moral claims. By acknowledging the inherent indeterminacy of legal rules and the need for judicial discretion, this perspective underscores the importance of flexibility, empathy, and pragmatism in legal decision-making. One illustrative example of the implications of this concept is the situation involving conscientious opposition to military duty. In many legal systems, individuals may seek exemptions from conscription on grounds of moral or religious beliefs. However, the criteria for granting such exemptions are often subject to interpretation by judicial authorities, leading to varying outcomes based on the unique circumstances of each instance. Similarly, the application of environmental regulations provides another compelling example of the complexities inherent in applying law in diverse contexts. Environmental laws are designed to balance competing interests, such as economic development and ecological preservation, yet their interpretation and enforcement can vary significantly depending on local conditions, cultural norms, and political dynamics.[15]

14. *Id.*
15. Alan Boyle and Catherine Redgwell, Internation Law and The Environment, (OUP Higher Education Division 4th ed. 2021).

Legality v. Morality in the light of Radbruch Doctrine

Gustav Radbruch was a leading philosopher from Germany. He was also a law professor in Heidelberg University. After the end of Second World War the 'Radbruch Doctrine' was formulated by him and it became very important in the jurisprudential discussions regarding violence against humanity.

Radbruch have highlighted the idea regarding law in three aspects:

1. It is a way to serve expediency
2. It helps in providing justice
3. It promotes certainty of legal outcomes

Radbruch argues that legal certainty that law brings can advocate the validity of unjust laws as well. However, some extremely unjustified laws might bound the judges to give judgments against conscience because of the power of rigidity that law carries but it can never receive the validation it should otherwise. He gives a test of morality to apply to positive laws where every kind of unjustified law is not disregarded and he grounds this argument by saying that the notion of just and unjust is very subjective and a matter of debate. His test declares every law as null and void which reflects injustice beyond any kind of rational doubt.

Debatable cases of post war convictions in Germany: Radbruch had formulated the doctrine before world war, however he has made significant changes to the theory post war through his essay on 'Statutory lawlessness and supra-statutory law'.[16]

Case 1: (The 'Grudge informer' case)- There were a group of critics who criticized the Nazi Government and some others who knew these critics, betrayed them and played the role of informers to the authorities. After the war, both the informers who betrayed the critics and the

16. Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law (1946)*, 26(1) OJLS 1-11(2006).

officials who put them to execution defended by saying that they were following their legal duty by doing so. However, Radburch argued that it was justified for the courts to convict the informers post war. This conclusion was a result of reformulation of his pre-war theory.

He explained the issue between certainty of law and justice by arguing that laws are backed by legislation and power. It has the capacity to take precedence over any unjustified law until and unless the degree of conflict becomes intolerable as between the prevailing law and justice concerned. He further says that it is not possible to differentiate on rigid lines the statutory lawlessness, that is the laws that are not considered valid law because of intolerably discarding morality out of law and statutes that can be considered as valid laws despite all the flaws they comprise of. However he puts forth one way to distinguish between the two, that is, betraying with the idea of 'equality' which is the very essence of law and the core of justice. Such a law is not only flawed but far away and completely out of the circumference of the very nature of law.

Criticism by Hart: Professor H.L.A. Hart criticized the trials made after the end of war for the war criminals and also Radbruch views on it. Hart firmly commented on Radbruch's Statutory lawlessness and supra statutory law and said that he failed to recognize the presence of moral duty along with legal duty. Hart argued that obeying a law despite it being inhumane might be a legal duty but to not obey the same is also a moral duty which subsists within the wider periphery of duty of a decision maker. According to Hart, in the grudge informer case, the informers should not have been punished as they have followed the law and acted accordingly, however, they only breached the prevailing moral duty[17].

Case 2- Here a woman was put to conviction by the courts after the end of war for committing the offence of conspiring and deriving her husband from enjoying his freedom. Her intention was to get away

17. HLA Hart, *Positivism and the Separation of Law and Morals*, 71(4) HLR (1958).

from her husband and so she informed the authorities about him criticizing the government because she knew that such a complaint will lead him to death by the party in power. The husband as thus was put to jail first and then he was sent on the battlefield where he somehow survived. The woman was convicted in post war trails for her immoral act, Hart discusses about the legal vs. moral dilemma through this.

He says that the German courts had two choices, either to punish the woman or free her. If the courts freed her despite the immoral act, then it will be compromising with a well-established universal principle, that is, morality. And if she is punished then it is a violation to 'fidelity of law' which is another severely cherished principle or value uphold by law.

At last Hart says that the courts should create a new statute having retrospective effect so that it remains clear to the individual that an immoral law need not be obeyed.

Criticism by Fuller: Radbruch died by the time Hart criticized his theory and it was Lon Fuller, a Professor in Harvard who carried forward Radbruch's ideas and developed the theory of morality of law. Fuller criticized Hart's response to post war trials and said that even if the courts created retrospective statutes and invalidates the laws of pre-war period yet the value to fidelity of law cannot be upheld because we are annulling or declaring it to not being a law which was once a law through new overriding statutes. Fuller supported the post-war trials with his argument that the legal system under German Nazi reign was degrading and inhumane to a point that it could not be considered as law. It was a mere dictatorship clothed to be a legal form and completely missing the most important ingredient of law, that is, morality[18].

Fuller argues that morality is a larger part of Law. Law comprises of morality and any law without the later shall fail to establish itself as law. Law flows from the attitudes of a community relating to its moral values.

18. Lon L Fuller, *Positivism and fidelity to law: A Reply to Professor Hart*, 71(4) HLR, (1958).

Creation of a law by, missing its purpose carries no value. Law is not a injection of rules flowing from a definite source, rather it is a system where both ruler and its subjects cooperate to bring harmony.

Understanding through hypothetical incidence

To explain the rational relation between justice and law and its dependency, let us take a hypothetical example of a motor vehicle incident. We know that it is almost a universal rule to not cross the parallel lines in the road. A car drives through the street and suddenly a young child crosses the road, leaving two scopes for the driver to proceed. One, he can either cross the parallel lines thereby breaking traffic rules but saving the girl. Two, he can choose to avoid breaking the traffic rule and hit the child.

Keeping in view that the child was too fast and small for the driver to be noticed ahead of time, leaving no argument on negligence of the driver. Some might also argue that the child's action of moving out in front of a running vehicle discards the "innocence" of the child and the child creates a mere error in formulating the judgment.

In the above situations if a traffic police was in observance of the incidents, the driver would probably be fined for crossing the parallel lines as it is an established law and despite the argument that he did so to save the child, the traffic police does not stand in a position to interpret law but to apply it. Thus, establishing the fact that justice inherently comprises in in the statutes and laws.[19]

Criticisms

1. **Justice and law are separate entities:** Notable thinkers and scholars have argued that Justice and Law are completely different things. Here I would like to draw the idea of Hens Kelsen whose main aim was to establish "pure science of law" where the law is predictable and certain. However, Kelsen was convinced that justice

19. *Id.*

can never be determinate because the very notion of just and unjust, right and wrong is the ultimate end based on a very subjective judgement. The elements of emotions, feelings, mindset, wishes, and so many uncontrolled factors are related to the coercive power of the decision maker which is not verifiable and therefore is prone to grave biasness.[12]

Kelsen has put forward three instances as to why justice and law should be separated.

a. Law is fixed and certain but justice is indeterminate, uncertain.

b. The very fact that a law is "just" and "fair" is not within the sphere of legal system.

c. Justice depending on law shall mean strict implication of rules to similar cases within that rule.

2. **Unjust laws cannot be considered as law:** The statement that 'one must obey the laws' is a very improper statement. A person might violate the law but there is possibility that the law itself is unjust. The law says one thing while justice says something else. A law as defined earlier, is simply the rules put forth by a standing power, now this power can be the legislature, police officer, judge, king, or any officer who is in a dominating position to make laws for its subjects. For instance, the Nuremberg Laws made by the Nazi Party in Germany in the year 1935 were racist where the officials were ordered to sterilize a particular section of the society (specifically the Jews). In such a case someone who chooses not to obey the so-called law made by the Nazi Party, can we call it violation of law? If a law order killing of innocent lives or to do or forebear from doing something which is against the very notion of natural, universal or moral standards of what is right, how can we deliver justice in such a situation?

3. **Law are statutes regulated largely by judges:** If justice depends solely on law which is a set of fixed rules why do we need a judge to apply it? Since law is a topographic factual reality, it should not need any human intervention to interpret it. Thus, we can settle on the reality that justice requires a mode of transportation through human interpretation to reach the end that is the law. And the concerned transportation to our understanding is a highly subjective matter involving intangible human emotions. Therefore, the notion that Justice is solely dependent on law is unacceptable and vague.

   If we go by the idea that justice is application of the laws considering justice depends solely on law then again drawing the context of Nazi laws, we can observe that not applying the law can also be the justice in certain circumstances, specifically when the law is unjust and inhumane.

Challenges to Dependency Theory Perspective

Dependency Theory has its own criticism, despite the fact that it provides insightful information on the dynamics of power and inequality in global contexts. One major challenge to Dependency Theory arises from its deterministic view of development, which some scholars argue overlooks the agency and diversity of experiences within developing countries. Critics contend that Dependency Theory's focus on external factors, such as colonialism and neocolonial exploitation, may oversimplify complex social, political, and economic processes, neglecting internal factors that shape development trajectories.[20] Another critique of Dependency Theory concerns its pessimistic outlook on development prospects for peripheral nations. While Dependency Theory highlights the structural constraints imposed by global capitalism, it offers limited guidance on strategies for achieving self-reliance and autonomy. Critics argue that Dependency

20. Peter Evans, Dependent Development: The Alliance of Multinational, State, and Local Capital in Brazil (Princeton University Press 1979).

Theory's emphasis on dependency relationships risks fostering a sense of fatalism and resignation, undermining efforts to mobilize collective action and pursue alternative pathways to development.[21]

Counter arguments and Alternative Perspectives

In response to the perceived limitations of Dependency Theory, several alternative perspectives have emerged that offer different interpretations of development dynamics and strategies for addressing inequality. One such perspective is the neoliberal approach, which emphasizes market-oriented reforms, privatization, and deregulation as pathways to economic growth and development. Proponents of neoliberalism argue that free-market policies can stimulate investment, innovation, and productivity, ultimately benefiting all segments of society.[22] Additionally, theories of modernization offer an alternative lens through which to understand development processes. Modernization theorists argue that economic development is a natural progression marked by stages of industrialization, urbanization, and social change. Modernization theory stresses how internal variables like entrepreneurship, technology, and education drive development results, in contrast to Dependency Theory, which emphasizes systemic restraints and power imbalances.[23] However, critics of neoliberalism and modernization theory contend that these perspectives often prioritize economic growth over social equity, exacerbating inequalities and marginalizing vulnerable populations. They argue for a more holistic approach to development that integrates social, environmental, and human rights considerations, challenging the dominance of market-driven paradigms and advocating for alternative models of governance and economic organization.[24]

21. *Supra* note *5*.
22. David Harvey, A Brief History of Neoliberalism (Oxford University Press 2005).
23. W. W. Rostow, The Stages of Economic Growth: A Non-Communist Manifesto (Cambridge University Press .3 ed.1991).
24. Arturo Escobar, Encountering Development: The Making and Unmaking of the Third World, (Princeton University Press 2011).

Conclusion

Justice can never overthrow law inside the court and shall largely remain dependent on law because law is a fact that subsists in the stories that litigators bring to the judges. Law is thus the factual stories of the parties in a case. For example, if a person while driving sees a grove of apples and decides to carry some with him. Now if he picks the apples to take with him, such an action is just or unjust completely depends on the law prevailing in that area. For instance, if the concerned grove is a private property where the right to dispose of the apple lies completely on the owner of the grove then it will be unjust on the part of any other person to take apples from the grove without due permission. However, if it is a government property allowing any person to freely access the grove and avail apples then it will be justified to take apples from the concerned grove. Hence justice is not possible if decision maker is blind to laws.

Lord Mansfield in the case of *Tinglay v. Dolby*[25] stated,

"An appeal to a judge's discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with, established principles of law."

In the process of trial, the law is very complicated and hazy thereby making the decision indeterminate. Every administration must be subject to judicial review to achieve a government of laws and not of men so that the inevitableness of subjective conscience can somewhat be brought under control.[26] Rule of law is definitely indeterminate and subjective but every legal system individually and universally follows a basic structure which makes it predictable for much of the time.[27] Rule of law promotes government to be subject to the statute and not otherwise.[28]

25. Tinglay v. Dolby, 14 N.W. 146.
26. *Supra* note *3*.
27. Hon'ble Mr. Justice F.M. Ibrahim Kalifull, *Rule of Law & Access To Justic*e, (NJA South Zone Regional Judicial Conference on "Role of Courts in upholding Rule of Law" at Tamil Nadu State Judicial Academy 31.01.2014 to 02.02.2014).
28. Wade & Forsyth, Administrative Law, 20-25 (Oxford University Press.12 ed. 2022).

As Justice Khanna quotes:

"The judges of the higher courts are concerned, their office demands that they be historian and prophet rolled into one, for law is not only as the past has shaped it in judgments already rendered but as the future ought to shape it in cases yet to come."

To understand the comprehension of rule of law within the judicial process let us take Dicey's view on doctrine of separation of powers. He keeps the law/statute as supreme while the organs to interpret and execute are subordinate to it. The idea of strict separation of power is not feasible from a practical point of view but main objective of Montesquieu's view was that when the organs of the government are divided it can act as checks and balances to maintain a proper justice delivery system which can survive with least subjectivity possible.[29]

Dr. Barrack has very persuasively explained the role and function of a judge according to him in his book '*The Judge in a Democracy'*:

> As a judge, I do not have a political platform. I am not a political person. Right and left, religious and secular, rich and poor, man and woman, disabled and nondisabled, all are equal in my eyes. All are human beings, created in the image of the Creator. I will protect the human dignity of each. I do not aspire to power. I do not seek to rule. I am aware of the chains that bind me as a judge and as the president of the Supreme Court. I have repeatedly emphasized the rule of law and not of the judge. I am aware of the importance of the other branches of government – legislative and executive – which give expression to democracy. Between those two branches are connecting bridges and checks and balances. I view my office as a mission. Judging is not a job. It is a way of life. Whenever I enter the courtroom, I do so with the deep sense that, as I sit at trial, I stand on trial.[30]

29. *Supra* note 15.
30. Dr. Aharon Barrack, The judge in a democracy, (Princeton University Press 2008).

A judge should always remember that judicial interpretation is allowed inside the court but judicial legislation is prohibited.

Quoting Salmond from his book 'Salmond on Jurisprudence':

"... it is no part of the judge's function to create rules of law: his only task is to apply already established rules. "[31]

There are two very important components to 'access to justice': the first one is having a legal system which is effectively strong enough to deliver the rights to its subjects which should be backed by substantial legislations; the second one is to have a judicial system which is easily available and accessible to the public. Justice access is recognized as a fundamental right in numerous international documents. It is evident that the rule of law is a fundamental component of the justice delivery system and that access to justice is dependent on it.[32]

"Justice is an ideal, and law is the tool"

- L. E. Modesitt Jr.

31. John W Salmond, Salmond on Jurisprudence, (Sweet and Maxwell. 12 ed.1966).
32. Sanjay Prakash Srivastava, *Functioning of Indian courts and litigants' right to justice: A critical reflection of norms and practice,* 13(2) IJLJ, (2022).

Amplifying the Silence of Veto and Pocket Veto in the Indian Constitution

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Introduction to Silences in the Constitution

The Constitution of India is a written Constitution. Although it covers comprehensively the basic framework under which our nation is governed and run, it cannot be expected from the Constitution makers to legislate upon every matter. No legislation can be called comprehensive in a true sense and with the changing times new matters may arise not covered by the legislation. Hence, naturally, there shall be occasions when the Constitution, like any other codified legislation, is silent upon some matters.

The silences in the Constitution are of prime importance since they shall involve questions of law requiring interpretation and construction. The learned jurist Michael Foley has said, "What is said in the Constitution is important but what is not said, but is implied from what is said, is equally important"[1]. Interpreting the silences in the Constitution in consonance with the spirit of the Constitution is the task of the Constitutional courts. Indian jurist Fali S Nariman in his book "The State of the Nation", has stressed

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1. Michael Foley, The Silence Of Constitution (Routledge Revivals. 2012).

upon plumbing the depths of the silences of the Constitution and probing its crevices[2].

The silences in the Constitution may have wide repercussions. For instance, while hearing the petition for declaring the abrogation of Article 370 and subsequent deprivation of the statehood of Jammu and Kashmir as unconstitutional[3], an argument concerning a silence in the Constitution was submitted before the Court. Notable Lawyer Mr. Kapil Sibal advanced for the petitioners that Article 3 of the Constitution of India provides the Parliament with the power to form new states[4]. It quite explicitly provides that new states and union territories can be formed by separating a part from a state or by uniting two or more states or their parts. In Article 3 the word state also includes Union territories. Thus, UTs too can be formed in a similar way. Similarly, Article 2 also gives the Parliament the power to establish new states. The learned counsel submitted to the Apex Court that nowhere in the Constitution, including in Articles 3 and 4, the loss of statehood is mentioned. The learned counsel submitted that the Constitution is silent on whether the parliament can, contrary to the formation, deprive an existing state of its statehood. The learned counsel advanced that Article 4 provides for the creation of new states while preserving the statehood of existing states. He insisted that by diminishing an area of an existing state a new state could be created like Himachal and Haryana from Punjab[5], Uttarakhand from Uttar Pradesh[6] and Chhattisgarh from Madhya Pradesh[7], but an existing federal unit as such could not be wiped out by transforming

2. Fali S Nariman, The State Of The Nation 183 (Penguin Books. 2014).
3. The Jammu and Kashmir Reorganisation Act, 2019, No.34, Acts of Parliament, 2019 (India).
4. Kapil Sibal, *Centre's lawyer in heated argument during article 370 hearing,* https://www.ndtv.com/india-news/article-370-hearing-supreme-court-j-k-statehood-kapil-sibal-slams-centres-nil-organised-bandhs-in-j-k-since-2018-remark-4344562 (last visited Sept.27, 2023).
5. The Punjab Reorganisation Act, 1966, No.31, Acts of Parliament, 1966 (India).
6. Uttar Pradesh Reorganisation Act, 2000, No.29, Acts of Parliament, 2000 (India).
7. Madhya Pradesh Reorganization Act, 2000, No.28, Acts of Parliament, 2000 (India).

into a UT. A UT could be carved out of a state but only by preserving the statehood of the parent state. The argument advanced by the learned counsel deserves merit and attention since the Constitution is conspicuously silent upon the destruction of statehood. Can such silence be interpreted as a deliberate one to underscore the spirit of federalism in the Constitution? Thus, the issue before the court largely involved a silence in the Constitution concerning deprivation of statehood.

Silence of Pocket Veto

Another important silence in the Constitution, which shall be the subject matter of this paper, is the absence of a period within which a Constitutional head, who also happens to be a part of the legislature, has to provide or withhold assent to the bills presented to him. This is commonly classified as a power with such a head and is generally called "a pocket veto" with the head of the executive[8]. To resolve whether a Constitutional head has a pocket veto, it is required to be determined whether he can veto a bill at all. There are provisions in the Constitution which make a Constitutional head to mandatorily act in accordance with the advice of the council of ministers[9]. Does it negate the existence of veto in favour of a Constitutional head and make India a pure parliamentary democracy wherein a Constitutional head is just a rubber stamp? Once a bill is passed by one house of a legislature or both houses of the legislature at Union Parliament or in a state having a bicameral system of state legislature, it goes to the President or the governor of the state as the case may be[10]. At the union level, existence of pocket veto does not have much repercussions since the President has generally no political conflict with the Union executive and legislature. However, since a governor is appointed by the President, he is technically a union representative in a State. He enjoys his office at the

8. Dr. Narender Kumar, Constitutional Law Of India (Allahabad Law Agency. 2022).
9. India Const. arts. 74 & 163.
10. *Id* at. arts. 111 & 200.

pleasure of the President[11]. The State executive and legislature have no say in his appointment. Therefore, when the government at the center and in a particular state are different a situation of conflict of interest arises. A post that was created to keep a check upon the actions of state government so that they do not go ultra vires the Constitution has continually been used to satisfy selfish political ends. Thus, many a time situation has arisen when the state legislature passed a bill but the bill was never given assent to by the Governor nor the assent was withheld. It remained in limbo forever. Hence, a silence of time period within which a Constitutional head has to provide assent to the bill has been taken up to be a tacit power by the Constitutional heads many a times for satisfaction of political ends. This has been clearly evident in some of the recent political events, for instance, the Tamil Nadu Governor R N Ravi did not provide assent to the bills nor withheld them. Notably these bills were pending assent for the past 3 years[12].

It is not that the silences in the Constitution have not been answered hitherto. Earlier too, on several occasions, the Supreme Court of India has amplified the silences in the Constitution. For instance, the judgment of Kesavananda Bharti's case[13] filled a huge crevice, perhaps left deliberately by the Constitution makers, in the Constitution of India. The Constitution of India empowered the Union Parliament to amend the Constitution. On one hand, article 368 of the Constitution of India gave a plenary power to the parliament to amend the Constitution but on the other hand, Article 13 provided that any law abrogating the rights contained in Part III of the Constitution shall be void. Thus, as a natural corollary, there was a big crevice in the Constitution left to be filled by the Supreme Court through

11. *Id.* at art. 156.
12. *SC questions delay in assent to bills: What was Tamil Nadu governor doing for 3 years?,* Times of India, https://timesofindia.indiatimes.com/india/sc-questions-delay-in-assent-to-bills-what-was-tamil-nadu-governor-doing-for-3-years/articleshow/105365270.cms (last visited Apr. 11, 2024).
13. Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

the principles of construction. A question of seminal importance was could the Parliament alter or abrogate the fundamental rights in view of the language of Article 368 or is there an embargo upon the parliament to bring such an amendment to the Constitution in view of the express wording of Article 13? This crevice in the Constitution was finally filled by the judgment of Kesavananda Bharti[14] which applying the principles of construction held that there are some immutable principles of the Constitution which form the very basic structure of the Constitution. So long the basic structure of the Constitution remains intact Parliament can make any amendment in the Constitution. Hence, through the formation of the doctrine of basic structure, the Supreme Court has provided a voice, perhaps a reverberating one, to one of the silences found in the Constitution.

Natural Law theory as an amplifier of the silence

The silences can well be understood and filled by taking the aid of natural law theory. Natural legal theory is one of the significant jurisprudential theories along with some other theories like legal positivism and legal realism. It is the oldest of all the legal theories and even to date, it is highly relevant. It owes much of its origin to religious tenants signifying the importance of humanity, works of philosophers and ideologies of humanism like liberalism. It has no single source or founder, unlike other jurisprudential theories. The basic premise of this theory is that there are certain immutable natural principles of law which are not man-made for instance that essentially all human souls are equal, every human has a right to life and many others. The theory further espouses that man-made law and state actions should align with these principles[15]. However, it is to be noted here that each jurist subscribing to the natural legal theory gives a different version of natural legal theory and accordingly it can be held that there is no single unified natural legal theory rather it is a set of various legal theories

14. *Id.*
15. Dr. N.V. Paranjape, Studies In Jurisprudence And Legal Theory (Central Law Agency, Allahabad 7th ed. 2001).

given by different jurists at different points of time and inspired from different sources. However, all of them do agree with one common legal proposition that there is a set of principles which are divine in nature and these principles are a touchstone for testing the legal validity of man-made law. Hence, ethics and morality are intrinsic parts of law. If a law is immoral in nature, it is not a law to begin with. Thus, the natural law jurists espouse a synthesis of law, morality and ethics[16].

John Adams the Second President of the U.S. once said "You have rights antecedents to all earthly governments- rights which cannot be repealed or restrained by human laws- rights derived from the great legislature of the Universe… British liberties are not grants of princes or parliaments, but original rights, conditions of original contracts coequal with prerogative and coequal with government[17]"

Similarly, Alexander Hamilton had long said in 1775 "The sacred rights of men are not to be rummaged for among old parchments and musty records. They are written as with a sun beam, in the whole volume of human nature, by the hand of divinity itself and can never be erased and obscured with mortal power[18]."

Or as stated by Lord William Blackstone "Law of Nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding overall the globe and, in all countries, and all times; no human laws are of any validity if they are contrary to this; and such of them as are valid derive all their authority, mediately or immediately, from this original.[19]"

The Supreme Court when formed the doctrine of basic structure in a way affirmed the natural law theory. It rejected legal positivism on the

16. H.L.A. Hart, The Concept Of Law (Clarendon Press Oxford 2nd ed. 1994).
17. Justice Asok K Ganguly, Landmark Judgments That Changed India (Rupa Publications India. 2015).
18. *Id.*
19. *Id.*

ground that there is something in the Constitution which is unalterable, i.e., something which cannot be modified. This is the basic premise of natural law theory that certain principles are so immanent in human nature and life that a man-made law cannot override them. Article 13 of the Constitution in a way was an embargo that a man-made law cannot violate these intrinsic principles. Such is also the case with the doctrine of basic structure.

Hence, in the light of recognition of certain immutable principles, which have their conception since time immemorial and have their origin in ethics, philosophy, reason and morality, the silences in the Constitution about the pocket veto of the head of the executive may be answered. Here, it is important to distinguish construction from interpretation. A silence in the Constitution can never be interpreted. It has to be constructed as in the case of *Kesavananda Bharti's* case[20]. Interpretation is textual whereas construction goes beyond the text but still does not break the essence of the legislation. Interpretation is peripheral whereas construction goes to the root of the legislation. The doctrine of basic structure was not interpreted. It was constructed since it was never contained in the text of the Constitution[21]. Construction is a judicial tool in the hands of the Constitutional courts to amplify the silence in the legislation so that the spirit of the legislation is not violated. When the doctrine of basic structure was not constructed, there was a big silence upon the relationship between enforcement of directive principles and fundamental rights. The fundamental rights and the directive principles were two extremes of a spectrum, but how these are to be harmoniously connected so that none of them remains ineffective was a path to be constructed by the Supreme Court.

Judicial Pronouncements on the matter

The provision of pocket veto, if it exists Constitutionally, can be analysed by examining its parent provision 'the power of veto' of which

20. *Supra* note 13
21. Justice Asok K Ganguly, *supra* note 17

pocket veto is an incidental part. It is certainly true that if the power of veto exists only then the existence of pocket veto is possible. Hence, if it is proved that the Constitutional figurehead does not have any power to veto a bill, no question of the existence of pocket veto arises then. The answer to such a question shall be, tacitly, negative.

The Supreme Court in its initial years in *Ram Jawaya Kapur* v. *State of Punjab*[22] deduced the kind of governance system that the Constitution prescribes. The Supreme Court concluded that in India it is the parliamentary system of government which is followed and not the presidential form of governance. This parliamentary form of government is quite akin to the British parliamentary. In this form of government, the executive is not completely divorced from the legislature. The members of the executive are to be chosen from the elected members of the legislature. Since the Indian Constitution prescribes a federal structure of governance too, it means the council of ministers at the union level must be the members of the parliament and the council of ministers in a state must be the members of the legislative Assembly of the state[23]. In the words of the Supreme Court, "In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, 'a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part."

The court further pondered upon the leadership of the executive and held that the President and the governor are formal, nominal or Constitutional heads of the executive. However, virtually it is the Council of Ministers who are spearheading the executive and they are the real head of the executive[24].

22. AIR 1955 SC 549.
23. Mahendra Pal Singh, *Discretionary Powers of the Governor of a State in India*, 63(3) IJPA 1177 (2017)
24. *Supra* note 22.

Now in the abovementioned judgment, the conflict between the governor and the state government concerning veto and pocket veto was not an issue before the Supreme Court. However, the judgment still underscores the essence of parliamentary democracy by raising the stature of the council of ministers in a state to that of a governor for spearheading the executive in a state. What seems to be a natural corollary from the conclusion laid down by the judgment is that the nominal head can neither override nor virtually render ineffective the decision of the real head of a state.

Later on, the view in *Ram Jawaya Kapur's* case was reiterated by the Supreme Court in a number of cases and notably in *Samsher Singh* v. *State of Punjab*[25]. In *Samsher Singh's* case the Supreme Court held, "We declare the law of this branch of our Constitution to be that the president and governor, custodians of all executive and other powers under various articles shall, by virtue of these provisions, exercise their formal Constitutional powers only upon and in accordance with the advice of their ministers save in a few well-known exceptional situations". The exceptions laid down by the Supreme Court in this judgment do not include veto and power veto of the executive head[26]. Hence, in the light of *Ram Jawaya Kapu*r case and *Samsher Singh's* case, the Supreme Court, though not expressly dealing with the power of the governor/president to dissent from the opinion of the legislature, seems to point that the President or governor cannot deviate from the consensus of the houses of legislature.

Nature of the power and its consequences

It has been suggested that to determine the existence of power of veto it is required to be understood whether the power to assent or withhold the assent is an executive power or a legislative power. If the power to assent to a bill is a legislative power, certainly the power to veto a bill exists with a Constitutional head since the president or a governor shall then be a part

25. Samsher Singh v. State of Punjab, AIR 1974 SC 2192.
26. Mahendra Pal Singh*, supra* note 23

of the legislature and shall have an equal say in the bill. In such an event the Constitutional head becomes the third leg of the parliament and the bill has to stand a tripod test which includes two houses of the legislature and a parliament.

However, if it is an executive power the president/governor shall not be a part of legislature. In that event if power of veto is allowed it shall amount to giving one organ of state namely the executive an overriding power upon the other organ of state i.e. legislature. In a Presidential form of government like in the USA where the President is not a part of Congress (legislature in USA), he has the power to veto a bill. Such an executive power to veto a bill is certainly due to the doctrine of checks and balances[27]. When Montesquieu provided for doctrine of separation of powers by providing the theory of water-tight compartments, he certainly nodded the doctrine of checks and balances. Although each organ of the state performs functions in its own domain of working, certainly each organ has the power to override any malpractice or wrong done by another organ of the state so that the Constitutionality remains intact. This is true in India as well. The power of Judicial Review with the Constitutional courts manifests doctrine of separation of powers. If a legislature passes a law contravening fundamental rights of the citizens and the restriction imposed does not pass the proportionality test, the judiciary is empowered to override the work of legislature and declare such a law as *void ab intio*[28]. Similarly, if a Constitutional amendment altering the basic structure of the Constitution is made, same can be declared as void by the Constitutional courts[29]. Conversely, the parliament may by passing a resolution with a special majority remove a judge of Supreme Court or High Court on grounds of proved misbehaviour or incapacity[30]. This is another manifestation of the

27. Shreeram Chandra Dash, *The Power of Assent and President's Role in India*, 22 IJPS 319, 320-321 (1961)
28. India Const. art. 13.
29. Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
30. *Supra note 25,* arts. 124(4) & 218

doctrine of checks and balances. A natural corollary of this would mean that if the power to give or withhold assent is an executive power then just like the other manifestations of the doctrine of checks and balances found in the Indian Constitution as discussed above, it could be another manifestation of the doctrine of checks and balances granting the Constitutional head to veto a malpractice conducted by legislature.

From the above analysis, at least one thing is sure that the nature of the power to give assent to a bill, be it executive power or legislative power, does not negate the existence of power to veto. Rather in both cases the support is there for the existence of veto in favour of the President/Governor. Therefore, it can be said that the power to veto can exist whether it is classified as a legislative power or executive power. In first case it exists by virtue of the fact that the President or Governor is an essential part of the legislature and in the latter case it exists due to the inevitable doctrine of checks and balances. This means the ratio of *Ram Jawaya Kapoor's*[31] and *Samsher Singh's* case[32] is not appropriate for determining the legality of veto or pocket veto as it essentially makes the President/Governor a rubber stamp only while granting the Council of Ministers supremacy over the former.

Historical Origin of the power of veto

In UK since 1707, no queen or King has exercised his prerogative to veto any bill. Hence, it has become a practice to assent to any bill passed by the British Parliament[33]. The position due to this constant practice has become now that it shall be unconstitutional for the Crown to negate assent to any bill passed by the Parliament. But no such rule of law has developed in India. Moreover, it was way back held by the Privy Council that the existence of a particular rule of law in England does not imply that the same

31. *Supra* note 22
32. *Supra* note 25
33. *Supra* note 25, at 320-321

rule shall be applicable in India[34]. The ruling becomes more significant when one observes that the Privy Council was a court in England when India was under British rule. When the British judges themselves held the view that the social, political and economic conditions of India and Britain were not the same consequently same laws could not be applied in both places, how, then, can the present Independent India be made bound by a rule of law applicable in England? There is no reason to support that a well-found practice of law in England is also the rule of law in India because of the historical legal ties with England.

The historical origin of this power too can be analysed. When kingdoms and empires existed the words of the King were law. So, it was the executive head, the King who had law-giving power at that time. There was no law-making power since the legislature did not exist. The king gave the law and never made it as making a law necessary involves deliberations and debates which are done in a legislature. Gradually with time people revolted and struggled to acquire law-making power. Soon with time the law-giving power was delegated to the representatives of people and the legislatures came into being. But these legislatures were filled with political parties which were more focused on attaining the goals of their political parties and the agendas of their ideologies. So more or less they were swayed by extraneous influences alien to the welfare of people. Here Kings played the role of vetoing bills averse to the welfare of people and which were aimed at securing personal political benefits.

Thus, one argument in favour of the power to veto is that a President, like Kings in the ancient empire, is an embodiment of a nation's integrity and sovereignty whereas council ministers, cabinet and even the MPs and MLAs belong to political parties and are much guided by the political goals of the parties to which they belong. For them what matters is to stay in power. Hence, any policy which serves their vote bank politics but is averse to the welfare of the nation shall be supported and implemented by them.

34. Mohori Bibee v. Dharmodas Ghose, [1903] UKPC 12.

Therefore, in such a state of affairs, it is imperative to provide power to the Constitutional head to withhold assent to any bill averse to the integrity, unity and sovereignty of India though it may be satisfying the political ends of the cabinet. Therefore, the Constitutional figurehead must be vested with a power to veto a bill passed under political influences not serve the interest of a nation as a whole. Similarly, if a bill which *prima facie* violates the basic structure of the Constitution or the fundamental rights of the citizens need not be given assent by the President at the very outset. However, definitely, this kind of practice should be done sparingly by the President or Governor only in those cases where the Constitutional error is apparent on the face of the legislation. It must not be an error arising out of an interpretation of law since in such a case the President or Governor would then be trespassing into the domain of the Constitutional courts.

Constitutional scheme of the Provisions on Veto

Even the Constitutional provisions support this proposition. The Article 111 provides that once a bill is passed by both houses it shall be given to the president. It further provides that the President shall provide or withhold his assent. He can also send the bill back for reconsideration except in case of a money bill. Thus, even for a money bill just like an ordinary bill, he can withhold his assent. Even the provision providing the power to the President to send back the bill for reconsideration shows a conflict of opinion between the President and the cabinet. Thus, the President in India, unlike in UK, does have a power to veto a bill passed by the Parliament.

The only doubt cast upon the veto power of the president is by the Article 74 of the Constitution of India. The Article provides that the President shall act in accordance with the advice of the Council of Ministers. But the Article 74 is contained in Chapter I of Part V which has the tile "The Executive" whereas the Article 111 is contained in Chapter II which has the title "The Parliament". Clearly the Constitution demarcates legislative and executive provisions in two different Chapter. If such separation of powers is the intention of the Constitution makers, how can it be held that the

provisions of Article 111 is controlled by Article 74 and that the President has to mandatorily concur with the council of ministers in providing assent to the bill. Actually, there is no apparent conflict between the Article 74 and 111. The Article 74 operates in the sphere of executive functions whereas the Article 111 comes into play for legislative processes. The separation of power made by the Constitution is required to be honoured here.

Similarly, when a governor of state reserves a bill for the consideration of the President, the President may veto such a bill. The provision of Article 200 is contained in Part VI which is "The States" whereas the Article 74 is contained in Part V which is "The Union". Hence, the President cannot be said to be bound by the advice of the Council of Ministers in Union Executive for a state bill. The position becomes much clearer under Article 254 where the President is given the power to provide legal validity and operation to a state law inconsistent with a Union law upon a matter specified in the Concurrent List. This signifies that the President under the Constitution of India is not mere a figurehead and has been vested with substantive powers which allows him to differ from the council of ministers.

Conclusion

The natural law theory as enunciated above also provides that certain basic rights which have a divine origin and thus are sacrosanct are required to be upheld and protected at every cost. If the political parties are easily swayed by the vote bank-politics, they cannot be trusted to be the guardians of these natural rights. The political parties may for vote banks provide affirmative action to those who are in majority and belong to the privileged class. The law of the land is that the affirmative action can be a reasonable classification only if the community who is to be given benefit of it is socially and educationally backward. If political parties are given unbridled power to make legislations and amendments in the Constitution, the natural rights of the citizens shall be in danger.

The Constitutional post of the President and the Governor is thus for securing the natural rights of the citizens. Saint Thomas Aquinas, a notable

natural law jurist explained that law is a rational mode of conduct. The Greek philosophers like Socrates, Aristotle and Plato put a lot of emphasis on reason. Reason is the faculty of mind which does not rely on any sensory experience for gaining knowledge. Further, they proposed that it is the knowledge acquired through reason which is eternal and *a priori.* For them law is an *a priori* phenomenon. For instance, let's consider the principle of equality and rule of law which is one of the essential components of law. Equality among human beings cannot be conceived if one relies upon sensory experience. There shall be racial differences, the differences in skin colour, shades of eyes and hair. There shall be differences in clothing, culture and economical differences. So, if only sensory experience is relied upon, one cannot conceive of equality. So, the rule of law and equality is essentially an invention of the rational faculty of human mind. This is the reason that Saint Augustine held that no man-made law is a law unless it adheres to the divine law/natural law.

The Constitution of India too recognises the postulation made by Saint Augustine. We find it in the doctrine of basic structure as enunciated in *Kesavananda Bharti* case[35]. The basic structure of the Constitution which comprises up of many facets like secularism, democracy, egalitarianism, liberty etc. cannot be overthrown by any man-made legislation. This is, truly, the essence of the doctrine of basic structure. Similarly in Part III of the Constitution we find fundamental rights like right to life, equality, freedom of religion and freedom of movement. These are nothing but natural rights. The origin of these arises from natural law only. The Article 13 of the Constitution is another reflection of Saint Augustin's statement. It provides that any law made by the state violating any of the fundamental rights shall be *void ab initio*. Hence, the Constitution of India too promotes a concept of limited government which cannot encroach upon certain sacrosanct and immutable principles.

35. *Supra* note 13

Therefore, the decisions passed by the Supreme Court in *Ram Jawaya Kapur*[36] and *Samsher Singh's*[37] case require a revisit as these decisions do not acknowledge the origins and nature of veto power of the Constitutional head. As has been considered before, the President and the governor are to represent as the embodiment of the country and the state respectively. If the political parties legislate bills to achieve selfish political goals for electoral ends and not for the welfare of the citizens, the Constitutional heads must be equipped with the power to veto such coloured political bills. One cannot wait for the matter to go to Constitutional courts since a writ petition is required to be filed for that matter first. Moreover, such bills by then will have become laws and be operative in the state or the country. Thus, by the time one approaches the court much damage is already done. Although this veto power is discretionary, but the discretion is to be used by the Constitutional head if *prima facie* the law appears to be violating the essence of the Constitution. Therefore, the Constitutional head must not go into a judicial investigation of the law like a Constitutional court does. Hence, the function which a Constitutional head serves by using veto is safeguarding the Constitutional values and natural rights in a non-judicial way tacitly so that eventually the matter reaches the Constitutional court where the merits of law can be explored judicially in a meticulous manner.

Let's take an example, for instance, a state legislature passes a bill in a legislative Assembly providing for 100% reservation in all public and private jobs in that particular state to appease the residents of that state for electoral ends. If we hold that the governor does not have veto power to withhold the assent, this bill will inevitably become law. Later on, whether this law is challenged in a Constitutional court, when will it be challenged and whether any stay will be granted on the operation of the law are separate and distinct matters. By the time the merits of the law are challenged or any stay is granted many recruitments will have happened based on this unjust,

36. *Supra* note 22
37. *Supra* note 25

unfair and unconstitutional law. To prevent this, the Constitutional head including a governor must be conferred with the power to veto a bill.

If veto power on the Constitutional head should be conferred, should pocket veto too be conferred? The answer is no. The power to veto a bill is discretionary but has to be exercised within a reasonable time. To keep holding bills with oneself means to keep the Constitutional machinery jammed. Further, a deliberate and *malafide* delay is itself against the principles of natural law theory which supports for existence of veto. Furthermore, the Constitution in its provisions prescribes only two options with the Constitutional head i.e. either to withhold the assent or to provide the assent. Thus, he does not have any power to keep the bills pending for assent for an unreasonable period of time. When a bill is presented to him, he must without further delay, either veto it or provide his assent. No doubt, that no fixed time period can be laid down here for the Constitutional head to provide his assent as each bill is different and has its own complexity and length, thus demanding variable time for Constitutional scrutiny. Therefore, the period within which the assent is to be given shall vary for each bill.

Hence, the conclusion of the thorough investigation as made out in this paper is that the Constitutional scheme as contained in the Constitution does bestow the veto power upon the President and the Governor to weed out the bills passed by the legislatures with selfish political ends while violating the essence of Constitutional values and fabric. However, a pocket veto will mean conferment of arbitrary discretion leading to jamming of Constitutional machinery for indeterminate period of time, thus, the Constitutional head must use the veto within a reasonable time depending upon the nature and intricacies of bill. In this light the decisions passed by the Supreme Court in *Ram Jawaya Kapur* v. *State of Punjab*[38] and *Samsher Singh* v. *State of Punjab*[39] require reconsideration.

38. *Supra* note 21
39. *Supra* note 24

The Dynamic Concept of Marriage and the Socio-Legal Implications of Live in Relationship: A Comparative Study

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Introduction

The social dynamics of India are seen taking a positive turn over time. A catena of progressive decision rendered by the Supreme Court of India underscores the same, which in fact has led to a change in some of the archaic beliefs. However, the tendency remains to view certain social truths, through the prism of patriarchal morality. The chaos and uncertainty surrounding live-in relationships hint at the same. Though a portion of the Indian society has rendered its acceptance, a substantial number of populations still remains opposed. Indian judiciary has looked into this matter several times, but some of them stands contradictory to each other, thus there is a requirement to critically introspect the discourse surrounding of live in relationship in India, more particularly as to what is the approach by legislature and judiciary and also draw possible solutions to balance the confusion in this matter. This article makes an effort to comprehend the scope of gender equality with regard to the rising idea of de facto relationships in India, the legal recognition granted, the potential obstacles associated along with comparative analysis with foreign jurisdictions.

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1. What is Live in Relationship?

A living union between two people is termed as live-in relationship.[1] Common names for this kind of living arrangement include cohabitation and common law union.[2] It is mostly a product of the west,[3] but it is has become popular in India as well. It is a type of sexual and emotional arrangement in which no coercive social or legal commitment is necessary. It is a simple alternative from marriage, and those who do not require social or legal approval for their love usually engage in this type of partnership. [4] It is a kind of emotional bond between two people to live together that can be broken at any time at the request of either party. Two persons can enjoy an intimate relationship without being married without the need for a ceremony or social gathering.[5] Freedom and privacy are the two fundamental components that back the idea of a live-in relationship[6]. The term is mostly applied to couples who are not married but never lived together 'as husband and wife'[7].

2. Live-In Relationship in India

The term 'live in relationship' lacks a definite meaning and in India one of the acceptable definitions is 'domestic cohabitation between two unmarried individuals. Nonetheless, the Indian judiciary has intervened and

1. Albertina Antognini, *Nonmarital Contracts*, 73 Stan. L. Rev. 67 (2021).
2. S. S. Halli & Zachary Zimmer, *Common Law Union as a Differentiating Factor in the Failure of Marriage in Canada, 1984*, 24 Soc. Indic. Res. 329 (1991).
3. Robert Leckey, *Differences in a Minor Archive: Feminist Activists and Scholars on Cohabitation*, 70 Am. J. Comp. Law 364 (2022).
4. Louis-Philippe Béland et al., *Determinants of Family Stress and Domestic Violence: Lessons from the COVID-19 Outbreak*, 47 Can. Public Policy Anal. Polit. 439.
5. William C. Nichols, *The Marriage Relationship*, 27 Fam. Coord. 185 (1978).
6. Sangeeta Chatterjee, *Legal Recognition of Live-in Relationship: An Emerging Trend of Social Transformation in India*, 11 I.JLJ 1 (2020).
7. Bimal N Patel, Mamta Biswal & Anand Tripathi, Live-In Relationship and Surrogacy: Legal Implications and Social Issues (2012), https://www.researchgate.net/publication/299638102_Live-In_Relationship_and_Surrogacy_Legal_Implications_and_Social_Issues (last visited Aug 16, 2024).

awarded relief to live-in couples on numerous occasions, maintaining the individual's right to liberty.[8]

Article 21 of the Indian Constitution establishes that it is an inalienable fundamental right that gives the right and freedom of choice to marry or to engage in a live-in relationship with anyone whom he/she likes in the exercise of their own free will. Significant cases decided by the Supreme Court have paved the roots for the recognizing live in relationship in India.

The Supreme Court *Payal Sharma v. Nari Niketan*[9] ruling that a man and woman could live together, if they wanted without engaging themselves in a marriage. Distinguishing the difference between law and morality, the Court pointed out that though live-in relationships are mostly considered immoral by society, they are neither illegal nor an offence.

Indra Sarma v. V.K.V. Sarma[10] is a landmark case in which the Supreme Court debated the legality of live-in partnerships in depth. The decision in this case serves as a foundational framework or guideline for live-in relationships. While articulating upon the legal sanctity provided to live-in relationships, the Court alluded to Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 which defines the term "domestic relationship" which says

"(a) relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family."

In the case at hand, the court decided that the phrase "relationship in the nature of marriage" includes live-in relationships. It should be noted, however, that the Act's provisions do not apply to all live-in couples. In this

8. Archana Mishra, *Vicissitudes of Women's Inheritance Right—England, Canada and India at the Dawn of 21st Century*, 58 J. Indian L. Inst. 481 (2016).
9. Payal Sharma v. Nari Niketan, AIR 2001 All 254.
10. Indra Sarma v. V.K.V. Sarma, (2013) 15 SCC 755.

regard, the Court reaffirmed the tests established in *Velusamy v. Patchaiammal*[11]:

i) "*Holding out to society as being akin to spouses;*

ii) *being of legal age;*

iii) *otherwise qualified to enter into a legal marriage;*

iv) *voluntarily cohabited for a significant period*."

Indra Sharma while determining also established certain factors to consider whether a live-in relationship qualifies to fall within the definition of "relationship in the nature of marriage" under the Act. Those factors are "*the duration of the relationship, shared household, pooling of resources and financial arrangements, domestic arrangements, sexual relationship, children, companionship, public socialization, and the parties' intention and conduct*".[12]

3. Facets of Live in Relationship in India

It is possible to trace out three different scenarios under the concept of 'relationship in the nature of marriage'. Firstly, unmarried heterosexual individuals having a cohabitation, Secondly, cohabitation classified as adulterous and lastly, the same-sex partners.[13] The first category, wherein two unmarried heterosexual persons deliberately reside, is the most prevalent, popular, and acceptable. Most of the societal hostility and legal concerns, on the other hand, stem from the second and third categories as described above.[14]

In *Kusum v. State of Uttar Pradesh*[15], the petitioner abandoned her husband and lived with another man for more than four years. The Allahabad

11. Velusamy v. Patchaiammal, (2010) 10 SCC 469.
12. Goel, A., *Supreme Court and The Domestic Violence Act: A Critical Comment On "Indra Sarma V. V.K.V. Sarma*, 56 J. Indian Law Inst. 398–406 (2014).
13. Vijender Kumar, *Bigamy and Hindu Marriage: A Socio-Legal Study*, 59 J. Indian Law Inst. 356 (2017).
14. *Id.*
15. Kusum v. State of U.P., W.P.(C) No: 53503 of 2016.

High Court held that, the petitioner could not claim the remedy under the pretense of a live-in relationship as formal dissolution of marriage has not taken place yet. Consequently, her new relationship does not qualify as a "relationship in the nature of marriage" and, therefore, does not fall within the scope of Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 Act.

In a case involving cruelty, the Supreme Court in *Sunita Jha v. State of Jharkhand*[16] ruled that the term "relative" in Section 498A of the Indian Penal Code, 1860, should not be broadly interpreted to include a woman.

In *Reshma Begum v. State of Maharashtra*[17], it was ruled by Bombay High Court that the prospect of a legal marriage is essential for a "domestic relationship under Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 Act" and held not to be broad enough to cover adulterous relationships. Consequently, it held that the relationship was does not qualify to be termed as a marriage and thus, is not entitled to a remedy under the Act.

The provision dealt in Section 498A of Indian Penal Code, is now relocated to Section 85 of Bhartiya Nyay Sanhita, 2023, with the Section heading "Husband or relative of husband of a woman subjecting her to cruelty". In addition to offering legal protection to live-in relationships, the Indian judiciary has extended further protections to relationships arising from such arrangements. Courts have upheld the rights of the woman partner to maintenance and property inheritance in many cases.

3.1 The Right to Maintenance

The maintenance in live-in relationships is often described by the word 'palimony'. Section 125 of the Cr.P.C. provides for the provision for maintenance arising out of a relationship. The clause, which was established

16. Sunita Jha v. State of Jharkhand, (2010) 10 SCC 190.
17. Reshma Begum v. State of Maharashtra, (2018) 3 AIR Bom R (Cri) 482.

to help wives who do not have sufficient means to maintain themselves, children who have not attained the age of eighteen, and elderly parents[18], now applies to the partner of live-in partnerships.

Section 125 of the Criminal Procedure Code was amended following the report of the Malimath Committee which suggested to amend and to broaden the definition of "wife", an amendment was carried out[19]. By virtue of it, woman who was cohabiting without marriage and was later abandoned by her partner is given the legal status of a wife. The Supreme Court itself overturned its earlier decision in *Chanmuniya v. Virendra Kushwaha*[20] by upholding that a woman in live-in relationship is entitled to maintenance under the provision of Code of Criminal Procedure, 1973. Explaining the reasons for granting such a privilege to a woman in a live-in relationship, Supreme Court clarified that it is "*to ensure that a male does not take advantage of legal loopholes by enjoying the benefits of a de facto marriage while failing to fulfil the marriage's responsibilities*". In *Kamala v. Mohan Kumar*[21] the Apex Court held that the term 'wife' should be given a purposive interpretation, in order to further "*the principles of social justice and safeguard the right to dignity of individuals guaranteed in the Constitution*". Drawing out a presumption of marriage from the long cohabitation between the woman and the man, it was held that the woman has a right to get the support to maintain herself and their children, which in turn rendered the legal position of a cohabiting woman claiming a right to maintenance similar to that of lawfully married women[22].

18. Badshah v. Urmila Badhshah Godse, (2014) 1 SCC 188.
19. Ministry of Home Affairs, *Report of Committee on Reforms of Criminal Justice System*, 185 (2003), https://www.mha.gov.in/sites/default/files/criminal_justice_system_2.pdf. (last visited Aug 16, 2023).
20. Chanmuniya v. Virendra Kushwaha, (2011) 1 SCC 141.
21. Kamala v. Mohan Kumar, (2019) 11 SCC 491.
22. Rajnesh v. Neha, (2021) 2 SCC 324; *Ajay Bhardwaj v. Jyotsna,* (2017) 1 HLR 224; Abhijit Bhikaseth Auti v. State of Maharashtra, (2009) 1 AIR Bom R 212.

After the enforcement of Bhartiya Nagrik Suraksha Sanhita, 2023, the provision related to the order of maintenance of wives, children and parents are now dealt in Section 144 of the Act.

3.2 Right to Inherit Property

The Supreme Court in *Dhannulal v. Ganeshram*[23], while resolving a property dispute upheld the right of women to inherit property when her live-in partner died. Family members contended that despite the cohabitation of their grandfather with a lady, she was not eligible to inherit the land after their grandfather died as she was not married to him. The Court disagreed and ruled that "*where the man and woman lived together as husband and wife, the law will presume that they were living together in a valid marriage*."

3.3 Legal Status of Children

In *Balasubramanyam v. Suruttayan*[24], for the first time in the Indian legal history, children born out of live-in partnerships were considered legitimate. Supreme Court held that cohabitation of man and women for a long time, could give rise to a presumption of marriage under Section 114 of the Evidence Act could be attracted and as a result, the children born to them during the cohabitation will be regarded legitimate and entitled to a share of the ancestral estate. With the introduction of Bhartiya Sakshya Adhiniyam, 2023, the provision mentioned above is now under Section 119 stated as 'court may presume existence of certain facts.

The Supreme Court in *Bharatha Matha v. Vijeya Renganathan*[25] children born during the live-in relationship of their father were given a share of their parents' property. The Court decided that children born to the couples in a live-in relationship could not be considered as illegitimate if the relationship lasted long enough[26]. In a recent landmark decision, the

23. Dhannulal v. Ganeshram, (2015) 12 SCC 301.
24. Balasubramanyam *v.* Suruttayan, AIR 1992 SC 756.
25. Bharatha Matha v. Vijeya Renganathan, (2010) 11 SCC 483.
26. Madan Mohan Singh v. Rajni Kant, (2010) 9 SCC 209.

High Court of Kerala held that, for the purpose of adoption, a child born in a live-in relationship has the status of a child born out of a wedlock.[27]

A progressive step ahead can be traced in *Svetlana Kazankina v. Union of India*[28], a fascinating case, wherein there arose the problem of granting a visa extension to an Uzbek woman having a live-in relationship with an Indian citizen. It was contended by the Government that the visa extension was refused because the relevant Rules only allow for such extensions if proof of marriage is provided, and it does not extend to live-in relationships. The Court noted that the rules allowing foreigners married to Indian nationals to extend their visas allowed such couples "*to enjoy companionship, love, and affection*". The Court stated that, because live-in relationships have become a common occurrence, marriage and live-in relationships cannot be considered at different pedestal while granting a visa extension.

4. Position in Comparative Common Law Jurisdictions

4.1 Australia

Live-in relationship in Australia is referred to as de facto relationship. It is defined as "*a relationship in which a couple lives together on a genuine domestic basis*".[29] In Australia, the definition of de facto relationship is wide enough to accommodate same sex or opposite sex couples.[30] At the same time, a couple formed by marriage or related by family does not falls within the meaning of de facto relationship.[31] On contrary, even a legally married person can hold a de facto relationship with another individual with whom the person is not married to.

27. Lydia Suzanne Thomas, *Child Born In Live-in Relationship Should Be Treated As A Child Born To Married Couple: Kerala High Court*, LiveLaw.in, https://www.livelaw.in/news-updates/child-born-in-a-live-in-relationship-child-married-couple-kerala-high-court-adoption-juvenile-justice-172398?infinitescroll=1 (last visited Aug 16, 2023).
28. Svetlana Kazankina v. Union of India, (2015) 225 DLT 613.
29. Daniel J Hill, *Could the State do Without Marriage Law?*, 24 Ecc LJ 123–147 (2022).
30. Bower, Donald, W., and Victor A. Christopherson, *University student cohabitation: A regional comparison of selected attitudes and behavior*, 39 JMF 44 (1977).
31. Siew-Ean Khoo, *Living Together as Married: A Profile of De Facto Couples in Australia*, 49 J. Marriage Fam. 185 (1987).

The Family Law Act 1975 applies to the de facto relationships in Australia, these rights include property settlement rights, maintenance of children, separation etc. In case of Western Australia, the Family Law Act 1997 governs de facto relationships. General requirement for the recognition of de facto partner is that the couple should have lived together for two years without separation.[32] However, having a children or substantial contributions to joint property, would qualify for an exception under the rule.

Factors to determine a de facto relationship was formulated to validate whether a couple are or were in a de facto relationship. Such factors include marital status of the couple, the degree of a mutual commitment to a shared life, property ownership and use, sexual nature involved, financial dependency, length of the relationship, care and support of children and the other public aspects of the relationship.

In reality, a concrete definition to the term de facto relationship could not be traced. It is evaluated taking into consideration the circumstances in each case. Having more than one de facto relationship at a time is also possible according to the law as the Family Law Act 1975 specifically accepts that an individual can be in a de facto relationship regardless of being into another relationship,[33] thus rendering a de facto relationship not to be mutually exclusive.

Most of the states allow registration of live-in relationships, thereby, the applicant is provided with a certificate proof of de facto relationship and certifying the length of the relationship. In such a case of registered relationship or civil union, it creates rights for property division, even if the de facto couples have not lived together for two years.

Most of the times, de facto relationships end peacefully and amicably. In certain circumstances there can be disputes on division of property or

32. Glick, Paul C., and Graham B. Spanier, *Married and Unmarried Cohabitation in the United States*, 42 J. Marriage Fam. 19-30 (1980).
33. Eleanor D Macklin, *Nonmarital Heterosexual Cohabitation*, 1 Marriage Fam. Rev. 1 (1978).

custody of children. These are possibly three remedies of settlement, they are by 1) agreement without court involvement, 2) through an agreement formalized by the court through an application for Consent Orders or 3) by applying to the court for orders.[34]

The court may make an order for the division of property owned together or separately by the couples which can include split of any superannuation or payment of spousal maintenance. The net asset pool is computed by anything acquired before, during or after the breakup irrespective of the property owned jointly or individually. Most importantly, while deciding a property settlement, the court looks into financial and non- financial contributions made by the individual[35]. In case of death of de facto partner, the surviving partner has the same rights as a married person[36].

Thus, in short it can be said that de facto relationships are well regulated in Australia giving the couples equal and same status of that of marriage.[37]

4.2 United Kingdom

Live-in relationship in the United Kingdom (hereinafter referred to as the UK) is termed common-law partners or cohabitants.[38] Live-in

34. Margaret Briggs, *Which Relationships Should Be Included in a Property Sharing Scheme?*, *in* Law and Policy in Modern Family Finance: Property Division in the 21st Century 37 (Jessica Palmer et al. eds., 2017), https://www.cambridge.org/core/books/law-and-policy-in-modern-family-finance/which-relationships-should-be-included-in-a-property-sharing-scheme/0C6925F5AED0D60A4A94BF77559D07C6 (last visited Aug 16, 2024).
35. Stafford, Rebecca, Elaine Backman, and Pamela Dibona, *The division of labor among cohabiting and married couples*, 39 J. Marriage Fam. 39-45 (1977).
36. S. Sarantakos, Living Together in Australia (1984), http://archive.org/details/livingtogetherin0000sara (last visited Aug 16, 2023).
37. Brian Sloan, *The Concept of Coupledom in Succession Law*, 70 Camb. Law J. 623 (2011).
38. Göran Lind, *Common Law Marriage and Cohabitation Law*, *in* Common Law Marriage: A Legal Institution for Cohabitation 781-850 (Göran Lind ed., 2008), https://doi.org/10.1093/acprof:oso/9780195366815.003.0012 (last visited Aug 16, 2023).2024

relationships are also referred to as "common law marriages."[39] However, the irony is that the continued cohabitation does not confer the relationships, the status of marriage nor does the law recognize such cohabitations as "marriage" as in a civil partnership. Such cohabitations get recognized as existing in various statutes in the UK for multiple purposes yet without adopting any uniform criterion. When a handful of statutes refer to cohabitants in an unqualified manner, several other statutes adopt varying qualifications.[40] For example, Sec. 137(1) of the Social Security Contributions and Benefits Act, 1994, recognizes "*a man and woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances*" without any qualifications as "Couples". However, The Adoption and Children Act, 2002, under Section 144(4)(b) adopts the approach of including cohabitants within the meaning of Couples based on the criteria of "enduring family relationship". The ambit of the term "enduring family relationship" was called into question in *T and Anor v. CC*[41], where parties were in a live-in relationship for 20 years but were not living in the same home. It was, however, held to be an "enduring family relationship." Inconsistency in describing unmarried partners is further visible in the Human Fertilization and Embryology Act, 2008, under Section 54(2)(c) where it defines couples as "*two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other*."

Amidst the conundrum surrounding the definition of couples in the UK, it is unequivocally clear that cohabiting couples are not afforded the same status as that of married couples in a civil partnership in terms of maintenance, domestic abuse, property, contract, trust and related civil matters.[42]

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39. Heather Conway & Philip Girard, *No Place Like Home: The Search for a Legal Framework for the Family Home in Canada and Britain*, Osgoode Leg. Stud. Res. Pap. Ser. (2014), https://digitalcommons.osgoode.yorku.ca/olsrps/25.
40. *Id.*
41. T and Anor v. CC, [2010] EWHC 964 (Fam).
42. Scottish Law Commission, *Aspects of Family Law Discussion Paper on Cohabitation*, 47 (2020), https://www.scotlawcom.gov.uk/files/1115/8270/8061/Aspects_of_

The lack of statutory schemes relating to the cohabitation of unmarried couples in the UK becomes more complicated with the breakdown of relationships.[43] The Women and Equality Committee of the House of Lords, in their report in 2022, made it clear that the existing law is insufficient to settle the matters relating to caring and non-financial contributions.[44]

However, unmarried cohabitants are still able to obtain legal protection by way of entering into cohabitation contracts.[45] The absence of a specific statutory scheme has made it vital that the couples living together have to make cohabitation contracts on financial matters, assets, tenancy, and related civil matters.[46] However, as reported by The Women and Equality Committee of the House of Lords in their report that the myth of "common law marriage" deters couples from entering into such contracts creating chaos in the event of breaking down of relationships. [47]

The report further hinted that the lack of a statutory framework has resulted in equality issues, which such relationships generally profess to mitigate. According to the Committee, the results from the two recent surveys indicate that two-thirds of women are disproportionately disadvantaged. Experiences from the field also point out that though domestic abuse is covered under the Domestic Abuse Act, 2021, the socio-economic causes arising out of the comprehensive statutory framework make it difficult for women, particularly those relating to economic abuse, to seek effective remedies under the applicable statutes.[48]

Family_Law_-_Discussion_Paper_on_Cohabitation_DP_No_170.pdf (last visited Aug 16, 2023).

43. Andy Hayward, *The Future of Civil Partnership in England and Wales*, 44 *in* The Future of Registered Partnerships: Family Recognition Beyond Marriage? 527 (Andy Hayward & Jens M. Scherpe eds., 2017), https://www.cambridge.org/core/books/future-of-registered-partnerships/future-of-civil-partnership-in-england-and-wales/A6EF4B0287E362651136578650CA3F7C (last visited Aug 16, 2023).
44. Women and Equality Committee, The Rights of Cohabiting Partners, 9 (2022).
45. Sloan, *supra* note 37.
46. Briggs, *supra* note 34.
47. *Id.*
48. *Id*.

4.3 United States

Any discussion on the cohabitation law should first begin with *Marvin v. Marvin.*[49] The lawsuit was filed by Michelle Marvin against Lee Marvin in 1976 after six years of cohabitation. The question of law involved in the case was whether the promise made by Lee Marvin to share his property with Michelle Marvin and to support her throughout her life was legally enforceable or not. In a landmark decision, it was held by California Supreme Court that not only written or express contracts, but oral and implied contracts are also enforceable. It was further held that even in the absence of an agreement, the equitable powers of the courts could be invoked to seek justice in the matters arising out of cohabitation. Intending to bring in social reformation at a time when many states consider living relationships as a criminal offence, the court observed that the cohabitation is am "*....trial period, preliminary to marriage, serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties*." Following *Marvin,* most of the States agreed to enforce the cohabitation agreements; however, they lacked uniformity.[50]

Most of the States in the United States draw a clear line to distinguish between cohabitation and marriage. Marriage is accorded legal status, creates rights and obligations and is protected by appropriate legislation intended to cover different walks of life, whereas, with regard to cohabitation, the statutory protection varies widely from state to state.[51] Following *Marvin,* the position existing in different states could be classified as follows:

a. States that do not provide any rights
b. States allow the enforcement of cohabitation agreement
c. States that provide rights based on status

49. Marvin v. Marvin, 557 P.2d 106 (1976).
50. Sanford N. Katz, *Friendship, Marriage-Like Relationships, and Informal Marriage*, *in* Family Law in America 3 (Sanford N. Katz ed., 2021), https://doi.org/10.1093/oso/9780197554319.003.0002 (last visited Aug 16, 2023).
51. Brian H. Bix, *Marriage Eligibility, Marital Rules*, *in* The Oxford Introductions to U.S. Law: Family Law 0 (Brian Bix ed., 2013), https://doi.org/10.1093/acprof:osobl/9780199989591.003.0002 (last visited Aug 16, 2023).2024

A few States, such as Illinois, Georgia and Louisiana, chose to ignore *Marvin* and continued the prior state of affairs. *Hewitt v. Hewitt*[52] is a classic example of the resulting chaos. In *Hewitt v. Hewitt,* the lady sued the other for divorce upon the belief that there existed a valid marriage between them. However, the Illinois Supreme Court rejected the divorce petition and denied even the claims for contractual or equitable remedies. Though in the process, the Supreme Court called upon the legislature to come up with a statutory remedy considering the impact of cohabitation relationships on family and society and uncertainty surrounding the same, however, as of now, the state lacks any form of legislative intervention. Cohabiting partners were continuously denied any rights, as evident in *Ayala v. Fox*[53]*, Medley v. Strong,*[54] *and Jarrett v. Jarrett*[55]. Such a position makes it difficult for couples to invest in a non-marital relationship.

However, apart from these States, most of the States in the United States recognize cohabitation contracts.[56] Still, it is to be noted that it is the lethargy of States to provide statutory protection, despite the growing number of cohabitations, make it necessary that the cohabiting couples will have to enter into contracts to govern matters of mutual involvement. It affords a situation the matters relating to property, investments, lease, trust, valid custody and family affairs that could be reduced into a contract would be provided with a contractual remedy, if written down or reduced to contractual terms through necessary implications. However, the studies reveal that the vast majority of cohabitating couples do not engage in a cohabitation agreement and their rights and obligation remain unsettled, leaving grounds for disputes on the same. Consequently, cohabitants are often treated as third parties and are not afforded any right in relation to

52. Hewitt v. Hewitt 77 Ill. 2d 49, 31 Ill.
53. Ayala v. Fox 206 Ill. App. 3d 538.
54. Medley v. Strong 200 Ill. App. 3d 488.
55. Jarrett v. Jarrett 449 U.S. 927 (1980).
56. Cynthia Grant Bowman, Unmarried Couples, Law, and Public Policy, https://global.oup.com/academic/product/unmarried-couples-law-and-public-policy-9780195372274 (last visited Aug 16, 2023).

inheritance, insurance, consortium or social security benefits. Furthermore, in matters involving insurance, inheritance and tortious claim arising out of the death of one of the partners, the other is incapacitated from seeking effectual remedy, disregarding the length of cohabitation.[57]

Many States, meanwhile, continue to provide rights in a cohabiting relationship based on the status of the relationship, despite being rejected in *Marvin*. The State of Washington offers rights to cohabiting couples based on a "meretricious relationship", which, as defined in *Connell v. Franciso*[58] and *Re Marriage of Lindsey*[59], as "*a stable, marital-like relationship where both parties cohabit with the knowledge that a lawful marriage between them does not exist*" It allows just and equitable distribution of property rights. However, in determining whether a cohabitation qualified to be termed as a "meretricious relationship", the following conditions were introduced by the Washington Court "*continuous cohabitation*, *duration of the relationship*, *purpose of the relationship*, *pooling of resources and services for joint projects, and the intent of the parties."*[60]

However, the concern associated with such an arrangement is that it applies only to property distribution against one another, which gets activated only upon the dissolution of the relationship or death. Hence, the applicable rules are not as favorable as that of the married. It is particularly because the legislature has not considered cohabitation as "legally equivalent to marriages." [61]

57. Cynthia Bowman, *Legal Treatment of Cohabitation in the United States*, Cornell Law Fac. Publ. (2004), https://scholarship.law.cornell.edu/facpub/148.
58. Connell v. Franciso, 127 Wash. 2d 339, 898 P. 2d 831 (1995).
59. Re Marriage of Lindsey, 331 Ill. App. 3d 261.
60. Connell v. Francisco, 127 Wash. 2d 339, 898 P. 2d 831 (1995).
61. Joanna L Grossman & Lawrence M. Friedman, *Cohabitation | Inside the Castle: Law and the Family in 20th Century America*, *in* Inside the Castle: Law and the Family in 20th Century America (2017), https://academic.oup.com/princeton-scholarship-online/book/19867/chapter-abstract/178754026?redirectedFrom=fulltext (last visited Aug 16, 2023).

4.4 South Africa

In South Africa, cohabitating but unmarried couples are not regulated by law and are not afforded the protection as it does with married couples. Common law marriage is not recognised in South Africa, and the duration of cohabitation does not render it the status of a marriage. Hence, in South Africa, the option is to resort to a cohabitation agreement itself in order to govern the aspects of investments, property rights, leases, custody of the child, and related affairs arising out of a relationship.[62] Meanwhile, it is not necessary that the cohabitation agreement has to be reduced to writing, and it can even be made verbally, though it is recommended to stick to the former route. Such an agreement can only be enforced between the couples, not the third party. Equitable remedies could also be sought in the case of the property. However, a cohabitation agreement cannot contain stipulations as to inheritance or maintenance after the death of one of the persons involved in the relationship. The effects of cohabitation agreements are that the partners in a cohabitation agreement cannot seek inheritance under the Interstate Succession Act and maintenance under the Maintenance of Surviving Spouses Act.[63]

However, varying legislation water down the distinction between cohabitation and marriage. For example, domestic violence in a cohabiting relationship would come within the meaning of the Domestic Violence Act. The Act refers to 'parties to the marriage, but it deems to include partners living together. For the purpose of the Income Tax Act and the Estate Duty Act, the status of spouse is given to the cohabitating couples. With regard to the obligation to maintain children as well, the distinction does not apply.[64]

Concerning the inheritance of the deceased partner's property, *Bwanya v. Master of the High Court Cape Town and Others*[65] made a significant

62. Bix, *supra* note 51.
63. Elena Moore & Rajen Govender, *Marriage and Cohabitation in South Africa: An Enriching Explanation?*, 44 J. Comp. Fam. Stud. 623 (2013).
64. *Id.*
65. Bwanya v. Master of the High Court Cape Town and Ors., [2021] ZACC 5.

difference whereby Section 1(1) of the Intestate Succession Act, speaking about the class of people governed by the statute, was declared unconstitutional for it discriminated the couples based on marital status.

Conclusion

Succinctly speaking, live-in relationship has emerged as a new form of relationship where couple lives together in a domestic relationship. Statistics in each of countries mentioned above, affirms the same. The nature of the relationship meanwhile is that it transcends almost every walk of life as it happens in a married life. However, most of the countries have not yet afforded, the cohabiting couples , the statutory protection except in few countries like Australia, UK, US- through State laws etc. Such a lethargy, causes serious concerns, particularly following the death or break down of relationship. Paying little or no heed to the sort of relationship having deeper impact in the society. Keeping away a section of society by denying a range of rights to the cohabiting couples, is highly discriminatory. It is high time that these relationships are given statutory protection or any form of legal recognition as given in the case of marriage. Alongside, an objective standard must be fixed to determine the existence of a valid live-in relationship, rather than fixing subjective standards, paving way of inconsistent interpretations. Such a legislative protection would be vital in rooting out societal discrimination, securing socio-legal rights and in availing the welfare services of the Government. Few such measures can include mandatory registration of live in relationships in the form of civil partnership where two unrelated persons can register their relationship and be granted rights like that in a marriage, as well as legal acknowledgement of the relationship. Such type has been proposed under Uniform Civil Code passed by Uttarakhand in 2024 where it is mandatory for couples to register their live in relationship to the Registrar of the State. Other measures can include cohabitation contract which lists out rights and duties of the parties. Or it can be placed under the umbrella of the State's secular marriage legislation. Whatever be the mode incorporated, it is high time regulations are brought which can taper out the confusions and inconsistencies which eclipse such intimate relationships.

Addressing Hate Speech in Democratic Elections: Approaches to Electoral Reform in India

Vedansh Sharma& Dr Meenakshi Punia***

Introduction

India, the largest democracy in the world, conducts elections of immense scope and importance. India's democratic process is intricate and dynamic, with more than 900 million eligible voters. It is marked by a wide range of political parties, diversified candidates, and several problems that deeply resonate with its extensive population. The democratic elections of India are strongly influenced by its colonial history, its fight for independence, and its dedication to upholding a democratic system of government.[1] Nevertheless, this system is not exempt from its difficulties, one of which is the persistent problem of hate speech.

Today hate speech during elections include any form of speech, action, behaviour, written material, or public demonstration that has the potential to provoke violence, prejudice, or animosity towards individuals or

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1. Bidyut Chakrabarty, Indian Politics And Society Since Independence: Events, Processes And Ideology (Routledge 2008).

collectives due to their race, religion, ethnicity, gender, or political association.[2] In India, the word comprises a diverse array of expressions that have the ability to disturb the social fabric and impact political results.

The influence of hate speech in Indian elections is complex and significant. First and foremost, it weakens the democratic process by creating a climate of fear and intimidation. Inflammatory rhetoric in political discourse might discourage voters from engaging in the voting process. Voters who perceive a sense of danger or exclusion may choose not to participate in the voting process, therefore distorting the outcomes and undermining the credibility of the election. India is a nation characterised by significant diversity, encompassing a wide range of religions, languages, and ethnic groupings.[3] The voting process, which should ideally be a celebration of this diversity, can instead turn into a contentious arena for divisive and polarising language. Politicians and political parties have the potential to manipulate pre-existing divisions in society, use inflammatory language to gather support from particular groups of voters. This not only isolates other groups but also fosters long-lasting conflict and suspicion among communities.

In India, there are legal procedures in place to specifically address and control hate speech, especially during election periods. The Act 1951 contains provisions that explicitly forbid the incitement of hostility between various groups and the exploitation of religion or caste for the purpose of securing votes[4]. In addition, the IPC includes provisions that deem actions of hate speech as criminal offences[5]. However, the implementation of these legal measures still poses a considerable difficulty, monitoring and regulating

2. Anmol Kaur Bawa, *Explainer | What Every Voter Should Know - The Law on Hate Speech By Electoral Candidates*, (2024), https: //www. livelaw.in/top-stories/explainer-what-every-voter-should-know-the-law-on-hate-speech-by-electoral-candidates-258831 (last visited June 13, 2024).
3. Bipan Chandra et al, India Since Independence (Penguin Books India 2008).
4. Representation of the People Act, 1951, § 123, No. 43, Acts of Parliament, 1951 (India).
5. Indian Penal Code, 1860, § 153A, No. 45, Acts of Parliament, 1860 (India).

the vast amount of content produced during political campaigns, particularly on digital platforms, is a formidable challenge.

Recently, there has been growing attention over the role of social media in spreading hate speech. Today social media platforms such as Facebook, Twitter, and WhatsApp have become widely used in political campaigns, providing a potent tool to connect with and sway voters. Although these platforms offer chances for constructive interaction and spreading knowledge, they can function as channels for hate speech.[6] Social media's ability to provide anonymity and quickly transmit information makes it an ideal platform for the proliferation of provocative content. The disinformation, manipulated visuals, and harmful rumours have the ability to rapidly spread throughout the internet, disregarding both accuracy and the potential repercussions.

The profound influence of hate speech on the voting population should not be ignored.[7] When we observe, it was witness that the repeated exposure to messages promoting hate and division can influence perceptions and attitudes, often strengthening existing prejudices and stereotypes. This phenomenon can result in a society that is more divided and fragmented, where people's political loyalties are increasingly based on identity politics rather than policy or ideology. Within this context, the crucial elements of constructive discourse and debate, which are vital for a robust democracy, are sometimes eclipsed by the presence of acrimony and animosity.[8]

Furthermore, hate speech has the potential to provoke real acts of violence, resulting in concrete damage and loss of human lives. The historical occurrences in India, such as the anti-Sikh riots of 1984 and the Gujarat riots of 2002, illustrate how hate speech may lead to widespread violence. During elections, even seemingly little instances of hate speech

6. Ashis Nandy, *The Political Culture of the Indian State*, 118 Daedalus 1 (1989).
7. Kevin Boyle, *Hate Speech--The United States Versus the Rest of the World*, 53 Me. L. Rev. 487 (2001).
8. Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 Ucla L. Rev. 103 (1992).

have the potential to incite communal tensions and conflicts, causing disruption to both the electoral process and the wider societal structure.

A comprehensive study is hereby required to address the hate speech during Indian elections, moreover the legal reforms and strict enforcement are indispensable but insufficient in isolation. There should be a focused and coordinated campaign to enhance media literacy among the general public, providing citizens with the ability to analyse and assess the content they come across in a critical manner. The educational programmes consist of a vital impact in promoting a better-informed and perceptive voting population, which is less vulnerable to the deceptive strategies of hate speech.[9]

Today the political accountability is a crucial element which should be accountable for the language they employ and the messages they disseminate. To address this issue, it is necessary to have a strong system in place to monitor the language used during political campaigns. Additionally, there must be a readiness to enforce penalties on individuals who disregard the standards of polite and inclusive communication.[10] The civil society organisations and independent watchdogs have a crucial role to play in ensuring monitoring and advocating for a more ethical political culture.

Moreover, it is imperative to enhance cooperation among the government, technology corporations, and civil society in order to address the problem of online hate speech,[11] where the social media companies should adopt and enforce standards to prevent the dissemination of hate speech, while simultaneously maintaining transparency regarding their initiatives and the

9. United Nations, *The Preventive Role of Education*, United Nations, https: //www .un.org/en/hate-speech/impact-and-prevention/preventive-role-of-education (last visited June13, 2024).
10. Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 Santa Clara L. Rev. 729 (1999).
11. Ritika Singh et al., *Online Hate Speech in India: Legal Reforms and Social Impact on Social-Media Platforms,* (2024), https: //papers.ssrn. com/abstract=4732818 (last visited June 13, 2024).

obstacles they encounter.[12] The government can expedite this process by implementing explicit directives and cultivating a collaborative rather than confrontational rapport with technology companies.[13]

The various public awareness programmes that are so crucial in the fight against hate speech, where these campaigns might emphasise the perils of hate speech and advocate for messages of tolerance and solidarity. By utilising the same media platforms commonly employed to disseminate hate speech, these initiatives have the ability to reach a broad audience and fight the detrimental narratives that undermine the democratic process. The presence of democratic elections in India serves as evidence of the nation's dedication to democracy and also mirrors its intricate social dynamics.[14] The hate speech presents a substantial danger to this procedure, as it undermines the involvement of voters, worsens societal rifts, and instigates acts of violence.[15] To tackle this problem, a thorough strategy is needed, encompassing legal changes, promoting media literacy, ensuring political responsibility, and raising public consciousness. India can enhance its democracy and ensure a truly representative electoral process by directly addressing hate speech, leading to more inclusive and harmonious elections that accurately reflect the diverse will of its population.

Theoretical Framework

The author (Yadav, 2018)[16] in his research has observed that the regulation of hate speech remains a formidable challenge. The author observed that the anti-hate speech laws are frequently contested due to their

12. *Id*.
13. David L. Markell, *States as Innovators: It's Time for a New Look to Our Laboratories of Democracy in the Effort to Improve Our Approach to Environmental Regulation*, 58 Alb. L. Rev. 347 (1994).
14. Babu G. S. Suresh, *In Search of Political Culture: Location of Education in Indian Democracy*, in Culture Change in India (Routledge 2024).
15. Gagliardone Iginio et al., Countering Online Hate Speech (Unesco 2015).
16. Anandita Yadav, *Countering Hate Speech In India: Looking For Answers Beyond The Law*, 2 Ili .L. Rev. 17 (2018).

perceived conflict with the fundamental right to freedom of speech and expression. Further the author (Patni & Kaumudi, 2009) in his research[17] the author discussed over the regulation of hate speech which is a contentious and complex issue that grapples with the delicate balance between curbing harmful speech and protecting freedom of expression. Dealing with how the hate speech is characterized by offensive language aimed at abusing, dehumanizing, disparaging, or harassing individuals or groups based on various attributes such as race, gender, religion, caste, ethnicity, and more. The author (Deepak Gupta et al., 2022)[18], expressed its intention which brought over inciting violence, harm, or hatred towards the targeted groups. With the surge of social media and online platforms, the prevalence of hate speech has significantly increased, presenting substantial challenges for manual moderation due to its time-consuming nature.

In the present study, the author (Rathi, 2022)[19] observed that hate speech laws in India reveals a complex landscape marked by stringent legal measures and ongoing debates about the balance between regulation and freedom of expression. Where the Indian laws, such as the IPC and the Representation of the People Act, contain provisions to curb hate speech, aiming to prevent speech that promotes enmity between different groups based on religion, race, language, and other factors. Moreover, the author[20] in his research found and stated that the profound threat to the unity and peace in India, is a nation characterized by its immense cultural, religious, and linguistic diversity. The hate speech exacerbates social divisions, inciting discrimination, hostility, and even violence against marginalized groups.

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17. Ritika Patni & Kasturika Kaumudi, *Regulation of Hate Speech*, 2 Nujs L. Rev. 749 (2009).
18. Prasanta Mandal et al, *Hate-Speech Detection in News Articles: In the Context of West Bengal Assembly Election 2021*, in Pattern Recognition and Data Analysis with Applications 247 (Deepak Gupta et al. eds., 2022)
19. Kartik Rathi, *Critical Study of Hate Speech Laws in India*, 4(6)Indian J.L. & Legal Res. 1 (2022)
20. Syed Owais Khadri, *Hate Speech: A Threat to the Unity and Peace in India*, 6(1) Int'l J.L. Mgmt. & Human. 2136 (2023)

In the present study, the author (Charan & Verma, 2020)[21] discussed the role of social media in regulating hate crimes and cyber racism in India is a burgeoning area of study, as further highlighted the increasing misuse of free speech to target marginalized groups, particularly Dalits. The research also focused over the proliferation of fake news, hate crimes, and cyber racism underscores the urgent need for vigilant regulation of internet content and digital media, which currently remains underdeveloped. In the present research, the author (Jadon, 2021)[22] has observed that the hate speech in India not only incites violence and social unrest but also perpetuates systemic discrimination against marginalized groups, particularly Dalits and religious minorities. The author (Dhavan, 2007)[23] in his research addressed multifaceted approach, including legal reforms, digital literacy initiatives, and active involvement of civil society to promote a culture of tolerance and respect.

Together, the research by several author highlights how difficult it is to control hate speech in India, exposing a complicated environment in which the fundamental right to freedom of expression frequently clashes with the necessity to suppress damaging discourse. According to (Yadav, 2018)[24] and (Patni & Kaumudi, 2009)[25] underscore the underlying conflict in this matter, underlining the contentious and nuanced nature of striking a balance between regulation and free speech. According to (Deepak Gupta et al. 2022)[26], the emergence of social media has increased the occurrence of hate speech, making it more difficult to moderate. Further as per the study

21. Amita Charan & Jitendra Kumar Verma, *Characterizing Social-Media Contents for Regulating Hate Crimes and Cyber Racism against Marginalized and Dalits in India*, *in* 2020 International Conference on Computational Performance Evaluation (ComPE) 864 (2020).
22. Harsh Jadon, *Hate Speech in the Indian Perspective*, 2 Indian J.L. & Legal Res. 1 (2021).
23. Rajeev Dhavan, *Harassing Husain: Uses and Abuses of the Law of Hate Speech*, 35 Social Scientist 16 (2007).
24. *Id.* at 16.
25. *Id.* at 17.
26. *Id.* at 18.

by (Rathi, 2022)[27], it is observed that despite the existence of strict legal measures such as the IPC and the Representation of the People Act, there are ongoing discussions on how to strike a balance between addressing the danger of hate speech to India's unity and peace, considering its various cultural and religious composition. According to (Charan & Verma, 2020)[28] and (Jadon, 2021)[29] emphasized the growing abuse of free speech on digital platforms to harm vulnerable communities. They underscore the pressing necessity for strong regulation of online material to address issues such as misinformation, hate crimes, and cyber racism. Furthermore, in accordance to (Dhavan, 2007)[30] supports the implementation of a comprehensive strategy that includes legal reforms, internet literacy, and civil society engagement in order to foster tolerance and respect. These observations indicate a strong requirement for extensive research to create successful methods for controlling hate speech while safeguarding freedom of speech in India.

Analysis of Hate Speech in Indian Elections

In the dynamic and frequently chaotic realm of Indian elections, the matter of hate speech has become a notable worry, influencing both voter conduct and election results in major manners. The 2023 and 2024 elections have brought attention to the enduring and widespread presence of hate speech, exposing concerning patterns and emphasising the significant impact of social media and digital platforms. The occurrence of hate speech in recent Indian elections has seen a concerning increase in both frequency and intensity. In the 2024 General Elections, a number of notable incidents garnered widespread public attention. When we talk about hate speech, it has been utilised in political rallies, campaign speeches, and social media

27. *Id.* at 19.
28. *Id.* at 21.
29. *Id.* at 22.
30. *Id.* at 23.

posts to divide voters based on religion, caste, and ethnic affiliations.[31] For example, there has been a consistent pattern of using inflammatory language to specifically target religious minority groups. This has been observed in statements made by leaders from different political parties, which aim to provoke hostility and create divisions. These cases are not rare; instead, they demonstrate a wider pattern of using hate speech as a political tactic to rally specific groups of voters.

The ramifications of hate speech on voter behaviour are complex and highly alarming. To begin with, hate speech has the potential to foster an environment characterised by fear and intimidation, especially among minority communities. This context might dissuade individuals from engaging in the democratic process, either by demotivating them from casting their vote or by exerting an impact on their voting choices due to apprehension over their well-being and protection. The reports from the 2023 State Elections in many Indian states revealed that hate speech resulted in a noticeable decrease in voter participation in regions with a high concentration of minority communities.[32] The act of suppressing voter participation weakens the democratic process by distorting election results and diminishing the credibility of the outcomes.

Furthermore, hate speech tends to divide the electorate, causing voters to adopt more inflexible and extreme stances. This polarisation can result in the solidification of identity politics, wherein voters associate themselves according to religion, caste, or ethnic identities instead of policy matters or candidate qualities.[33] The 2024 elections witnessed a significant rise in campaign methods that prioritised divisive identity politics, leading to highly

31. Shakuntala Rao, *Making of Selfie Nationalism: Narendra Modi, the Paradigm Shift to Social-Media Governance, and Crisis of Democracy*, 42 J. Comm. Inquiry 166 (2018).
32. *India: Freedom in the World 2023 Country Report*, Freedom House, https://freedomhouse.org/country/india/freedom-world/2023 (last visited June 13, 2024).
33. Laura G. E. Smith et al., *Polarization Is the Psychological Foundation of Collective Engagement*, 2 Commun Psychol 1 (2024).

fragmented voting patterns. The polarisation not only impacts the immediate outcome of elections but also has enduring consequences for societal unity and political steadiness.[34]

The significance of social media and digital platforms in magnifying hate speech cannot be exaggerated, moreover platforms such as Facebook, Twitter, and WhatsApp have become crucial for political campaigns, providing politicians with unparalleled opportunities to reach out to people.[35] Nevertheless, these forums have also evolved into breeding grounds for the dissemination of hate speech. The social media's anonymity and wide reach facilitate the swift spread of provocative content, frequently without immediate consequences.[36] Whereas prior to the 2024 elections, investigators were able to link a number of widely shared social media posts and WhatsApp messages containing hate speech back to political operatives who were attempting to manipulate public opinion. The algorithms powering these platforms have a tendency to prioritise sensational content, unintentionally amplifying the exposure and influence of hate speech.

The social media firms' endeavours to mitigate hate speech have displayed inconsistency and frequently proven insufficient. Although platforms have put in place regulations to identify and eliminate hate speech, the large amount of content and the complex strategies employed to evade these safeguards provide substantial obstacles. Throughout the 2023 State Elections, there were multiple occurrences of unrestrained hate speech, which swiftly disseminated before any action could take place.[37] In

34. *Id.*
35. Tara Karki, *Role of Social-Media in Facilitating Social Justice Movements and Advocacy in the Field of Social Work*, 13 Current Trends in information Tech 45 (2023).
36. Kaiping Zhang & René F Kizilcec, *Anonymity in Social-Media: Effects of Content Controversiality and Social Endorsement on Sharing Behavior*, 8 Eighth International AAAI Conference on Weblogs and Social-Media 157 (2014).
37. In 2023, Over Two-Thirds of Hate Speech Against Muslims Was Made in BJP-Ruled States: Report, The Wire, https: //thewire. in/communalism/india-hate-lab-hate-speech-against-muslims-2023-report (last visited Jun. 13, 2024).

addition, the inclusion of regional languages in hate speech introduces further intricacy, as detection systems primarily trained on dominant languages frequently struggle to identify damaging content in less commonly spoken dialects.[38]

Notwithstanding these obstacles, there have been endeavours made to tackle the problem. The civil society organisations and independent fact-checking groups have played a crucial role in discovering and combating hate speech on the internet. During the 2024 General Elections, numerous grassroots activities were dedicated to increasing internet literacy and educating voters about the perils of hate speech.[39] These projects sought to enable users to assess the content they come across online in a critical manner and to withstand the manipulative strategies employed by persons disseminating hate speech.[40]

Nevertheless, the task of addressing hate speech is not only the responsibility of social media firms and civic society. The political parties and leaders should be responsible for the language they use and the behaviour of their followers. There is a growing demand for more robust regulatory frameworks to impose penalties on individuals who participate in hate speech during recent elections. There is a call for the ECI to adopt a more assertive approach by closely monitoring campaigns and promptly addressing any infractions. In the 2024 elections, the Commission implemented measures to address this issue by issuing notices to candidates and parties who were found to have engaged in hate speech.[41] Nevertheless, opponents contend that these restrictions frequently proved insufficient and

38. Anchal Rawat, Santosh Kumar & Surender Singh Samant, *Hate Speech Detection in Social-Media: Techniques, Recent Trends, and Future Challenges*, 16 WIREs Computational Stats e1648 (2024).
39. *India's General Elections, Technology, and Human Rights Questions and Answers* , Human Rights Watch, (Apr. 8, 2024), https: //www .hrw.org/news/2024/04/08/indias-general-elections-technology-and-human-rights-questions-and-answers (last visited June 13, 2024).
40. *Id.*
41. *Id.* at 23.

were implemented belatedly, emphasising the need for more stringent enforcement to discourage future transgressions.

The media, encompassing both conventional and digital platforms, exerts a pivotal influence in moulding the public's perspective and discussion pertaining to hate speech. In the 2023 and 2024 elections, mainstream media sources faced frequent criticism for exacerbating the spread of harsh discourse through widespread coverage. The pursuit of sensationalism and the desire for increased ratings occasionally resulted in a prioritisation of provocative utterances over meaningful policy debates.[42] This media coverage can legitimise hate speech, presenting it as a regular component of political discussions rather than a harmful deviation. However, there have been occasions when media organisations have opposed hate speech by refusing to give it a platform and emphasising the negative consequences it brings. The responsible journalism plays a crucial role in combating the dissemination of hate speech and cultivating a better-informed and more tolerant body of voters.

When analysing the current patterns of hate speech in Indian elections, it becomes clear that a comprehensive strategy is necessary to tackle this widespread problem. Legal reforms are important to establish a more robust structure for governing hate speech, but they must be accompanied by initiatives to foster digital literacy, media accountability, and political responsibility.[43] The increasing prominence of social media in political campaigns requires creative strategies to promptly identify and combat hate speech. Effective tactics for this aim necessitate collaboration among social media corporations, public society, and political organisations.

Furthermore, it is crucial to cultivate a culture of tolerance and respect within the realm of politics. It is imperative to promote and support political

42. Mahmoud Mohamed Abdelsamie, Shahira Shaaban Azab & Hesham A. Hefny, *A Comprehensive Review on Arabic Offensive Language and Hate Speech Detection on Social-Media: Methods, Challenges and Solutions*, 14 Soc. Netw. Anal. Min. 111 (2024).
43. Richard Ashby Wilson & Molly K. Land, *Hate Speech on Social-Media: Content Moderation in Context*, 52 Conn. L. Rev. 1029 (2020).

leaders in their efforts to participate in good and inclusive campaigns.[44] This entails prioritising policy matters and engaging in constructive discussions, rather than relying on divisive language whereas the public awareness initiatives that emphasise the perils of hate speech and advocate for principles of diversity and inclusion can also have a substantial effect in reducing its influence.

The consequences are significant; the increase in hate speech during Indian elections not only jeopardises the fairness of the voting system but also endangers the cohesion of the country's society.[45] India, being the largest democracy in the world, should set an example by directly addressing this issue. It should show that a dedication to democratic principles and societal unity can coexist with strong political discussions and freedom of speech. One of the most practical learning we observed from the 2023 and 2024 elections highlight the pressing necessity for collective efforts to combat hate speech and promote a more inclusive and peaceful political process.[46]

Innovative Approaches to Electoral Reforms

Today whenever we talk about the implementing innovative strategies for election reforms it is essential to enhance the democratic structure in India. Primarily these measures are necessary to guarantee that elections continue to be unrestricted, impartial, and representative of the collective desire of the people. In order to accomplish this, it is required to implement a comprehensive approach that includes legislative and regulatory measures, technological solutions, promotion of digital literacy, public awareness campaigns, and political accountability.[47] The legislative structure regulating elections in India is strong, but its implementation sometimes

44. Alexander Tsesis, Destructive Messages: How Hate Speech Paves the Way For Harmful Social Movements (York University Press 2002).
45. *Id.*
46. *Id.* at 21.
47. Sandra Kopecky, *Challenges of Deepfakes*, *in* Intelligent Computing 158 (Kohei Arai ed., 2024).

lacks effectiveness. The Act 1951, is the principal statute that governs electoral processes, encompassing the behavior of candidates, political parties including governance on the corrupt practices[48], disqualification on conviction[49], account of election expenses[50], lodging of account[51] etc. Although it is extensive in scope, there are still areas that require attention in order to effectively combat malpractices such as hate speech, misinformation, and improper influence on voters.

An important aspect in improving the legal systems is to augment the authority and autonomy of the Election Commission of India (ECI). The ECI is responsible for supervising the electoral process, however its efficacy is occasionally hindered by its weak enforcement capabilities. Further enhancing and focusing over the ECI's power to enforce prompt and decisive punishments for infractions can serve as a deterrent against electoral misconduct.[52] The possible measures may encompass augmented penalties, disqualification of candidates, and, in extreme circumstances, the invalidation of election outcomes.[53] Furthermore, it is imperative to safeguard the independence of the ECI from political influences in order to preserve its integrity and impartiality.

Another important aspect to consider is the necessity for more explicit restrictions regarding political money. Whenever we talk about the political financing, it has to be transparent and accountable which is crucial in order to prevent corruption and maintain fairness in the political arena. Moreover the existing legislation mandates that candidates must reveal their campaign disbursements[54]; nevertheless, the implementation of these regulations is

48. Representation of the People Act 1951, § 123, No. 43, Acts of Parliament, 1951 (India).
49. Representation of the People Act 1951, § 8, No. 43, Acts of Parliament, 1951 (India).
50. Representation of the People Act 1951, § 77, No. 43, Acts of Parliament, 1951 (India).
51. Representation of the People Act 1951, § 78, No. 43, Acts of Parliament, 1951 (India).
52. India. Const. art. 324.
53. Iraq Ahmad Reshi & Sahil Sholla, *The Blockchain Conundrum: An In-depth Examination of Challenges, Contributing Technologies, and Alternatives*, 36 Concurrency and Computation e7987 (2024).
54. *Id.* at 50.

frequently lenient, and legal loopholes enable substantial quantities of undisclosed expenditures.[55] The implementation of the rigorous audit systems and implementing real-time reporting of campaign contributions and spending can improve openness. Moreover, implementing a public financing mechanism for political campaigns could diminish politicians' dependence on dubious sources of finance and promote more ethical elections.[56]

Today in the era of technological solutions and digital literacy which are crucial components of new electoral changes in the society. The technology has the potential to significantly change elections by increasing transparency, improving accessibility, and enhancing security. An exceptionally promising advancement is the utilization of blockchain technology for the purpose of ensuring secure and unalterable voting.[57] The blockchain technology can safeguard the integrity of the voting process by offering a decentralized and transparent record of votes, thereby minimizing the potential for fraud and manipulation.[58] Today various pilot initiatives across the globe have showcased the potential of blockchain technology in electoral processes. India stands to gain by embracing and expanding the use of such technologies.

Furthermore, the implementation of EVMs in India has already brought about a modernization of the voting process, while there is yet potential for additional advancements. By integrating EVMs with biometric verification systems, the process of voter authentication can be improved and the risk of impersonation can be minimized. In addition, the adoption of mobile voting technologies can enhance accessibility for voters who are unable to physically access polling booths, such as individuals with impairments, elderly persons,

55. *Id.* at 17.
56. *Id.* at 23.
57. Kaveri Banerjee & Sajal Saha, *Blockchain Signatures to Ensure Information Integrity and Non-Repudiation in the Digital Era: A Comprehensive Study*, 16 IJ Computing and Digital Systems 1 (2024).
58. *Id.*

and non-resident Indians. However, it is of utmost importance to guarantee the security and dependability of these systems in order to avert cyber attacks and uphold public confidence in the election process.

The technological improvements necessitate the same level of importance for digital literacy. The growing trend of digitalization in elections, it is essential for citizens to possess the necessary abilities to effectively navigate this domain.[59] The implementation of the digital literacy programs can enable voters to effectively assess the information they come across on the internet, hence diminishing the influence of disinformation and fabricated news.[60] The educational endeavors should prioritize instructing individuals on the methods of verifying the authenticity of sources, comprehending the consequences of data privacy, and discerning internet manipulation strategies. By promoting the development of a population that is knowledgeable and skilled in using digital technology, we can enhance our ability to withstand and counteract any inappropriate or harmful use of technology during elections.

The third crucial element of electoral reforms consists of public awareness initiatives and political accountability. It is essential to educate the general public about their rights and obligations as voters in order to cultivate an engaged and knowledgeable electorate.[61] Awareness campaigns serve to emphasize the significance of voting, shed light on the consequences of electoral malpractices, and underscore the necessity of ethical political conduct.[62] These campaigns can be implemented through diverse platforms, such as conventional media, social media, community outreach programs, and educational institutions.

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59. Nathalie Tan Yhe Huan & Zuriati Ahmad Zukarnain, *A Survey on Addressing IoT Security Issues by Embedding Blockchain Technology Solutions: Review, Attacks, Current Trends, and Applications*, 12 IEEE Access 69765 (2024).
60. *Id.*
61. Joseph Migga Kizza, *Blockchains, Cryptocurrency, and Smart Contracts Technologies: Security Considerations*, *in* Guide to Computer Network Security 575 (Joseph Migga Kizza ed., 2024), https: //doi.org/10.1007/978-3-031-47549-8_26 (last visited June 13, 2024).
62. *Id.*

Furthermore, it is imperative to establish political responsibility in order to guarantee that candidates and parties comply with ethical norms. One way to accomplish this is by establishing a thorough code of conduct for political participants, which includes explicit instructions on acceptable and unacceptable actions during election campaigns. The ECI should possess the jurisdiction to enforce this code of conduct and levy sanctions for any breaches. The disseminating cases of failure to comply and the consequent sanctions can act as a deterrent and foster a culture of responsibility.[63]

In order to bolster public confidence in the democratic process, it is imperative to advocate for transparency in political campaigns. An effective strategy involves enforcing the requirement for candidates to reveal their criminal backgrounds, financial assets, and conflicts of interest. The dissemination of this information should be readily available to the general public, allowing voters to make well-informed selections.[64] Incorporating procedures for public participation in the nomination and selection of candidates can enhance accountability and guarantee that political representatives truly represent the interests of their constituents.

The civic education programs are essential for developing a politically aware and engaged population. These activities can be included into school curricula to imbue democratic values and principles in students from a young age. Through the provision of knowledge on the significance of voting, the operation of democratic establishments, and the consequences of corruption and misconduct, we may cultivate a cohort of conscientious and involved individuals.[65] Moreover, adult education projects can effectively target neglected and low-literacy areas, guaranteeing that every citizen have the necessary information and resources to actively engage in the democratic process.

63. Badr Bellaj et al., *Drawing the Boundaries Between Blockchain and Blockchain-Like Systems: A Comprehensive Survey on Distributed Ledger Technologies*, 112 Proceedings of the IEEE 247 (2024).
64. Dhanasak Bhumichai et al., *The Convergence of Artificial Intelligence and Blockchain: The State of Play and the Road Ahead*, 15 Information 268 (2024).
65. *Id.* at 38.

The significance of media in electoral reforms cannot be exaggerated, the unbiased and equitable media coverage is crucial for providing information to the public and ensuring that political figures are held responsible for their actions. It is important to promote and support media sources in delivering impartial and precise news coverage, while avoiding the use of exaggerated or prejudiced content. The concept of fact-checking projects can be encouraged to combat the dissemination of false information and fabricated news, which tend to be especially widespread during electoral periods.[66] The autonomous media oversight organizations can observe media coverage and identify cases of unethical journalism, thereby encouraging the adoption of more rigorous media practices.[67]

In addition, cultivating a culture of political discourse and dialogue can enhance the integrity of the democratic process. The platforms that facilitate discourse on policy problems and foster engagement between politicians and voters have the potential to improve the caliber of political discussions. The civic engagement can be facilitated through town hall meetings, public forums, and online debates, allowing citizens to interact with their elected officials and ensure their responsibility.[68] Furthermore, these encounters have the potential to facilitate a connection between politicians and the audience, so promoting enhanced trust and comprehension.

The electoral reforms should incorporate inventive methods that directly tackle the unique obstacles encountered by underrepresented communities. Ensuring universal access to the voting process for all individuals, irrespective of their social, economic, or geographic standing, is essential for upholding a just democracy.[69] Implementing measures such

66. Amit Kumar Tyagi et al., *Role of Blockchain Technology in Smart Era: A Review on Possible Smart Applications*, 23(3)J. Info. Know. Mgmt. (2024).
67. *Id.*
68. Miray Özden, *Active Participation or Legal Obligation? A Qualitative Study of the Effectiveness of Participatory Methods Designed for Local Participation*, 58 Qual Quant 559 (2024).
69. Huifeng Li & Ceren Ergenc, *Party-Led Public Participation in Neighborhood Governance: A Comparative Analysis of Two Forms of Social Networks*, 9 J. Chinese Governance 130 (2024).

as mobile polling stations, absentee ballots, and specific allowances for individuals with disabilities can contribute to the accomplishment of this objective.[70] In addition, focused outreach initiatives have the potential to enhance knowledge and foster engagement among historically marginalized demographics, including women, tribal communities, and religious minorities. The international cooperation and drawing insights from global best practices, India can enhance its approach to election reforms, interacting with international organizations, election monitors, and other democratic nations can offer useful views and experiences. By implementing proven tactics and customizing them to suit the specific needs of India, the country may improve its voting system and efficiently tackle new difficulties.

The implementation of inventive strategies for election changes is crucial in fortifying India's democratic structure. India can guarantee the integrity of its elections by prioritizing legal and enforcement measures, implementing technology solutions and promoting digital literacy, and conducting public awareness campaigns and holding politicians accountable.[71] These reforms necessitate a comprehensive and all-encompassing strategy, which entails the active engagement of individuals, political stakeholders, civil society, and the media.[72] By implementing coordinated and determined actions, India has the potential to construct a stronger and more durable democracy that firmly supports the values of openness, responsibility, and inclusiveness.[73]

Conclusion

It is very much evident that the proposed electoral reforms provide a comprehensive approach to tackle the systemic problems afflicting the

70. *Id.*
71. Abhishek Thommandru et. al., *Fortifying India's Integrity Landscape: Harnessing India's Tech-Driven Anti-Corruption Strategies*, 7 Sustainable Futures (2024).
72. Fayzah Wanjiru, *Upskilling and Retooling Regional Correspondents in a Changing Media Landscape: A Case Study of Royal Media Services Limited.*, Theses & Dissertations (2024).
73. *Id.*

Indian election system. Enhancing legal and enforcement tools, such as implementing stronger regulations, creates a more resilient framework to guarantee fairness and responsibility in electoral processes. The objective of these reforms is to diminish corruption and improve transparency by bestowing increased authority and autonomy upon the ECI, as well as by strengthening legislation pertaining to campaign money. Utilizing technological advancements such as blockchain for secure voting and biometric verification offers novel methods to protect the electoral process from fraudulent activities and promote inclusivity. Additionally, promoting digital literacy empowers voters to navigate the intricate digital environment and make well-informed decisions.

Although there are potential advantages, the implementation of these reforms is not devoid of obstacles. A major obstacle is the firmly established political interests that may oppose any reforms that jeopardize their existing power dynamics. Politicians and parties who get advantages from the current system's gaps and uncertainties may resist stronger restrictions and increased scrutiny because to concerns about losing their competitive advantage. To overcome such resistance, it is necessary to not only make legislative reforms but also to move the political culture towards a higher emphasis on integrity and accountability.

Furthermore, augmenting the authority of the ECI requires adeptly manoeuvring through intricate legal and bureaucratic procedures. To guarantee the independence of the Commission, it is necessary to make changes to the constitution, which can only be achieved through a wide political agreement. This is particularly difficult in a politically divided and diverse environment. Similarly, the implementation of strict campaign financing restrictions requires a strong and transparent monitoring system, which may be both logistically and financially burdensome.

Although technological solutions hold great potential, they also provide a unique set of difficulties, but the deployment is full of sophisticated technologies such as blockchain for voting or biometric verification

necessitates substantial investments in infrastructure and cybersecurity. It is of utmost importance to guarantee the dependability and safety of these technologies in order to prevent possible breaches that could damage the public's confidence in the voting process. Moreover, the digital gap continues to be a pressing concern in India, since substantial segments of the population still lack dependable internet access and digital literacy. It is crucial to address this division in order to prevent technological changes from unintentionally excluding already disadvantaged communities.

There are significant obstacles to overcome in order to promote digital literacy and counteract disinformation. Implementing extensive educational projects necessitates synchronized collaboration among multiple tiers of government and civil society, in addition to significant resources. The swift dissemination of false information on social media platforms poses a persistent challenge, requiring constant adjustment and attentiveness. It is imperative to maintain and implement a variety of strategies to combat misinformation and enhance public awareness regarding digital media. This requires close cooperation between technology corporations, educational institutions, and grassroots organizations.

The effectiveness of public awareness campaigns and political accountability measures relies significantly on the collaboration of the media and the active involvement of civil society. It is essential to guarantee fair and impartial media coverage, but media organizations frequently encounter influences from political and financial interests that can distort reporting. Establishing a culture of responsible journalism and promoting media independence are objectives that necessitate ongoing lobbying and support.

Ultimately, although the suggested electoral reforms present an opportunity for a more open, responsible, and comprehensive electoral system in India, the process of putting them into practice is filled with difficulties. To overcome these obstacles, it is necessary for all parties involved, including government entities, political organizations, civil society, and the voting population, to make a united and determined effort.

It encompasses not just alterations in policies, but also a transformation in culture towards enhanced political honesty and increased public participation. Although facing challenges, it is crucial to undertake these reforms in order to enhance India's democracy and guarantee that elections really represent the desires of the population.

Poverty Jurisprudence and Rawlsian Distributive Justice: An Analysis in the Indian Context

Susmit Isfaq* & Raajdwip Vardhan**

Introduction

Poverty has been ubiquitous in human society throughout history. The significance of poverty in human civilization can be gauged by the fact that the United Nations had designated the year 1996 as the International Year for the Eradication of Poverty, and the decade from 1997-2006 as the Decade for the Eradication of Poverty, and also affirmed the position that eradicating poverty is an ethical, social, political and economic imperative of humankind.[1] Class differentiations and unequal distribution of resources have been the two foremost reasons of poverty in the modern world. The State, in its transition from a mere police state, concerned only with the enforcement of laws, to a welfare state, wherein it is also concerned with welfare initiatives that aim to tackle social issues arising from poverty, has attempted to bring in social reform through legislations.

In India, mass impoverishment has been attributed to the two-century long colonial rule, which left the native Indian populace distraught economically and financially. Dadabhai Naoroji famously asserted this

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1. U.N.G.A Res. 51/178, U.N. Doc. A/RES/51/178 (February 11, 1997).

connection between colonialism and poverty in India in 1876 through his paper *Poverty in India.*[2] After independence, the Indian Constitution recognized the significance of a welfare State. Poverty alleviation measures have also been undertaken by the State in India through both legislative reforms and also policy measures. Interestingly, land reform measures, which were one of the foremost attempts at reducing social inequalities, had also led to a tussle between the judiciary and the State during the decades after independence, with the former asserting the rights of private individuals, and the latter advocating for social rights of the poor and impoverished.

Two decades after India achieved its independence, legal philosopher John Rawls conceptualized a famous theory of justice, wherein he asserted the significance of distributive justice, and opined that only those social inequalities were permissible in society that operated to improve the status of the least advantaged members of society. This, Rawls postulates, is the only means of achieving a 'just' society. Distributive justice has also been interpreted as a facet of Article 39(b) of the Constitution.[3]

It is in this backdrop that this paper shall be to analyse the applicability of the Rawlsian theory of distributive justice in the Indian context. This shall be done with special emphasis on the judicial trends, and how the judicial decisions have helped to ensure the Rawlsian notion of justice. Three distinct facets will be utilized for this discussion – access to justice; access to food, education and livelihood; and, affirmative action.

1. Distributive Justice – Rawlsian Approach

Equality among individuals is a basic notion of modern moral and political philosophy, and this is rooted in the conception that all people 'matter equally', with every person possessing equal value and worth, and

2. Dadabhai Naoroji, the Poverty of India 03 (Union Press 1876).
3. M/s. Victoria Granites (P) Ltd. v. P. Rama Rao & Ors. (1996) 9 SC 303.

therefore, every person deserves to be treated as equals.[4] This moral equality is bestowed on individuals by virtue of their capacity as possessors of certain fundamental properties that each individual has to a certain degree, yet, what is also true is that notwithstanding which capacities and properties are identified for such demarcation, there will always remain certain fundamental differences in the degrees to which persons possess these properties. This means that while some persons may have these properties in abundance, others may possess only the most basic degree of these properties.

John Rawls was a cornerstone jurist of the 20th century. He attempted to tackle the aforementioned conundrum through his theory of distributive justice by suggesting that the basis of equality, in relation to the notion of distributive justice, stems from the possession of certain scalar properties above a particular threshold, and as long as an individual possesses scalar properties above that threshold, the person becomes eligible to seek equal moral status.

The Rawlsian idea of distributive justice begins from the *'*original position*'*. The *'*original position' is a hypothetical situation that functions as a scenario wherein any and all agreements that are reached can be deemed fair. [5] There is zero arbitrariness in the process of decision-making since the decisions are reached by equally represented moral persons, without any influence from social forces, thereby ensuring that there is pure *"procedural justice"* from the beginning. The original position is brought forth by the *'*veil of ignorance*'* which refers to a hypothetical veil that the persons responsible for ascertaining the socio-economic regime or order of society must place before their eyes before taking any decisions. The *'*veil of ignorance*'* places these individuals in a situation wherein they are ignorant about their own position within the social hierarchy, and therefore, once the veil is lifted after the decisions have been made on the appropriate social

4. Emil Anderrson, *Distributive Justice, Social Cooperation and the Basis of Equality,* 88 Theoria 1180 (2022).
5. John rawls, A Theory of Justice 102 (Harvard University Press 1971).

and economic order of society. This implies that once under the influence of the *'*veil of ignorance*',* the individuals are unaware of any and all information about themselves, including both biological facets such as gender, age, and intelligence, as well as the social facets such as wealth, education, religion, status in society, etc.[6] The individuals who are behind the veil of ignorance are only aware of two things – firstly, the individuals have the knowledge that they are capable of forming, pursuing and revising a plan for the overall well-being of people for a good life; secondly, the individuals understand that they possess the capacity to develop a sense of justice which will invoke an effective desire among the members of the society to abide by it.[7] Since the persons responsible are not aware of their status in society, and therefore they may end up at the best- or worst-case scenarios of society, they won't be willing to risk anything, and thus, work for everyone's advantage in a manner that even the worst off in society are benefitted in some manner from the economic and social order that they seek to usher in.[8] Rawls perceives that this hypothetical scenario is consistent with a situation wherein an enemy would assign someone his place in society,[9] and therefore, there is no scope for arbitrary favouritism. Risk aversion, Rawls argues, would overcome all other rational considerations, since no one would be willing to risk a social order that discriminates against a particular stratum of society, since the person may very well end up being a member or part of that strata.[10]

In this backdrop, Rawls gives his two principles for his theory of distributive justice. The "First Principle" states – *"*each person is to have an equal right to the most extensive scheme of equal basic liberties

6. Sampurrna Dutta, *Rawls' Theory of Justice: An Analysis* 22 IOSR J. OF HUM. & SOC. SCI. 40, 41 (2017).
7. *Id,* at 41.
8. Ronal Paul Hill et.al., *Global Consumption and Distributive Justice: A Rawlsian Approach,* 23 HUMAN RIGHTS QUARTERLY 171, 173 (2001).
9. John Rawls, *Justice as Fairness*, 67 PHILO. REV. 163, 173 (1958),
10. RAWLS, *supra* note 5*,* at 153.

compatible with a similar scheme of liberties for others.*"*[11] The "Second Principle" states - *"*social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.*"*[12] The former advocates for the availability of basic general rights for everyone in society, while the latter is more concerned with advocating and improving the status of social and economic inequalities that are persistent in society. Rawls argues that the first principle takes precedence over the second principle and only when it is achieved can the second principle be applied. This is primarily because in the absence of equal basic liberties, unequal scenarios where the least advantaged are benefitted become meaningless.[13]

The "Second Principle" has two parts. The first part advocates for the equality of opportunity to all citizens within the given society, and mandates that members who have the same talents and the willingness to utilise them should be bestowed the same opportunities to do so, notwithstanding their position in society. The second part, which is also known as the *'difference principle'* argues that social institutions must be arranged and reorganized in a manner that they function only to facilitate the existence of a scenario wherein the inequalities of wealth and income of a certain group of society are utilized to ensure the development and growth of those who are least well-off.[14] In essence, therefore, this part of the second principle is also anti-utilitarian in its nature and scope since it opposes the utilitarian philosophy that greater advantages for one group are justified, and instead, argues that inequalities of society, such as wealth for example, are justifiable only if they serve the purpose of compensating the least disadvantaged members of society.[15] The "Second Principle" is also referred to as the 'maximin criterion' since it suggests that the core tenet of distributive justice

11. *Id,* at 53.
12. *Id,* at 53.
13. Dutta, *supra* note 6, at 41.
14. *Id* at 42.
15. Rawls, *supra* note 5, at 14-15.

is to ensure that inequities that exist should only continue to persist if they somehow operate for the benefit of those that *"*subsist in the minimum societal position*".*[16]

2. Poverty and Its Meaning – A Brief Overview

A discussion on poverty jurisprudence first mandates that a definition of poverty. Economists, ranging from Adam Smith in 1776, to Amartya Sen in 1992, have attempted to define poverty. Smith argued that the unavailability of necessities, which in this context means not merely those aspects of life that are indispensably necessary to live, but also those which have been established as things rendered necessary for decent existence due to cultural traits of the society.[17] Sen, on the other hand, argued that poverty means the *"*failure of basic capabilities to reach minimally acceptable levels*",* with basic capabilities ranging from simple aspects such as food and shelter, to more complex issues such as being able to *"*appear in public without shame*."*[18] The United Nations takes a more integrative approach, and instead of merely taking into context the economic aspects, poverty is defined herein in terms of social, economic and cultural parameters, with these aspects also related to the broader perspective of 'human dignity'.[19]

From a legal standpoint, Prof. Upendra Baxi gives an illuminating approach on the definition and meaning of the terms 'poverty' and 'poor'. Prof. Baxi, instead, substitutes the words 'poverty' and 'poor' with 'impoverishment' and 'impoverished', since he believes that the words 'poor' and 'poverty' normalise something that ought to be centrally problematic.[20] He argues that *"*people are not naturally poor but are made poor, and that

16. John Rawls, *Concepts of Distributional Equity: Some Reasons for the Maximin Criterion* 64 Am. Eco. Rev. 136, 141 (1974).
17. Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 519 (Random House Inc 1776).
18. Amartya Sen, Inequality Re-Examined 109-110 (Oxford University Press 1997).
19. Vikrant Narayan Vasudeva, *Legal Intervention in Poverty Alleviation: Enriching the Poor Through the Law,* Nujs L. Rev. 447, 449 (2010).
20. Upendra baxi , Law and Poverty: Critical Essays vi (N.M Tripathi 1988).

impoverishment is a dynamic process of public-decision making in which it is considered just, right and fair that some people may become or stay impoverished.*"*[21] From a judicial standpoint, Dr. Justice Lakhmanan has opined that poverty is a violation of human rights since poverty pushes an individual into a situation wherein the individual's basic rights such as the right to remain free from hunger, access to safe drinking water, education, primary health care and medical attention, and the right to be free from discrimination are violated due to their impoverished condition.[22]

3. Poverty Jurisprudence – A Post-Independence Study in Light of Rawlsian Distributive Justice

Poverty and impoverishment in India have been attributed to the colonial loot of Indian resources[23] and also to the social distinctions of caste and class that existed in Indian society prior to the advent of the British. After independence, however, attempts were made by the founding fathers of the independent India to undertake measures for alleviating this rampant poverty. This is reflected in the socialistic tendency of the Constitution of India, wherein, although the term 'socialist' was inserted into the Preamble two decades later by the 42nd Constitutional amendment. Furthermore, India's poverty was noted by its first Prime Minister Pt. Jawaharlal Nehru, when he discussed in the famous *'Tryst with Destiny'* speech that *"*service to the nation meant ending poverty in India*,"*[24] a sentiment that was echoed four decades later by Prime Minister Atal Behari Vajpayee when he declared - *"*I have a vision of India free of poverty, illiteracy and homelessness.*"*[25] Nonetheless, the focus of this article isn't on the legislative and executive

21. *Id,* at vi.
22. Dr. Justice A.R Lakshmanan, Voice of Justice 121-122 (Universal Law Publishing Co 2006).
23. Dadabhai Naoroji, Poverty and Un-British Rule in India 2 (Swan Sonnenschein & Co. Ltd 1901).
24. Vasudeva, *supra* note 19, at 448.
25. *Id,* at 448.

actions that were undertaken to alleviate poverty in India, but rather on how the judiciary has, through an evolution of poverty jurisprudence, helped to alleviate poverty, or at the very least, extend the doors of justice to the impoverished in India, since independence.

The 1980s marked a swift transition from a law-centric understanding of justice to a justice-centric perspective of law, wherein anti-poverty jurisprudence flourished. A revolution of the judicial process was simmering with the issues of the poor and marginalized vis-à-vis accessing justice was coming to light. Indeed, as J. Bhagawati observed in *S.P Gupta v. Union of India,*[26] large masses were being denied access to justice, thus denying them even their most basic rights, leading to a scenario where *"*liberty and justice have no meaning*."*[27] Again, in *PUDR v. Union of India,*[28] the Court opined that it was necessary to restructure the existing social and economic order in order to ensure that basic human rights were meaningful for the weaker sections of society. The Court, in *Samatha v. State of Andhra Pradesh* also appreciated and recognized the efforts undertaken by the legislature and executive through policy measures for reconstructing the old social order of unequal social hierarchy through measures centered on distributive justice principles, and held that the *"*establishment of the egalitarian social Order through the rule of law is the basic structure of the Constitution*"*.[29]

This chapter will attempt to understand how the Courts have tried to develop and further jurisprudence to help the impoverished and alleviate poverty by tracing the jurisprudential developments under three broad categories – access to justice; access to food, education and livelihood; and, affirmative action policies.

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26. AIR 1982 SC 149.
27. N.S Chandrasekharan, *Dalit Jurisprudence: Legal Basis,* 28 JILI 492, 495 (1986).
28. AIR 1982 SC 1473.
29. AIR 1997 SC 3297.

3.1 Access to Justice

An important and often neglected aspect of poverty jurisprudence in the Indian context is access to justice. It was estimated by the United Nations in 2008 that four billion people across the world are excluded from the ability to come out of poverty due to their exclusion from the facets of rule of law.[30] This means that a system of inadequate access to law, or more precisely, a deprivation of access to justice, both qualitative and quantitative, can be deemed to be contributory to the *crisis of impoverishment*.[31] Inadequate access becomes an indirect catalyst of impoverishment, and although an individual may not be thrust into poverty merely due to lack of access to legal mechanisms, this lack of access would inadvertently mean that the individual is unable to skip out of the vicious web of impoverishment.[32]

Before delving further into the discussion on this issue, it is first important to define what the phrase 'access to justice' actually means. One of the most comprehensive definitions in this regard is – *"*access to justice guarantees that people can go before the courts to demand their rights be protected, regardless of their economic, social, political, migratory, racial, or ethnic status or their religious affiliation, gender identify, or sexual orientation*."*[33] This definition is in consonance with the ideals of equal access of law envisioned under Article 14 of the Constitution of India. Access to justice is intrinsically connected with access to courts. The phrase 'access to courts', in this regard, has been held in *Cotton Corporation of India v. United Industrial Bank* to mean that every person has *"*unhindered

30. M. S. Carmona & K. Donald, *Beyond Legal Empowerment: Improving Access to Justice from the Human Rights Perspective* 19 Int. J. of Hr 242, 243 (2015).
31. Diyaanshi Chandra, *Scouting into Poverty Thickets with 'Access' Searchlight: Understanding the Connect Between Inadequate 'Access' to Law and Poverty,* 4 Gnlu L. Rev. 15, 17 (2013).
32. *Ibid,* at 18.
33. V. Lima & M. Gomez, *Access to Justice: Promoting the Legal System as a Human Right*, in W. Leal Filho et.al., (Eds.), Peace, Justice and Strong Institutions: Encyclopaedia of the UN Sustainable Development Goals (Springer Publishing, 2021).

and uninterrupted access to law courts*"*, with law courts herein used in a broad sense, that brings within its umbrella every forum where relief can be secured.[34] The relationship between access to justice and how the judiciary has attempted to make this easier for the impoverished sections in India will be discussed under two headings – firstly, the relaxation of *locus standi* principles due to which public-spirited organisations and individuals can also file petitions on behalf of members of society who would be otherwise unable to access justice, with this transforming to PIL jurisdiction; and secondly, through the development of a jurisprudential norm in Indian law that individuals should be compulsorily given free access to legal aid, which would ultimately assist in ensuring that those individuals who would otherwise be unable to knock at the annals of the judiciary can now do so to assert their rights.

The traditional law of *locus standi* states that only individuals whose rights were *"*directly affected by the law*"* could approach the Court to seek remedies.[35] Nonetheless, with the excesses of the emergency as the backdrop, this traditional notion began to change, and judges of the Supreme Court began to echo within their chambers in *obiter dictas* that the relaxation of *locus standi* norms was needed in cases such as *Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai*[36] and *"Fertilizer Corporation v. UOI"*.[37]

The movement culminated with *Hussainara Khatoon v. State of Bihar,*[38] where the Hon'ble Apex Court recognized that an advocate had the requisite right to file a petition enquiring about the status of under-trial prisoners in Bihar, and this led to the advent of "Public Interest Litigation" (PIL hereafter) jurisprudence in India. Once established, PILs began being filed on numerous aspects of social and public importance, however, many

34. AIR 1983 SC 1272.
35. Chiranjit Lal v. Union of India, AIR 1951 SC 41.
36. AIR 1976 SC 1455
37. AIR 1981 SC 344.
38. (1980) 1 SCC 81.

of them, such as *Samatha*[39] which dealt with tribal rights, with the Court advocating that the tribal lands owned by members of the Scheduled Tribes were protected by law and could not be utilized for mining; and *Gaurav Jain*[40] where the Court directed that children of prostitutes were the victims of circumstances, and needed to be rehabilitated and given access to vocational centres were instrumental in securing the rights of members of society who may not have been able to knock on the doors of the Court if the traditional rules of *locus standi* were still in practice.

Similarly, the cases of *Bandhua Mukti Morcha v. UOI,*[41] and *Neeraja Chaudhary v. State of MP*[42] dealt with the issue of bonded labour, a practice which was prohibited by the Constitution, which states that *"*begar or other forms of forced labour are prohibited*"*[43] was given practical implications through judicial intervention. These cases exemplify that the relaxation of traditional *locus standi* principles was instrumental in securing justice and that in these circumstances, the judiciary also did not falter in setting *"*appropriate legal bases*"* with an aim to develop an anti-poverty jurisprudence.[44]

Access to justice also connotes to access to legal aid. Poverty and impoverishment limit the financial capabilities of individuals to pursue justice even when they concretely know and realize that there has been an infringement of their rights. This ultimately means that justice and law remain lofty aspirations for this section of people. In this regard, an important judgement of the Hon'ble Apex Court was in *Sheela Barse v. State of Maharashtra* wherein the Court held that the State was obligated to provide free legal aid to the poor who were arrested, and yet, was unable to represent themselves in front of the Court, by tracing a right to legal

39. *Supra* note 29.
40. Gaurav Jain v. Union of India, AIR 1997 SC 3019.
41. AIR 1984 SC 80.
42. AIR 1984 SC 109.
43. India Const. art. 23
44. Chandrasekharan, *supra* note 27*,* at 492.

representation from Articles 14, 21 and 39A.[45] Article 14 concretizes the doctrine of the rule of law within India, Article 21 safeguards individuals and their right to life and personal liberty from being curtailed without following due process of law and Article 39A envisages "equal justice and free legal aid" for all through the enactment of statutes such as the Legal Service Authority Act, 1987 (hereafter LSAA, 1987) that provides free legal services to people designated under the statute. This judicial stand from *Sheela Barse* was subsequently reiterated in *Sukh Das v. UT Arunachal Pradesh*[46], wherein the Court declared that the State is fundamentally obligated to provide free legal aid and assistance to individuals who are accused of an offence, and which would ultimately lead to jeopardy of the life and liberty of that accused person if convicted, since the pursuit of justice has the implicit requirement of being just, fair and reasonable under the ambit of Article 21,[47] and this is only possible if all parties are given due representation before the Court of law.

Rawls' first principle of distributive justice advocates for the availability of equal basic liberties for all. Thus, according to Rawls' approach, a just society grants every individual the same right to the broadest possible set of basic liberties, provided that these are also equally accessible to others. This principle is foundational to the idea that every individual must have the ability to seek redress in court for the violation of their rights. Access to basic liberties is only possible and relevant if there is an equivalent protection provided to all notwithstanding their social position when these basic liberties are infringed. Guaranteeing liberties without actually having a mechanism in place to provide a remedy for the rights if they have been violated, inadvertently leads to an erosion of basic liberties. This is because a victim whose liberties are violated cannot access justice and rectify the violation when the rights are contravened. The Indian judiciary has worked

45. (1983) SC 378.
46. 1986 AIR 991.
47. Mayukha Parcha & Anicham Tamilmani, *Access to Justice in India*, 2 Int. J. of L. Mgmt. & Hum. 01, 05 (2018).

to enhance access to justice, especially for the marginalized, by expanding PIL and making legal aid more accessible. These measures do not merely uphold formal equality of rights but also address the substantive inequalities that often prevent marginalized individuals from fully exercising these rights. In a society where the most disadvantaged can effectively challenge the injustices and seek redress, Rawls' idea of a fair system – where institutions work to balance equality and liberty – is realized. These measures ensure that even the most marginalized and disadvantaged people can challenge the inequalities and seek justice, thus embodying Rawls' vision of equal basic liberties.

3.2 Access to Education

Education is undoubtedly the most important instrument for alleviating poverty at a large scale because education exponentially expands the opportunities to seek employment for an individual. The ICESCR and the UDHR recognize the right to education for all under Articles 13 & 14 and Article 26 respectively. Along with rampant poverty at the time of India's independence, the statistics of which have been already highlighted in the previous section, there was also rampant illiteracy, with the literacy rate back then being only 14%.[48] Nonetheless, the right to education in India was given the status of a Directive Principle under the Constitution of India. The judiciary however, more than three decades after India's independence, recognized the sacrosanctity of the right to education in two landmark cases.

In the first case of *Mohini Jain v. State of Karnataka,* [49] the Hon'ble Apex Court highlighted that it is impossible to ensure the right to life and personal dignity unless the same was accompanied by a corresponding right to education. It was further held that proper enjoyment of the rights under Part III of the Constitution would not be possible to its fullest capacity if

48. Dr. Navimchandra R. Shah, *Literacy Rate in India*, 1 Int. J. of Res. in All Subj. in Multi-lang. 12, 12 (2013).
49. AIR 1982 SC 1858.

the right to education was not guaranteed.[50] In the second case of *Unni Krishnan v. State of Andra Pradesh*, [51] the Court reiterated that the right to education is implicit in Article 21, albeit, it also stated that the same could not be deemed to be a pure fundamental right since its parameters were constrained within Articles 41, 45 and 46 of the Constitution. Nonetheless, it laid emphasis on Article 45 and stated that four decades had passed since independence, it was high time to apply the right envisaged by the founding fathers within the ambit of that provision, and in this regard, obligated the State to ensure that every child gets free and compulsory education till the age of 14 years.[52] Ultimately, these decisions were instrumental in the insertion of the 86th constitutional amendment, which recognized free and compulsory education under the ambit of Article 21A.

This, again, is an important development for the realization of Rawlsian distributive justice. Education is the greatest levelling agent in a hierarchical society, and it allows those that are disadvantaged to climb the ladder of social hierarchy and compete with the socially advantaged members of society on equal footing. If free and compulsory education is declared to be an inviolable right by the judiciary, then even the least advantaged children of society, including the most impoverished children, will be able to reap the benefits of education. From this perspective, ensuring that children up to the age of 14 years are guaranteed access to education seems like a fulfilment of the Rawlsian difference principle. However, it can also be analysed and interpreted as the fulfilment of Rawls' first principle, since without education and literacy, guaranteeing basic individual liberties to all members of the society remains an ideal on paper that cannot have any actual practical implications. This is because without a basic level of education, individuals will remain oblivious to their rights and liberties, and therefore, even if they are given access to the altars of the Courts with

50. Manoj Kumar Sinha, *Right to Education: Indian and International Practices,* 48 Ind. Soc. of Int. L. 188, 200 (2008).
51. AIR 1993 SC 2178.
52. Sinha, *supra* note 50*,* at 201.

the most relaxed procedural norms, their ignorance will still not allow them to reap the benefits of these relaxations, and therefore, justice will continue to remain a distant dream. Therefore, access to education also fulfils the first principle of Rawlsian distributive justice, and helps in ushering in a society wherein that principle is realized by all members, irrespective of social standing, thereby making the social scenario even more conducive for applying the difference principle. Finally, the Constitution of India recognizes that certain classes of persons may have inadequate representation in the educational institutions, by giving them reservation through affirmative action (the implications of which will be discussed in more detail in the next part of this chapter), and in light of this recognition, it becomes especially important to ensure that education becomes a basic and inalienable right, so as to ensure that the equality envisaged by the first principle of Rawlsian distributive justice is adequately recognized.

3.3 Affirmative Action under Articles 15 & 16 - The Indian 'Difference Principle'

Articles 15 and 16 of the Indian Constitution recognize the significance of affirmative action policies. Article 15 prohibits the State as well as citizens from discriminating on the basis of *"*sex, religion, caste, race or place of birth*"*, but allows for positive discrimination by granting the State the right to make laws for the advancement of *"*Socially and Educationally Backward Classes*"* (hereafter SEBC)*,* as well as women and children.[53] Article 16, similarly, advocates for the *"*equality of opportunity in matters of public employment*"*, however, at the same time, it also allows for positive discrimination through affirmative action for the benefit of a class of persons who are not adequately represented in the services under the State.[54] These two articles seem to be *prima facie* contradictory to the provisions of Article 14 which advocates for "equality before the law" and "equal protection of laws", nonetheless, this would be a very rudimentary understanding of the

53. India Const. art. 15.
54. *Id,* Art. 16.

contents of this provision. This is because Article 14 also permits reasonable classification, where equals are treated equally and those who are not equal are treated differently. This means that the Constitution permits that those who need to be given special treatment in order to achieve equality should be treated specially, and therefore, those who are the least disadvantaged members of society must be given certain special concessions to ensure that they can perform on par with the advantaged persons.[55] This is the gist of the Rawlsian difference principle, and it is represented concretely by the two aforementioned articles – Article 15 and 16.

The constitutional recognition afforded to affirmative action principles makes a distinction between substantive and formal equality, with the focus falling on the former when laws are created and enforced. In *State of Kerala v. N.M Thomas,* it was held that the reservation scheme envisaged under Article 16(4) was not an exception to the general principle of non-discrimination envisaged under clause (1) of Article 16, but rather, a facet of the same, and therefore, a means of ensuring and achieving equality that was *"*embodied in Article 16(1*)."*[56] This was an important observation since it meant that the *difference principle* of reservation was not deemed an exception but rather a separate facet of equality itself.

Moreover, the landmark case of *"Indra Sawhney v. Union of India",*[57] also known as the *Mandal case,* seems to clearly reflect Rawls' second principle, since herein reservations were forwarded to benefit the least disadvantaged.[58] Here, the Court allowed for a 50% ceiling with regards to reservations on account of the argument that there should be a balance between merit and affirmative action, and this, in a way, balances the notions of equal basic liberties and difference principle that Rawls advocates for.

55. Adv. S.S.R. Bhonsle, *Justice for All: John Rawl's Theory of Justice and Its Relevance in Indian Judicial System,* 9 J. of Res. in Hum. & Soc. Sci. 64, 66 (2021).
56. (1976) 2 SCC 330.
57. AIR 1993 SC 477.
58. Abinash Darnal, *Social Justice in India: A Comparative Study of Rawls and Ambedkar,* 14 Comp. Philo. 13, 21 (2023).

Furthermore, the case also elucidates the concept of the *"creamy layer'* in the case of reservations for "Other Backward Classes" (OBC hereafter), and argues that those members of the OBC who fall under this class shall be excluded from the benefits of reservation. This is also a significant development since this ensures that only the least advantaged members of the OBC class that actually benefit from affirmative action policies will reap the rewards of the same, and the ones who are not backward will not be able to seek reservations. Regrettably, although this exclusion was envisaged for the OBC, the Scheduled Castes (SC) and Scheduled Tribes (ST) were exempted from this exclusion, and this was a missed opportunity to ensure that only the least disadvantaged members of these two classes as well were given the benefit of reservation.

The significance of the 93rd Constitutional Amendment, which sought to add clause (5) to Article 15 that allowed for special provisions for the advancement of the SEBC vis-à-vis their admission into educational institutions. This amendment was upheld in *Ashok Kumar Thakur v. UOI*[59] and the judiciary upheld the amendment in this instant case since it perceived the amendment as a facilitator of social justice for the SC, ST and OBC communities. Nonetheless, herein, when the question of applying the *creamy layer* concept to the SC and ST communities was raised, the Court held that this was inapplicable since these two communities formed a separate class by themselves.

Furthermore, the discussion on affirmative action vis-à-vis employment extends not only to appointments but also to promotional reservations. In *Southern Railway,*[60] it was held that the advancement of SEBC mandated that there be adequate representation of these groups at all levels of employment, from the lowest to the highest rungs, and therefore, if promotion was merely based on merit then there may exist a scenario where the socially and educationally backward classes did not get representation in the same proportion in the higher rungs of the employment hierarchy that

59. (2008) 6 SCC 1.
60. Southern Railway v. Rangachari, AIR 1962 SC 36.

they had in the lower rungs. Interestingly, this stand was reversed three decades later in the landmark *Indra Sawhney case*[61] wherein it was held by the Hon'ble Apex Court that promotional reservations did not fall within the ambit of Article 16(4) from which it was being traced. Nonetheless, this stand was promptly reversed by the Indian Parliament through the 77th and 85th Constitutional Amendments, which added Clause 4A and 4B to Article 16, giving reservation in promotions to SC & ST communities, and also consequential seniority in matters of reservation in promotion. The validity of these amendments was challenged, and it was promptly held in *M. Nagraj* that promotional seniority was a relevant necessity, although it was held that the State must provide quantitative data that highlighted the backwardness and inadequate representation of the group in question.[62]

The evolution of affirmative action policies in India, as outlined through key constitutional provisions and landmark judgements, reflects a commitment to realizing the Rawlsian difference principle. By recognizing the need for special treatment of SEBC through Articles 15 and 16, the Indian judiciary and legislature have sought to balance equality and fairness. The inclusion of reservations, the distinction of the *'*creamy layer*'* for the OBC and the provisions of promotional reservations underscore an effort to ensure that inequalities in society work to the advantage of the least privileged. These measures align with Rawls' vision that social and economic inequalities are justified only when they benefit those who are the worst off. Thus, India's affirmative action framework strives to create a more just and equitable society by giving the marginalized the tools and opportunities needed to achieve substantive equality.

4. Rawlsian Justice and Directive Principles: A Study

The Apex Court, while discussing the essentials of justice, had briefly touched upon the German jurist Gustav Radburch's jurisprudence where

61. *Id*
62. M. Nagraj v. Union of India, AIR 2007 SC 71.

he had differentiated between two kinds of justice – commutative and distributive.[63] Commutative justice primarily focuses on fairness and equality in terms of transactions between parties. It is based on the idea that fairness and equality must be dealt with in mutual interactions and exchanges. But in the case of distributive justice, the Court affirmed that equality has to be relative in the sense that it treats different persons differently while granting relief keeping in mind reward and punishment according to merit. The Court reaffirmed that distributive justice presupposes three kinds of equality; equality of rights, status, and capacity to act. The discussion on distributive justice in *Gurbax Singh* can also be read in light of an earlier Apex Court judgement in the *Minerva Mills v. UOI* [64] case. The Court, while discussing the co-dependency of Part III and Part IV of the Constitution, has opined that the rights conferred in Part III are means to the end and not the end itself. While provisions of Part IV could be considered as an end in itself, the fundamental rights given in Part III are just means that have reasonable restrictions. Article 37 of the Constitution mandates that provisions of part IV are non-justiciable. Yet, it is vital in formulating laws of the State and providing policies fundamental to the governance of the country. Part IV mandates that the State must endeavour to diminish income inequalities and also focus on the elimination of disparities and status among people.[65]

The Rawlsian Principle of 'Fair Equality of Opportunity' requires that jobs be formally open to all and be allocated meritocratically but each individual has to have a fair chance in attaining these positions. This conception of Rawls' equality of opportunity is based on the native talent of the individual and their willingness to participate in the position, not giving any emphasis on their family background or the class they belong to. The Constitution not only argues in favour of equality of opportunity but aims to minimize inequalities in income which goes a step beyond

63. Gurbax Singh v. Finance Commissioner, AIR 1991 SC435.
64. AIR 1980 SC 1789.
65. India Const. art. 38(2).

Rawlsian philosophy. While Rawls argues for a favourable environment for the least advantaged, the Constitution of India argues for eliminating inequalities in social status, income and opportunity. Article 39 of the Constitution also talks about having rights to an adequate means of livelihood which is part and parcel of Article 21. Without adequate livelihood opportunities, it is not practically possible to enjoy rights under Article 21. Again, under Article 46, it has been mandated by the Constitution that the State must promote the educational as well as the economic concerns of the weaker sections, with an emphasis on the SC and ST communities. Furthermore, Rawls on the other hand, only focused on the people 'similarly endowed and motivated' and focused only on economic inequalities disregarding the social and historical inequalities. The Constitution of India talks about not only reducing income inequalities but also giving opportunities to socially and culturally disadvantaged people. Hence, it can be assumed that the Rawlsian principle of giving opportunities to a 'similarly endowed' population extends to people of scheduled class and caste which goes beyond the periphery of economic disparity under the Constitution of India which extends to public employment.

Rawls' first principle says, "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." As any other liberal democrat, John Rawls too had given priority to basic civil and political liberties, and he regards them as non-negotiable. Regarding the second principle: "social and economic inequalities are to be managed so that they are both (a) reasonably expected to be to everyone's advantage and (b) attached to positions and offices open to all" which is related to social and economic rights, Rawls suggests that he has no objection if the inequality is for everyone's advantage and everyone has fair and equal opportunity to attain public offices. The second Rawlsian principle has been contended by many for its assumptions that in liberal democracies all have equal political rights by being citizens. But often, this is not the case. In practice, many liberal democracies deny basic social and political rights to the least advantageous populations of the country. It is

often said that Rawlsian idea of distributive justice is a defence of the softer version of capitalism that exists today, defending libertarian egalitarianism. While the Constitution of India retains provisions of the same, Part IV of the Constitution seeks a society that is more socialist in nature than egalitarian.

5. Conclusion

India's struggle with poverty is a complex and enduring challenge that has seen substantial progress over the decades. Although India has uplifted hundreds of millions from poverty since its independence, an equally staggering number still lives in absolute impoverishment. Within this context, the Indian judiciary has played a key role in shaping poverty jurisprudence through the adoption of principles that resonate with the Rawlsian framework of distributive justice that emphasizes the tenets of equality and fairness.

Rawls' first principle of distributive justice states that there should be equal access for all individuals to the fundamental liberties. Central to this idea is the belief that everyone must be empowered to approach the courts for remedy when their rights are infringed upon. This principle underlines the importance of ensuring that every person, regardless of their status, has the opportunity to challenge violations of their rights through local avenues, maintaining justice and equality in society. The Indian judiciary's efforts to establish a relaxation of *locus standi* norms through PIL and the recognition of legal aid as an integral part of Article 21 of the Constitution have significantly transformed access to justice in India, especially for the marginalized sections, and played a crucial role in the realization of the Rawlsian first principle of equal basic liberties for all. A related aspect of the realization of Rawls' first principle is access to education since it empowers individuals with the necessary knowledge and skills to exercise the basic liberties guaranteed by the principle and fully participate in society. Equitable educational opportunities are also important in bridging the gaps

between economic and financial statuses, and this has also been realized through the Indian judiciary's inclusion of the right within the aegis of Article 21, as well as the subsequent insertion of Article 21A that guarantees the right to all. Rawls' second principle allows the existence of social and economic differences, albeit only to the extent that they operate for the benefit of the socially least advantaged, and the essence of this principle is upheld in Indian affirmative action policies since they are designed to uplift historically marginalized communities and attempt to provide them with greater opportunities to ensure that inequalities serve only to improve the position of the most disadvantaged in society.

These measures are collectively and individually crucial in advancing Indian poverty jurisprudence by ensuring that the principles of justice and equality are actively upheld in society. Although these developments are appreciable and have done a lot to further the interests of the disadvantaged to create a more egalitarian society, the following suggestions are being proposed.

First, the presence of equal basic liberties for all is the *sine qua non* of Rawlsian distributive justice, and liberties are deemed meaningless if they cannot be protected. The "equal justice and free legal aid" envisaged by Article 39A and enforced by the LSAA, 1987 is appreciable in furthering access to justice however, it still needs to be amended to incorporate a larger section of the population within its ambit so that the greatest possible number of individuals can enjoy the right to redressal of their rights. One change is through an amendment of Section 12(h) of the LSAA, 1987, which states that individuals with an annual income of less than Rs. 9,000 or Rs. 12,000 can avail of the services of this statute. In the spirit of 103rd Constitutional (Amendment) Act, 2019, the Government of India formed a classification of people whose annual income is less than Rs. 8 lakhs per annum, and this class is now designated as Economically Weaker Sections (hereafter EWS). Thus, by amending the provisions of Section 12(h) to reflect the EWS

categorization, legal aid entitlement can be substantially increased. This will bolster the tenets of access to justice exponentially in India.

Second, Rawlsian distributive justice, through the 'difference principle' advocates substantial equality, and for a fair and equal opportunity, access to education plays a very crucial role. While education has been guaranteed till the age of 14 in India, under Article 21A, the absence of an extension of this right to higher education inadvertently affects the least advantaged people of society since affording quality education at private Higher Education Institutions (hereafter HEI) at exorbitant rates remains beyond their financial capability. For this, it is important that this unaffordability experienced by the least advantaged classes be addressed through the extension of this right to higher education, achieved through an increase in the number of seats available in public HEIs, so that the least advantaged groups can also access higher education at minimal fees that they can afford. This will ensure that actual fairness and equality can be achieved in creating opportunities for the most disadvantaged classes.

Third, the Rawlsian 'difference principle' allows inequalities only to the extent that it benefits the least advantaged classes, yet, there can be a scenario where members of this class who have received inequal benefits in the interests of equity have risen above their counterparts and no longer form a part of the same 'least disadvantaged class'. This implies that these groups should be excluded from benefiting from inequalities, and the same should be passed on to their brethren who continue to occupy their position in that class. The *Indra Sawhney*[66] judgement applied 'Creamy Layer' criteria to the OBC groups and prevented them from enjoying affirmative action benefits, yet, the same was not extended to the SC and ST classifications. Notably, in *Jarnail Singh v. Lacchmi Narain Gupta,*[67] the "creamy layer" concept was applied to prevent the SC/ST members belonging to this sub-classification from enjoying the benefits of reservation

66. *Supra* note 57.
67. AIR 2018 SC 4729.

in promotion. More recently, the judiciary opined that sub-classification within the SC/ST system was allowed.[68] This is an appreciable step, and the application of "creamy layer" categorization within the SC/ST reservation system will allow the individuals who are actually disadvantaged to enjoy the benefits of affirmative action policies while those who have achieved the status of "creamy layer" can be prohibited from enjoying the benefits of this inequalities. This will be consonant with the ideals enshrined within the Rawlsian difference principle.

68. State of Punjab v. Davinder Singh, 2024 INSC 562.

A Comprehensive Review of the Implementation Challenges and Efficacy of the Kerala Right to Service Act, 2012

Bineesh P Chacko*

Introduction

The article analyzes the scope of the Kerala Right to Service Act, 2012. The primary function of the state is to ensure public administration and maintain the welfare of its citizens. The state needs to provide statutory services to the public and uphold citizens' welfare. A democratic state should be welfare-oriented, transparent, and accountable. Since residents pay taxes, they have the right to statutory public services from the state without delay or bribery.

The Kerala Right to Service Act is one of the initiatives by the Kerala Legislative Assembly to hold the government accountable to public service users. It was enacted in response to the first legislative initiative by an Indian state towards the Right to Service, known as the Madhya Pradesh Public Services Guarantee Act of 2010, passed by the Madhya Pradesh Legislative Assembly. The primary objective of RTS Act is to maximize administrative benefits and ensure citizens' utmost satisfaction. Accountability, time-bound delivery, and transparency are essential for public satisfaction with these services.

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This study aims to examine how successful the Kerala Right to Service Act has been in developing a citizen-friendly, citizen-centric public administration in Kerala.

Methodology

A qualitative approach using a descriptive case study method was employed in the study. Secondary data were collected through an RTI application submitted to the Personal and Administrative Reforms Department. Due to the unavailability of Right to Service second appeal information in their custody, the department forwarded the application to all departments in Kerala. The researcher received responses from most departments indicating no RTS appeals. However, three second appeal orders were received, which were considered as data and analyzed using the case study method. The data were analyzed using descriptive and inferential statistics.

Evolution, Concepts of Citizen Charter

The Citizen Charter is a written, voluntary declaration by service providers that outlines standards of service delivery, consumer choices, avenues for grievance redressal, and other related information[1]. The Citizen Charter (CC) was initiated and implemented in the UK in 1991 by Prime Minister John Major as part of a national program aimed at improving the quality of public services. Public services may be defined as all activities delivered by government to fulfill those needs that society requires to go through life[2]. one important object of a charter is to encourage improved

1. Ministry of Personnel, Public Grievances and Pensions, Department of Administrative Reforms and Public Grievances Citizen's Charters- A Handbook, https://goicharters.nic.in/public/upload/pdfs/DSF6gw.pdf.(last visited June 14, 2024)
2. Jak Jabes, The Role of Public Administration in Alleviating Poverty and Improving Governance: Selected Papers from the Launching Conference of the Network of Asia-Pacific Schools and Institutes of Public Administration and Governance 537 (NAPSIPAG) (2005).

trust between citizen and provider, through improved transparency and accountability; in a democracy, regime legitimacy (sometimes a fragile commodity) might be taken as an analogue of trust[3]. It provides the opportunity to put in place a market system within the public services sector in the guise of empowering citizens[4].

The key principles of Major's initiative were accountability, transparency, access to information, citizen-orientation, and civic engagement. This initiative was embraced by the prevailing public administration theory, New Public Management (NPM), which regarded the public as 'clients' or 'customers' and emphasized accountability and transparency. Under NPM's influence, Citizen's Charter initiatives became quality assurance tools for service providers, requiring only periodic revisions based on changing needs.

The Citizen Charter also allowed Major to advance neo-liberal ideas, particularly concerning public services that could not be privatized immediately due to practical difficulties and political opposition. This approach allowed him to tackle public concerns regarding declining services, indicating that the government was proactive in resolving these issues and redirecting blame towards the lack of customer focus among public servants and a culture frequently supported by trade unions and other traditional adversaries.

Inspired by the UK's Citizen Charter, many countries worldwide adapted the concept to address their specific issues and problems, making Citizen Charters more popular globally than in the UK. The idea gained significant traction in countries such as India, South Africa, Hong Kong, the Philippines, Japan, Jamaica, and Australia.

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3. Gavin Drewry, *Citizens as Customers – Charters and the Contractualisation of Quality in Public Services*, 31 EGPA Conference Bern 16 (2005).
4. Jonathan Tritter, *The Citizen's Charter: Opportunities for Users' perspectives?*, 65 The Political Quarterly 397 (1994), https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-923X.1994.tb01554.x (last visited Jun 5, 2024).

In the UK, the execution of the Citizen Charter was led by a cabinet minister at the executive level. With Prime Minister Major's staunch backing, all public services were urged to develop and endorse Charters under this directive. When Tony Blair assumed the role of Prime Minister in 1994, he introduced roughly 200 national-level Charters and about 10,000 at the local level. The principles underpinning these Charters garnered broad approval, including from the Labour Party. The "result was that the Charters not only survived the transition of government, but also acquired a new impetus under Blair, along with a new name, "Service First," which continues to be used at present"[5]. "Blair also supported with renewed energy the system of awards granted to the Charters, known as "Charter Mark[6]"". "Correspondingly since June 1998, the Charter Office in UK has been renamed as a People First Unit, signifying precedence of people over the other things[7]".

Principles of Citizen Charter

The first "six major principles of UK's CC were:

- The setting, monitoring and publication of explicit standards,
- Information for the user, and openness in the availability of that information,
- Choice, wherever practicable, plus regular and systematic consultation with users.
- Courtesy and helpfulness,
- Well publicized and easy-to-use complaints procedures and
- Value for money".

5. Carty,W., *Citizen's Charters: A Comparative Global Survey*, Paper Prepared For The Launch Of Mexico's Citizen Charter Initiative (2004).
6. *Id.*
7. V. S Beniwal, *Challenges and Prospects of Implementing Citizen's Charter: A Study of Panchkula (Haryana) Municipal Council in India.*, (2005). https://bora.uib.no/bora-xmlui/handle/1956/1256 (last visited June 14,2024)

Thereafter, "Blair's Labor government relaunched CC under the new label 'Service First' program in 1998 and elaborated the six principles in to nine:

i) Performance Standards;

ii) Information and openness;

iii) Choice and Consultation;

iv) Courtesy and helpfulness;

v) Putting things right;

vi) Value for money;

vii) User satisfaction;

viii) Improvements in service quality; and

ix) Planned improvements and innovations"[8].

In 2008, the UK Parliament declared that the Charter Mark was a crucial component of the Citizen's Charter initiative. Launched in 1992, it served as recognition for organizations within the public sector that had demonstrated outstanding customer service.

Citizen Charter: Indian History

The Right to Services is highly significant in a democratic country like India, where the rule of law drives the government. It ensures essential actions for the development of human rights and a sustainable democratic order. The Citizen Charter promotes socioeconomic justice among people and guarantees the right to services, which are part of the Right to Life under the Indian Constitution.

The primary function of the state is to manage public administration and maintain citizens' welfare. The state must provide statutory services to the public and uphold citizens' welfare. A democratic state should be

8. Ministry of Personnel, *supra* note 1.

welfare-oriented, transparent, and accountable. Since residents pay taxes, they have the right to statutory public services without delay or bribery.

In 1996, the Chief Secretaries Conference, concerned with ensuring a responsive, accountable, transparent, and citizen-centric administration, aimed to restore public faith in governance. The then Prime Minister of India inaugurated this conference to develop an effective and responsive administration and enhance public service efficiency. The conference recommended several civil service reforms, emphasizing accountability in terms of public satisfaction and responsive service delivery, and advocated for the phased introduction of Citizen Charters in as many service institutions as possible. Key aspects highlighted were: (a) Administration is not people-sensitive or citizen-friendly, (b) There is an urgent need to make the administration people-sensitive, efficient, and cost-effective, (c) For public satisfaction and responsive service delivery, Citizen Charters should be phased in for as many service institutions as possible to ensure citizens' entitlement to public services, and (d) Governance should include other actors such as citizens, consumer groups, elected local bodies, or those linked with the administration in some way.

In response to these suggestions, the Department of Administrative Reforms and Public Services formulated an "Action Plan on Effective and Responsive Administration" in 1997, incorporating insights from experts, officials, media, and voluntary organizations. The Chief Ministers' Conference on May 24, 1997, focused on three key areas: "(a) Make the administration accountable and citizen-friendly, (b) Ensure transparency and the right to information, and (c) Adopt measures to cleanse and motivate civil services".

An implementation committee was formed, with the Cabinet Secretary serving as its chair, tasked with devising strategies to put the Action Plan into effect. A core group, led by the Secretary (Personnel), was formed to monitor the formulation of Citizen Charters and identify ministries and departments with substantial public interaction to assist them in finalizing

their Charters. In 2002-03, DARPG commissioned a professional agency to create a standardized evaluation model for Citizens' Charters, aiming for improved effectiveness, measurability, and objectivity. The agency assessed Charter implementation in five Central Government Organizations and fifteen Departments/Organizations across Andhra Pradesh, Maharashtra, and Uttar Pradesh. Additionally, the agency was tasked with proposing methods to enhance awareness among stakeholders and to guide management and staff in Charter formulation and deployment. According to the agency's evaluation report, "major findings were:

(i) In majority of cases Charters were not formulated through a consultative process

(ii) By and large service providers are not familiar with the philosophy, goals and main features of the Charter

(iii) Adequate publicity to the Charters had not been given in any of the Departments evaluated. In most Departments, the Charters are only in the initial or middle stage of implementation

(iv) No funds have been specifically earmarked for awareness generation of Citizens' Charter or for orientation of staff on various components of the Charter"[9]. Therefore, drawing from lessons learned over the past decade, India transitioned to a legislative approach with citizen charters. Now, almost all states, with the exception of Tamil Nadu, Nagaland, Telangana, and Puducherry, have enacted the RTS Act.

Review of Kerala Right to Service Act: A Citizen Charter

The Citizen Charter helps establish social and economic justice among the people and ensures the right to services, which are part of the Right to Life. However, the executive-level approach of the Citizen Charter to

9. Home |*Citizen's Charter*, https://goicharters.nic.in/public/website/home (last visited May 31, 2024).

provide effective public service failed due to various factors, including the absence of a grievance redressal mechanism. In response, following the enactment of the right to service Act in 13 states, the Kerala legislature passed the Kerala Right to Service Act (RTS) on August 4, 2012, with it coming into effect on November 1, 2012.This law aimed to ensure accountability in public services, following legislative models such as the Anti-Red Tape Act in the Philippines and the Good Governance (Management and Operation) Act of 2007 in Nepal.

The move to legislate the Citizen Charter in India began with the introduction of the Right of the Citizens for Time-Bound Delivery of Goods and Services and Redressal of their Grievances Bill, 2011, in Parliament. However, this Bill did not become law. The Kerala Act was implemented in response to the central government's failure to enact a uniform law applicable throughout India. The primary objective of the RTS Act is to provide high-quality service from the administration and ensure citizens' utmost satisfaction. The Act operates on the principle that accountability, time-bound delivery, and transparency in public services are essential for public satisfaction.

Scheme of the Kerala RTS Act

The Directive Principles of State Policy, as laid out in Part IV of the Indian Constitution, mandate the establishment of a welfare state. The state plays a crucial role in protecting and promoting the interests of its citizens, ensuring their well-being, and allocating a significant portion of the budget to social welfare programs and policy implementation. It is the duty of the state to provide for its citizens equally and fairly, as outlined by the socioeconomic principles of a welfare state.

Despite delays and uncertainty from the Central Government in passing such an Act, twenty-two states and one Union Territory in India have enacted the Citizen Charter (CC) or Right to Service (RTS) Act. Additionally, Telangana and Andhra Pradesh are in the process of drafting similar bills.

Every citizen is entitled to hassle-free public services and grievance redressal. The Right to Services Act represents a state's commitment to standard, quality, timely service delivery, grievance redressal mechanisms, transparency, and accountability.

The RTS Act has been implemented in 24 states, including all Union Territories except Puducherry. However, the specifics of the Act vary across states in six main areas:

- Administrative/institutional setup, whether part of an existing department or as an exclusive mission/entity
- Department responsible for implementation
- Mode of invoking penalties, whether suo moto or appeal-based
- Compensation and reward mechanisms
- Penalty clauses (minimum and maximum)
- Type of grievance redressal mechanisms

Moreover, each department has notified their services under the Act which are varied in each State due to the local realities such as,

- Levels of simplicity in definition of service and delivery of the same;
- Strength of existing processes of service delivery; and
- The local demand from citizens for particular services.
- Willingness of various departments to include some of their services under the guarantee legislations.
- Willingness of various departments to include some of their services under the guarantee legislations. Willingness of various departments to include some of their services under the guarantee legislations[10].

10. Tina Mathur, Right to Public Services a Comparative Perspective of Implementation of Guarantee of Public Services in Select States of India, (Centre for Organisation Development 2012), https://www.academia.edu/1572769/Tina_Mathur_Right_to_Public_Services_Comparative (last visited Apr 29, 2024).

Objectives of Kerala RTS Act

The Act serves as a remedial measure for executives, aimed at improving the quality of their service, enhancing accountability, and upholding transparency in public administration. Some states, such as Punjab and Maharashtra, have adopted the model of the Right to Information (RTI) Commission, which includes an officer independent of the department. However, the majority of states' RTS Acts have adopted a structure similar to the primary part of the RTI Act, which provides for the appointment of a higher officer within the concerned department as the Appeal Authority. The table below provides important information about the RTS Act.

Table 1: No. of services under RTS Act

Name of Act	Date of Commencement	No. of sections	No. of services	No. of Department	Penalty	Nodal Department
The Kerala State Right to Service Act,2012	01.11.2012	12	697	121	Section 8 (a) Rs. Min 500 to max Rs. 5000 Section 8 (b) Rs. 250 per day, max Rs. 5000	Personal and Administrative Reforms Department

Source: *RTI reply*[11]

In the RTI Act, both the Public Information Officer and the Appeal Authority are appointed from the same department. Similarly, in the RTS Act, the Public Service Officer and the Appellate Authority are also appointed from within the same department. This means that the authority may not be independent and may protect the interests of their department and subordinates

11. RTI reply, by SPIO, PARC to Bineesh P Chacko No. A.R. 12-1/145/2019/PARD 27/7.2019

The Kerala State Right to Service Act, 2012, enforced on November 1, 2012, through G.O (P) No.55/2012/P&ARD, aims to ensure effective, timely redressal of citizen grievances, service delivery to the public, and holds government servants accountable for any defaults. Initially, 22 government services, including nine from the police department, fall within the legislation's scope**. Subsequently, the Act has been expanded to include 121 departments and 621 services. However, some universities, the Kerala State Electricity Board, and other entities have yet to align their services with the RTS Act.** These encompass issuing birth, death, caste denomination, income, and domicile certificates, as well as providing power and water connections, ration cards, among others. Police-related services involve complaint receipts, FIR copies, intervention in serious crimes, passport and employment verification, post-mortem report issuance, and releasing impounded vehicles. Failure to meet service deadlines may result in penalties for designated officers, as outlined in the Act.

Key features of the Kerala RTS Act include:

- The State that offers the widest range of services under the RTS Act
- Imposing penal and civil liabilities on designated officers and first appellate authorities.
- Setting maximum service times and penalties for delays or denials.
- Ensuring government department accountability and transparency.
- Mandating acknowledgment of all service applications.
- Specifying time limits for each service.
- Guaranteeing timely resolution of RTS complaints, with a 30-day limit for the first appellate authority and 60 days for the second.
- Waiving fees for RTS Act complaints/petitions.
- Requiring state authorities to publish service details.
- Aiming to eradicate corruption in public services.

- Simplifying complaint application procedures.
- Mandating the public display of service numbers, times, and appellate authorities.
- Combating unfair practices and upholding ethics in executive departments.

Procedure of Filing Complaint under Right to Services Act

The Act underscores the responsibility of the designated officer, who upon receiving a service application, must either fulfill it or reject it within the specified timeframe, starting from the day of receipt. If the application is rejected, the officer must provide written justification. As per the Act, if the designated officer fails to provide the service without adequate reason, the second appellate authority may, through a written order citing reasons, impose a fine on the officer ranging from five hundred to five thousand rupees.

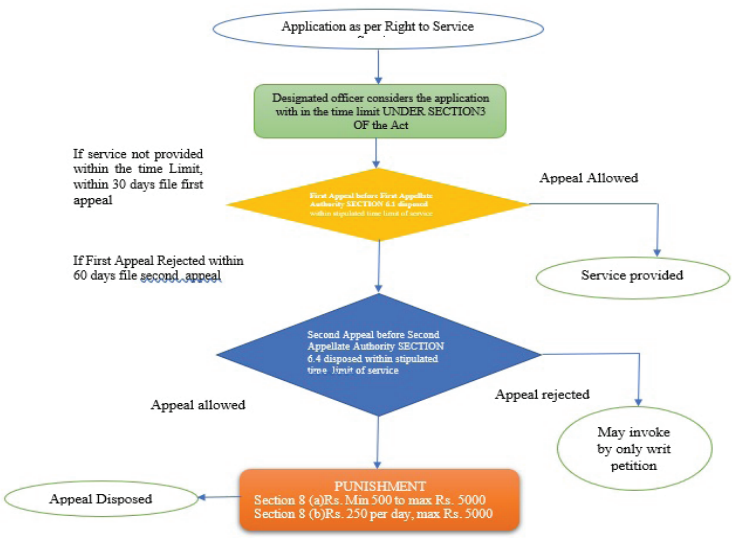

Figure: Flow chart of procedure under Kerala RTS Act

The Act delineates the procedures for filing appeals and the manner in which appeals are to be handled by the first and second appellate authorities. These authorities are empowered with the civil court's jurisdiction concerning document production and inspection, summoning the designated officer and appellant for hearings, and any other matters as prescribed. The Act ensures government servants are held accountable for their roles, duties, and obligations to the public.

In Kerala, approximately 121 departments are covered under the Act, offering around 697 services[12]. Each service has a distinct time limit depending on its nature. The table below illustrates some service details across various departments.

Table 2: Some service details under various Govt. departments in Kerala

	Department	Category of service	Time Limit	Designated Officer	First Appellate Authority	Second Appellate Authority
1	**Civil Supplies**	Correction of Name in Ration Card	Same day	Taluk Supply officer	District Supply officer	Deputy Controller of Rationing
2	**Motor Department**	Transfer of Ownership of Vehicle	10	Joint Regional Transport officer	Regional Transport officer	Zonal Deputy Transport Commissioner
3	**Municipality**	Occupancy Certificate	5 days	Secretary	Municipal Joint Director	Municipal Director
4	**Parekshabhavan**	Correction of Name in SSLC Book	90	Joint Commissioner	Commissioner	Secretary
5	**Police Department**	FIR	Same day	Station House officer	Circle inspector	DSP

12. *Id*

6	**Registration**	Encumbrance Certificate	Next Date or 7 days if data not available in computer	Sub Registrar	District Registrar	District Inspector of Registrar
7	**Village, Taluk**	Mutation	40 days	Village officer	Tahsildar	Revenue Divisional Officer

Source: *Secondary data*

CASE STUDY ANALYSIS

Case Study 1: Delay of Service in Motor Transport Department[13]

Service: RC Book transfer of ownership

Stipulated time: 45 days

This case represents the inaugural RTS appeal occurring five years post-enactment. Sony, the appellant, sought a service for ownership change in their RC book on August 15, 2017. The initial appeal was filed on November 7, 2017. Despite no action from the First Appellate Authority (FAA), upon instruction from the Deputy Transport Commissioner, the process commenced on November 24, 2017. An inquiry was conducted on November 29, 2017, and the appeal was decided on December 4, 2017, ruling out any delay and confirming service provision. The appeal decision took 27 days.

However, the appellant remained dissatisfied and lodged a second appeal on January 25, 2018. The Deputy Transport Officer, acting as the Second Appeal Authority (SAA), issued an order on April 25, 2018. The

13. Order number: G2/114/2018 Dated: 25.04.2018/N.Z Deputy Transport commissioner.

SAA determined a default on the part of the designated officer and staff, leading to service delay. Despite this finding, no penal action was taken, as disciplinary measures had already been directed against the junior transport officer on October 13, 2017, resulting in the appeal's disposal. The second appeal process took 120 days, surpassing the stipulated time frame of 45 days as per the relevant section.

This case highlights a concerning lack of awareness regarding the time limits for appeal disposal by both the FAA and SAA. Furthermore, it underscores the absence of display of appeal disposal times by any public authority in Kerala.

This case study underscores the importance of adherence to stipulated time frames in the disposal of appeals under the RTS Act. It indicates a lack of awareness among authorities regarding these time limits and a failure to display such information publicly. Such oversights can lead to delays in justice delivery and erode public trust in the RTS system. Therefore, there is a critical need for increased awareness and enforcement of time limits, as well as the public display of appeal disposal times, to ensure the efficient functioning of the RTS mechanism and uphold accountability in public service delivery.

Case Study 2: Delay of Service in Civil supply department[14]

Service: Name correction in Ration card

Stipulated time:

Rahullal, a resident of Changanacherry, applied for a correction to his name on his ration card. However, the service was delayed by one month. Consequently, he filed a first appeal with the District Supply Officer against the Taluk Supply Officer. Following the direction of the first appeal, he eventually received the service. Despite this, Rahullal remained dissatisfied with the decision of the First Appellate Authority (FAA) due to the hardship,

14. Number: A-62/19 Date:04.02.19

irreparable injury, and the denial and delay of service he had experienced. As a result, on January 7, 2019, he filed a second appeal before the Rationing Deputy Controller of the south zone in Kollam.

The second appeal was delivered on February 4, 2019, wherein the Second Appeal Authority (SAA) found that the explanation provided by the Taluk Officer was examined. It was revealed that there had been a backlog of ration card applications pending for four years, with processing only commencing from February 15, 2018, onwards. This surge in applications, coupled with technical issues such as internet connectivity problems and the unavailability of a printer, contributed to the delay in processing Rahullal's application. Consequently, the SAA concluded that the delay on the part of the Taluk Officer was unintentional. Therefore, further proceedings were avoided, and the appeal was disposed of.

This case highlights the challenges faced by individuals in obtaining essential services due to administrative delays. Despite Rahullal's persistence in seeking redress through the appeal process, the underlying issues such as backlog, technical constraints, and administrative bottlenecks persisted. While the Second Appeal Authority recognized the unintentional nature of the delay, it underscores the need for improved administrative efficiency and infrastructure to prevent such delays in the future. Additionally, it emphasizes the importance of timely and effective service delivery to mitigate the hardships faced by citizens in accessing their entitlements.

Case Study 3: Delay of Service in Registration Department[15]

Service: Action of complaint

Stipulated time: 7days

Rajesh V.V, a resident of Ernakulam, lodged a complaint with the District Registrar against a society registered under the District Registration department. However, there was no action on this complaint for 45 days,

15. File No. IGR/1344/2019-E8, Joint Inspector General ,Registration department

leading to a delay. Consequently, he filed a first appeal, and following the direction of the First Appellate Authority (FAA), the designated officer conducted an inquiry. Subsequently, a second appeal was filed on February 15, 2019, and the decision was issued on April 3, 2019.

The Second Appeal Authority (SAA) found that there was a delay of 45 days, even though the inquiry notice should have been sent within 7 days. However, it was sent only after 30 days due to the Onam vacation and the transfer of the district registrar. The SAA acknowledged that the FAA's decision to order the first appeal was appropriate. Additionally, upon examining the complainant's deposition during the inquiry, it was revealed that the proceedings had temporarily halted. Therefore, no further direction from the SAA was deemed necessary. Nevertheless, the designated officer was cautioned and warned by the SAA regarding the delay in service.

This case illustrates the importance of adhering to prescribed timelines in addressing complaints and appeals under regulatory frameworks. Despite acknowledging the extenuating circumstances such as vacation periods and administrative changes, the SAA emphasized the need for timely action to ensure effective service delivery. While the FAA's intervention initiated the inquiry process, the SAA's admonition highlights the accountability of designated officers in adhering to service timelines. This case underscores the significance of regulatory bodies in maintaining procedural integrity and addressing delays in service provision.

Denial of Tax receipt

Kaavilpurayidathil Joy, aged 57 and a resident of the 3rd ward of Chakkitapara Grama Panchayat, was discovered hanging outside the Chembanoda village office on June 21, 2017[16]. Allegedly, he took this drastic

16. *Kerala: Farmer commits suicide outside village office, official suspended*, The Indian Express (Jun. 22, 2017), https://indianexpress.com/article/india/kerala-farmer-commits-suicide-outside-village-office-loan-land-tax-4716337/ (last visited May 25,2024).

action because the village office officials refused to accept tax payment for his land. Joy's family further claimed that the village officials repeatedly rejected his attempts to pay taxes on land registered in his wife's name and even demanded a bribe. Unfortunately, Joy was unaware of the Right to Service (RTS) Act and did not file any appeals before the relevant authority. This incident underscores the failure in implementing the RTS Act.

This case serves as a tragic example of the consequences of inadequate implementation of the RTS Act. Joy's desperate act highlights the dire consequences individuals may face when they encounter bureaucratic hurdles and corruption in accessing essential services. Furthermore, his lack of awareness of his rights under the RTS Act indicates the need for greater public education and awareness campaigns. This case underscores the importance of effective implementation of the RTS Act to ensure citizens' rights are protected and to prevent such tragic incidents in the future.

Denial of Occupancy certificate

On June 18, 2019, Sajan Parayil, a 48-year-old NRI businessman, tragically took his own life in Kannur, Kerala[17]. His suicide came as a result of the mental anguish he experienced after being unable to open a convention center, which he had constructed using his savings. The root cause of his distress was the denial of a license for his convention center by the municipal authorities. In response to this incident, the Kerala government took action by suspending four employees of the municipality.

The prescribed time frame for obtaining an occupancy certificate is 5 days, and for obtaining numbering and tax receipts, it is 15 days. However, Sajan Parayil was denied these services by the municipal authority due to unnecessary technical issues. His family alleges that the denial was

17. George Poikayil, *How Kerala's Killer Red Tape Garotted NRI Businessman Sajan Parayil's Rs 15 Crore Dream*, The New Indian Express (2019), https://www.newindianexpress.com/states/kerala/2019/Jun/29/how-keralas-red-tape-garotted-nri-businessman-sajan-parayils-rs-15-crore-dream-1997331.html (last visited May 25, 2024).

compounded by demands for significant bribes. Following Sajan's death, the Kerala High Court took Suo moto cognizance of the suicide.

It's notable that Sajan did not appeal to the first appellate authority, possibly due to a lack of awareness. This raises questions about whether the panchayat authority had effectively displayed the citizen charter and right to service under the RTS Act, as mandated.

Sajan Parayil's tragic suicide underscores the severe consequences of bureaucratic inefficiency, corruption, and lack of awareness of citizens' rights. His inability to obtain necessary licenses and certificates due to technical issues and alleged bribery highlights systemic failures in service delivery. The delayed action by authorities and the absence of recourse for Sajan point to gaps in the implementation of the RTS Act and the need for greater awareness campaigns. This case underscores the urgent need for administrative reforms to streamline processes, eliminate corruption, and ensure timely and fair service delivery to prevent similar tragedies in the future.

Delay in procuring Conversion Certificate

A 57-year-old fishing laborer named Sajeevan tragically ended his life by hanging himself, disheartened by the prolonged delay in obtaining a land conversion certificate necessary for securing a loan. This occurred shortly after he returned disappointed from the Revenue Divisional Office in 2022. Sajeevan had sought to use his 4-cent residential plot, already mortgaged with a chit fund company, as collateral for the loan. Bank officials advised him to provide the land conversion certificate since the property was categorized as paddy fields in revenue records[18].

For about a year and a half, Sajeevan had been tirelessly visiting various offices in pursuit of the land conversion certificate. Relatives revealed that

18. *57-year-old hangs to death frustrated over delay in getting land conversion certificate* | Onmanorama, https://www.onmanorama.com/content/mm/en/kerala/top-news/2022/02/04/delay-land-conversion-certificate.html (last visited May 25, 2024).

he took the extreme step after encountering repeated failures from the officials at the office and the Revenue Divisional Officer (RDO) in converting his land under the paddy land conversion scheme. Despite his efforts, his property remained classified incorrectly.

Sajeevan did not file any appeals under the Right to Service (RTS) Act due to the delays in service. His lack of awareness, coupled with the absence of service displays in front of the village office, prevented him from lodging an appeal before the First Appellate Authority. Proper implementation of the RTS Act could have potentially prevented Sajeevan's suicide and addressed the deficiencies in service delivery.

Sajeevan's heartbreaking story highlights the dire consequences of bureaucratic delays and the lack of awareness about citizens' rights under the RTS Act. His tragic death could have been prevented with timely and efficient service delivery. This case underscores the urgent need for comprehensive implementation of the RTS Act and increased public awareness to prevent similar tragedies in the future.

In addition to this case study, numerous other tragic incidents have been reported, some resulting in vigilance trap cases. Studies reveal that implementation of Right to Service Act in the state has not been effective. Disposal within specified time limits is not enforced effectively. There is lack of awareness among the public on provisions of the Act. So far only few services and cases have come for consideration of appellate authorities[19]. These instances highlight either the insufficient execution of the RTS Act or a deficiency in public awareness regarding its mechanisms.

Findings

The range of services available varies greatly from state to state. For instance, Kerala leads with the highest number of services at 621, while Chandigarh follows closely in second place with 436 services. Moreover,

19. ADMINISTRATIVE REFORMS COMMISSION, ACCOUNTABILITY AND PUBLIC GRIEVANCE REDRESS MECHANISMS IN GOVERNMENT, 88 (GOI 2021).

the stipulated time for the same service varies from state to state, indicating a lack of uniformity across states.

A notable feature of the Kerala Right to Service Act is its adherence to time limits for appeal disposal. The time allocated for both the first and second appeals matches the stipulated service time. For example, if a service is expected to be completed within seven days, the appeal time is also seven days. This dynamic aspect often goes unnoticed, with public authorities failing to give it sufficient publicity. In contrast, the Himachal Pradesh Act imposes a 30-day limit for first appeal disposal, while the Chhattisgarh Lok Sewa Guarantee Act lacks a specified time limit for appeals.

The Kerala Right to Service Act adopts the scheme of the model law suggested by the central government, which includes designated officers, First Appellate Authorities (FAA), and Second Appellate Authorities (SAA) within public authorities. However, other states such as Punjab, Uttarakhand, Assam, Maharashtra, Jharkhand, Haryana, and West Bengal have opted for a scheme similar to the Right to Information Act, providing for an independent adjudication body known as the Right to Service Commission. However, the ARC finds that "unfortunately, the public and civil servants are unaware of the presence of the Act. Main reason for this state of affairs is considered to be the absence of an independent supervisory authority as in the case of State Information Commission[20]".

While most RTS Acts impose fines for non-compliance, some states like Karnataka, Goa, Haryana, Gujarat, and Jammu and Kashmir offer compensation for denial of service. In contrast, the Chhattisgarh Act provides for the cost of appeal instead of compensation. Some states, such as West Bengal, Manipur, and Delhi, incentivize designated officers with rewards for timely service delivery, a provision absent in Kerala's legislation. Most FAA and SAA are reluctant to fine their subordinates due to potential favoritism, but if legislative provision for compensation were provided, it might encourage such actions.

20. *Id.*at 99

In the forwarding note of 4th ARC's 5th report finds that in spite of efforts of the state government, introduction of the Service Delivery Policy, passing of the Right to Service Delivery Act, and introduction of Citizen Charter for government institutions, the Commission observed that the delivery of services of the State Government requires considerable improvement across departments and institutions[21]. There is a need for front office facilities to provide information on filing RTS appeals. Transparency and accountability are the two most important aspects of public service delivery, as perceived by citizens. An improvement in these aspects has a direct impact on the quality of service delivery. There is also a need to integrate service delivery with other public sector reforms to make it more comprehensive, broad-based and sustainable. Countries are still finding their way to the most suitable approach[22].

The variation in the number of services, appeal disposal time limits, and schemes for adjudication, compensation, and rewards across different states underscores the lack of uniformity and highlights areas for improvement in the implementation of RTS Acts. The absence of publicity for dynamic features like appeal disposal time limits and the failure to provide website filing options reflect shortcomings in social audit mechanisms. So, juxtaposition between good governance and human rights is necessary[23]. Again there is a contrast with the UK Citizen's Charter where it was felt that there was insufficient monitoring and evaluation and that the quality of some charters was poor[24]. Addressing these issues through legislative reforms and increased public awareness can enhance the effectiveness and transparency of RTS mechanisms nationwide.

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21. FOURTH ADMINISTRATIVE REFORMS COMMISSION & GOVERNMENT OF KERALA, TOWARDS PEOPLE CENTRIC SERVICE DELIVERY, (GOK 2020).
22. M Surendar Reddy & B Lakshmi, *Improving Service Delivery for Better Outcomes: A Case Study of Kerala*, 37(1) ASCI JOURNAL OF MANAGEMENT 40 (2007).
23. Ishan Krishna Saikia, *Good Governance And Human Rights: International And National Perspective*, 2 (7) IJOART 133 (2013).
24. Simon James et al, *The Citizen's Charter: How Such Initiatives Might Be More Effective* (2005). https://www.researchgate.net/publication/251760972_The_Citizen'_Charter_How_Such_Initiatives_Might_Be_More_Effective (last visited June 14,2024)

Conclusion

In essence, the pioneering experience of Great Britain illustrates how Customer Charters (CC) have become integral components of public sector service delivery and management processes worldwide. The Kerala Right to Service (RTS) Act serves as a tool for implementing CCs in the state. However, case studies suggest that the RTS Act's effectiveness is questionable, thereby impacting the implementation of CCs in Kerala. There is a pressing need for built-in mechanisms to monitor, evaluate, and review the functioning of these charters. Social audits are also necessary to enhance their effectiveness, ensuring greater responsibility and responsiveness among public servants.

Despite these efforts, the RTS Act lacks provisions for a dedicated RTS Commission and faces other shortcomings such as inadequate follow-up, improper departmental coordination, an unreliable e-governance system, and a dearth of public participation and feedback mechanisms. The state's vision of leveraging IT for seamless, transparent, and efficient service delivery to citizens through an integrated e-governance framework remains unfulfilled. The goal of making Kerala '100 percent e-literate and digital' is hindered by issues like the absence of professional management, poorly designed web applications, multiple portals across different departments, and insufficient high-speed internet access, making the implementation of e-governance seem like an elusive dream.

In conclusion, addressing these challenges is crucial to realizing the state's vision of efficient service delivery and digital empowerment. Efforts to strengthen the RTS Act, improve e-governance infrastructure, enhance coordination among departments, and foster greater public participation are essential for achieving these objectives and ensuring meaningful progress towards a digitally empowered Kerala.

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