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Articles

UNRAVELING BACKWARDNESS: ANALYZING THE DYNAMICS OF DEVELOPMENT FROM INDIVIDUAL TO COMMUNITY PERSPECTIVES

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ABSTRACT

The Indian Constitution provides special provisions for socially and educationally backward classes (SEBCs), including Scheduled Castes (SCs) and Scheduled Tribes (STs). The said paper aims to provide an understanding of the Indian legal framework in place for the SEBCs and analyses the criteria for determining backwardness from both legal and sociological perspectives. The authors examine the political and social implications of reservation policies and highlights the need for reforms. The research also explores the concept of equal opportunity ensuring equitable access to benefits and further proposes measures to revamp the reservation system for socio-economic justice.

I. INTRODUCTION

The Constitution of India provides special privileges and safeguards not only to the schedule caste and tribes, but also to other backward communities. The constitution doesn't specifically mention the term 'Other backward classes. However, they have been given the special protection through compensatory discrimination under the head of 'socially and educationally backward classes.' Article 15(4) permits the State to make special provision for the advancement of any socially and educationally backward classes of citizens.[1] Quota system was one of the modes since pre independence to reserve and provide preferential treatment to backward communities. In the meantime, backward class communities of citizens which includes SCs and STs, was inserted by the constituent assembly in Article 16 (4) of Indian Constitution.[2] However, Article 15(4) was inserted after the landmark judgment of *Champkam Dorairajan* where it allows the state to make special provision for the advancement of socially and educationally backward clasfses of citizens and for the SCs and STs. To interpret such

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[1] *The Constitution of India 1950, a. 15(4)*
[2] *The Constitution of India 1950, a. 16(4)*

articles with regard to socially and educationally backward classes, various central as well as state committees has come up with the indicators and weigh to determine backward communities.

The main inquiry in this research, the main analyses is to revisit the concept of socially and educationally backward class communities from the framework of Indian Constitution. Also, to examine the indicators to determine community as Socially and Educationally backward classe. Further, to discover whether individual or community should be designated as backward class community based on current demand. With regard to the second issue, there is an inequality of opportunities for socially and educationally backward classes. Today any community gets the privileges if it has been designated as backward class community . Meanwhile, amongst these communities many individuals have developed socially, educationally and economically but are still benefited in the name of community. Even caste should not be a sole criterion to identify backwardness. Amongst the upper caste communities, there are some individuals who fall below poverty line, i.e. economically backward individuals. But they don't get the benefit of reservation due to their community being socially and educationally forward. Therefore, state should adopt policies and methods to fulfil individual needs. In the name of caste and community, social stratification is created. The political parties mostly take advantage in the name of community to increase their vote banks, which is unjust for the society. Community has become a political tool as more and more groups have started demanding reservation to fulfil their own agenda. The larger objective of reservation seems to fail if the community and individuals from reserved categories, who have become economically affluent are benefited repeatedly. The recommendation of an "Equal Opportunity Commission" is an affirmative step in the context of including the individual based approach along with the community as a parameter for identification of backward classes.[3]

The dissertation shall seek for two research questions. The following will be researched upon in the subsequent chapters.

- What is Socially and Educationally backward class under Indian legal framework? What are the indicators to determine community as Socially and Educationally backward class?
- Whether we designate community as backward or individual.

[3]*Report by the Expert Group to examine and determine the structure and functions of an Equal Opportunity Commission Set up by the Ministry of Minority Affairs, Government of India February, 2008 <http://www.minorityaffairs.gov.in/sites/default/files/eoc_wwh.pdf> accessed on 27th May, 2023.*

The dissertation aims to provide several suggestions for fulfilling the purpose of reservation policy i.e. to ensure socio-economic justice. This is intended to be achieved through further division of chapters for finding the measures to revamp the reservation system by systematic study.

The first chapter will describe the evolution of backward class communities through pre independence and post-independence perspective. It highlights the objective behind representation of community by the British and the Indian government.

The second chapter looks into various indicators to identify backward classes by referring the court interpretations and commission reports. The chapter is further divided into sociological discussion of class and understanding the concept of class v. caste under Indian legal framework.

The third chapter examines the concept of equal opportunity and the arguments as well as ideas generated in equal opportunity commission. It further analyses the demand of modern society on individualistic approach based on the principle of equal opportunity.

This research will be mainly focused on the idea developed by the above research questions and will try to reach at a conclusion which would develop the knowledge and the awareness in accordance with the Indian legal framework, commissions and judgments.

II. RESEARCH QUESTIONS:

1. What is Socially and Educationally backward class community under Indian legal framework?
2. What are the indicators to determine community as Socially and Educationally backward class community?
3. Whether we designate community as backward or individual.

III. EVOLUTION OF SOCIALLY AND EDUCATIONALLY BACKWARD CLASS COMMUNITIES

3.1. Introduction

The reservation system was introduced before independence during the British colonial era. But intention of the British government was different then Indian government. It can be analysed in this chapter by looking through two different perspectives:

1.2 Pre-independence era

1.3 Post-independence era

3.2. Pre-Independence

The origin of the caste system in India can be traced back to 3000 years ago when the Hindus were classified on the basis of four occupations namely Brahmins, Kshatriyas, Vaishays and Shudras. In this hierarchy of castes, the fourth group i.e. the Shudras comprised of the 'lower caste' and were considered to be apart from the three higher castes. The Shudras faced discrimination for ages which invoked vast inequalities in the Indian society. In the pre-Independence era, the British never interfered in the matters of prevailing caste system as they didn't want to take the trouble of facing mass public outrage and criticism. So they allowed this to go forward in the manner in which they were being practiced[4].

In colonial era rulers of the princely state were genuinely interested in the upliftment of the disadvantaged section of the society. It was justified by both colonial and post-colonial states on the basis of representing particular community with regard to government job between different communities. It is important to know the objective behind representing community by British government and Indian government. Colonial government started identifying political significance of community by classifying differences between various social group[5]. They inducted into the political process by granting separate representation to the minorities on religious as well as schedule castes and tribes such as Muslim community in various legislative bodies.[6] Colonial government had introduced affirmative action policies in India which kept on growing ever since. That affirmative action is known as 'reservation system'. Although, the policy was not designed to directly support or uplift communities in India.

[4] *Zia Mody, 10 Judgements That Changed India (First Published 2013, Penguin 2013) 117*
[5] *Singh, 'Reservation Policy for backward class community es' (1996)*
[6] *Singh and Bal, 'Strategies of Social Change in India' (1996)*

Rather, it was encouraged as community within Indian society to seek political representation. The British realised that the Indian culture is divided on religious, linguistic and regional basis. Therefore, representation of different communities would benefit them. The British were in fear of the Indian National congress as in 1930s the party had began to negotiate with the leaders of the untouchable communities. These negotiations were regarding the terms for separate political representations where they were granted separate reserved seats.[7] This led to the beginning of reservation policy in India.

Reservation policy was further developed in the round table conferences of the 1930s. These conferences were held to discuss the role of Indians in government and to insure political representation for each group.[8] The purpose of the conference was to develop an Indian constitution and there were also representatives from major and minor community. In that conferences many of the issues with regard to disadvantaged group was introduced which gave separate representation to the minority community.

3.3. Post-Independence

In the post-independence era, after the enactment of the constitution, the Indian courts were struggling with responses from the state with regards to the constitutional provisions on fundamental rights which emphasizes on promoting the interests of disadvantaged groups. Such groups are comprised of Scheduled Castes, Scheduled Tribes, and OBCs.[9]

The motive of the Indian government was to uplift the disadvantaged communities through compensatory discrimination which comprises of various preferential treatments. This policy which was introduced to remove caste inequalities from the Indian society is known as 'reservation'.[10] The intention behind implementing reservation system was to advance the interests of deprived classes i.e. socially and educationally backward class community es, scheduled castes and scheduled tribes. The two groups primarily identified as disadvantaged were were the SCs and STs.[11] However, with regard to OBCs, different states had their own criteria for classification. The groups were identified as majority or minority communities, but not as individuals. If we see the Indian society through the lens of caste or religion, community

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[7] Bineet Kedia, 'Affirmative Action in India and U.S- A Challenge to Reservation Policy in India' International Journal of Law and Legal Jurisprudence ISSN – 2348- 8212 Vol2 Issue1
[8] Tracey L. Connette, 'Sherman Alexies Reservation' Relocating the Centre of Indian Identity' (2010)
[9] Sushma Yadav, 'Reservation & Inclusive Growth' (2010) 7
[10] Quleen Kaur Bijral, 'Affirmative Action: The System of Reservations and Quotas in India' (The Logical Indian, 2015) https://thelogicalindian.com/story-feed/awareness/affirmative-action-the-system-of-reservations-and-quotas-in-india/ accessed on 25 March 2013
[11] Shariful Hasan, Fundamental Rights and Directive Principles(Deep and Deep Publication) 14

as a whole were subject to discrimination, not individual. Hence, the constitution makers intended to uplift the deprived groups and ensure an equal position for them in the main stream society.

The framers believed that due to discrimination, the two main disadvantaged communities which are SCs and STs should be taken to the mainstream. For STs, were unable to derive equal opportunity in every sphere. Whereas SCs were discriminated by upper caste communities amongst the Hindus. These two communities are integral part of the Indian society. So, the purpose was to ensure equal representation through compensatory discrimination.[12] Equal representation of communities was breaking out as a huge debate in the parliament and legislative assemblies. It was intended to uplift these communities from every aspect such as the socio-economic aspect, educational aspect, etc. to achieve development. Community has been taken into consideration for claiming any rights rather than individual. If one community has been identified as deprived, then every individual of that community is benefited. Therefore, community upliftment of SCs and STs was the main preference for the Indian framers.

In case of socially and educationally backward class community, the British Government of India made a list of 'Backward Tribes' which was prepared under Government of India Act, 1935.[13] Colonial thinkers realised that within the tribes, there are backward communities. The first two amendments in the Indian Constitution were related to the policy of protective discrimination. The debate that was raised on the issue was whether reservation that has been provided to SC and ST should also be provided to socially and educationally backward class community. The term backward class has not been defined anywhere in the constitution. Therefore, to overcome the difficulties, parliament laid down article 15(4). As caste and community bonds are stronger than anything else, this reservation would led to provide some weightage to the disadvantaged community.

In this research, the main analysis is in relation to the identification based on present scenario, i.e. community should be designated as backward classes or individual. In caste and tribes, there are communities which are backward. Whereas in upper caste communities, many individuals are still backward owing to social and economic factors. Therefore, further

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[12] Shefali Jha, 'Defending Minority Interests in the Constituent Assembly: Rights vs Representation' [2003] Vol 38, Issue No.16, Economic and Political Weekly

[13] Christophe Jaffrelot, 'India's Silent Revolution' The Indian Constitution Appendix III, London: Hurst & Co. Publication 208

examination is essential to discover the changes which happened after independence till the present scenario. Now, the current scenario demands some restructuring where the state and courts can take some measures in the interest of achieving the larger goal of the reservation policy.

III. UNDERSTANDING INDIVIDUAL VS COMMUNITY AS A UNIT OF BACKWARDNESS

4.1. Introduction

Indian political thinkers usually believed to integrate the ethnic groups, minorities and other social group by framing constitutional safeguards in the form of protective discrimination or reservation. Dr. Ambedkar wanted the Indian Constitution to give some means such as equal citizenship, fundamental rights of equality, possession of equal civil rights, political representation of the deprived class, abolition of untouchability and discrimination.[14] The implementation of reservation was a means to combat group or community inequalities. OBCs unlike SCs and STs were not distinct social group. Prior to the insertion of constitutional provision for reservation to backward class communities, hefty debates arose among legislators on some issues with regard to identification of backward class communities. First, the meaning of backward community was vague. Secondly, different states identified backward community in different manner. Thirdly, the data which were collected on backward community were improper. These issues were taken into consideration before inserting clause for backward community reservation. In Indian society, the backward class community is considered to be an important section. This chapter reflects into deep analysis of various indicators and weigh to identify backward community by referring court interpretations and commission reports. Whereas, the chapter is further divided into two parts which are as follows:

4.3 Sociological discussion of Class

4.4 Class v. Caste under Indian legal frame work

[14] *Constituent Assembly Debates, Vol. II, p. 227.*

4.2. Meaning of Backward Community

The constituent assembly did not fix any criteria or index to determine backward or non-backward class community . However, they passed this task to the upcoming elected government and legislatures for embedding some criteria and alter them from time to time based on future circumstances. In constituent assembly there was a demand for a precise definition of the term "Backward". H. N. Kunzru stated that "the word 'Backward' is not defined anywhere in the Constitution". He pleaded that "whether any class is Backward or not should not be left on the courts of law to decide".[15] The term 'other backward class community', i.e. backward class community other than the schedule castes and the schedule tribes, has not been defined in the Constitution. Article 15(4) and (5) instead use the expression "socially and educationally backward classes", a more concrete expression than the expression "other backward classes".[16]

Though constituent assembly provided reservation for backward class communities only in Article 16(4), but through the first amendment[17], Article 15(4) was inserted after the landmark judgment of Champkam Dorairajan.[18] The issue of this case classified students merely on the basis of 'caste' and 'religion' irrespective of their merit. On the other hand, Article 15(1) states that "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them'. So basically in the above mentioned case there was a discrimination on the ground of 'caste' and 'religion'. Therefore, the Supreme Court held this reservation to be invalid. As an aftermath of the judgment, the parliament added Article 15(4) to the constitution in 1951. Prior to 1951, Article 15 did not contain a clause such as Article 16(4). But there exists a fundamental difference between Article 15(4) and 16(4) in regards to the term backward class communities. Article 15(4) allows the state to make special provision for the advancement of socially and educationally backward class communities of citizens and for SCs and STs. However, Article 16(4) provides for the reservation in public employment to any backward class community of citizens. As K.M. Munshi[19] contended that "it is perfectly clear that the word 'Backward' signifies that class of people who are deprived and backward. It does not matter whether you further classify them as touchable or untouchable. The

[15] *Constituent Assembly Debates, Vol. VII. p. 680.*
[16] *Udai Raj Rai, 'Fundamental Rights and Their Enforcement' (2011) p.572*
[17] *Constitution of India (First) Amendment Act 1951*
[18] *State of Madras v. Champakam Dorairajan, AIR 1951 SC 226*
[19] *Constituent Assembly Debates, Vol. VII, p. 683*

interpretation which can be inferred out of Munshi's statement is that, the backward class community of citizens as mentioned in Article 16(4) includes the SCs and STs.

4.3. Sociological Discussion of Class

According to Paul W. Taylor, "When an injustice has been done to a group, compensation must be made to that group. Group's right to compensation are not rights against wrongdoers but against society as a whole. The obligation to offer such benefit to the group as a whole is an obligation that falls on society in general and not on any particular person for it is the society that through its established social practice brought upon itself the obligation."[20]

In the Constitution of India, the very purpose of providing reservation to the SCs and STs is different from the purpose of providing it to the backward class communities. While the SCs and STs were given the privilege of reservation in the parliament (House of People)[21] and the legislative assemblies[22] through reserved constituencies, the reservation to the backward class community was confined only to the public employment under Article 16(4). However, the reservation for the backward class communities, the SCs and STs was extended to the educational institutions and other sectors through the insertion of Article 15(4) in 1951[23], but this was not done by the constituent assembly. Although Article 16(4) while providing for the reservation in public employment only mentions the term 'any backward class community of citizens', but its implication is different. It includes the SCs and STs as well.[24]

Thus, it can be inferred from the above that the constituent assembly while drafting and enacting Article 16(4) had considered all the deprived classes as homogenous. Hence, the SCs, STs and OBCs were classified under one common head "backward class of citizens". Any emphasis was not laid on the identification and classification of different castes and classes and gave all of them a common nomenclature. This approach of homogeneity of all backward and deprived classes as one is not applicable in the practical implication of the constitution. The reason for this is the presence of different degrees of backwardness in the society due to which all cannot be treated as one. The different classifications amongst the backward class community of citizens includes the SCs, the STs, the backward class communities and the more backward class communities. It also includes those who were backward but are now considered

[20] *Paul W. Taylor, ''The Ethics of Respect for Nature''[1981] p. 214*
[21] *Constitution of India, 1950, a 330*
[22] *Constitution of India, 1950, a 332*
[23] *Constitution of India (First Amendment) Act 1951*
[24] *Indra Sawhney v. Union of India, 1992 Supp 3 SCC., pp. 786-89*

to be forward due to their economic development and exclusion from the creamy layer. The Supreme Court in Indra Sawhney verdict had considered that the very intention of providing reservation to the backward class community is their social and educational upliftment and upheld the criterion of creamy layer exclusion. It also upheld the identification of backward class communities into backward and more backward. The court also held that due to the social structure being an integral part of India, caste can be one of the indicators (but not the dominating factor) to decide backwardness.[25] Thus the classification of the backward class community into several other sub divisions is an inevitable part of the society.

4.4. Class vs Caste Under Indian Legal Frame Work

The debate which emerged between legislature and judiciary was on 'caste' and 'class' in order to identify backward community. Whether the definition of backward class community was based on the criteria of "caste as a sole basis or class". Article 15(1) and Article 16(1) both provides for a restriction on the state to entertain reservation solely on the basis of caste. There has been a conflict while identifying classes which can be categorised as backward for the purpose of availing benefits of compensatory discrimination. Amidst this process of identification, several states used the terms caste and class interchangeably. Although caste has been a significant factor for deciding backward class communities, these two terms differ fundamentally.

4.4.1. Backward Class Communities Commission

Article 340 of the Indian Constitution authorises the President of India to appoint a commission to investigate and give report on the conditions of the backward class communities in different parts of the country.[26] So the first backward classes commission i.e., the Kalekar Commission was appointed in 1953 by the President of India.[27] The commission was tasked to determine the criteria to be adopted in considering whether any section of people should be treated as socially and educationally backward. It was also to prepare a list of such classes. It was directed to investigate the conditions of all such socially and educational backward class communities and the difficulties faced by them. It was asked to make recommendations on the following matters, (a) steps to be taken by union and states to remove such difficulties and to improve

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[25] *Ibid., pp. 801-03*

[26] *Constitution of India 1950, a 340.*

[27] *National Commission for backward classes Annual Report 2012-13, p. 1 http://www.ncbc.nic.in/Writereaddata/AR%202012-13%20Pandey635705824205955927.pdf accessed on 25th April 2023.*

their conditions, (b) as to grants that should be made available. Mainly three criteria were identified for determining backwardness.

1) Low social position in caste hierarchy
2) Lack of educational progress
3) Inadequate representation in government services, in the field of trade, commerce and industries.

The commission took caste as the key factor in making a list of backward class communities which again invoked the debate of caste v. class. The central government rejected the tests of criteria prescribed by the commission for the reason stated that the views of the commission was vague and impractical.

4.4.2. Identification of Backward Class Communities: Ambiguity

In 1962, the states were asked to specify the backward class communities themselves based on the indicators as suitable to them. Following this, the state of Mysore identified the socially and educationally backward class communities by considering castes as a primary index of social backwardness. The supreme court in the case of MR Balaji vs state of Mysore[28], held these criteria to be unsatisfactory and laid down the following principles:

1. The respective government shall identify the backward class communities which shall be subject to judicial review.
2. The backwardness needs to be both social and educational and not social or educational
3. The classes should not fall just below the advance sections of the society but must be sufficiently below the average standard of advancement.
4. Caste can be a relevant consideration amongst Hindus but not the dominant consideration. Poverty and occupation can be other relevant factors.

Further in *R. Chitralekha vs state of Mysore,*[29] another constitution bench upheld the identification of backward class communities on the basis of occupation and income. Later in the case of *P Rajendran vs State of Madras,*[30] it was held that if a caste was found on the whole to be backward, it could be designated by the caste name and the court observed that 'caste was also a class'. In state of *Andhra Pradesh vs P Sagar,*[31] the caste-based determination was held

[28] *MR Balaji vs state of Mysore [1963] Supp. 1 SCR 439*
[29] *R. Chitralekha vs state of Mysore [1964] 6 SCR 368*
[30] *P Rajendran vs State of Madras [1968] 2 SCR 786*
[31] *Andhra Pradesh vs P Sagar [1968] 3 SCR 595*

to be invalid as a state was not able to justify any basis on which it had classified certain castes as backward. However, in *Andhra Pradesh vs U.S.V Balram*[32] the designation of certain castes as backward was held valid as the state could justify.

In 1974, the government of UP gave reservation under Article 15(4) for candidates belonging to Uttarakhand hilly and village areas. Thus, the Supreme Court in *State of UP vs Pradip Tandon,*[33] upheld the identification of Uttarakhand and hill areas as backward but disallowed the classification of entire village population as backward. It was held that nearly 80 percent of the state population could not be said as backward and all villagers could not form one homogeneous class.

4.4.3. Class vs Caste

Hence from the above instances and cases, it can be inferred that although caste can form the basis of one of the indicators for identifying class but both of them are not interchangeable. Following are the differences between caste and class:

- Caste is placed by virtue of birth whereas class by virtue of wealth and education
- There is no social mobility in caste but this exists in class
- In caste there is no occupational mobility whereas it is there in class
- Caste has its own customs and usages but this lacks in class
- Inter-caste marriages are forbidden but interclass marriages are allowed
- Caste follows single religion and is supported on religious grounds but every class follows its own religion and is not supported on religious ground
- In caste system social gap is wide but in class it is narrow

While interpreting various cases, Supreme Court endorsed the meaning of backward community. The judicial interpretation on MR Balaji case held that caste cannot be the sole or dominate criteria but it can be a relevant factor to determine backwardness. As social backwardness is the result of poverty, it invalidated reservation policies. In *Indra Sawhney*[34] *and in Ashok Kumar Thakur,*[35] it was held that caste cannot be sole consideration to determine backwardness, it can be used as a dominant criterion. A caste can be and often is a social class in India.

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[32] *Andhra Pradesh vs U.S.V Balram [1972] 1 SCC 660*
[33] *State of UP v. Pradip Tandon & Ors, [1975] 2 SCR 761*
[34] *1992 Supp 3 SCC 217*
[35] *Ashok Kumar Thakur v. Union of India [2006] WP (Civil) 265*

There was a lack of a reasonable index for identification of backward class communities due to which different states adopted different means resulting in situation of chaos. This also prevented the backward communities from availing the benefit of reservation. Thus, the government of India appointed the second backward classes commission under the chairmanship of B. P. Mandal. The commission was given the task to (a) determine the criteria for defining socially and educationally backward classes, (b) recommends steps to be taken for their advancement, (c) examine the desirability of making provision for reservation of backward classes, (d) to present a report setting out the facts found and make such recommendations as they deemed fit.[36]

4.4.4. The Mandal Commission and Indra Sawhney

The commission observed that backwardness was both social and educational. If a caste as a whole is backward then reservation shall be given for the entire caste considering the specific caste as backward class community. backward class communities including non-Hindus, SCs and STs constitute 52 percent of India's population. Total 3743 communities across India were identified as backward. The commission recommended 27 percent reservation for backward class communities in government jobs and educational institutions. The commission used the method of survey and sample. Under this there were level points based on various social (caste as a class), economic (average assets of the family) and educational (number of members completed matriculation) factors. For this 11 criteria were given which consisted of three economical, three educational and four social. Total out of 25 points, if any community clears 11, it shall be declared as backward.[37]

This report was implemented in 1990. After the implementation the matter came to Supreme Court of India in the case of Indra Sawhney v Union of India[38]. The verdict was pronounced by the nine judges bench in 6:3 and majority opinion been delivered by Reddy, J.[39] Though there were several issues that were brought to the court but the emphasis of the bench was in and around the methodology of identification of backward class communities. The commission in its index had given 12 points to social backwardness and only ten points to economic and educational backwardness, taken together. It is a well-established fact that to decide the social

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[36] National Commission for backward classes Annual Report 2012-13, p. 2 http://www.ncbc.nic.in/Writereaddata/AR%202012-13%20Pandey635705824205955927.pdf accessed on 25th Jan 2024.

[37] Zia Mody, 10 Judgements That Changed India (First Published 2013, Penguin 2013) 125

[38] Indra Sawhney v Union of India [1992] Supp 3 SCC 217

[39] Ibid., para 859, pp. 766-69

backwardness, the position in traditional caste hierarchy is the most significant factor unless any person has become economically so well and is being covered in the creamy layer. This index was upheld by the majority. The contention claiming that no reservation to be given to any caste if there has been no discrimination in the past, was refused. Although it was held that unlike the SC and ST community, reservation to the citizens of backward class communities shall not be given if they have become prosperous, affluent and belongs to the creamy layer.[40]

Indra Sawhney: A Critical Analysis

In *Indra Sawhney*, the court has not been able to completely eliminate the caste factor in identifying the backward class community. However, the court has sought to keep the caste factor within limits. Caste can be one of the factors, but not the sole factor, to access backwardness.[41]

Reservation has become the bane of the contemporary Indian life. More and more sections of the society are demanding reservation for themselves in government services. The politicians are also vying among themselves for demanding reservations to all and sundry groups whether deserved or not. Needless to say, reservation is inequitable insofar as a meritorious candidate may have to be passed over in favour of a much less meritorious candidate in the reserved category.

Reservation is a compensatory discrimination for the special category. The appointments to the reserved posts may be made in the order of merit exclusively amongst themselves in their own specific category. However, those who are given reservation are not required to compete on equal terms with the open category. Their selection and appointment to the reserved posts is made independently on them inter se merit and not as compared with the merit of candidates in the open category. The very objective of providing reservation is to give protection to the weaker section as against the competition from the general category competitors. The Supreme Court had stated in this case that the very intention of giving reservation is to ensure selection of a less meritorious person." The only justification for reservation is social justice. It is a constitutionally recognised method of overcoming backwardness. This may have adverse effects in the efficiency of administration.[42] But in the present scenario, the system of reservation has to be accepted as necessary. However, while accepting reservation up to a point

[40] *Ibid., pp. 790-93*
[41] *Ibid., pp. 776-79*
[42] *Ibid., pp. 780-85*

as a present day political and social necessity, it does not mean that it must not be kept within strict limits. The defects of the system of reservation ought to be minimised as far as possible.

The Supreme Court's opinion in *Indra Sawhney* makes a signal contribution to this end. For example, some minimum qualifications for the candidates of the reserved categories should be prescribed. Also, the list of services where merit will prevail may be enlarged.[43] Above all, it seems to be essential that reservation for more than 50% ought to be declared unconstitutional as adversely affecting the 'basic' feature of the constitution and equality, so that reservation may not be increased beyond 50% even by a constitutional amendment. This is necessary to hold the growing demand of politicians for more and more reservation in favour of groups they seek to represent.

The basis of providing reservation should be quantitative data which depicts the backwardness of the class and inadequate representation of that class in public services and employment. The Court appears to have introduced the principle of proportionality by saying that "even if the state has compelling reasons, the state will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely".[44]

4.5. Individual vs Community

The constituent assembly intended to provide reservation for the backward class community es, SCs and STs. The reservation for the STs and SCs is based on the community as a whole. The reason being that, according to Article 341 and Article 342 The President of India notifies any caste or tribe as a whole community to be eligible for availing the benefit of reservation. In the cases of backward class community es, in various cases it has been held by the Hon'ble Supreme Court that caste cannot be the sole criterion but a significant basis for the identification of backward class community es. This extended the reservation on community basis to the backward class community es as well.

The Indra Sawhney verdict given by the 9 judges constitution bench is considered to be the turning point in the regards to the individual v. community approach. The concept of 'Exclusion of Creamy Layer' was introduced as part of the implementation and effect of the Mandal Commission report and the Indra Sawhney judgement. According to the creamy layer system the individuals whose annual family income exceeds a certain limit then they wouldn't

[43] *Ibid., pp. 832-41*
[44] *Ibid., pp. 804-813*

be eligible form availing the benefit of reservation even if they belong to the backward class community. The limit was initially fixed at Rs. two lakhs per annum in 1992 which was gradually increased in the upcoming years and in 2017 it was made as Rs. 8 lakhs per annum. The court was of the opinion that if a certain individual has become so affluent and economically sound that he is being covered the creamy layer, then cannot be considered as socially and educationally backward.

The invoking of creamy layer for the OBC reservation is a landmark in significantly considering the individual based approach along with the community-based approach. Unlike the SCs and STs in which no economic restriction is applicable, the backward class community es can avail the benefit of reservation only if they fulfil the required eligibility criterion of creamy layer exclusion.

This is certainly clear that the reservation policy needs to be revamped for the purpose of achieving the larger objective of socio-economic justice. The appraisal of backwardness on the basis of individualistic approach along with the community-based approach through the insertion of creamy layer is a significant development in this direction. But this measure is not adequate. A significant question that remains is that how to ensure equal opportunities for the other excluded groups and sections of the society. In this regard, certain other steps such as extension of the individualistic approach to other sections of the society and establishment of an Equal Opportunity Commission shall be instrumental.

V. THE CONCEPT OF EQUAL OPPORTUNITY

5.1. Introduction

In the constituent assembly, Dr. B. R. Ambedkar defended the backward class community es which has been embodied in the constitution and argued on equal opportunity concept where three views were expressed in constituent assembly, “The first is there shall be equality of opportunity for all citizens. Many members of this House wanted that every individual who is qualified for the particular post should be free to apply, sit for examinations and to through the qualifications test in order to operate principle of equality of opportunity. Furthermore, another view was expressed by the section of this house if this principle is to be operative, there ought to be no reservations for any class or community. All citizens if they are qualified, should be placed on the same level of equality with regard to public services are concerned. There should

be entry of certain communities which have so far been outside the administration".[45] From this debate I believe that most of the members of legislature were in favour of equal opportunity principle. This chapter examines the concept of equal opportunity and the arguments as well as ideas generated in equal opportunity commission. It further analyses the demand of modern society on individualistic approach based on the principle of equal opportunity.

5.2. Principle of Equal Opportunity

The Preamble of the Constitution of India provides for "Equality of status and of opportunity."[46] Article 14 of the Constitution finds its inception from this. Article 14 reads as "The State shall not deny any person equality before law and equal protection of law within the territory of India".[47] The concept of equality as mentioned above means 'Equality amongst the equals'.[48] According to H.L.A. Hart, there are two principles/rules of justice, (a) Like must be treated alike, (b) different must be treated differently.[49] Based on these principles the compensatory discrimination has been made an integral part of the Constitution.

The main argument which can be drawn on principle of equal opportunity is that, equality does not mean to treat each and every one in the same manner. While providing justice on the basis of equality, it must be considered that justice must not only be done but must also be seen and appear to be done. In the pre constitutional era, several castes and classes of people suffered huge discriminations. Due to this historical aspect, it was necessary to invoke some special safeguards for the suppressed and backward class community es. The constitutional provisions for guaranteeing equality to all individuals were not sufficient for substantive equality of opportunity to the disadvantaged groups. Therefore, reservation was implemented to rectify the discrimination practice against these groups. It basically emphasized on equal treatment of all individual. The main social goals of constituent assembly were to reduce social and economic inequalities. The reservation in public services for the backward class community was inserted to eradicate disparities between groups. The very idea of compensatory discrimination is to

[45] *Constituent Assembly Debate, Vol. VIII, p. 11.*
[46] *Constitution of India, 1950, Preamble*
[47] *Constitution of India, 1950, a. 14*
[48] *M.P. Jain, 'Indian Constitutional Law' (6th edn, Lexis Nexis 2012) 929*
[49] *Robert S. Summer, "H.L.A. Hart on Justice" [1962] Paper 1263, 499*

achieve objective such as 'to re-distribute resources and opportunities to those who enjoy the fewest advantages.'[50]

It can be analysed that there is a lack of understanding between Article 15 and 16 of the Indian Constitution, which stressed mainly on 'right to equality for every citizen irrespective of religion, race, caste etc.'[51] The very idea of right to equality makes the state responsible to provide equal opportunity for each and every citizen irrespective of their religious identity or based on the community to which they belong. But this has been evident through various cases and recommendations of commissions including the Mandal Commission report, that caste is a significant and inevitable factor for the identification of backward class community es. From this it can be inferred that for providing the benefit of reservation to the SCs and the castes identified as backward, the state has to deviate from the principle of non- discrimination on the basis of religion. This is so because the caste system prevails only in the Hindu religion and therefore the classification on the basis of Hindus and non- Hindus becomes a necessity.[52]

However, in order to uplift socially and educationally backward class community es of citizen or for the SCs and STs, special provision was inserted through 'Compensatory Discrimination'. It consists of two sets of principles- formal equality for all and compensatory discrimination for some, competing with each other. In order to apply the principle of equal opportunity, it is necessary to understand that certain classes of the society are weaker than others in terms of social upliftment. Therefore, the introduction of compensatory discrimination is not against equality. In *NM Thomas vs State of Kerela*,[53] Supreme Court has held that 'Article 16(4), which is prime source of compensatory discrimination, is not an exception to Article 16 (1) but only an instance for classification'. It highlights that equality of opportunity, not opportunity to achieve equality. Though there are some flaws in compensatory discrimination. It is obvious that until and unless educational and economic factors of the weaker sections are promoted, the principles of equal opportunity will not be achieved. Eventually state is authorized to promote the objective by taking necessary steps without affecting fundamental rights.

Another argument can be stated here that identifying beneficiaries based on multiple criteria, including religion is important for proving equal opportunity. Indian Constitution preserves equality of status and opportunity of all citizens. Under Article 14 of Indian Constitution,

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[50] *Marc Galanter, "Competing Equalities: Law and the backward class community es in India" [1984] Vol. 28, 118 Oxford University Press*
[51] *Constitution of India, 1950, a. 15 and 16*
[52] *Rochana Bajpai, "Minority Rights in the Indian Constituent Assembly Debates, 1946-1949" 7*
[53] *[1976] 2 SCC 310*

equality before the law or equal protection of the laws does not mean the same treatment to everyone. As no two human beings are equal in all respects, the same treatment to them in every respect would result in unequal treatment. For example, the same treatment in all respects to a child as to an adult, or to a sick or physically challenged as to a healthy person, or to a rich person as to poor, will result in unequal treatment or treatment which nobody will justify or support. Therefore, the underlying principle of equality is not the uniformity of treatment to all in all respects, but rather to give them the same treatment in those respects in which they are similar and different treatment in those respects in which they are different. In a nutshell it is stated: 'Equals must be treated equally while unequal's must be treated differently.'[54]

However, for the application of the principle of equality in real life we must, therefore, differentiate between those who are equal and those who are different. This exercise is expressed as reasonable classification. Even though no two human beings are similar in all respects, they are all similar in one respect, namely, they are all human beings. Therefore, as human beings they require the same treatment, i.e. they must all be treated as human beings. In the language of rights, even though we are all different from one another in one respect or the other and may be given different treatment in those respects, we are all entitled to equal treatment as human beings. As human beings in Kantian terms we all have equal worth and in Dworkin's words are entitled to equal respect and concern.[55] Any classification or absence of it that ignores this aspect, violates equality and cannot be justified under Article 14. Therefore, as it can be said that Articles 14, 15 and 16, equality not only prohibits unequal treatment but it also demands equal treatment. The State must not only treat people equally but it must also take positive steps to remove existing inequalities, especially those inequalities which treat human beings less than human beings. Our common humanity, which is also formulated as human dignity; demands distributive justice both of which —dignity and distributive justice are essential to equality.[56]

5.3. Stratification By the Legislature

The right to equality as incorporated in and discussed above requires legislation for its operation so that equals may be treated equally and unequal's may be treated differently. The

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[54] M.P. Jain, 'Indian Constitutional Law' (6th edn, Lexis Nexis 2012) 935
[55] Ronald Dworkin, 'Taking Rights Seriously'(1977) 223
[56] Sandra Fredman, 'From Deference to Democracy: The Role of Equality under the Human Rights Act, 1998' (2006) 122 LQR 53.

principle of equality, we have noted, does not mean that every law must have universal application to all persons who are not by nature, attainment or circumstances in the same position. The varying needs of different classes of persons require different treatment.

In fact, public welfare requires that persons, property and occupations be classified and subjected to different and appropriate legislation. Governance is not a simple exercise. It encounters and must deal with the problems which come from persons in an infinite variety of relations. Classification is the recognition of these relations, and, in making it, a legislature must be allowed a wide latitude of discretion and judgment.[57]

The Indian statutory law is full of instances of special legislation applying only to a particular class or groups. Lawyers, doctors, money-lenders, landlords, drivers of motor-cars, insurance companies, minors and, indeed, most other classes are subject to special legislation. Such classification undoubtedly differentiates between persons belonging to one class and the others, but that by itself does not make the legislation obnoxious to Article 14.

The Supreme Court has time and again reiterated[58] that Article 14 does not rule out classification for purposes of legislation. In *Kedar Nath Bajoria v. State of W.B.*,[59] it was stated that

"The equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all the laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation."

A legislative classification to be valid must be reasonable. It must always rest upon some real and substantial distinction bearing reasonable and just relation to the needs in respect of which the classification is made. In order to pass the test for permissible classification, two conditions must be fulfilled, (a) classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (b) the differentia must have a rational relation to the object sought to be achieved by the statute in question.[60]

[57] *Tigner v. Texas [1940] 310 US 1417*
[58] *Charanjit Lal Chowdhary v. Union of India [1951] AIR SC 41*
[59] *Kedar Nath Bajoria v. State ofW.B. [1953] AIR SC 404*
[60] *Das J., State of West Bengal v. Anwar Ali Sarkar [1952] AIR SC 75*

So, from the above it can be inferred that the compensatory discrimination of any kind which primarily includes the reservation in educational institutes and government services to the backward class communities, is not a violation of Article 14. Rather it is the facilitation and enhancement of the idea and principle of equality as enshrined in part three of the Constitution of India.

5.4. Idea and Prospects of Equal Opportunity Commission

In India caste and religion are dominant social identities of backwardness based on occupation, residential and regional identities. Still religion prevails over castes which creates systematic biasness in society. The only way to remove such bias is to entertain equal opportunity and access to the programme that generate benefits. In current situation, accessing to various government programmes that promote literacy, education, health, employment services, etc. are difficult due to systematic failure of on the part of societal structure and government. There is a differentiation in outcome measures but it is essential to ensure equal opportunity of access and proper utilization of such services. As with the pace of development, equity is a concurrent objective. Sachar Committee in its recommendations proposed on Equal Opportunity Commission so that opportunity of 'access and use' is ensured equally and justly that also provides equal level to all social- religious communities.[61] The committee submitted a draft bill along with the report to the government in February 2008. The then Prime Minister constituted a group of ministers to establish the process of equal opportunity commission. The purpose of equal opportunity commission is not only to protect interests of minorities, but to ensure equal opportunity to all citizens of India, irrespective of religious, caste, linguistic or geographical differences.[62]

The object of introducing this commission is to remove unfair discrimination and pro- active creation of conditions in order to enable such neglected groups to avail the right to equality under Article 14 of the Indian Constitution. The idea of equality of opportunity is to offer equal chance to unequal. It is an idea of 'openness to opportunity' and procedural fairness rather than about equality of opportunity. The advantages of this approach are such as it allows for open

[61] *Ministry of Minority Affairs, Government of India, Report by the Expert Group (February 2008).*
[62] *Yogendra Yadav, 'Rethinking Social Justice'*

debate and discussion on criteria by which deprivation can be determined. It can distinguish different level of deprivation.[63]

Although, the very idea of constituting this commission is to ensure equal opportunity, to enhance and facilitate the noble idea of Right to Equality in its true sense. This is yet to be witnessed that whether this commission is successful in proper recommendation and also that the implementation is done efficiently.

5.4.1. Need for Equal Opportunity Commission

The preamble of Constitution of India includes "Equality of status and of opportunity to all citizens," which has been secured through the provisions enshrined in Article 14, 15, 16 and 17. Even the concept of Equality was strengthened by Directive Principle of State Policy in part IV of the Constitution of India. The Directive Principle ensures a positive duty upon the State to secure these rights of the citizens. Since there is continuous presence of inequalities in social structure of country.[64] These inequalities cover from basic necessity of life to the higher needs like privileged section of society. Therefore, new policies and programmes have to be adopted by the commission to enable the deprived groups to access rights through equal opportunities. The commission's strategy has to emphasize on highlighting the problems of unequal opportunities, disproportionality, deprivation and various forms of discrimination. However, the previous commissions have identified and arrived at a stage where group membership cannot be a sufficient criterion to claim disadvantage. Furthermore, they also proposed evidence-based policy options that can be tailored to meet specific requirements. The Equal Opportunity Commission has been proposed as a device to meet the strategies. It will also direct policies which need to move in future to address the problem of inequality of opportunity. At the same time, it will actively act as a forum which will redress inequalities of opportunity and to work on advice and action.

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[63] *Richard Power, 'Competing Equalities: Law and the backward classes in India' (1985) Vol. 63 Iss 3, Washington University Law Review.*

[64] *Pg. 6, Chapter 1, EOC Part 1 Report by the Expert Group to examine and determine the structure and functions of an Equal Opportunity Commission Set up by the Ministry of Minority Affairs, Government of India February, 2008 <http://www.minorityaffairs.gov.in/sites/default/files/eoc_wwh.pdf> accessed on 2nd June 2023*

5.4.2. Functions of The Equal Opportunity Commission

It is proposed that the functions of the commission should comprise of the policy advisory, research, gathering of data. It shall also fix the indicators for identification of the backward classes.[65] I believe that a periodical evaluation of the list of SC, ST and OBC and accordingly the removal or addition of the existing caste and class will also constitute as a primary function of the Commission.

The very purpose is to ensure that the benefits of the reservation system reaches the last person in the row. It shouldn't merely get confined to few groups of people or individuals repeatedly getting the benefit.

5.4.3. Structural And Constitutional Framework

After studying the purpose and functions of the commission report. It can be suggested here that the Equal Opportunity Commission shall be a permanent constitutional body such as the Finance Commission of India. The President of India by order shall constitute an Equal Opportunity Commission to be appointed after the expiry of every five years.

Members:

The Commission shall consist of a Chairman and four other members to be appointed by the President for a fixed term of five years.

It shall be duty of the Commission to make recommendations to the President as to –

(1) The measures needed to be considered for ensuring equal opportunity for all the members of the deprived classes;

(2) Periodical Evaluation and alteration of the list of the SCs, STs and the OBCs for ensuring that those individuals, groups, castes or class of people who have become socially and educationally forward with due consideration to their financial prosperity and stability, shall be removed from the list so that the benefits could be extended to the maximum;

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[65] Pg. 59, Chapter 5, EOC Report by the Expert Group to examine and determine the structure and functions of an Equal Opportunity Commission Set up by the Ministry of Minority Affairs, Government of India February, 2008 <http://www.minorityaffairs.gov.in/sites/default/files/eoc_wwh.pdf> accessed on 2nd Dec 2023

These recommendations shall be made to the President on the basis of the research and data gathering by the commission in this regard.

The President shall ensure that every recommendation made by the Commission is laid before each House of Parliament by the government.

As the concept of equality is based on the principle of equality amongst the equals and treating different differently, so those who have become economically affluent shall be treated as forward and thus need to be excluded from availing the reservation.

VI. CONCLUSION AND SUGGESTIONS

The fundamental right to reservation under Part III has been inserted as an enabling right. It can be inferred from the constitutional provisions and that it was neither the intention of the constituent assembly nor of the parliament that these provisions shall be claimed as enforceable rights forever. Rather, it was a policy directive from the framers to the government. While achieving the larger goal of social economic justice, this is a policy tool to be used and implemented by the state. In pursuance of the same, the state from the very beginning implemented these policies of compensatory discrimination, extending it to the SCs, STs. Later on it was extended to the OBCs, both in the services and the educational institutions. But, it was quite clear from the very beginning that it was never meant to be perpetual. Unfortunately, the manner in which it has been implemented is of the type where we could see perpetual operation of the same. Be it any such policy measure, it requires alteration with the change in time, period, position and circumstances. The reservation policy is probably one such policy which has hardly undergone any change in the past 70 years which defies the very purpose of a policy itself. Therefore, it requires complete overhauling and reformation for which it needs to be detached from the notion of being a political tool and has to be seen as a policy measure.

I believe that the discussions in India shouldn't be on the existence or abrogation of reservation, rather it should be emphasized on who should get the benefits of compensatory discrimination. There has been a wrong notion that the revamping of reservation policy would reduce the percentage of reservation. The benefits of overhauling the reservation policy by extension of the creamy layer to the SCs and STs is neither going to reduce the percentage of reservation, nor it would benefit the general category aspirants. The purpose is not to give the benefits to the people of some other class. Rather, it is for the benefit of the people of same class. This is

to be understood that the restructuring of the SCs, STs and OBCs themselves. Hence, the refurbishment of the reservation policy shouldn't be objected.

It should be Considered from the academic point of view as a policy. For overhauling the reservation policy and treating it in the manner which could sub-serve the larger goals of socio-economic justice, I suggest some measures to be undertaken:

(i) Extension of the Creamy Layer: The introduction of Creamy Layer concept through the Indra Sawhney verdict is a milestone in the reservation system of India. This included the individualistic approach along with the community-based approach for the purpose of appraisal and identification of backwardness.

I suggest that following the footsteps of Indra Sawhney and Creamy Layer, this individualistic approach for reservation needs to be extended to the SC and ST reservation as well.

A thought towards insertion of creamy layer in the SC and STs can prove to be a turning point in this regard as there are still millions of deprived people who didn't or shall not receive the benefits of reservation and a primary reason being that few groups, families or individuals have been repeatedly getting the benefits since generations. An evaluation is needed to exclude the economically affluent individuals from taking further more benefits and instead giving it to those who are still deprived.

An individual is given the benefit of compensatory discrimination if he belongs to a backward class community. The backwardness is decided on the basis of various criteria and economic backwardness is one of them. I suggest that if an individual has become financially affluent, then it shall be considered that the person is no more backward, rather he has become forward.

The concept of equality is based on the principle of equality amongst the equals, like must be treated alike and different must be treated differently. So according to me, a financially strong person being a part of creamy layer, should not be considered as equal to the other backward people of his own class. Since the individual is unequal to the other members of his class, he shall be treated as forward and thus need to be excluded from availing the reservation.

(ii) Determining the Criteria for Creamy Layer:

The Government of India in 2017 increased the limit of creamy layer to Rs. 8 lakhs per annum from Rs. 6 lakh.[66] This is calculated on the basis annual family income of any individual. As per the report given by the National Commission for backward classes on "The Review Criterion For Determining the Creamy layer", while applying the creamy layer on the government servants, the income from salary and agricultural land of the employees below the category II is not included while computing the annual family income.[67] Not including the salary component of the class III and class IV employees is a major flaw in determination of annual family income for creamy layer in OBC. Thus, the larger purpose of the creamy layer exclusion is defeated.

I suggest that the salary component of all the employees to be included while calculating the annual family income for creamy layer.

(iii) Classification of the OBCs into Sub categories:

There are around 3000 castes listed in the central list of OBCs. But amongst those, there are a few castes who have been taking the maximum benefit repeatedly. For example, the Yadav community in Northern India and significantly in Uttar Pradesh is considered to be getting the maximum benefit amongst that of the 27% allotted to the OBC community. The largest quota of reservation is repeatedly being taken by a particular class amongst the OBCs due to their social and economic advancement. It is suggested that the OBCs to be classified further as backward and more backward. Then certain restriction as to the maximum percentage of reservation needs to be fixed. For example, amongst the 27% reservation for OBCs, 5% to 8% could be fixed exclusively for the particular caste or class of people. The remaining percentage would be left open for the other castes and class of OBCs (more backward classes), except those who have been given the exclusive reservation. This shall ensure that any specific caste or class that has been largely availing the maximal portion of reservation since a long time doesn't creates a hindrance in the facilitation of reservation to other classes.

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[66]The Hindu, OBC creamy layer limitbraised to Rs. 8 lakh per annum <http://www.thehindu.com/news/national/obc-creamy-layer-income-limit-raised-to-8-lakh-per-annum/article19677545.ece>accesed on 10th Nov 2023

[67] Report of the National Commission for backward class community es on The Review Criterion For Determining the Creamy layer, 2015 <http://www.ncbc.nic.in/Writereaddata/Supplementary%20Creamy%20Layer%20Report%20241115%20final%20at%20430PM%20Corrected%20by%2005052016%20page%20no15635980433155122719.pdf> accessed on 13th Jan, 2024

This suggestion to classify the OBCs into further sub categories was also upheld by the hon'ble apex court in the Indra Sawhney verdict wherein it was held that the classification of backward classes as backward and more backward is constitutionally permissible. The very purpose of this classification is to ensure that those amongst the backward class communities, who have been deprived of the benefits of reservation, are also given the advantage.

To ensure the implementation of the above mentioned suggestions, there is a necessity for the establishment of an Equal Opportunity Commission which shall be a constitutional body. A question that arises as to what is the need for establishing a permanent constitutional body if Article 340 of the Constitution already empowers the President to appoint a commission for investigating the conditions of backward classes.

The very purpose and idea of suggesting a permanent constitutional body in this regard is to ensure efficiency and effectiveness. The Mandal Commission report was submitted in 1980, but was implemented only after a decade due to vested political interest. While such commission reports are not binding on the government and even after spending heavy public money on preparing these reports, there is no accountability of the government for implementing them. On the other hand, the Equal Opportunity Commission after being established as a permanent constitutional body, shall follow the footsteps and the working of Finance Commission. This shall ensure regular, periodic and efficient recommendations and fix certain accountability for the legislature and executive. Unlike other commissions and their reports, this permanent body shall work as an independent commission. Its recommendations shall not be subject to biased political interests as there would be an accountability on the government and the parliament and both shall be answerable to each other in this regard.

Thus, the suggestions based on the study and analyses aims at revamping the reservation system of India. The emphasis is to attain the larger goal of reservation policy by the inclusion of individualistic approach along with the community based approach in the process of identification of the backward and deprived classes.

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TOWARDS PRIVACY-CENTRIC GOVERNANCE: ANALYZING INDIA'S DATA PROTECTION TRAJECTORY

- *Divya Singh[*] and Dr. Harish Tiwari[**]*

ABSTRACT

With the technological innovations gaining momentum, it is leading to the transformation of societies worldwide. Owing to these innovations, data is transcending the geographical boundaries thereby raising pressing concerns with regard to its effective regulation and safeguard. The collection, storage and utilization of vast amounts of data have become integral to numerous business and governmental operations. As a result, identity thefts, data breaches and the potential misuse of personal data have become pervasive threats. This rapid digitization and unprecedented growth in data generation, acquisition, and utilisation across public and private sector ecosystems has necessitated legal frameworks harmonising user rights with commercial interests globally. In the pursuit of strengthening data privacy, India has made notable progress by recently enacting the Digital Personal Data Protection Act 2023 modelled on the EU's pioneer GDPR standards. This study traces the genesis of the data protection legislation in the Indian subcontinent and delves into the inadequacies of the DPDP Act, 2023 in comprehensively addressing digital privacy concerns. Furthermore, the study proposes targeted measures that policymakers could consider to enhance data protection in the age of digital privacy.

Keywords: ***Data Protection, Right to Privacy, Srikrishna Committee, Digital Personal Data Protection Act 2023***

I. INTRODUCTION

In the modern digital age, the data protection and privacy right has grown into an increasingly vital issue. With rapid advancements in technology enabling more extensive data collection, analysis, and use, there have been increasing concerns regarding the potential for misuse and

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abuse of personal data.[1] This has led many countries to develop comprehensive legal frameworks regulating data protection.[2] In India, activism around data protection and privacy rights gained significant momentum after the 2017 Puttaswamy judgement of the Supreme Court, which ruled that the privacy right is a fundamental right under the Constitution of India.[3] This paved the path for India to enact its own data protection law. Following that, the Personal Data Protection Bill ("PDP Bill") was proposed in 2019[4], went through several amendments, and was finally enacted as the Digital Personal Data Protection Act ("DPDP Act") in 2023.

The DPDP Act controls how both the private organisations and the government process personal data by establishing a legal foundation for data protection in India.[5] Mandatory consent requirements for the collection and processing of personal data, limitations on cross-border data transfers, responsibilities for data fiduciaries and processors, data localisation standards, and sanctions for non-compliance are a few of its important characteristics. The law is still in the early stages of implementation and its complete impact remains to be seen.

Part II of this paper gives the historical context of the data protection legislation in India focussing on the pre-independence and post-independence data protection measures. It conducts an analysis of the IT Act 2000, IT Rules 2011, The Puttaswamy Judgement, The PDP Bill 2019, The DPDP Bill 2022 highlighting the lacunas in these laws resulting in their incapability to effectively regulate digital privacy and leading to the enactment of the DPDP Act 2023.

Part III of this paper critically analyses the DPDP Act, 2023 and brings forth its unique characteristics. Part IV of this paper highlights the inadequacies underlining the DPDP Act, 2023. Part V of this paper enumerates the policy recommendations to enhance the act's data security and privacy measures.

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[1] *Graham Greenleaf, Data Protection in a Globalised Network, 10 UNSWLRS 221, 228 (2021).*

[2] *United Nations Conference on Trade and Development, Data Protection Regulations and International Data Flows: Implications for Trade and Development, U.N. Doc. UNCTAD/DTL/STICT/2016/1 (Apr. 19, 2016).*

[3] *Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.*

[4] *The Personal Data Protection Bill 2019.*

[5] *The Digital Personal Data Protection Act, 2023, § 3, No. 22, Acts of Parliament, 2023 (India).*

II. HISTORICAL BACKDROP OF THE DATA PROTECTION LAW IN INDIA

India's narrative towards an effective and robust data protection legislation can be branched off into two phases. The first phase is the pre-independence phase which saw the glimpse of the rudimentary data protection measures while the second phase saw significant developments ranging from the Puttaswamy judgement to the introduction of the PDP Bill, 2019 and to the enactment of the DPDP Act, 2023.

2.1. Pre-Independence – Mid-20th Century

Data protection regulation in India has its roots in the pre-independence era, when the colonial government implemented limited policies and measures aimed at protecting certain types of private information. While comprehensive data protection legislation was still decades away, the early twentieth century saw Indian policymakers grapple with balancing privacy rights, government interests, and economic priorities even during colonial rule. One of the first examples was the Census Act of 1948, which guaranteed confidentiality to census data. The Act forbade the disclosure of any data collected during the census process that would identify a specific individual, though aggregate statistical data could be published.[6] This demonstrated an early recognition that personal information documented by the government deserved privacy protections.[7]

An important development came in the 1955 Report on the Revision of the Patent Law by Justice (Dr.) Bakshi Tek Chand which recommended limiting access to secret patent documents to only the "least number of persons in the Patent Office as may be necessary" to reduce potential leakage of sensitive commercial information. The report acknowledged the economic damage that could occur from disclosure of confidential documentation submitted by patent applicants. This reflected an understanding that certain types of private corporate or business information may warrant government restrictions on access. In 1958, the government implemented stringent controls specifically aimed at protecting individual privacy under the new Aircraft Rules.[8] The regulations placed limits on aerial photography to prevent infringement on the "right of the public to reasonable privacy." This was one of the earliest legislative attempts in India to codify privacy as an enumerated right deserving protection. Additional considerations for data privacy came about through case laws prior to independence,

[6] *The Census Act, 1948, § 15(1), No. 37, Acts of Parliament, 1948 (India).*
[7] *The Collection of Statistics Act, 2009, § 8(1), No. 7, Acts of Parliament, 2009 (India).*
[8] *The Aircraft Rules 1937.*

notably the landmark 1959 ruling in M.P. Sharma and Others v Satish Chandra.[9] Though the Supreme Court's verdict declined to recognise a generalised right to privacy under the Constitution of India, the judgement acknowledged that certain private matters may require safeguarding from governmental intrusion. This laid the bedrock for expanded privacy rights.

2.2. Post Independence – Present

India's legal framework has evolved significantly since gaining independence in 1947, shifting away from colonial laws towards a more progressive rights-based system aimed at social welfare and equitable justice. The journey of data protection regulation in India has traced an incremental path from limited sectoral safeguards to a comprehensive cross-sectoral framework that keeps pace with global best practices.

2.2.1. The IT Act 2000: India's first step towards data privacy regulation

The Information Technology (IT) Act 2000, the nation's first piece of legislation governing data practices, sowed the seed by introducing privacy protections for sensitive personal data.[10] However, the IT Act was primarily focused on facilitating e-commerce and e-governance, with data protection obligations introduced as a complementary afterthought. It contains basic data privacy protections, prohibiting unauthorised access, disclosure, and damage to electronic information. However, its applicability is limited, focusing chiefly on corporate data security practices rather than individual privacy rights.[11] Over time, the narrow scope and piecemeal privacy protections of the IT Act were deemed insufficient in the context of proliferation of data gathering and processing capabilities. The limitations stemmed from lack of definition around concepts such as ‘sensitive personal data’, absence of specifying purposes for data collection or explicit consent requirements, and lack of robust grievance redressal mechanisms.

Later on, the IT Rules, 2011 were notified under section 43A of the IT Act, 2000 in April 2011.[12] The goal was to mandate the usage of adequate security techniques and procedures

[9] *AIR 1954 SC 300.*
[10] *The Information Technology Act, 2000, § 43A, Acts of Parliament, 2000 (India).*
[11] *Rahul Matthan, Takshashila Discussion Document- Beyond Consent: A New Paradigm for Data Protection, TAKSHASHILA INSTITUTION (July 19, 2017), https://takshashila.org.in/research/discussion-document-beyond-consent-new-paradigm-data-protection.*

[12] *Information Technology Rules 2011.*

while handling sensitive personal data or information ("SPDI"). The IT Rules also strive to ensure that global data protection and privacy standards are met. However, the IT Rules have been criticised on grounds of ambiguity. The IT Rules define SPDI broadly to include various types of personal information. However, they are only applicable to body corporates or any person on behalf of body corporates. This excludes a significant portion of data collection and processing activities undertaken by individuals, partnerships, or entities other than body corporates. Further, while the IT Rules refer to service providers and other stakeholders, the obligations are only expressly imposed on body corporates. This fragmented approach dilutes the regulatory impact of the IT Rules. It allows a large portion of personal data processing activities to remain outside the purview of reasonable data security requirements mandated under the IT Rules. This substantively defeats the purpose of the IT Rules and reduces its effectiveness.

Another major criticism is that the IT Rules are not properly harmonised with other laws on data privacy in India, such as the various sectoral regulations on data privacy applicable to telcos, healthcare, etc. As an example, the IT Rules use a 'harm-based approach', regulating only sensitive personal data. On the contrary, unless exempted, regulations such as telecom industry privacy regulations automatically regulate all types of personal data. Such lack of harmonisation leads to overlaps, contradictions, and confusion regarding applicable standards. Data controllers and processors must adhere to varying standards under different rules for similar activity. This increases regulatory complexity and compliance costs. It also provides scope for arbitrage and forum shopping by data controllers seeking the most lenient regulations.[13]

Lastly, IT Rules doesn't provide for stringent penal consequences for violations. Rule 7 merely requires body corporates to 'define and periodically review' policies for breach notification and remedial action in the event of breach of privacy policies. It does not expressly impose any liability, damages, or penal consequences for non-compliance, breach or negligence by the body corporate itself. The only punitive provision is Section 43A of the IT Act, which provides for a maximum liability of Rs. five crores for negligent disclosure of personal information by a body corporate. This monetary cap of Rs. five crores is too lenient compared to the potential

[13] *Apar Gupta, Apar Gupta writes: Digital Data Protection Bill uses brevity and vagueness to empower government, undermine privacy* THE INDIAN EXPRESS *(Nov. 25 2022, 8:43 PM), https://indianexpress.com/article/opinion/columns/apar-gupta-writes-digital-data-protection-bill-brevity-vagueness-empower-government-undermine-privacy-827913/.*

scale of harm caused by data breaches, especially by large tech giants or social media companies processing data of millions of users. The effective deterrence is therefore absent. Recent occurrences, like as the Facebook-Cambridge Analytica scandal highlight the need for stronger penalties proportionate to the scale of entities and potential harm.[14]

2.2.2. Protecting Privacy: The Puttaswamy verdict

Judicial recognition of the fundamental right to privacy emerged from the Supreme Court's landmark Puttaswamy judgement in 2017, a watershed moment in Indian jurisprudence, emanated from the contentious backdrop of the Aadhar project and its implications on rights to life, liberty and freedom of expression.[15] It made an unequivocal declaration that the privacy right is a basic right under the Indian Constitution. This marked a shift from the earlier stance set by the M.P. Sharma and Kharak Singh ruling. In a collaborative effort, the court stressed that the privacy right is a necessary component of the right to life and personal liberty protected by article 21 of the Indian Constitution. The verdict went beyond the theoretical recognition of privacy as a basic right and delved into its nuanced applications. The state may impose reasonable restrictions on the right to privacy in its pursuit to achieve legitimate goals such as national security or public order. This constitutional underpinning established the expectation for robust data protection legislation that protects individuals' informational privacy.

2.2.3. Examination of the Personal Data Protection Bill, 2019

India's first standalone personal data protection bill was introduced in 2018, undergoing extensive debate and revision due to concerns over broad exemptions and inadequate safeguards.[16] An amended version, the PDP Bill, 2019, based on the Srikrishna Committee's recommendations, awaited Parliamentary approval amid further critiques of deficiencies compared to global standards. As legislative efforts continued, the government issued the joint parliamentary committee's report in December 2021, containing recommendations to address key gaps in the PDPB's rights protections.[17] Following that, on December 11th, 2019, the PDP Bill was presented in the Lok Sabha with the goal of setting up a statutory framework to govern the handling of personal data. The Bill attempts to find a balance individuals' privacy rights

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[14] Nicholas Confessore, Cambridge Analytica and Facebook: The Scandal So Far, ALJAZEERA (Mar. 28, 2018), https://www.aljazeera.com/news/2018/3/28/cambridge-analytica-and-facebook-the-scandal-so-far.
[15] Justice K.S. Puttaswamy, supra note 3.
[16] The Personal Data Protection Bill 2018.
[17] Joint committee on the Personal Data Protection Bill 2019, Report of the Joint Committee on the Personal Data Protection Bill 2019 (2021).

and right to use data for innovation, by imposing obligations on entities processing personal data while exempting certain categories of processing from its purview. The Bill creates a three-tiered structure, imposing varying obligations upon data fiduciaries and processors depending on factors like: volume of data processed, risk of harm to the data principal, type of processing etc.[18] This calibrated approach helps balance innovation needs with data protection. For instance, "significant data fiduciaries" have added transparency and accountability norms.[19]

Though the bill has introduced certain pioneering concepts like significant data fiduciary, differentiated obligations, direct liability on data processors etc. which will enhance privacy safeguards, however, exemptions for government agencies from consent, transparency requirements[20], exclusion of non-personal data, automated decision making, absence of rights like right to be forgotten pose concerns.

2.2.4. Scrutinizing the Digital Personal Data Protection Bill, 2022

With the aim to regulate the processing of personal data of individuals in India and ensure their privacy and protection, the Digital Personal Data Protection Bill ("DPDP Bill"), 2022 contains a number of significant aspects.[21] The bill applies to all data fiduciaries and data processors, regardless of where they are incorporated or situated, as long as they process personal data in connection with any business conducted in India or profiling of individuals residing within Indian territory.[22] The definition of sensitive personal data is also expanded by the bill to include information about finances, transgender status, health, official identity, caste, religion, genetics, sex life, sexual orientation, biometrics, passwords, PINs, and other types of data that the government has designated as sensitive personal data. [23]

Even though the DPDP Bill, 2022 attempts to provide a legislative framework for the processing of personal data in India, the bill has received criticism on numerous fronts even

[18] *The Personal Data Protection Bill 2019, supra note 4, Chps III, IV, & VII.*
[19] *Id. § 26.*
[20] *Id. § 35, 12(a).*
[21] *The Digital Personal Data Protection Bill 2022, Preamble.*
[22] *Id. § 3.*
[23] *Id. § 3 (36)(A)-(M).*

before coming into effect.[24] Critics argue that the bill falls short on protecting privacy rights, obtaining meaningful consent, regulating children's data, ensuring accountability of companies, and having a wide enough scope.

A commonly cited limitation is the DPDP Bill restricting its scope to only personal data processed digitally or in digitized format.[25] This shrinks the landscape drastically as compared to laws like the GDPR. Excluding non-digital data would leave regulation ineffective for significant realms involving paper or physical records. There are also exclusions of personal data being processed by government entities that draw criticism. Such carve outs for entire sectors dilute the potency of the law and could enable abuse as per experts.[26] Even artistic and journalistic purposes have been exempted from consent requirements and transparency obligations.[27] While aiming to balance rights, critics argue the bill adopts too many blanket sectoral exceptions without sufficient safeguards.

III. THE NEWLY FASHIONED DATA PROTECTION LEGISLATION (DPDP ACT, 2023)

The Digital Personal Data Protection Act 2023 signifies a profound shift from India's historical reliance on industry self-regulation toward an enforcement-based regime anchored in individual rights. While the previous bills lack extra-territorial applicability, the DPDP Act, 2023 applies to Indian citizens and businesses that gather and use resident data. This also applies to any processing of digital personal data that occurs outside of India as part of any activity involving the delivery of products or services to Data Principals in India.[28] This legislation has taken significant steps in the localisation of data. While the 2019 bill prohibited certain data flows, the 2023 legislation only specifies that the government may restrict flows to specific nations through notification.[29] While not explicitly stated, the ability to restrict data

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[24]Anjali Bhardwaj, The problems with the Data Protection Bill, THE HINDU (Feb. 21, 2023, 12:15 AM), https://www.thehindu.com/opinion/op-ed/the-problems-with-the-data-protection-bill/article66531928.ece.
[25] The Digital Personal Data Protection Bill 2022, supra note 18, § 3(21).
[26] Anushka Jain, A public brief on the draft Digital Personal Data Protection Bill, 2022, INTERNET FREEDOM FOUNDATION (Feb. 16, 2023), https://internetfreedom.in/read-our-public-brief-on-the-draft-digital-personal-data-protection-bill-2022/.
[27] The Digital Personal Data Protection Bill 2022, supra note 21, § 17,18.

[28] The Digital Personal Data Protection Act 2023, supra note 5.
[29] Anirudh Burman, Understanding India's New Data Protection Law, CARNEGIE INDIA (Oct. 3, 2023), https://carnegieindia.org/2023/10/03/understanding-india-s-new-data-protection-law-pub-

transfers appears to provide the government with the authority it needs to pursue national security objectives. The bill further stipulates that this will not have an effect on steps taken by

sector-specific agencies that have or may have localisation obligations.[30] The Reserve Bank of India's localisation requirements, for example, will remain legally binding.

In contrast with preceding bills that exempted government agencies from certain provisions, the DPDP Act subjects both the private entities and the government to nearly identical data protection obligations. By holding the state to the same standards of transparency and accountability, the law signifies greater commitment to universal data privacy rights. Exceptions apply only where necessary for prompt action in the interests of sovereignty, security, friendly relations with foreign states, public order, and preventing incitement to commission of cognizable offences.[31] In enforcing accountability, the DPDP Act establishes a Data Protection Board of India ("DPBI") to ensure compliance, investigate violations and levy penalties. Whereas previous bills empowered multiple sectoral authorities,[32] the centralised DPBI is intended to enable more consistent, rigorous oversight. The revamped governance structure draws lessons from successful European regulators like Austria's Data Protection Authority.

The DPDP Act of 2023 establishes specific rights and duties for data principles. The rights include: right to access information regarding personal data, the right to correction and erasure

of personal data, the right to nomination, and grievance redressal.[33] The data principles' duties include: avoiding impersonating another person in certain circumstances, preventing the suppression of any material information, and not filing a fraudulent or frivolous grievance or

complaint, among other things.[34] Thus, by setting higher expectations of privacy protections, security safeguards, consent protocols, and transparency standards backed by stringent oversight and harsher penalties up to Rs 250 crores for non-compliance, the new law aims to effect a cultural change by placing user interests at the centre.

90624#:~:text=The%20law%20provides%20exemptions%20from,tribunals%2C%20or%20for%20the%20prevention%2C.

[30] *Id.*

[31] *The Digital Personal Data Protection Act 2023, supra note 5, Schedule II.*

[32] *The Personal Data Protection Bill 2019 (n 4) chp VII.*

[33] *The Digital Personal Data Protection Act 2023, supra note 5, § 11,12,13.*

[34] *Id. § 15.*

IV. INADEQUACIES IN THE DIGITAL PERSONAL DATA PROTECTION ACT, 2023

Though the enactment of DPDP Act, 2023 has provided India the most awaited Data Protection legislation aimed at securing digital privacy, it has received numerous critiques on several aspects:

- Timeless data retention

While the DPDP Act requires reasonable purpose limitations and storage restrictions on collected data, it falls short of prescribing explicit time limits, unlike the GDPR which generally restricts storage to time durations necessary for specified purposes. Without precise retention cut-offs encoded in law, data mining, and unauthorised secondary usage may endure through exploits like broadly interpreted 'consent'.

- Transparency concerns

The act's transparency provisions have drawn criticism for excessive deference to commercial secrecy over public interest. While mandating algorithmic impact assessments and data audits, the law permits extensive redaction of these documents to protect intellectual property, hampering scrutiny of unfair, unethical or biased practices.[35] This negates the spirit of accountability.

- Exclusion of anonymized data

The act has excluded from its ambit anonymized data which appears to be a point of criticism of the recently revamped data protection legislation. It appears to be a point of concern as this data can be placed on top of personal data in order to draw inferences of the individuals.

- Ambiguous guidelines

The DPDP Act mandates the Data Fiduciaries to take reasonable security precautions in order to prevent breach of the Personal Data that it has in its possession.[36] However, the act fails to

[35] *Id. § 29(3), 37(5).*
[36] *Id. § 3 8(5).*

elaborate on as to what are these reasonable security measures leaving room for misinterpretation and misuse.

- Unregulated data usage

There are no restrictions on the utilisation or gathering of data under the data protection legislation. It allows data fiduciaries to collect data for any valid reason as long as it is lawful.[37]

- Harm Regulation

The act fails to mitigate harm pre-emptively and imposes no responsibility on the DPBI to inform citizens about their rights under data protection legislation.

- Unified data classification

The legislation includes no provision for classification of the personal data. All data is classified under one head i.e., digital personal data which refers to personal data in digital form.[38] It overlooks the fact that different types of data call for varying degrees of protection. As a result, sensitive and critical personal data are not adequately protected, necessitating stronger processing and retention guidelines.

- Exemptions granted to government entities

The DPDP legislation grants the government authority to process personal data of individuals without their consent on grounds of national security. This might result in superfluous retention of data leading to violation of privacy rights.[39]

- Concern on Board's independence

The central government is responsible for creation of mechanism for the selection and appointment of the data protection board's members. Additionally, the board members have a two-year term of office and are eligible for reappointment.[40] This raises concern over the board's independence from government's influence.

[37] *Id. § 2.*
[38] *The Digital Personal Data Protection Act 2023, supra note 5, § 2(n).*
[39] *Id. § 17.*
[40] *Id. § 20.*

- Lack of regulatory provision related to AI

The act lacks regulatory provision for regulation of data used and processed by Artificial Intelligence. This leads to unauthorised access of data potentially compromising the confidentiality and integrity of personal data.

- Voluntary undertaking

The act empowers the DPBI to accept voluntary undertaking from those who are not complying with the provisions of the act.[41] This constitutes a bar on the proceedings under the provisions of the act, providing wrongdoers with an opportunity to evade penalty.

- Improper handling of data

The DPDP Bill, 2022 held data fiduciaries accountable for wrongdoings committed by other data fiduciaries using shared data. This has been dropped in 2023 act, which resulted in inappropriate data management because it no longer requires data fiduciaries to secure the data principal's approval before sharing their data with another data fiduciary.

- Compensation oversight issue

The act states that all penalties collected from data fiduciaries goes to the consolidated fund of India. There is no provision to award compensation to aggrieved data principals.[42]

- No data portability right

The data portability right for data principals is not dealt with by the DPDP Act, 2023. By giving individuals an opportunity to choose from a variety of platforms, this right gave the data principals more power and promoted competition amongst data fiduciaries, which enhanced consumer welfare.[43] Although this right was mentioned in the 2019 PDP Bill, it is not present in the existing DPDP Act.

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[41] *Id. § 32.*
[42] *Id. § 34.*
[43] *Trishee Goyal, How different is the new data protection bill, THE HINDU (Nov. 21, 2022, 10:57 PM), https://www.thehindu.com/sci-tech/technology/how-different-is-the-new-data-protection bill/article66166438.ece.*

Henceforth, it can be concluded that the recently enacted data protection legislation though marks a significant step in India's pursuit for a comprehensive and efficient data protection framework, a critical examination of the legislation indicates that it falls short on several fronts

and requires continued modification. Nevertheless, it remains a milestone first step, delivering enhanced accountability and remedies even if an incomplete realisation of data sovereignty.

V. POLICY RECOMMENDATIONS FOR STRENGTHENING DATA PROTECTION IN INDIA

In the wake of massive digital transformation across sectors, India needs an optimal approach to balance enabling data-driven innovation while still safeguarding citizen rights and preventing harms from unauthorized data collection or usage. Based on comprehensive analysis, the following recommendations could significantly enhance data protection in India:

- **Establishing an Independent Data Protection Authority:**

Though India has set up a data regulator i.e. Data Protection Board similar to authorities under the EU's GDPR or UK's Data Protection Act 2018,[44] there are concerns over the board's independence from government's influence. Such an authority being responsible to monitor and enforce compliance from public and private sector organizations collecting or processing personal data, investigate complaints, enable auditing mechanisms, recommending policy changes, its independence becomes a crucial factor to allow neutral oversight on issues like surveillance reform which it lacks currently. In order to ensure the freedom of the data protection board, the composition of the selection committee needs to be modified and made as diverse as was proposed in the 2018 draft of the bill, i.e. a judicial authority, an executive authority and external members.

- **Streamlining Consent Requirements:**

Current consent mechanisms for collecting personal data are fragmented or vague. A standardized and simplified framework for recording consent in line with global standards will enable users to fully understand data usage. Elements would include clear communication of

[44] *Graham Greenleaf, Global Tables of Data Privacy Laws and Bills, 8 SSRN 167, 168, (2023).*

purpose, storage periods, withdrawal procedures etc. Rules around child data consent also need strengthening. Making informed consent a primary ground for lawful processing while limiting dependence on vague grounds like is critical.[45] Extra protections are necessitated for processing sensitive data like financial information, religious beliefs, sexual orientation, medical records etc.

- **Limiting voluntary undertaking and providing compensation to the data principals**

There appears to be a need to limit the acceptance of voluntary undertakings from non-complaint entities by the Data Protection Board as it has become a mechanism to evade penalty. It needs to be made sure of that voluntary undertakings do not delay enforcement actions and a there is a requirement to establish clear criteria for evaluating the effectiveness of voluntary compliance measures. Furthermore, the DPDP Act, 2023 doesn't provide compensation to the data principals in case of breach. Allocation of a portion of the penalties collected form data fiduciaries towards compensation fund is required for the aggrieved data principals. It would lead to accountability and deterrence.

- **Facilitating Data Portability:**

Presently, citizens lack awareness or agency regarding data held by public agencies or companies about them. Procedural complexities also hinder portability rights. The DPDP Act, 2023 needs to introduce provisions for the right to data portability in order to empower data principles to transfer their personal data between different platforms and services, enhancing individual control over their data and promoting competition among data fiduciaries to improve consumer welfare. Competition and user control can dramatically rise once data portability between services becomes scalable like in the EU or Australia, without unreasonable denial grounds.

- **Instituting Safeguards for Government Surveillance & Use of Personal Data**

Controversies have erupted globally around how security agencies access citizen data from public or private sector databases lacking judicial or parliamentary oversight. Hence a robust assessment framework before authorizing security surveillance or government data access

[45] *Malcolm Dowden, Charmian Aw & Bindu Janardhanan, India Welcomes Landmark Data Protection law,* PRIVACY WORLD *(Jan. 29, 2024, 9:30 PM),* https://www.privacyworld.blog/2023/08/india-welcomes-landmark-data-protection-law/.

along defined grounds and quick redress for affected individuals will be pivotal. The DPDP Act 2023 needs to limit exemptions granted to government entities for processing personal data without consent on grounds of national security. It needs to implement strict oversight mechanisms and judicial review to prevent misuse and ensure compliance with privacy rights.

- **Incentivizing Privacy-Preserving Data Innovation**

As data-driven services evolve amidst growing digitization, concerns around intrusive data collection practices collecting excessive personal data also abound.[46] But privacy protection need not conflict with AI innovation for public good. Methodologies like federated learning, differential privacy, synthetic data etc. allow insights extraction without compromising sensitive raw data. Tax benefits, grants and related incentives can motivate startups and companies to integrate privacy enhancing techniques in product design. Voluntary adoption of global standards like ISO 27701 for sensitive data handling will signal positive industry orientation. Such approaches align well with the National Strategy for AI #AIforAll vision focused on responsible AI.[47]

With the national data protection policy taking shape, learning from global developments and India's unique socio-economic needs will inform balanced frameworks. User rights have to be the foremost benchmark though along with decentralized enforcement mechanisms. With apt policies, data-driven growth can positively transform lives across all sections while upholding informational privacy.

[46] *Amnesty International, Facebook and Google's pervasive surveillance poses an unprecedented danger to human rights, MEDIAWELL (Nov. 21, 2019), https://mediawell.ssrc.org/news-items/facebook-and-googles-pervasive-surveillance-poses-an-unprecedented-danger-to-human-rights-amnesty-international/.*

[47] *NITI Aayog, National Strategy for Artificial Intelligence #AIforAll (June 2018), https://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion-Paper.pdf, (Last visited Feb. 2, 2024).*

VI. CONCLUSION

In its journey for a comprehensive data protection legislation, India has come a long way. From limited sectoral regulations under the colonial rule to the DPDP Act 2023, India has successfully achieved its much awaited and desired data protection legislation aligned with the global standards of individual rights and state duties. This watershed moment signals a cultural shift in India towards a privacy-centric governance. With the extra-territorial applicability, accountability, data localisation, rights and duties of data principles and data fiduciaries along with the gender diversity it brings, it truly serves as the guardian of the personal data of individuals.

While the DPDP Act 2023 signifies tremendous evolution from India's previous approach to data protection, the current legal regime continues to privilege commercial convenience over individual rights in key aspects. The act requires enactment of more precise, less discretionary standards and close loopholes permitting misuse under dubious pretexts like consent or commercial confidentiality in order to emerge as a truly empowering, rights-based framework.

However, its shortcomings should not discourage but encourage the policymakers to strive tirelessly for the continued development of the legislation, thereby making it efficient in resolving the developing concerns and leading to a robust data protection framework.

RECOGNISING 'EUTHANASIA' AS A HUMAN RIGHT: NATIONAL AND INTERNATIONAL CONCERN

- *Dr. Jaswinder Kaur*[*] *and Mr. Birendra Singh*[**]

ABSTRACT

The legal concept of death has developed on the notion that it should happen naturally and anything otherwise shall be prohibited. However, cases like Aruna Shanbaug and Hannah Jonas have challenged this notion and put forward the concept of assisted suicide or euthanasia. The current article looks to understand euthanasia and analyses the different debates as to its legality, individual autonomy, religious grounds, and other related aspects. It further examines its emergence as a basic human right through the lenses of International Law, under the Indian legal system and comparative legal framework. Further it provides suggestions to the policy makers as to how uniform standards can be laid down for the right to die with dignity.

I. INTRODUCTION

"Death is not the greatest loss in life. The greatest loss is what dies inside us while we live."

~ Norman Cousins, American Journalist

Since time immemorial, scholars from different fields such as religion, policy, science, law, medicine etc. have attempted to find the meaning of life and death but the question regarding the true nature of death has remained unanswered. Within a wide range of different approaches towards looking at life and death, legal jurisprudence towards life and death has developed with an approach of death being an uncalled abrogation of life. While law acknowledges the death of a person as an inevitable and certain event, but it strictly base its understanding of death on the underlying premise that the event of death should come to a person of its own, and any act or assistance causing or accelerating death needs to be prohibited. Recent coverage of episodes all around the world of terminally ill patients lying in a vegetative state such as

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(Hembert)[1], (Aloisi 2008)[2] Eluana Englaro, (Verkaik, R. 2008)[3] Hannah Jonas and (Barnagarwala, T. 2015)[4] Aruna Shanbaug wishing to end their life at once instead of living for few more days only to witness grief pain has constrained us to question the said premise as to what quality of right to life does law attempts to preserve (Besirevic, 2008)?

With the advent of 21st Century, when medical science has seen rapid advancement and has been able to prolong the life expectancy of humans, there have been instances of a large number of patients who though are able to breathe but only to suffer traumatic pain and witness protracted death. This poses a question as to why law attempts to protect such prolonged life which is not worth living and against the will of the individual himself. Looking at this in light of evolved understanding of the term 'life' which is no more seen in its limited sense of animal existence, there have been recent debates and discussions over 'euthanasia' and 'right to die' as part of an individual's autonomy.

II. UNDERSTANDING EUTHANASIA AND ASSISTED SUICIDE

Before analysing the various laws allowing euthanasia as enacted in different jurisdictions around the world, it becomes essential to understand the meaning of Euthanasia, its types and debates around it. First will start with briefly explaining the concept of Euthanasia, its types and thereafter, point out major arguments in favour of and against Euthanasia as prevailing in the society.

2.1. Meaning of Euthanasia

The term 'Euthanasia' is derived from a Greek term 'EUTHANATOS' which is a combination of two words – 'EU' meaning 'good' and 'THANATOS' meaning 'death'. Looking at it together, meaning of Euthanasia comes out to be 'good death' (D. Chao, 2002). The term Euthanasia was used by English Philosopher Sir Francis Bacon in the Seventeenth Century (Report 241). Black's Law Dictionary defines Euthanasia as *'the act or practice of causing or hastening the death of a person who suffers from an incurable or terminal disease or condition,*

[1] *Vincent Hembert, French, who became paralysed & blind after a road accident in 2000 and died after suffering pain for 3 years. His death in 2003 sparked debates in French Parliament to legalise active Euthanasia.*

[2] *Case of Eluana Englaro, who was lying in vegetative state for hospital in Italy after meeting with an accident and after suffering pain for nearly 16 years in vegetative state without any improvement, Italy Court authorised father to disconnect the feeding tube & let her daughter die.*

[3] *13 years old British Teenager, Hannah Jones, after undergoing chemotherapy & nearly dozon operations refused to undergo heart transplant surgery in 2008.*

[4] *Aruna Ramchandra Shanbaug story remarked as centre of euthanasia debate in India, when after spending nearly 42 years in vegetative state, Supreme Court allowed passive euthanasia.*

esp. a painful one, for reasons of mercy'.[5] Basically, Euthanasia means intentional premature ending of life to relieve intolerable sufferings. Legal studies refer to it as 'death with dignity', 'mercy killing' or 'death at will'.

At this juncture, there is also need to understand Euthanasia as different from Assisted Suicide, Physician Assisted Suicide or Non-treatment decision. While Euthanasia is intentional killing of a person for his benefit, Assisted Suicide is assisting the person to kill himself. The point of contrast between both lies in the fact that while authority to act in case of Euthanasia lies in hands of other person, authority to act in case of assisted suicide lies in hand of the person who wants to end his life. Physician Assisted Suicide (PAS) is further a subset of Assisted Suicide, when the person helping the subject is physician who suggests the most appropriate recourse because of their medical expertise. On the other hand, Non-Treatment Decision (NTD) is an act of withholding medical treatment. NTD directive can be because of medical futility such as decision to not perform fourth line chemotherapy in a patient with rapid progressive cancer and upon whom previous treatment has not responded. The Non treatment decision is different from euthanasia as, unlike euthanasia, NTD does not attempt to fasten death rather it is based on accepting death as a natural event by omitting to undergo ineffective or futile treatment (Radbruch, 2016).

2.2. Religious views on Euthanasia

2.2.1. Islam

Islamic religious beliefs oppose euthanasia. They believe that all human life is sacred because Allah gave it, and that Allah determines how long each person will live. However, according to IMANA (Islamic Medical Association of America), shutting off life support for those who are believed to be in a persistent vegetative state is permitted. This is due to their view of all mechanical life support treatments as temporary (Euthanasia: Human Rights Perspective, n.d.).

2.2.2. Christianity

Christians are largely opposed to it. The arguments are typically founded on religious beliefs that life is provided by God and that humans are created in God's image. Some churches also stress the significance of not interfering with death's natural process. God's gift is life. Every human being must be respected, according to Christianity (Radbruch, 2016).

[5] *Black's Law Dictionary (9th edn, 2009) 634.*

2.2.3. Hinduism

Monks promoted renunciation of the body (kaya) for eternal rewards and blessings in the pursuit for God in ancient India, according to Hindu faith. Making a demand for death is supported in cases where a sick individual is experiencing unbearable suffering. The right to sue for death stems from the freedom to choose one's own path. Everyone has the right to self-determination and the freedom to select his or her own way of life. Similarly, it is urged that everyone should have the right to end one's life when life becomes so stressful that it is easier to die than to live. As a result, death will provide him with respite from an incurable condition and a painful life. Euthanasia has been performed for centuries. Residents of Athens may get a dose of poison with official permission, allowing them to choose death over pain. Euthanasia debates fluctuate from country to country and culture to culture. Most Hindus believe that a doctor should refuse a patient's request for euthanasia since doing so would cause the soul and body to be separated at an unnatural moment. As a result, both the doctor's and the patient's karma will suffer. Other Hindus think that euthanasia is prohibited because it violates the ahimsa precept (doing no harm) (Monvik 2021).[6]

Karma: Hindus believe in the soul's (or atman's) rebirth over many lives, not all of which are human. Moksha, or escape from the cycle of death and rebirth, is the ultimate goal of existence. Karma determines a soul's next life as a result of its own good or bad conduct in previous lives. You could think of a soul's karma as the net worth of its good and negative activities. Without good karma, a soul cannot get moksha. According to the theory of karma, a Hindu seeks to get their life in order before they die, ensuring that there is no unfinished business or sadness. They attempt to attain the state of a sannyasin, a person who has forsaken the world. The ideal death is a conscious death, which indicates that palliative treatments that lower mental awareness will be problematic. Because one's final thoughts are relevant to the process, the state of mind that prompts a person to choose Euthanasia may alter the process of reincarnation.

Dharma: Hindus spend their lives in accordance with their dharma, or moral obligations and responsibilities. A Hindu's dharma mandates them to care for the elderly members of their community.

[6] *Monvik 2021, Euthanasia: Human Rights perspective. https://www.legalserviceindia.com/legal/article-7487-euthanasia-human-rights-perspective.html.*

2.3. Types of Euthanasia

The classical definition of Euthanasia i.e. premature ending of natural life for a good death and to relieve the subject from intolerable pain is very broadly worded. This definition encompasses different types of euthanasia on basis of circumstances.

On the basis of consent of subject, Euthanasia has been classified into three types – Voluntary, Involuntary and Non-voluntary. Voluntary Euthanasia refers to a situation of euthanasia with consent of subject. When the subject has expressed his intention to premature death and someone performs any act or omission to let him die. Contrary to it, both in Involuntary and Non-voluntary Euthanasia, euthanasia is carried out without the consent of subject. However, the point of distinction between Involuntary and Non-voluntary Euthanasia lies in the fact that Involuntary Euthanasia refers to a situation when subject was competent to express his will but he was not consulted whereas Non-voluntary Euthanasia is a situation when the subject was not competent to decide for his life (D. Chao, 2002).

Parallelly, on basis of modus operandi, Euthanasia has also been classified into two types – Active and Passive. Active Euthanasia as the name suggests require performance of some active act towards Euthanasia such as injecting a lethal drug etc. whereas Passive Euthanasia refers to situation when death is hastened by some omission.[7] Technically, there exist a distinction between Active and Passive Euthanasia, but it is argued that such distinction has no nexus with the ultimate purpose of relieving sufferings. This distinction is essentially recognised due to ethical and religious debates and has no basis on legal and medical standards (The Moral Basis for a Right to Die on JSTOR). The term 'Passive Euthanasia' sometimes becomes misleading and causes unnecessary confusion with non-treatment directive (Hansard, 9 May 1994).

2.4. The Euthanasia Debate

Debates over euthanasia around the world have recently gained momentum in various fields of study including medical, legal, psychological, ethical etc. As observed above, literal meaning of euthanasia is 'good death', however the question what is 'good death' has remained unanswered and the quest for finding answer to this question has its own versions and limitations. The idea of euthanasia and voices to legalising it flows through the natural human

[7] *Common Cause Society v Union of India (2018) 5 SCC 1.*

right to have dignified life. Despite debates all around the world, a common consensus on the topic is yet to be formed.

The principle argument for allowing euthanasia flows from the right to have dignified life and individual autonomy. It is argued that euthanasia should be legalised as each person have inherent right to be respected as an individual and should have complete authority over his own life (Lawrence O. Gostin, 1997). If a competent person is provided true knowledge about his medical condition on basis of best medical evidence, it is in the interest of individual as well as society that he be given liberty to take decision about his life. Besides argument of individual autonomy and a quality life, the demand for legalising euthanasia is also based on principle of beneficence as allowing the person to die instead of forcing him to take more breaths just to suffer pain is in the best interests of the patient (N M Harris, 2001). This can also be considered in light of utilitarianism theory of maximising pleasure and minimising pain. Euthanasia enables subjects to avoid misery and make most of their last days. In addition to above, the agreement for euthanasia and physician assisted suicide also flows from the argument that it would relieve burden from the relatives and available resources can be reallocated for saving lives of other needy patients. The practice of Euthanasia is also seen as appropriate means to proper health care in cases of incurable disease since death will relieve the patient from painful life (Mishra, S. & Singh, U. V., 2020).

On the other hand, this argument of individual autonomy is countered on the ground that justifying euthanasia as a contemporary human right of autonomy is absurd and self problematic as assisted suicide in the name of autonomy once acted upon takes away the very existence of individual autonomy (Safranek, J. P., 1998). Euthanasia is also seen as State's abdication of its duty to protect individuals. Other reasons for opposing euthanasia are based on possible repercussions of legalising it. Opponents argue that legalising euthanasia is a threat to weak old and vulnerable members of society as there are possible chances of financial and cultural pressures upon them to opt for euthanasia. Opponents also base their argument on the 'Slippery Slope' Phenomenon to regard euthanasia as first step towards genocide in the sense that today euthanasia as justifying killing of brain dead, tomorrow handicapped and then opponents of government. It is also contended that euthanasia would undermine the doctor patient relation as treating doctor should never foster idea of killing (N M Harris, 2001).

The practice is also majorly refuted on religious ground of euthanasia being an interference with sanctity of life. However the religious arguments become self contradictory in cases as

while religious debate on euthanasia gives importance to sanctity of life and prohibits any interference with natural course of life on one hand, it also propounds the concept of actual life after death. There have been many traditional practices in nature of euthanasia based on the religious and cultural beliefs prevalent in society such as practice of Sallekhana or Santhara (Ghatwai, M., 2015),[8] Thalaikoothal (Chatterjee, 2014),[9] etc.

Therefore, it would be appropriate to conclude that despite debates all around, a common consensus and collective will on the concept of euthanasia is still unclear. Due to difference of religious views, personal experiences and cultural fabric, each community and nation perceives euthanasia differently. The next chapter analyses the legal validity and status of euthanasia at national as well as international level.

III. EUTHANASIA AS EMERGING HUMAN RIGHT NORM

In light of prevailing diversified views and conflicting arguments with regard to concept of euthanasia as outlined above, now would analyse how euthanasia has started to become an acceptable norm over the period of time and how jurisdictions around the world have started allowing euthanasia.

3.1. Under International legal regime

The voices for allowing euthanasia at international level are believed to have started in the year 1935 with foundation of 'Voluntary Euthanasia Society' in the UK, which in 2006 has changed its name as 'Dignity in Dying' (Dignity in Dying, 2006). The initiative to legalise euthanasia during 1935-36 saw major debates and resulted in introduction of Voluntary Euthanasia Legalisation Bill 1936 before the House of Lords, which could not see the light of the day and after rigorous debate was resolved in negative after second debate (Hansard, 1 December 1936). Thereafter, the Second World War led to atmosphere unfavourable to demand for Euthanasia. The euthanasia programme started by Nazi in the year 1939 which caused death of more than 70 thousand psychiatric patients by poison. Such programmes during Second World Was reversed the momentum gained towards legalising euthanasia (D. Chao, 2002). The debate

[8] *Santhara is a Jain ritual of fasting till death as an act of supreme renunciation & salvation. Ghatwai, M. (2015, September 1). The Jain religion and the right to die by Santhara.*

[9] *Thalaikoothal is the traditional practice of killing elderly people by their own family members, observed in some parts of southern districts of Tamil Nadu state of India.*

remained silent until late 1970's and early 1980s, when several incidents of terminally ill patients being forced to suffer pain came into limelight. The stories of sympathetic patient

Despite euthanasia in its varied contexts slowly becoming acceptable norm around the world, "right to die with dignity" or "euthanasia" or "assisted dying" finds no express enumeration in any international human rights treaty till date. However, there are various instruments under human rights law recognising and reaffirming right to life, which can be seen as validating euthanasia in its varied contexts. Universal Declaration of Human Rights (UDHR) acknowledges that all human beings are born free, equal in dignity and are endowed with reason and conscience (Art. 1). Everyone has right to life, liberty and security of person (Art. 3). This acknowledgment is further fortified by International Covenant on Civil and Political Rights (ICCPR) which also guarantees legal protection of inherent right to life (Art. 6(1)). The scope of Right to life as used under ICCPR has been interpreted widely from time to time. As per Human Rights Committee General Comment No.36 on Article 6 ICCPC (as adopted on 30 October 2018) though not expressly mentions about die with dignity but does acknowledge it being followed by state parties in context of human dignity of personal autonomy. Para no.9 thereof provides that while state parties should take measures to prevent suicide as a general rule, the State parties which allow termination of life of afflicted adults such as terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity, should ensure robust safeguards to prevent its abuse (Art. 6).

Besides it, the right to proper and effective medical health care also carries it with implications of euthanasia in its varied form of physician assisted suicide particularly. The right to the highest attainable standard of health guaranteed under Article 12 of ICESCR (Art. 12) interpreted vide General Comment No.14 (as adopted on 11 August 2000) Paragraph 25, incorporates enabling chronically and terminally ill older patients to die with dignity (Art. 12). Another inherent human right which impliedly supports euthanasia is recognition of inherent dignity of a person provided & ensured under almost all human rights instruments including the UDHR (Art. 1, 22 & 23), the ICCPR (Art. 10 (1) and the ICESCR (Preamble). The inherent right of human to have a dignified life should extend to whole life till death and thus, to die with dignity also flows as necessary corollary out of this right.

Thus, although international human rights law though impliedly acknowledge euthanasia in its varied contexts, but express stand of international community on the concept of euthanasia is still awaited. And in such circumstances, the decision has been left with municipal perspective.

Around the world, various jurisdictions have started recognising and allowing euthanasia in their own understandings (Staff, 2021). The table below illustrates jurisdictions allowing euthanasia or assisted suicide, year of allowing:

S. No.	Jurisdiction	Year of legalising 'die with dignity'	Legal Status
1.	Switzerland	1942	Euthanasia is not allowed. However, Assisted Suicide have been decriminalised except if carried out with selfish motive.
2.	Columbia	1997	Court ruling decriminalised Euthanasia and Physician Assisted Suicide.
3.	Netherlands	2002	Enacted legislation allowing Euthanasia and Assisted Suicide.
4.	Belgium	2002	Enacted legislation allowing Euthanasia and Physician Assisted Suicide.
5.	Luxemberg	2009	Enacted legislation allowing Euthanasia and Assisted Suicide.
6.	Canada	2016	Enacted legislation allowing Euthanasia and Assisted Suicide under label "Medical Assistance in Dying" In Quebec, only Euthanasia in allowed.
7.	Victoria	2017	Enacted legislation allowing Euthanasia and Assisted Suicide under label "Voluntary Assisted Dying"
8.	Western Australia	2019	Enacted legislation allowing Euthanasia and Assisted Suicide under label "Voluntary Assisted Dying"

9.	Germany	2020	Apex Court held Assisted Suicide to be legal while euthanasia still remains offence.
10.	Spain	2021	Enacted legislation allowing Euthanasia and Assisted Suicide.
11.	India	2023	In 2018 the Supreme Court recognised the right to die with dignity as a fundamental right and prescribed guidelines for terminally ill patients to enforce the right. In 2023 the Supreme Court modified the guidelines to make the right to die with dignity more accessible, but not enacted any legislation as of now.
12.	USA	Oregon (first in 1997), Washington, Vermont, California, Colorado, Washington DC, Hawaii, New Jersey, Maine, Montana and New Mexico allow Physician Assisted Suicide.	

3.2. Under Indian Legal System

India has not enacted any legislation or statute legalising mercy killing in India. Though Law Commission of India in its 241st Report, 2012 recommended to enact law allowing Passive Euthanasia for terminally ill patients and annexed revised 'The Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill', which was earlier recommended in its 196th Report, 2006 (Law Com No 241, 2012). But, the legislation has not seen light of the day till date. The only text in legislative framework which mentions about euthanasia is Clause 6.7 of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002 provides practising euthanasia is an unethical conduct. However, in exceptional cases decision to withdraw life support would be taken by team of doctors by proper procedure (Regulations, 2002).

The jurisprudence around the concept of euthanasia has developed in India through judicial interpretations. The question whether right to life guaranteed under Article 21 of the Constitution of India includes right to die with dignity has been posed before Court at various

instances. In *P. Rathinam N. Patnaik v Union of India* (P. Rtahinam Case)[10] Supreme Court, while dealing with constitutionality of S.309 Indian Penal Code held right to life includes right not to live a forced life. But this interpretation was overruled in 1996 by constitution bench of Supreme Court.[11] Thereafter, after public coverage of case of Aruna Shanbaug lying in vegetative state for almost 4 decades, a petition was filed for permitting Euthanasia but the same was turned down by Supreme Court, while holding that passive euthanasia can be legalised and extended in India only through legislation.[12] The same issue of euthanasia was again presented before Supreme Court, recently in *Common Cause Society v Union of India*, wherein Apex Court has recognised right to die with dignity as a fundamental right and has allowed passive euthanasia. Court has also paved way for using 'Advance Medical Directive' or 'Living Will' executed by person while he was in mental capacity.[13]

3.3. Complexities due to absence of uniform international standards

Though dying with dignity and end life laws are slowly becoming new normal around the world but the problem lies in the fact that, in absence of clear recognition of such concept under international human right law, each state perceives it in its own fashion. States like Netherland, Belgium, Luxemburg considers active euthanasia as part of dying with dignity whereas the laws in United States of America though considers active euthanasia as illegal but allows self administration of lethal drug in assistance of physician under the label physician assisted suicide (Sarah Morz & Others, 2021). India has taken a stand that though dying in dignity is a fundamental right but this is limited to allowing passive euthanasia and not active euthanasia. In opinion of researcher, allowing passive euthanasia in exclusion of active euthanasia has no nexus with the exercise of right to die with dignity since euthanasia in both ways (active or passive) attempts to hasten death & relieve sufferings. In the same way, allowing physician assisted suicide while keeping euthanasia illegal is not intelligible in context of die with dignity.

Another problem which lies with implementation of end of life laws is lack of common consensus as to who can access such option. While most of the jurisdictions keeps applicability of such laws restricted to adults (above 18 years) as competent to opt for euthanasia or assisted suicide, Netherland and Colombia extends it to children above 12 & 6 years respectively. Belgium on other hand has no age restriction although in case of children, can be opted only in

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[10] *P. Rathinam N. Patnaik v Union of India AIR 1994 SC 1844, 1868.*
[11] *Gian Kaur v State AIR 1996 SC 946.*
[12] *Aruna Ramachandra Shanbaug v Union of India (2011) 4 SCC 454.*
[13] *Common Cause Society v Union of India (2018) 5 SCC 1 (Common Cause Society case).*

case of terminal illness (Davis, 2019). In India as well, passive euthanasia can also be opted by adult only.[14] The researcher finds the model opted by Belgium best in context of age requirements since the essence behind human right lies in the fact that they are fundamental to very existence of the human and can be restricted by age. Beside it, there is also lack of common consensus on the point as to which patients can opt for euthanasia. While most of the countries restricts it to terminally ill patients, Belgium and Netherland extends it to conditions of unbearable sufferings (Staff, 2021). With respect to procedural requirements, while all jurisdictions mandates peer consultation Canada and USA skips the requirement of medical committee review of such request (Sarah Morz & Others, 2021).

When terminology, competency and procedural requirements are inconsistently defined, this presents a problem at international level. In present day globalised world, when access to information and movement is not being restricted within national limits, individuals who wish to exercise right to die with dignity generally travels to countries with less procedural restrictions to end their lives. In 2018, 221 individuals travelled to particular clinic at Switzerland to end their lives (Staff, 2021). Therefore, leaving the decision of acknowledging right to die with dignity and prescribing conditions thereupon with municipal governments is not practicable and there in need of recognising this right at international level.

IV. CONCLUSIONS AND SUGGESTIONS

4.1. Conclusions

After extensive understanding of Euthanasia in its varied contexts and analysis of primary debates, perceptions around the concept of euthanasia under introduction; AND analysis of legal status of dying with dignity at national as well as international level by looking at origin of concept of euthanasia, tracing right to die with dignity under international human rights documents, development of concept in India and inconsistencies in end life laws around different jurisdictions under various head, this study can be concluded as while debates around right to die with dignity and euthanasia remains to exist in society, legalisation of euthanasia and assisted suicides is expanding significantly. This research paper started with hypothesis that Euthanasia is not expressly recognised as human right norm internationally and is understood differently by different nations and there is need for international recognition of

[14] *Common Cause Society Case.*

euthanasia as a natural human right and placing uniform standards for euthanasia taking into account possibility of it being abused, which stands proved in light of present research paper.

4.2. Suggestions

The study carried hereinbefore has confirmed that the law relating to right of dying with dignity is ambiguous & unsettled, and there is the need to expressly recognise right to die with dignity and lay down uniform standards and safeguards to protect vulnerable individuals from its abuse. Some key recommendations for laying down uniform standards which can be considered by policy makers are detailed below:-

- There is need to expressly recognise right to die with dignity as a fundamental human right. Denial of a human right just because there are chances of it being abused in itself.
- The exercise of euthanasia or assisted suicide should be pre-conditioned by 'informed consent'. The subject should be provided with exact details about his medical conditions after proper medical diagnosis/ investigation.
- The applicability of end of life laws should not be restricted to adults only but should extend to individuals of all age groups. However, specials safeguards to be laid down in cases of children below 18 years.
- The States should also incorporate concept of 'advance directives' and 'living will' to do away with problem of consent in cases when patient is not competent to consent. However, to act upon such advance directives certain additional safeguards to be laid down.
- To avoid 'slippery slope' argument, the conditions should be categorically specified for applicability of end of life laws. Euthanasia or assisted suicide should be last resort and should not be accessible if there are alternate options of relieving pain by palliative care etc.
- After Peer Consultation, Medical Committee Review of such decision to end life should be made mandatory to reconsider best interests of patients.

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SOCIAL REINTEGRATION OF RELEASED PRISONERS IN INDIA: AN ANALYSIS OF THE STATES OF KERALA AND TAMIL NADU

- *Harsh Mahesh*[*]

ABSTRACT

Social reintegration of the offenders in the criminal justice system is essential It becomes important in many aspects, including the aim of preventing crime, promoting social harmony, and giving a second life to the offenders. In India, more than 90% of the prisons are overcrowded with the burden of undertrial prisoners serving a long period of time in the jails. Thus, the mental state of the prisoners deteriorates and because of the social stigma, the released prisoners find it difficult to reintegrate within society. However, the Governments have consistently taken efforts to resolve this issue underlying the importance of rehabilitation programmes. Though there are relevant policies in place by the State Governments, there are many gaps left to be filled which became evident by the report to National Human Rights Commission (NHRC). This paper analyses the report discovering the nature of social reintegration programmes in Kerala and Tamil Nadu. It also tries to critique the analysis with several recommendations that the NHRC can make to the respective State Governments. This paper also emphasises the importance of reintegration programmes in the prison system of India as well as the two States in focus.

Keywords: ***Social Reintegration; India; Tamil Nadu; Kerala; Prison; Prisoner***

I. INTRODUCTION

Prison administration in India is governed by the Prisons Act, 1894 and the Prison Manual of the respective state governments.[1] Therefore, state governments have the authority and power to announce any reforms, rules, laws, and regulations for their prisons and administer them according to their rules. The overarching objective of the prison reforms is to assure the

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[1] *Meena N, 'Correctional Methods for Rehabilitation of Offenders in India', <http://14.139.58.147:8080/jspui/bitstream/123456789/319/1/53LLM18.pdf> accessed March 31, 2022*

rehabilitation,[2] social reintegration of the released prisoners into society,[3] and prevent recidivism.[4] The need for social reintegration also becomes essential as it has been reported that if re-entry needs are not met, the prisoners are likely to face depression and post-release criminal propensity.[5]

The state of Kerala has focused on reformation of the prisons right from 1993, in spite of having overcrowded jails. It has recognized, as per the report of Kerala Jails Committee,[6] the objective of the prisons to be the reformation of prisoners. Based on their prison rules, it has started many reintegration facilities such as vocational training, labour activities for the convicted. These programmes are set up in order to make them capable of exploiting the employment opportunities in those sectors, where they work.[7] The rehabilitation, however, becomes graver after the release of prisoners as the state machinery lacks social re-entry initiatives. Not only does the State fail to implement social reintegration initiatives, but also does the labelling and stigma of the released convicts inhibit the social reintegration of the released prisoners in Kerala.[8] Thus, in Kerala, despite the efforts from NGOs like Prison Ministry of India, the social reintegration becomes more difficult after facing challenges from and the society itself.

Though there have been no official reports on prison reforms, Tamil Nadu has also done phenomenal work in taking initiatives to reintegrate the released prisoners within society. It has introduced vocational courses, recreational facilities for the prisoners to undergo rehabilitation inside the prisons. However, the government fails to continue this process once they are released from the prisons and more reliance is put on non-government initiatives. The reformation programmes have also failed to make any impact as it chooses 'one fits all' approach for all the prisoners. Furthermore, the schemes put in place often fail to get

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[2] United Nations Office on Drugs and Crime, 'the Prevention of Recidivism and the Social Reintegration of Offenders' (2012).

[3] Dr. Francis Kodiyan MCBS, 'Reformative Explorations: Foundations for A Reformative Psycho-Spirituality and Crimino-Sociology' (2020) 6(1) https://www.prisonministryindia.org/uploads/5/8/4/3/58439507/reformation_and_rehabilitation_journal.pdf accessed March 28, 2022.

[4] Upneet Lalli, 'Putting ex-prisoners on road to reintegration' The Tribune (07 November 2020) <https://www.tribuneindia.com/news/punjab/putting-ex-prisoners-on-road-to-reintegration-167207> accessed February 22, 2022.

[5] Lin Liu, Christy A. Visher, Daniel J. O'Connell, 'Strain During Reentry: A Test of General Strain Theory Using a Sample of Adult Former Prisoners' [2021] The Prison Journal 420.

[6] The Superintendent of Government Presses, 'Report of the Kerala Jail Reforms Committee (1991-93)' 2001 <https://www.keralaprisons.gov.in/userfiles/downloads/prc_reports/apu_report.pdf?v=2> accessed March 06, 2022.

[7] Vinnetha S., 'Vocational Training and Work Programmes in the Prisons of Kerala' (Thesis, Tata Institute of Social Sciences 2017).

[8] Varghese J and Raghavan V, 'Restoration of Released Prisoners to Society: Issues, Challenges and Further Ways; Insights from Kerala, India' (2019) 57 International Annals of Criminology 61.

implemented properly. For instance, hundreds of released prisoners were not provided the promised aid to eke out a living.[9]

In 2019, NHRC had sanctioned a research report on Social Reintegration of Released prisoners in Kerala and Tamil Nadu to Prof. Santosh, IIT Madras. This paper tries to analyse and summarise the report findings undertaken by the researchers. It has also tried to evaluate the findings from a reformative perspective and how the report tries to address the loopholes in the prison system of Tamil Nadu and Kerala. Though the researchers did not have a considerable amount of data evidences, it was enough to reach an approximate conclusion on the situation of social reintegration in these two states. The paper also tries to answer how NHRC can implement the report's findings in the two neighbouring states.

Thus, this paper provides a more detailed insight on how the reformation programmes are working in these two states and where their importance lies. It also reviews the research work undertaken by the NHRC to study on the social reintegration of released prisoners in Kerala and Tamil Nadu. The paper tries to address the shortcomings of the existing reintegration programmes with an attempt to make the suggestions by the NHRC reform oriented. The intent of criminal law extends beyond punishment; it seeks to rehabilitate and reintegrate offenders into society. By focusing on education, therapy, and skill development, the criminal justice system aims to transform prisoners into responsible, contributing members of the community.[10] The paper, while making the arguments, emphasizes this intention of criminal law and seeks to focus on the reintegration of the prisoners in the state of Tamil Nadu and Kerala.

II. IMPORTANCE OF REINTEGRATION PROGRAMMES

The Indian government has made several efforts to address issues pertaining to prisoner rehabilitation. To begin, in 1957, the All India Jail Manual committee was constituted to prepare a model prison manual, which laid down the foundation for the Ministry of Home Affairs to designate the Working Group on Prisons. Later, in 1980, the Mulla Committee was set up to further the goal of the rehabilitation and social reintegration of the prisoners. It made

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[9] Shanmughasundaram J, 'Tamil Nadu: Freed prisoners struggle without promised aid' Times of India (07 December 2021) https://timesofindia.indiatimes.com/city/chennai/tamil-nadu-freed-prisoners-struggle-without-promised-aid/articleshow/80126441.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst accessed March 11, 2022.

[10] Paul H. Robinson, "The Virtues of Restorative Processes, the Vices of "Restorative Justice," UTAH L. REV. 375, 375-390 (2003).

several recommendations[11] to the Government of India to achieve this objective, including the need of having a national prison policy.

The prison manual is a comprehensive guide that outlines the rules, regulations, and procedures governing the administration and management of correctional facilities in a prison. The prison manual plays a crucial role in shaping the reintegration programs that aim to rehabilitate and reintegrate prisoners into society. The Indian Prison System is governed by various state prison manuals, with the *Model Prison Manual* (2003) serving as a guiding framework.[12] These manuals encompass a broad spectrum of policies and practices focused on the reformation and rehabilitation of inmates, which are integral to their successful reintegration. By focusing on education, rehabilitation, post-release support, and the protection of prisoners' rights, the manual provides a comprehensive framework to transform inmates into responsible citizens, ultimately contributing to the reduction of crime and the enhancement of social order.

Recently, a model prison manual[13] was drafted by the Central Government to develop the prison system in the country as an effective system for reformation and rehabilitation. The model prison manual suggested that state governments upgrade their prison systems with modernisation and more custodial programmes that can assist prisoners in relocating their lives. These custodial programmes may include cultural programmes, recreational facilities, vocational training, and other activities that help convicts cultivate a range of skills and attributes. These facilities may make it simpler for released prisoners to lead a normal life and reform within society. For instance, vocational training may help prisoners to get employment more easily after they are released from prison.[14] It also includes community-based correctional programmes that assist them to bring changes to their behavioural patterns and become law-abiding citizens. It also makes it easier for them to bond with the community and facilitates their reintegration. The victims' rights and interests should be prioritized in reintegration programs as well.[15]

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[11] Bureau of Police Research & Development Ministry of Home Affairs, 'Implementation of the Recommendations of All-India Committee on Jail Reform 1980-83' (2003).
[12] Model Prison Manual (2003), Government of India, Ministry of Home Affairs.
[13] Bureau of Police Research and Development Ministry of Home Affairs, 'Prison Manual 2016' (2016).
[14] Christopher Uggen, Jeff Manza, Melissa Thompson, 'Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders' [2006] 605(1) The ANNALS of the American Academy of Political and Social Science 381.
[15] Sneha Bhura, 'How to effectively implement release of prisoners, a criminologist speaks' The Week (India, 23 May, 2020) <https://www.theweek.in/news/india/2020/05/23/how-to-effectively-implement-release-of-prisoners-a-criminologist-speaks.html> last accessed March 06, 2022.

The importance of reintegration programmes in society has often been recognized by different research initiatives taken by organisations.[16] There have been specific organisations and non-governmental organisations (NGOs) that have predominantly worked with after-care institutions to rehabilitate criminal offenders.[17] Some scholars have also proposed the idea of public-private partnerships in prison management.[18] However, this comes with a word of caution. This may also help in the speedy social reintegration of prisoners but the threat of corruption can not be waived away. Some have also put forth the argument on how social acceptance is essential to prevent recidivism in society. It is understood that a lengthy prison sentence may have a negative impact on their mental health. Furthermore, the sluggish pace of trials in India puts the accused in prison for an extended period of time, even if they are innocent.[19] This weakens their mental strength, limiting career opportunities for them. It is critical that they no longer face stigma and secondary victimisation in society. As a result, social reintegration has become critical in these contemporary times. It should also be noted that the majority of criminals who wind up in prison have a poor social background and may find it difficult to reintegrate into society after their release. With this in mind, 'The Padho aur Padhao' project[20] was started in Delhi prisons to educate illiterate criminals. Permanent study centres of the NIOS have been opened in various prisons. The Indira Gandhi National Open University has initiated a programme to set up 94 special study centres in prisons across India for the benefit of around 25,000 prisoners. This has helped prisoners considerably to have a basic elementary education. Some states provide rehabilitation grants to prisoners based on their rules. However, the implementation of this scheme remained largely unsuccessful. The Punjab Prison Rules, 2021[21] have been signalled as a positive move in the domain of social rehabilitation of the offenders.[22] It laid down more emphasis on reforming the inmates within

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[16] *K.I. Vibhute, "Right to Human Dignity of Convict Under 'Shadow of Death' And Freedoms 'Behind the Bars' in India: A Reflective Perception" (2016) 58(1) Journal of the Indian Law Institute <https://www.jstor.org/stable/45163060> last accessed 4 March, 2022.*

[17] *Dr. Banamali Barik, 'Rehabilitation of Released Prisoners in India through After- Care Programmes and Services: An Analysis' (The Law Brigade, 2019) <https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf> accessed 4 January, 2022.*

[18] *Vijay Raghavan, 'Guidelines for Public-Private Partnership in Prison Management' (2011) 46 (4) EPW <https://www.epw.in/journal/2011/04/commentary/guidelines-public-private-partnership-prison-management.html?0=ip_login_no_cache%3D25c65c81aa1f007c419a839fbfccda8f> accessed 4 April, 2022.*

[19] *Lalli (n. 4).*

[20] *Ibid.*

[21] *The Prisons (Punjab Amendment) Bill, 2021.*

[22] *Karan Tripathi, 'Out of Prison, Sentenced to Poverty' (The Quint, 27 July 2021) <https://www.thequint.com/news/law/out-of-prison-sentenced-to-poverty-covid> accessed 03 March, 2021.*

the prisons. For children, the Juvenile Justice Act of 2015[23] provides for effective social reintegration of children in conflict with the law.

The COVID-19 pandemic acted as a blessing in disguise for the convicts who were imprisoned. The Supreme Court of India recognized the significance of releasing prisoners and effectively implementing them, as well as achieving the goal of restorative justice. However, social acceptance is not something that Supreme Court can impose. It must come from society and, notwithstanding the risk of infection, released prisoners have to face a double stigma. Reintegration is a 'two-way street' involving changes on the part of the returning prisoner as well as society.[24] Society needs to judge people not by their misdeeds, but by how they learn from them.

III. REVIEW OF PROJECT - FROM CELL TO SOCIETY: A STUDY ON THE SOCIAL REINTEGRATION OF RELEASED PRISONERS IN KERALA AND TAMIL NADU

The process of social reintegration of released prisoners is slow in India and is not widespread in the majority of states. There is hardly any literature with Indian context on this topic with the exception of Dr Deepti Shrivastava's research report[25] on reintegration of released offenders. However, in the southern states of Tamil Nadu and Kerala, they have considerably better prison management rules with a focus on rehabilitation and the reintegration.

3.1. The Role of the NHRC

This research report[26] was submitted to the NHRC by Dr Santhosh R, a social sciences professor at IIT Madras. The role of the NHRC was limited to funding the project and deciding the research topic. The NHRC has assisted the researchers with this project by arranging field trips and collecting data from various places. The NHRC also participated in the interim and final reviews of the research project that yielded the policy recommendations on prison management. The NHRC is also responsible for choosing this topic and researchers who will

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[23] *Juvenile Justice Act, 2015.*
[24] *Lalli (n. 4).*
[25] *Dr. Deepti Shrivastava, Follow up Study of Released Offenders on Their Reformation & Rehabilitation (Bureau of Police and Research Development, 2010) <https://bprd.nic.in/WriteReadData/userfiles/file/20161027062952515285 1Report-FollowUpStudy.pdf> accessed 4 March, 2022.*
[26] *Dr. R. Santosh, From Cell to Society: A Study on the Social Reintegration of Released Prisoners in Kerala and Tamil Nadu (NHRC, 2020) < https://nhrc.nic.in/sites/default/files/Dr.Santhosh%20Research%20Report.pdf> accessed 4 April, 2022.*

carry out the research project. As an intermediary, the NHRC can influence and advocate for reforms in the prison system and contribute to the effective implementation of social reintegration programs for released prisoners. The NHRC, through its monitoring, advocacy, and collaborations, plays a critical role in driving prison reforms and supporting the reintegration of released prisoners.

The NHRC is mandated to inspect prisons, investigate complaints, and monitor the implementation of laws and regulations related to the treatment of prisoners. Through these activities, the NHRC identifies human rights violations and gaps in the existing prison system. For instance, the NHRC's annual reports often highlight the need for improving prison conditions and stress the importance of rehabilitation programs aimed at reintegration.[27] By such an intermediary role, the NHRC can take the responsibility in ensuring the proper implementation of reintegration programmes in line with the prison manual and the policies of the state government.

3.2. Summary of The Project

This research was a collective effort of Dr Santhosh, his fellow researchers, and the probation officers. Probation officers have allowed the researchers to conduct ground visits and examine a group of prisoners over a period of time. The prisoners, whose data had been collected, were of a very limited kind. They could identify 60 prisoners from Tamil Nadu and 48 from Kerala. This figure was not gender-inclusive as more than 97% of the respondents were identified as male.

The researchers could not identify any released prisoners for the research project,[28] because some ex-convicts refused to answer and others had moved out of their previous addresses. Instead, they relied on samples of prisoners who were either under the supervision of probation officers or were released prematurely from jail. This was the case in both states of Kerala and Tamil Nadu. With very limited time at their disposal, they identified the samples and started conducting their research with the assistance of prison officials and probation officers.

They began by identifying the different types of prisons in each state, as well as the average occupancy in each. According to these statistics, Kerala had a more than 100 percent occupancy rate, while Tamil Nadu had a respectable 63 percent occupancy rate. They also analysed the types of vocational training offered in these prisons and how many prisoners were imparted

[27] *National Human Rights Commission Annual Report 2019-2020*
[28] *Ibid.*

vocational training. The number was dismal when it was compared to the number of prisoners present in the jail. However, Kerala's $1/4^{th}$ prisoners could avail the benefits of these programmes. The importance of rehabilitation programmes and welfare programmes in reintegrating offenders into society was discussed earlier. While we discussed the input of these measures, the researchers looked at the goods they produced and how much wages they were paid for their output. Despite the fact that the production rate has increased year after year, their wages remain nominal, and they frequently do not receive them from prison officials. The researchers made a report on welfare programmes, rehabilitation programmes, vocational courses and any other type of grant or help by the government for prison management. The government had planned many programs on paper, but they would not be carried out.

After getting a general idea of the plans of the prison department and the government, they would start analysing the primary data, looking at the demographics of the prisoners. By bifurcating them into age and gender groups, the research will be analysed from this angle as well. The participation of women prisoners in this project was negligible, thus, limiting the scope of this project. Understandably, the data reveals that the vast majority of the people imprisoned in Indian jails hail from socially backward communities as the majority of respondents belong to lower communities. This emphasises how Indian criminal system is skewed towards disadvantaged groups. Moreover, their demographic information included educational qualifications, economic indicators, family profiles, the type of works they carried out before, and health issues. It also surveyed the amount of time spent in jail by each respondent. The average prison sentence of the respondents is between 11 and 15 years.

After establishing a framework of their demographic information, it relied on analysing the efforts they undertook to rehabilitate themselves. It was discovered that the prisoners would not have an opinion on selecting the vocational courses they would prefer. This would also impact their mental strength as they would not have the best course suitable for their minds. A survey on the visits made by their families was also conducted to understand the role of families in social reintegration. This includes the role of parole and how it aids in their social reform. More than 85% of the respondents had availed of parole and had benefitted from it. Thus, it can be inferred that parole plays an important factor in social reintegration in society.

There was an attempt to link the nature of the crime committed with reintegration. However, this could not succeed as it was a very difficult dimension to enter. The other surveys undertaken include visits by religious personnel and welfare officials to facilitate the process of counselling and spirituality.

It has been established that the reintegration process is different in urban and non-urban areas. As the urban areas have ample number of employment opportunities and basic services, the reintegration process of the released prisoners in these areas become easier. However, this is not the case with the released convicts in rural and undeveloped areas.[29] The report fails to take the urban-rural disparities into account when the reintegration process is analysed.

Lastly, they conducted a survey on the post-release situation of the offenders. This included questions related to the current economic status, any funds offered by the government or prisons, the role of probation officers, awareness of conditions related to the premature release, involvement in family affairs and whether they faced any harassment or if the vocational training offered in prison assisted them in finding jobs. It could be deduced that the majority of respondents were in a poor economic situation and had difficulty finding work. Furthermore, whoever found the jobs couldn't find any that were similar to the ones they had in prison. Although their engagement in community activities has gradually risen, they are nevertheless prone to feel excluded from society. Most of the respondents did not experience any harassment by the officers and responded positively about probation officers, except for one respondent, who was ultimately released.

Thus, based on these surveys and reports, they made some policy suggestions that could be implemented to facilitate the process of rehabilitation programmes. Firstly, there should be proper implementation of the pay to be given to the prisoners. Merely announcing higher pay will not help the case. There were a few incidents where prison officials would take up the money by threatening. Thus, a transparent and fair process needs to be implemented to avoid any corruption or delays. It also stressed the importance of parole and its role in reintegration with society. Thus, paroles should be granted more frequently with less paperwork. Because they are still in a financial bind, the emphasis should be on connecting rehabilitation programs and post-release employment opportunities. It also acknowledged the role of families in social reintegration. Among all the respondents, there was not a single incidence of recidivism that turned into a conviction. As a result, the aim of reducing recidivism has been met; nonetheless, the convicts' economic conditions were dire and could not be disregarded. The researchers also proposed categorizing offenders based on the nature of the crime and keeping them in prison, which would have a positive impact on rehabilitation. The scope of reformation has been

[29] *Mamta U. Ojha, Catherine M. Pape, Melissa W. Burek, 'Reentry in a Comparative Context: Exploring Past, Present, and Future Participation in Services Between Nonurban and Urban Inmates' [2018] 98(2) The Prison Journal 167.*

constrained due to specific legislation with rigorous bail conditions. The reports also invited more participation from NGOs to facilitate the process in a smooth and transparent manner. Lastly, a national rehabilitation policy should be implemented so that there is uniformity across the rules of prisons.

A reintegration index was formed by correlating four closed questions related to their post-release life, like income stability, relationships with family and friends and involvement in informal groups. Moreover, they also gave weight to parole, visits from NGOs and probation officers. Based on this, a reintegration index was structured. It was inferred that the social reintegration of the offenders is quite poor and more efforts need to be undertaken by the government. The researchers have also advocated the policy suggestions made by the Mulla Committee in 1983. It also recognised that while the conditions have improved considerably in the last few years, yet efforts need to be taken to meet the purpose of restorative justice. The need to transform the prison system is vital and the onus is on the government to implement the schemes in a fair and transparent manner.

IV. POST SUBMISSION OF THE REPORT

The report[30] was submitted to the NHRC in 2020, during the coronavirus pandemic. This may be one of the main reasons why there is very little documented on the external review of the project. As there have been more than 20 policy suggestions made by the report, the state governments of Kerala and Tamil Nadu need to implement them. There are numerous non-governmental organizations (NGOs) in Kerala that work to promote the social reintegration of offenders. The Prison Ministry of India is one such example.

There is a social reintegration programme in place by the Tamil Nadu prison department with a good blueprint. It also invites applications from NGOs to serve as a reformation partner in Tamil Nadu. Furthermore, there have been a number of reformation programmes for inmates. These include yoga, meditation, counselling, educational programmes and many more. The underlying question is whether the implementation is carried out efficiently. This has become complex to answer as the pandemic has disrupted prison management. Based on Dr Santosh's report, implementation of the schemes was absent. Thus, in spite of having pertinent schemes in place, the implementation of these schemes is the key to reformation.

[30] *Santosh (n. 24).*

On the other hand, Kerala too has a similar picture. It carries out vocational programmes, recreation facilities and many other welfare activities. It is, however, difficult to infer the results in such a limited time. All these types of activities can be accessed on the websites of the respective prison departments. There has been no formal recognition of the report by both governments. It needs to be seen whether the NHRC urges the government to acknowledge the policy recommendations and bring about a change in the policy. It is to be understood that mere recognition of schemes is insufficient unless steps are taken to implement them. Thus, the NHRC has a huge role to play in formulating the prison policy in compliance with the report. The state government, with their programmes, will have to ensure the recommendations of the NHRC are implemented effectively.

4.1 Cases of Social Reintegration of Prisoners in Kerala And Tamil Nadu

There have been a few occasions where the reintegration of prisoners was undertaken successfully. Remarkably, the Social Justice Department had completed the rehabilitation of remand prisoners and funded their expenses till the time they were at the Mental Health Centre.[31] It also invites applications from other inmates who desire to remain at the facility. The Social Justice Department has, thus, done a notable job of working towards the reintegration of prisoners into society even after they are released.

One prominent case is that of a prisoner who struggled to survive in society after serving a sentence of more than 20 years. He had found difficulty connecting with his family and friends, as most of his friends would distance themselves. He was unable to find himself a job, which made his survival in the new environment more challenging. However, the Social Justice Department stepped in and assisted him in convincing his parents about the process of rehabilitation and refinement. They also helped him in obtaining employment at a private firm under the Nervazhi programme, an initiative to ensure the social rehabilitation of probationers and ex-convicts. This initiative has been by and large successful[32] in facilitating the social rehabilitation of released convicts in Kerala. It has taken great strides in rehabilitating a huge number of prisoners in remote areas of Kerala. This has also assisted in removal of the social

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[31] Express News Service, 'Five inmates of mental health centre rehabilitated' (The New Indian Express, 03 February 2021) <https://www.newindianexpress.com/states/kerala/2020/feb/17/ex-convicts-get-new-shot-at-life-through-nervazhi-in-kerala-2104374.html> accessed 3 April, 2022.

[32] Arun M, 'Ex-convicts get new shot at life through 'Nervazhi' in Kerala' (The New Indian Express, 17th February 2020) <https://www.newindianexpress.com/states/kerala/2020/feb/17/ex-convicts-get-new-shot-at-life-through-nervazhi-in-kerala-2104374.html> accessed 4 April, 2022.

stigma associated with released convicts.[33] As per official records, the scheme has transformed the lives of 323 prisoners in the state. Moreover, the Social Justice Department has consistently provided a good number of grants to prisoners who finish their terms.

In Kerala, the rehabilitation programme within jails is also effective, with inmates participating in various vocations such as cooking. This also helped them earn a livelihood[34] once they are released from prison. In February 2021, the State Cabinet approved a draft probation policy by the Social Justice Department. The proposed probation system seeks to reduce recidivism, address the issue of overcrowding in prisons, and increase the efficiency of the criminal justice system.[35] It proposes steps to reform the offender by allowing him to reintegrate with his family and reducing the social stigma attached to the offender's family.

Whereas, in Tamil Nadu, the outreach of reintegration programmes is modest. The implementation of prisoners' schemes to provide grants has not been up to pace.[36] The promises of financial support to the prisoners were not fulfilled by the prison department. That made the reintegration of prisoners into society more difficult. Many procedures have been put in place to ensure the rehabilitation of convicts on remand, but there is still a long way to go in putting those efforts into action.[37] Even within prisons, jail officials turn a blind eye to any of the injuries inflicted on prisoners. There is a pressing need to formulate a policy[38] which can effectively implement the steps in place.

A recent study had found that there are not enough social workers in the correctional institutions to help with the reintegration process.[39] It is observed that the relevance of social workers is greater to focus on the physical and mental health being of the inmates. To address this, Tamil Nadu government have acknowledged the post of a qualified social worker in these institutions. This has certainly assisted in furthering the reintegration process.

In the district of Kallakurichi, police have drawn up a plan for the rehabilitation of offenders through counselling and providing assistance through government schemes[40] for employment

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[33] Deccan Chronicle, 'Kerala: Rehab for women jail inmates on anvil' Deccan Chronicle (Kollam, 26 May 2018).
[34] Anakha Arikara, 'Prison Inmates in Kerala Are Making Foodies Happy. Here's How!' (The Better India, 2018) <https://www.thebetterindia.com/129449/prison-inmates-kerala-food-for-freedom/> accessed 3 March 2022.
[35] Special Correspondent, 'Probation policy to rehabilitate criminals' The Hindu (Thiruvananthapuram, 23 January 2022).
[36] Shanmughasundaram (n.10).
[37] Aditi R., 'The road to reforming women's prisons' The Hindu (Chennai, 02 September 2017).
[38] S. Prasad, 'Rehabilitation programme for prohibition offenders' The Hindu (Kallakurichi, 04 November 2020).
[39] Serena Josephine M., 'Not many social workers in correctional institutions: study' The Hindu (Vellore, 07 December 2017).
[40] Ibid.

opportunities. As a result, in some areas, it is on the district authorities to lay down the plan for undertaking the reformatting programme. Hence, the implementation of the schemes and programmes is the only key to the effective reintegration of prisoners into society.

V. CONCLUSION

As the report is submitted to the NHRC, it largely depends on the commission how it wants to move forward with the recommendations. The report has comprehensively listed down policy recommendations for the prison departments of respective State Governments that can be implemented to facilitate social reintegration. These recommendations include a systemic classification of prisoners, specialized counselling for prisoners who are charged under POCSO Act 2012,[41] UAPA Act 1967,[42] and other special acts, increase of welfare officers, skill enhancement programmes and many more. It also recommended the Probation Officers to work with local communities on social reintegration of the prisoners. Setting up of half-way homes, which acts as an active space for prisoners to facilitate their transition from prison life to normal life, is one of the key recommendations.

The NHRC can act as an intermediary to bring these reforms and conduct the social reintegration programmes for released prisoners in the society. As per Section 12(c) of the National Human Rights Commission Act 1993,[43] the commission has the powers to make recommendations to the State as well as Central Government after studying the living conditions of inmates in the prisons. Apart from that, it could involve in encouraging NGOs and institutions to work in implementing rehabilitative programmes and various other schemes facilitation reintegration of the offenders. For instance, the Discharged Prisoners Aid society in Tamil Nadu has done some good work in this field. However, they are now facing financial difficulties as they are entangled in court cases. These institutions may also be involved in educating the society about the reformative theories of punishment to erase the social stigma. Furthermore, the Social Justice Department must also try to implement the laws on the ground level. They need to ensure that the vacancies in welfare officers post should be filled.

[41] *Protection of Children from Sexual Offences Act, 2012.*
[42] *Unlawful Activities (Prevention) Act, 1967.*
[43] *National Human Rights Commission Act 1993, s.12 (c).*

In a recent research study, it was reported that the experience in a prison has a negative impact on reintegration process.[44] Thus, to prevent this lack of optimism, the State should also emphasise upon educating the prisoners about the smooth reformation process. Among other things, the State should also ensure that the released prisoners are provided with a stable home. There has been a strong connection of recidivism and homelessness among released prisoners.[45] In of the studies formerly incarcerated men reported that home ownership or entrepreneurship is an important factor for their successful reintegration.[46] As the issue is socio-economic in nature, the onus is on the society as well to facilitate the process of reintegration of the prisoners. It is our individual duty to change the outlook towards the prisoners and help them in relocating their lives after spending a prolonged time in prisons. Hence, the society is equally responsible in facilitating the process of social reintegration of the prisoners.

Therefore, it is expected from the NHRC to make the representation to the State Governments of Kerala and Tamil Nadu with the policy recommendations and any further initiatives pertaining to the field of reintegration of offenders. The NHRC must also ensure the implementation of these recommendations in these states.

[44] *José Cid, Albert Pedrosa, Aina Ibàñez, Joel Martí, 'Does the Experience of Imprisonment Affect Optimism About Reentry?' [2021] 101(1) The Prison Journal 81.*
[45] *Edward I. Boman & Katherine Ely, 'Voices of Returning Citizens: A Qualitative Study of a Supportive Housing Program for Ex-Offenders in a Rural Community' [2020] 100(4) The Prison Journal 423.*
[46] *Tia S. Andersen, Deena A. Isom Scott, Hunter M. Boehme, Sarah King & Toniqua Mikell, 'What Matters to Formerly Incarcerated Men? Looking Beyond Recidivism as a Measure of Successful Reintegration' [2020] 100(4) The Prison Journal 488.*

SOCIAL STOCK EXCHANGE: NAVIGATING ROLES, REGULATIONS, AND URGENT REFORMS

- *Satakshi Gupta[*] and Priya Nahar[**]*

ABSTRACT

In this article, we explore the Social Stock Exchange as an evolving approach to redefining the traditional financial paradigms and how it was established to promote safer investment opportunities. We look at how the Social Stock Exchange has transformed the traditional stock exchange and controls for ease of convenience, which has increased the flow of money towards the management of sustainability and welfare advancement of the environment. We also look at the regulatory frameworks that govern the Social Stock Exchange and how they impact market participants. This article also explores the elements and regulations relating to the Social Stock Exchange and its key impact on its working. Then we look at its structural setup up which impacts its performance. It also discusses how the Securities and Exchange Board of India has made certain regulations regarding the Social Stock Exchange and its impact on it. Then we look at the logical assessment of the social stock exchange in bringing it functional in India. This article also brings forth how the Social Stock Exchange are a powerful mechanism for channelling investment towards socially responsible, sustainable enterprises, and how they can help drive a more sustainable, equitable future.

This article explores a comparative study on the Social Stock Exchange in different countries in terms of its functionality and how Social stock exchange. Then further we look at certain defects and feasibility errors present in the social stock exchange in India. At last, we look at the reforms which are required to make in the social stock exchange set-up in order to make it more functional and effective. Thus, this research paper delved deep into the various facets of SSE, exploring its origins, objectives, challenges, and probable reforms. The SSE, as an innovative financial platform, bridges the gap between social enterprises and impact investors, fostering a symbiotic relationship that can drive positive change in society.

I. INTRODUCTION

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Financial institutions known as social stock exchanges (hereinafter referred to as SSE) have evolved in several nations as a means of assisting social entrepreneurs with their growth. By creating a market that is regulated for dealings in securities, SSE pledges to advance social welfare. Focusing on India, the government's July 5th projected Union Budget for the fiscal year 2019–2020 placed a significant emphasis on social businesses and nonprofit organizations, opening the door for the Social Stock Exchange to revolutionize the Indian market.[1]

The SSE's goal is to encourage investors to think about starting an Indian SSE, which could not only provide a forum for the exchange of thoughts but also help in the expansion of the Social Enterprise sector as a whole by providing access to external growth capital. The SSE was established to address rising interest in social enterprises and non-profit organizations, funding challenges, aligning with policy objectives, promoting transparency and accountability, encouraging ethical and impactful investments, and aligning with global trends in impact investing and socially responsible finance. However, it is submitted that there are various inadequacies and loopholes under the Social Stock Exchange framework in India. The difficulties include strict oversight, financial examination that is necessary given the growth in participation, transaction costs, the design and provision of a variety of financial instruments, tax advantages, and the definition of all instruments and companies, among other things. Thus, there is a need to bring in reforms under the Social Stock Exchange framework of India to meet its desired goals.

II. SOCIAL STOCK EXCHANGE: A BRIEF ANALYSIS

The word "Social" first appeared between 91 and 88 BC and derives from the Latin "Socii", which means Allies. It incorporates several concepts, such as social equity, social wealth, social psychology, and social realism.[2] Financial institutions known as social stock exchanges have evolved in several nations as a means of assisting social entrepreneurs with their growth. The instrument is used to control social enterprise issuers, its regulatory status, and the tools used to control investors are all part of its evolutionary history, which began in 2013. By creating a market that is regulated for dealings in securities, SSE pledges to advance social welfare.[3]

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[1] *Vidya Sreedhar, NSE gets Sebi nod to set up Social Stock Exchange, The Economic Times, Dec. 23, 2022.*
[2] *Sanjana S., A Study on Social Stock Exchange in India, 2 IJARCMSS, (2019).*
[3] *Sachin Chaturvedi, Social Stock Exchange for Social Enterprises and Social Incubators: An Exploratory Study for India, Research and Information System for Developing*

Focusing on India, the government's July 5th projected Union Budget for the fiscal year 2019–2020 placed a significant emphasis on social enterprises and nonprofit organizations, opening the door for the Social Stock Exchange to revolutionize the Indian market.[4] This suggests that there has been a trend toward sustainable management as funding for environmental and social welfare has increased. The Securities and Exchange Board of India oversees this stock market, which caters to the listing of social institutions and nonprofit organizations to increase their capital, loans, or in the way of units similar to mutual funds. By putting the equity market nearer and encouraging foreign investment, progress is being geared toward the areas of good health, education, transportation, and sustainability. The Social Stock Exchange in India has transformed the traditional stock exchange into "an electronic fundraising platform" and controls for ease of convenience, which has increased the flow of money towards the management of sustainability and welfare advancement of the environment.[5] The Social Stock Exchange's (SSE) regulatory structure was established by SEBI by revisions to certain SEBI regulations issued on July 25, 2022, as well as through notifications dated September 19, 2022, and October 13, 2022.[6]

III. ELEMENTS AND REGULATIONS RELATING TO THE SOCIAL STOCK EXCHANGE

The following elements and regulations of the Social Stock Exchange need to be understood to better understand the concept of the Social Stock Exchange in India:

Meaning of Social Enterprise

The meaning of Social enterprises is necessary under the Social Stock Exchange, as this concept is beneficial for social enterprises. A social enterprise functions as a business that generates profits, but differs in that its principal objective is to further a social cause. While the pursuit of money is neither overlooked nor dismissed, its primary goal is social service. The social enterprise seeks social goals while maintaining a focus on profit since it ensures the

Countries (2019), https://www.ris.org.in/sites/default/files/Publication/DP%20243%20Social%20Sector%20Exchange_1.pdf.

[4] *Sanjana S., A Study on Social Stock Exchange in India, 2 IJARCMSS, (2019).*

[5] *C.S. Divyesh Patel & Naresh K. Patel, India's Social Stock Exchange (ISSE) – A 360° Analysis - Today's commitment for tomorrow's action, 2022 Journal of Sustainable Finance & Investment 1, XXXX, https://doi.org/10.1080/20430795.2022.2061404.*

[6] *Dr Pragati Mehra, Social Stock Exchange: New Paradigm For Social Enterprises, ICSI (2023), https://www.icsi.edu/media/webmodules/CSJ/May/22ResearchCornerDrPragatiMehraDrMadhuVij.pdf.*

survival of the business. The driving premise of the industry is that even social firms may be highly profitable. In actuality, the majority of social enterprises run and seem like conventional companies. The main point is the fact that the money these organizations make is invested in their social projects rather than being paid out to investors. Social companies can better develop and carry out long-term initiatives and hire the necessary personnel and expertise if they have a steady stream of profits. Social businesses vary from charities in that they are for-profit, making them sustainable.[7] Although charities are entirely reliant on contributions, they do have a social objective. The scholarly and professional literature yields several definitions of social enterprise. A social enterprise is defined as "A business with primarily social objectives whose surpluses are primarily reinvested for that purpose in the business or the community, rather than being driven by the need to maximize profit for shareholders and owners" by the Department of Trade and Industry (2002). Social businesses are known as "social enterprises" in South Africa.[8] The International Labour Organization (ILO) created the working definition of a "Social enterprise" as follows: "The fundamental goal of a social enterprise is to address social issues through a financially viable business model, in which surpluses (if any) are reinvested primarily for that purpose."

3.1. Structure

A Social Stock Exchange (SSE) is a system that connects impact investors, particularly institutional investors, with social enterprises so that the latter can purchase securities from listed companies whose missions fit with the objectives of the investors. It functions similarly to a standard stock exchange by enabling the listing, trading, and agreement of shares, bonds, and other financial tools; however, listed companies must show social and environmental impact reporting in addition to their conventional financial reporting, rather than simply providing information on their profit and loss.[9] SSE serves as a conduit between investors willing to make investments in social entrepreneurs and those seeking funding. Following inspections, audits of finances, and social inspections, social entrepreneurs can trade their shares on the SSE platform. The primary goals of the SSE Portal are to encourage new

[7] *C.S. Divyesh Patel & Naresh K. Patel, India's Social Stock Exchange (ISSE) – A 360° Analysis - Today's commitment for tomorrow's action, 2022 Journal of Sustainable Finance & Investment 1, XXXX, https://doi.org/10.1080/20430795.2022.2061404.*
[8] *ibid*
[9] *Sachin Chaturvedi, Social Stock Exchange for Social Enterprises and Social Incubators: An Exploratory Study for India, Research and Information System for Developing Countries (2019), https://www.ris.org.in/sites/default/files/Publication/DP%20243%20Social%20Sector%20Exchange_1.pdf.*

approaches to community and business involvement in social change and to identify social entrepreneurs that can attract finance.[10] The Indian SSE was established as of April 2023 in both the National Stock Exchange (NSE) and the BSE (formerly the Bombay Stock Exchange).[11]

3.2. Eligibility Criteria for SSE under Regulations for Social Stock Exchange in India

The SEBI ICDR Regulations' broad definition of "social enterprise" allows both for-profit social enterprises (FPE) and not-for-profit organizations (NPO) to apply for registration and raise money on SSEs as long as they meet several strict requirements, including proving their social intentions come first. [12]The SEBI ICDR Amendments set out certain qualifying requirements for an organization to be classified as a Social Enterprise.[13] SEBI has acknowledged a list of operations (Eligible Activities) that NPOs and FPEs are permitted to participate in to set up the precedence of social aim. The operations of Social Enterprise should be directed at population segments that are underserved, underprivileged, or regions that perform poorly in terms of achieving the development goals of the federal or state governments (Target Segments). In addition, social enterprises must demonstrate that: (a) at least 67% of their clientele over the previous three years belonged to the target segments; or (b) 67% of their income or expenditures over the previous three years came from or were incurred on eligible operations.[14]

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[10] *Tanya Zaveri, Social stock exchange – An Indian perspective, 8 IJARIIT, (2022).*

[11] *Dr Pragati Mehra, Social Stock Exchange: New Paradigm For Social Enterprises, ICSI (2023), https://www.icsi.edu/media/webmodules/CSJ/May/22ResearchCornerDrPragatiMehraDrMadhuVij.pdf.*

[12] *C.S. Divyesh Patel & Naresh K. Patel, India's Social Stock Exchange (ISSE) – A 360° Analysis - Today's commitment for tomorrow's action, 2022 Journal of Sustainable Finance & Investment 1, XXXX, https://doi.org/10.1080/20430795.2022.2061404.*

[13] *Dr Pragati Mehra, Social Stock Exchange: New Paradigm For Social Enterprises, ICSI (2023), https://www.icsi.edu/media/webmodules/CSJ/May/22ResearchCornerDrPragatiMehraDrMadhuVij.pdf.*

[14] *Dr Pragati Mehra, Social Stock Exchange: New Paradigm For Social Enterprises, ICSI (2023), https://www.icsi.edu/media/webmodules/CSJ/May/22ResearchCornerDrPragatiMehraDrMadhuVij.pdf.*

IV. THE RATIONALE BEHIND BRINGING IN SOCIAL STOCK EXCHANGE IN INDIA

India confronts a $564 billion cash gap in attaining the sustainable development goals (SDGs) by 2030, according to a new Brookings Institute analysis titled "The Promise of Impact Investing in India".[15] Considering the financial shortages in both the social and economic sectors of the Indian economy, it is apparent that India will fall far short of achieving the Sustainable Development Goals (SDGs) by 2030 as mandated by the United Nations. This worrying observation calls for an immediate aggressive reaction.[16] The Union Budget 2019 took action by proposing the establishment of India's first Social Stock Exchange.[17] The establishment of an SSE was a solution presented by the Union Minister of Finance and Corporate Affairs, Ms Nirmala Sitharaman, at the unveiling of the Union Budget 2019-2020 in the legislature, to address the shortage of financing options for social groups. In Press Information Bureau, G. O. (2019, July 5), she discovered the idea of an SSE and mentioned it with the following quote: "It is time to bring our capital markets closer to the masses and accomplish numerous social welfare objectives relating to inclusive growth and financial inclusion." "I propose that the Securities and Exchange Board of India take steps to establish an electronic fund-raising platform—a social stock exchange—for listing social enterprises and voluntary organizations working to achieve a social welfare goal so that they can raise capital as equity, debt, or units similar to a mutual fund,"[18] the Hon. Finance Minister stated in her Budget Speech for FY 2019-2020.

As a result, the SSE's goal is to encourage investors to think about starting an Indian SSE, which could not only provide a forum for the exchange of thoughts but also help in the expansion of the Social Enterprise sector as a whole by providing access to external growth capital.[19] The SSE was established to address rising interest in social enterprises and nonprofit organizations, funding challenges, and alignment with global trends in impact investing and socially responsible finance.[20] The SSE aims to bridge the gap between the financial sector and

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[15] C.S. Divyesh Patel & Naresh K. Patel, India's Social Stock Exchange (ISSE) – A 360° Analysis - Today's commitment for tomorrow's action, 2022 Journal of Sustainable Finance & Investment 1, XXXX, https://doi.org/10.1080/20430795.2022.2061404.

[16] Dr Pragati Mehra, Social Stock Exchange: New Paradigm For Social Enterprises, ICSI (2023), https://www.icsi.edu/media/webmodules/CSJ/May/22ResearchCornerDrPragatiMehraDrMadhuVij.pdf.

[17] Sanjana S., A Study on Social Stock Exchange in India, 2 IJARCMSS, (2019).

[18] Tanya Zaveri, Social stock exchange – An Indian perspective, 8 IJARIIT, (2022).

[19] 'A Study on Social Stock Exchange in India' (2019) 2(4) IJARCMSS.

[20] Sachin Chaturvedi, Social Stock Exchange for Social Enterprises and Social Incubators: An Exploratory Study for India, Research and Information System for Developing

the social development sector, facilitating the flow of capital to organizations with a dual mission of financial sustainability and social impact. The SSE will provide a standardized approach to funding, utilization, impact measurement, disclosures, and reporting, boosting investor confidence and promoting responsible capital for the greater good.[21]

V. COMPARATIVE STUDY OF SOCIAL STOCK EXCHANGE IN INDIA WITH OTHER COUNTRIES

5.1. UK

The Social Stock Exchange launched in the UK in June 2013. The exchange currently does not allow for the sale or purchase of shares; rather, it works as an index of businesses that have completed a "social impact test" and as a research resource for potential social impact investors.[22] The good news is that it is never too late to list with an SSE and gain much-needed publicity for social companies. In the UK, the Social Stock Exchange (SSE) imposes specific criteria on companies wishing to register on its platform. To access it, companies must pass a rigorous "social impact test" that evaluates their commitment to creating positive social and environmental change in addition to their financial performance. Surname. This rigorous assessment ensures that companies listed on the SSE are truly committed to making a meaningful difference in the world. Transparency and accountability are fundamental principles championed by ESS. Once listed, a company must maintain a high level of transparency and provide regular reporting on its social and environmental impact. This commitment to openness ensures that investors and the public receive clear information about the company's operations, promoting trust and making informed decisions. Although ESS does not directly facilitate the buying and selling of stocks, it is a valuable resource for investors interested in socially responsible investing. The platform allows them to research and identify potential investment opportunities in companies that prioritize social impact. In the UK, there

Countries (2019), https://www.ris.org.in/sites/default/files/Publication/DP%20243%20Social%20Sector%20Exchange_1.pdf.

[21] *Sachin Chaturvedi, Social Stock Exchange for Social Enterprises and Social Incubators: An Exploratory Study for India, Research and Information System for Developing Countries (2019), https://www.ris.org.in/sites/default/files/Publication/DP%20243%20Social%20Sector%20Exchange_1.pdf.*

[22] *Dr Pragati Mehra, Social Stock Exchange: New Paradigm For Social Enterprises, ICSI (2023), https://www.icsi.edu/media/webmodules/CSJ/May/22ResearchCornerDrPragatiMehraDrMadhuVij.pdf.*

is growing interest in social impact investing and sustainable finance, which is likely to grow further from 2021. Discussions about setting up an exchange of Formal social or similar platforms to facilitate social impact investing may have made progress. The UK Government is actively supporting the development of impact investing, potentially introducing additional initiatives, regulatory changes and incentives to encourage businesses to prioritize social goals and the environment.

5.2. Canada

The Social Venture Connection launched in Canada in September 2013. It promotes itself as a "trusted connector" that connects social entrepreneurs with service providers, impact investors, high visibility, and a way to evaluate their triple bottom line at competitive rates. In Canada, Social Enterprise Connection (SVC) provides an essential link for social entrepreneurs. It fulfils a vital role in connecting these entrepreneurs with a variety of stakeholders, including service providers and impact investors. This connection function plays an important role in supporting and expanding the social enterprise ecosystem.

SVC also provides social entrepreneurs with a valuable tool to assess their “triple bottom line,” which includes assessing their social, environmental and financial performance. This comprehensive assessment enables businesses to measure and improve their overall impact, driving continuous improvement.

Additionally, being part of the SVC network gives social enterprises clear visibility, which is decisive for their growth and investment attraction. By gaining visibility through this network, social entrepreneurs open the door to new opportunities and increase recognition, thereby advancing the cause of positive social and environmental change. Canada is seeing a rising tide of impact investing, with institutions and investors increasingly aligning their investments with social and environmental values. This trend may have led to discussions about creating a platform akin to a social exchange. Additionally, social venture capital organizations in Canada may have formed partnerships and alliances with financial institutions, streamlining the process for social entrepreneurs to access capital and resources. needed to increase their social impact. It's important to note that specific developments may have occurred since my last update in 2021, so for the most up-to-date information on social stock exchanges and impact investing initiatives in these countries, you should check out recent news, government websites, and industry reports.

5.3. Singapore

Singapore's Impact Exchange, the sole public SSE, debuted in June 2013. It seeks to operate similarly to the UK SSE by disseminating details about reputable social enterprises and impact investment funds. It's important to note that the list of issuers includes charitable organizations, which are permitted to issue debt instruments like bonds. Singapore Impact Exchange plays a vital role in promoting social entrepreneurship and impact investing in the region. Its goal is to connect investors with social enterprises and influence investment funds. In addition to charities, other types of issuers on the Impact Exchange include social enterprises and companies with strong social or environmental missions. These issuers can list debt instruments such as bonds, allowing them to raise capital for their social initiatives. The exchange serves as a platform for impact investors, including both individual and institutional investors, to discover and invest in organizations aligned with their values and impact goals in their society.

5.4. South Africa

SASIX, the second SSE worldwide, originated in South Africa. It began operations in June 2006 to supply critical capital to emerging social enterprises. It operates similarly to a traditional social stock exchange and gives morally responsible investors a platform to purchase shares in social enterprises based on two categories: sector and province. SASIX, the South African Social Investment Exchange, is known for providing much-needed capital to emerging social enterprises in South Africa. This is the second ESS to be established globally. SASIX offers a more traditional stock market experience, allowing investors to buy shares in social enterprises. Investors can choose to invest based on two main categories: industry(social impact category) and province (geographic location).

VI. DEFECTS AND INADEQUACIES UNDER THE SOCIAL STOCK EXCHANGE OF INDIA

6.1. Defects Under Regulatory Framework

There are several gaps under the Regulatory framework, which is provided for the Social Stock Exchange in India. It is not made clear in the modifications to the SEBI ICDR Regulations or the SEBI LODR Regulations whether the 67% eligibility threshold is a one-time requirement or a recurring one. Further, it is submitted that targeting "underserved" or "less privileged social

segments" or "regions recording lower performance in the development priorities of central and state governments" is expected of us. However, neither the SEBI ICDR Regulations modifications nor material in the public domain make any reference to the specifics of the defined target groups. For Social enterprises hoping to take advantage of the law, the open-ended interpretation of target sections under the regulations may create more ambiguity.

6.2. Finance and Investment Related Problems

It is submitted that NPOs will have a harder time obtaining funding than FPEs since they can't gauge their social effect. They would be unable to successfully compete with other businesses on the main board due to the extremely low financial returns they would offer. Therefore, having separate SSE venues for NPOs and FPEs is the optimal answer. Thus, one of the most difficult things social entrepreneurs must do is raise the necessary funding. The Indian government and regulators have lofty plans for SSE, but it can be difficult for exchanges to allocate funds to socially conscious initiatives. Making SSE an effective platform is a significant issue given the failure of large worldwide platforms to capture investors' interest. Some variables prevent social enterprises from participating in the Social Stock Exchange, including regulatory constraints (that can be loosened through rewards like tax breaks for investments), a lack of affordable financing (which can be addressed through mechanisms to pool such funds), a lack of technology (which can be solved through local solutions and technology transfer), and a lack of technology.

6.3. Other Problems

Many other difficulties are there in the provisions related to the Social Stock Exchange in India. The difficulties include strict oversight, financial examination that is necessary given the growth in participation, transaction costs, the design and provision of a variety of financial instruments, tax advantages, and the definition of all instruments and companies, among other things. It is not desirable to list FPEs on SSE under the same set of rules that apply to listings on traditional stock exchanges. In addition, the new scientific group must go over the FCRA provisions again to clarify the function of foreign donors and the scope of their involvement in the SSE in light of the most recent modifications to the Foreign Contribution (Regulation) Act in September 2020. Social stock market (ESS) applications are a promising concept that seeks to harness the power of financial markets to drive social and environmental impact beyond financial returns. Although small businesses have increased in size in recent years, they still

face several significant challenges and problems beyond the main ones. One of the main challenges is the limited supply of investment opportunities that impact the environment and society. Small businesses need a robust pipeline of institutions that are not only willing but able to meet the rigorous impacts and financial standards set by the exchanges. Finding such units can be difficult, especially in regions or fields where social enterprises are underdeveloped. This scarcity of investment opportunities can hinder the growth of small businesses, making it difficult to attract many investors.

Another problem is the lack of standardization and harmonization in measuring and reporting impact. Although significant progress has been made in developing various impact measurement frameworks, there is still no widely accepted standard. This lack of standardization makes it difficult for investors to compare and assess the impact of different securities listed on the SSE. The lack of standardized reporting also increases the risk of greenwashing, in which organizations exaggerate or misrepresent their social and environmental impact to attract investors. Establishing a common framework for measuring and reporting impact is essential to building trust and transparency within small businesses.

Legal and regulatory barriers are a significant obstacle. Social enterprises are often hybrid, blurring the lines between traditional for-profit businesses and nonprofit organizations. This ambiguity can lead to classification, tax and compliance issues. Regulations must evolve to suit the unique characteristics of small businesses, which can be a slow and complicated process. Additionally, small businesses may face cross-border trade barriers due to differences in regulations and tax treatments in different countries, making international expansion an effort.. complicated.

Liquidity is another issue affecting small businesses. Many social enterprises are not as liquid as traditional companies and their shares do not trade as frequently. This lack of liquidity can prevent investors from looking for opportunities to buy or sell stocks quickly. To address this problem, small businesses may need to develop mechanisms to improve liquidity, such as creating market makers or facilitating secondary trading platforms grants.

One overlooked challenge is the potential impact of a recession on small businesses. While small businesses aim to create positive social and environmental outcomes, they are not immune to broader economic trends. During times of economic crisis, investors may prioritize financial returns over social impact, which may lead to disinvestment in small businesses. This

phenomenon can affect the long-term stability and sustainability of small businesses, hence the importance of addressing the resilience of these exchanges during economic downturns.

Furthermore, the social stock market model itself may not be suitable for all types of social enterprises. Some social enterprises may have limited financial returns or revenue streams, and strict listing requirements for small businesses may disqualify them from participating. In such cases, alternative funding mechanisms, such as impact bonds or philanthropic grants, may be more appropriate.

Access to capital remains an important issue for social enterprises, even for small social enterprises. While the concept is designed to channel capital to high-impact organizations, it can still be difficult to match investors' risk appetite and preferences with available investment opportunities. These differences can hinder the growth and scalability of small businesses.

Additionally, the investment base for small businesses may be limited. The group of investors interested in both financial returns and social impact is smaller than the investment community as a whole. This could affect the scale and breadth of capital flows to small businesses, potentially limiting their effectiveness.

VII. PROBABLE REFORMS THAT NEED TO BE TAKEN UNDER THE SOCIAL STOCK EXCHANGE IN INDIA

There are many loopholes and deficiencies under the Social Stock Exchange in India which need to be rectified to have SSE, as an innovative financial platform, bridging the gap between social enterprises and impact investors, and fostering a symbiotic relationship that can drive positive change in society.

It is suggested that the social sector needs additional seed money from investors, whether they are local governments, charitable groups, or foundations, to better identify and assess the factors that will determine the success of impact investments. With this information, investors may make more comprehensive judgments that take social enterprises and SSEs into account. Further, finding social companies that are tackling challenges that are seen as tough and have strong leadership, a capable staff, and creative, scalable, and robust business models is crucial. Additionally, in the context of India, ideas have been put up for funding social businesses through resource sharing and cooperation between investors and outcome payers at the governmental and private sector levels.

A clause for submitting a Social Impact Report may also exist and an impartial admissions panel should review this report. Verifying the social or environmental goals of the firms listed in the report will fall within the purview of this panel. To demonstrate progress toward social impact goals, all Members should also be obliged to publish and submit yearly social effect reports. The objectives and goals that these reports establish for attaining their social effect ought to rise year after year.

Moreover, it is advised that contributors and investors receive higher tax breaks since they are powerful tools for luring involvement across a variety of financial instruments and structures. Last but not least, the first step in creating India's own SSE should be to research effective SSE models from other countries.

VIII. CONCLUSION

In conclusion, the concept of a Social Stock Exchange (SSE) in India holds immense potential to revolutionize the country's social sector landscape. This research paper delved deep into the various facets of SSE, exploring its origins, objectives, challenges, and probable reforms. The SSE, as an innovative financial platform, bridges the gap between social enterprises and impact investors, fostering a symbiotic relationship that can drive positive change in society.

However, successful implementation requires collaborative efforts from regulators, market participants, and policymakers. The difficulties include strict oversight, financial examination that is necessary given the growth in participation, transaction costs, the design and provision of a variety of financial instruments, tax advantages, and the definition of all instruments and companies, among other things. Some variables prevent social enterprises from participating in the Social Stock Exchange, including regulatory constraints (that can be loosened through rewards like tax breaks for investments), a lack of affordable financing (which can be addressed through mechanisms to pool such funds), a lack of technology (which can be solved through local solutions and technology transfer), and a lack of technology.

SOCIAL SECURITY FOR THE DIGITAL AGE: EVALUATING PROVISIONS CONTAINED IN THE SOCIAL SECURITY CODE OF 2020 FOR THE PROTECTION OF GIG WORKERS IN INDIA

- Shailesh Kumar Pandey[*] and Dr Balwinder Kaur[**]

ABSTRACT

"In a globalised and digitalized economy, the cost of labour and production is on the rise. Hence, to ensure greater profitability with minimum compliance of labour welfare provisions now employer-employee contracts are shifting into a hybrid model of 'platform-partnership or gig'. The gig economy involves the usage of technology to mobilise the workforce by making them sign a contract with marker aggregators or entities. In gig-work contracts, the terms and conditions are unilaterally dictated by the marker aggregators or platform only and are then agreed upon by gig workers which makes them vulnerable in terms of their rights and entitlements. The recent trends signify that the gig economy model is being adopted worldwide due to its cost-effectiveness and limited legal implications. The present study delves into determining the meaning, classification and legal safeguards for ensuring the social security of Indian gig workers under the Social Security Code 2020. Further, the research has critically analysed the challenges in the effective implementation of the 2020 Code and the shortcomings of legal provisions contained in the Social Security Code 2020. The paper takes into consideration social security-related issues that are currently being faced by gig workers in India and the impact of the Social Security Code 2020. Lastly, a comparative analysis of the legal position of gig workers in India, UK and the USA has been done to suggest various policy reforms for effective implementation of social security benefits to gig workers in India".

Keywords: ***Gig economy, social security, labour rights, platform-partnership, Social Security Code 2020***

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I. INTRODUCTION

With the advent of globalisation in the world economy, the relationship between employers and employees is dynamically transforming. The 21st century is the era of technological transformation and hybrid work cultures, and the service sector has witnessed a paradigm shift in the mode of hiring and engaging the workforce worldwide. Due to the rapid rise of e-commerce platforms, the demand for a low-skilled gig workforce, including cab drivers, bike taxi riders' delivery partners, etc., has increased. The enactment of strict labour welfare legislation inflicted a lot of financial burden on corporations, and it ultimately created the challenge of ensuring profitability in operations. The capitalist corporations in the Western world developed a hybrid employment model, known as a 'platform-partner contract', to ensure that those undertaking their assignments did not directly fall under the traditional definition of 'employee'. It was done to bypass welfare-oriented labour laws so that labour costs and expenses on labour welfare activities could be mitigated. In India, in the past few years, the growth of the gig economy has been on the rise. The cost-effective nature of the 'platform-partnership model' is the fundamental reason behind the exponential growth of the gig economy. As per an estimate, by the end of 2024, more than 75% of service sector employees will work as non-permanent demand-based gig workers.[1] Currently, 15 million Indians are employed as gig workers, but in the future, about 90 million individuals are likely to be employed as gig workers in India. There is a significant increase in demand for gig workers because, in the name of a 'partner-platform contract', the companies are allowed to evade all their liabilities and responsibilities inflicted by the labour laws of the land.[2] The gig economy transformed traditional employer-employee relations into 'platform-partner' partnership agreements. On one hand, the employer-employee relationship is fundamentally governed by labour law. On the contrary, platform-partnership agreements are governed by the civil laws incorporated under the Indian Contract Act 1872[3] and the Indian Partnership Act 1932[4]. The fundamental characteristics of gig workers include non-permanent engagement, partnerships for only benefit sharing, legal positions as independent contractors, etc.

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[1] *Suvarna, P. (2021, August 29). Gig workers forgo dignity, safety in quest for a living. Deccan Herald. https://www.deccanherald.com/india/gig-workers-forgo-dignity-safety-in-quest-for-a-living-1024703.html (accessed October 1, 2023)*

[2] *Ibid.*

[3] ***The Indian Contract Act, 1872*** *(Act No. IX of 1872).*

[4] ***Indian Partnership Act, 1932.***

II. RESEARCH QUESTIONS

For the study following research questions have been framed -

1. Whether the gig worker falls under the category of employee or independent contract in India, the UK and the USA?
2. What are the Social Security challenges that are being faced by the gig workers in India?
3. What are the legal safeguards available under the Social Security Code 2020 for ensuring the social security of Gig workers in India?
4. What are the key implementation challenges and criticisms of the Social Security Code 2020 regarding the Social Security of gig workers?

III. IS A GIG WORKER AN EMPLOYEE OR A PARTNER?

In India, gig workers often face denial of several social security benefits typically offered in traditional employer-employee relationships. The reason cited by market aggregators and platforms for not treating gig workers as employees is that such workers are not covered under the legislative definition of 'employee' due to the nature of their employment and engagement as they sign the contract, which is like 'contact of partnership'. The gig workers are incentivised through proportionate benefit sharing per assignment or order. Thereafter, it is important to understand whether the legal protection that is available to labourers or employees can be further extended to gig workers.

As per the Social Security Code of 2020, a gig worker is defined under section 2(35)[5]

"A person who participates in a form of work in exchange for consideration through his contribution to these activities beyond the ambit of a traditional master-servant or employer-employee relationship is known as a gig worker."

Recently, Rajasthan became the first state in India to enact dedicated legislation for safeguarding the interests of gig workers as stipulated by the Code of Social Security 2020, and the Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023[6] gave a detailed definition of a gig worker.

(e) "gig worker" means a person who performs work or participates in a work arrangement and earns from such activities outside of the traditional employer-employee relationship and

[5] *The Code on Social Security, 2020 s 2(35).*
[6] *The Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023*

who works on the contract that results in a given rate of payment, based on terms and conditions laid down in such contract and includes all piece-rate work.[7]

Among all the New Labour Codes, only the Social Security Code 2020 addresses the rights and welfare of gig workers. The Code of Wages 2019[8] remain completely silent about the rights and entitlements of gig workers. Consequently, provisions such as minimum wage, retirement benefits, insurance, etc. do not apply to gig workers.

3.1. INTERNATIONAL LANDSCAPE OF GIG WORKER STATUS

3.1.1. Position of status of gig workers in the United Kingdom

The UK courts have developed several tests to distinguish between regular employees and independent contractors. Key factors include the degree of control exercised, the existence of mutual obligations, and the right to substitution.

A. Uber BV v Aslam case[9]

In the landmark case of giant market aggregator Uber, UK Apex Court determined whether Uber drivers, who work for the car taxi service platform Uber in the United Kingdom, are employees under UK labour laws. The Court indicated that while the payment is structured on a per assignment or per round trip basis, the degree of control, the nature of the work, and the arrangements for performing functions under the gig platform align with those of a regular employee. Consequently, despite the appearance of being a gig worker, an Uber driver is entitled to claim labour law benefits from the market aggregator, Uber. This landmark judgment profoundly impacted the foundations of gig market aggregators, as they feared a loss of protection from strict labour law compliance and a significant risk to business profitability.

B. Independent Workers Union of Great Britain v. Central Arbitration Committee & Anor. case[10]**,**

In the landmark case of the *Independent Workers Union of Great Britain*, riders working for a gig platform demanded the protection of collective bargaining afforded to trade unions under

[7] *The Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023 s-2(e)*
[8] *The Code of Wages, 2019.*
[9] Uber BV v Aslam [2021] UKSC (U.K.) 05.
[10] *Independent Workers Union of Great Britain v. Central Arbitration Committee & Anor. case [2023] UKSC (U.K.) 43.*

British law. However, this contention was unequivocally rejected by the lower courts and ultimately by the Supreme Court. The courts determined that gig workers do not qualify as regular employees due to the contractual flexibility and the option to provide a replacement for work assignments. This judgment dealt a severe blow to gig workers who sought equal treatment as regular employees in Great Britain.

3.1.2. The legal status of gig workers in the United States of America

In the landmark case of *Dynamex Operations West, Inc. v. Superior Court*[11], the California Supreme Court established a new standard for determining whether a worker is an employee or an independent contractor. This standard, known as the ABC test, has significantly impacted the gig economy. Consequently, various states in the United States have adopted similar tests to classify gig workers and determine their eligibility for employee benefits.

A. Proposition 22: A Battleground for Gig Worker Rights

To nullify the effect of the Dynamex case Proposition 22 was launched as a California ballot initiative that passed in November 2020, reclassifying app-based drivers for companies like Uber, Lyft, and DoorDash as independent contractors rather than employees.

B. Protect App-Based Drivers and Services Act of 2020[12]

The major gig platforms operating in California were dissatisfied with the *Dynamex* case's interpretation, which negatively impacted their profitability. To circumvent strict labor law compliance, they proposed a document named "Proposition 22" aimed at classifying gig workers as independent contractors. Additionally, they launched a ballot initiative to enact new legislation safeguarding the social security of gig workers. This legislation was successfully passed after voter approval.

C. Landmark Judicial pronouncements by courts of the USA

The landmark case of *Castellanos et al. v. State of California*[13] petitioners challenge the constitutionality of Proposition 22, a California ballot initiative that classifies app-based drivers

[11] *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County, [2018] LA County, Ct. App. 2/7 B249546, Super Ct. No. BC332016.*
[12] *Protect App-Based Drivers and Services Act of 2020, Cal. Bus. & Prof. Code § 7448 (2020).*
[13] *Hector Castellanos et al. v. State of California and Katie Hagen, Case No. S279622, Supreme Court of the State of California (U.S.A.).*

as independent contractors. Plaintiffs argue that Proposition 22 infringes upon the state legislature's authority to establish labour protections and violates the state constitution's single-subject rule. Conversely, the defendants contend that Proposition 22 is a valid exercise of voter initiative and effectively balances the interests of gig workers and platforms. The case is currently before the California Supreme Court, which will determine the legality of Proposition 22 and its potential impact on labour rights in the gig economy.[14]

3.2. ANALYSIS OF GIG WORKER STATUS: EMPLOYEES OR INDEPENDENT CONTRACTORS?

Upon analysis of the legal position of gig workers' status as 'independent contractors' or 'employees' across jurisdictions like the USA and the UK, it can be fairly concluded that there is still significant ambiguity in the terminology appropriately encompassing gig workers. The hybrid nature of gig work positions them outside the scope of traditional employment, while the narrow definition of independent contractors is unsuitable for their classification. Consequently, there is a pressing need for an international convention, perhaps under the aegis of the International Labour Organization, to clarify the status of gig workers globally. Additionally, a model law establishing a social security regime for gig workers is essential to address the ongoing challenges of interpreting their employment status. After the enactment of the code on Social Security 2020, under provisions of the code, the gig workers were classified as a distinct category of workers and were designated as 'platform workers. In the year 2021, a petition was filed in the Hon'ble Supreme Court.[15] The prayer is for reconsidering the position of gig workers under the Social Security Code 2020 and to recognise gig workers as unorganised workers to safeguard their rights under the Unorganised Workers' Social Security Act, 2008[16]. **The primary objective of the PIL was to secure for gig workers the same legal protections and benefits afforded to unorganized workers.** By classifying gig workers as a distinct category under the Social Security Code, the legislation has fundamentally discriminated against them and denied them equal protection of the law. The hybrid nature of their employment has exacerbated this inequality, as existing labour laws inadequately address their rights and entitlements.

[14] Ibid.
[15] *Indian Federation of App-Based Transport Workers v. Union of India & Others*, Writ Petition (Civil) No. 1068 of 2021 (India).
[16] The Unorganised Workers' Social Security Act, 2008.

3.2.1. Aggregators and Social Security Code, 2020: A Compliance Analysis

The Social Security Code of 2020, failed to impose sufficient legal obligations on corporations and market aggregators. The 2020 union law lacks clarity regarding which entities must comply with state-mandated measures to protect the interests of gig workers. Social Security Code 2020 does not exclusively define the 'market aggregators' and 'e-commerce intermediaries' who effectively engage gig workers for their operational and logistic tasks as partners on per order commission basis.

A. Meaning of aggregators

The term aggregator has been defined in the Motor Vehicle Act 1988 after the insertion of clause (1 A)[17] that defines aggregator but in a very limited scope.

clause (IA) - "aggregator" -aggregator means a digital intermediary or marketplace for a passenger to connect with a driver for transportation.[18]

The most illustrative and exhaustive definition of aggregator has been given under the state-enacted regulation passed by the state of Rajasthan in the year 2023 and the definition reads as follows

2 (a) "aggregator" means a digital intermediary for a buyer of goods or user of a service to connect with the seller or the service provider, and includes any entity that coordinates with one or more aggregators for providing the services.[19]

B. Classification of market aggregators

A. *Ride-hailing aggregators e.g. Ola, Uber, Rapido, etc.*
B. *Food delivery aggregators and platforms include Zomato, Swiggy, Uber Eats, etc.*
C. *E-commerce and service delivery platforms like Amazon Flipkart Delhivery Urban Clap Etc.*

C. Legal liability of 'aggregator' under various national and state legislations

Registration and licensing: Section 93[20] of the Motor Vehicle Act 1988 prescribes that the market aggregators involved in the Transportation and conveyance business like Ola, Uber,

[17] *Inserted Vide the Motor Vehicles (Amendment) Act, 2019.*
[18] *The Motor Vehicle Act 1988. s-2(1A).*
[19] *The Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023 s-2(a)*
[20] *The Motor Vehicle Act 1988. s-93.*

Rapido, etc. need to register themselves as per the instructions and directions of the state government under the rules formed.

Policy for aggregators dealing in transport services**:** The Union Ministry of Highway and Road Transport has framed model guidelines for forming aggregators rules and registration processes by the state governments.[21] Based upon the directives of the Union Ministry of Highway and Road Transport the government of Kerala formulated The State Motor Vehicle Aggregator Policy 2024[22] notifying registration and licensing-related processes for market aggregators who are involved in the employment of the gig workforce.

13.5 - The Owner of a vehicle integrated with the Aggregator shall receive at least 80% of the fare applicable on each ride and the remaining charges for each ride shall be received by the Aggregator.

Above rule is a clear attempt of the government of Kerala to ensure that the gig workers are not exploited by the market aggregators and sufficient benefit shall be shared amongst the platform and partner.

IV. INDIA'S GIG ECONOMY: A SOCIAL SECURITY CRISIS?

With the increase in access to technology and the Internet, the scope of micro-workers in the gig economy of both skilled and unskilled nature has significantly increased in India. The COVID-19 pandemic significantly accelerated the growth of India's gig economy. However, this rapid expansion simultaneously underscored the precarious social and financial conditions faced by gig workers.[23] India is an emerging economy and has a large unskilled workforce available easily at a nominal pay. Hence, platform-based collaborative businesses are utilizing a cheap workforce for profit maximisation through labour exploitation and denial of rights. Although the platforms utilising gig workers for operations are continuously rising in India, the legal and procedural safeguards to protect their interests are inadequate and ineffective.[24]

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[21] *Motor Vehicle Aggregator Guidelines 2020*
[22] *GOVERNMENT OF KERALA (2024). STATE MOTOR VEHICLE AGGREGATOR POLICY G.O.(P)No.8/2024/.*
[23] *Bhattacharyya, U. & Jha, S., 2021. Understanding social security for gig workers: analyzing recent developments.* NLIU Law Review, *11, pp.61-88.*
[24] *Ibid.*

The gig model is now adopted in developing countries like India, which have an abundant and cheap labour force. The gig workers in India have no job security and no labour rights, and their terms and conditions of employment are entirely decided by the aggregators.[25] More importantly, neither the minimum wages nor any sick leave or leave with pay are paid to them.[26] Lastly, the unilateral system of rating the services of gig workers and terminating them upon a bad rating is creating a sense of deterrence among gig workers to work without committing even a single human error.[27] The new form of individualization of work is inflicting workers with sudden terminations, limited rights, and low remunerations. A similar situation exists in Kazakhstan, a continuous struggle has been seen among gig workers to ensure and secure basic rights and dignity at work.[28] Further, factors like inadequate safeguards for protecting employment rights and Social Security of gig workers are discouraging youth from seeking employment in the gig economy.[29]

Key social security issues faced by the gig economy that are mentioned under the Code of Social Security 2020 are: -

1. Paid leave / sick leave,

2. Insurance for employees,

3. Accidental compensation,

4. Occupational risks,

5. Retirement benefits including provident fund etc.

6. Protection against arbitrary termination

7. Minimum wages for gig workers

In India's digital labour economy, on-demand workers, including gig workers, are being hired through digital means and are ultimately exposed to economic exclusion, subcontracting etc. and they possess minimal bargaining power. Workers in the gig economy are bound to work

[25] *Webster, J. (2016, September). Microworkers of the gig economy: Separate and precarious. In New Labor Forum (Vol. 25, No. 3, pp. 56-64). Sage CA: Los Angeles, CA: SAGE Publications.*
[26] *Ibid.*
[27] *Ibid.*
[28] *Insebayeva, S. and Beyssembayev, S. (2023) 'Digital Platform Employment in Kazakhstan: Can New Technologies Solve Old Problems in the Labor Market?', International Labor and Working-Class History, 103, pp. 62–80.*
[29] *Ibid.*

for long working hours, and their interests are not safeguarded.[30] Recent instances in India have raised grave concerns regarding the deplorable conditions of gig workers. The role of the International Labour Organization in safeguarding the interests of gig workers may be said to be minimal as ILO has not formulated any standard code of conduct for regulating digital technology-oriented labour hiring and digital global work.[31]

4.1. Fairwork India Ratings 2022: Are Indian Gig Workers Protected?

In a report titled 'Fair Work India Ratings 2022 it was revealed that the majority of the Indian digital platform-based companies are not providing 'minimum wages' as mandated by the Social Security Code.[32] Furthermore, the condition for gig workers in most of the digital platforms and aggregators is miserable as even the hourly minimum wage is not being paid. which is ultimately resulting in a reduction in the decent standard of living of gig workers in India.[33]

India's gig platforms Flipkart, Swiggy, Zomato Zepto, Ola, Pharmeasy, Uber, and Big Basket, Amazon Flex, etc., are quite reluctant to strictly adopt the minimum wage policy for gig workers. The reason is that if they adopt regulatory norms governing minimum wages, their margin of profit will reduce, and eventually they will have to shift the burden of increased delivery costs to customers, which will eventually result in a reduction in demand due to an increase in the cost of service.[34] For instance, if the minimum wage-related legal requirements are strictly followed, gig platforms have to either sacrifice their profit or charge extra to meet these legal requirements, and in both cases, the company will be at a loss.[35]

The outcome of the report on certain Social Security parameters are elaborated in detail below

A. Minimum wages policy

As per the Fair Work ratings report it has been revealed only a few major market aggregators like Big Basket, urban Company, Flipkart, etc have operationalized certain welfare policies to

[30] Corujo, B.S. (2017). The 'Gig' Economy and its Impact on Social Security. *European Journal of Social Security*, 19(4), pp.293–312.

[31] Calvão, F., & Thara, K. (2019). Working futures: The ILO, automation and digital work in India. In *The ILO@ 100* (pp. 223-247).
[32] THE FAIRWORK PROJECT (2022). *Fairwork India Ratings 2022*. pp.4–14.
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*

ensure that the requirement of the 'hourly minimum wage' for gig workers shall be fulfilled and the living condition of the workers can be improved. However, the report found that there is no statistical evidence of any aggregator implementing the above-mentioned policy in its letter and spirit.

B. Medical or sick leave with pay policy

As per the report, only three market aggregators have safeguards to ensure that workers get minimum pay during medical illness or other occupational hazards A helpline in this regard has also been implemented.

C. Protection against discrimination through Grievance redressal

In the gig economy, no formal trade unions are representative bodies exist and it has been disclosed in the report that e-commerce intermediaries and market aggregators do not recognize any collective body of workers to Channel the grievances of gig workers.

4.2. NITI Aayog Report on The Gig Economy and Social Security Code 2020.

Key statistical highlights: As estimated by Niti Aayog, the total Indian workforce employed in the gig economy currently is nearly 77 Lakhs, but it is reported to rise to 2.3 crore by 2029.[36] It is noteworthy that, due to factors like flexible working, greater autonomy etc. the participation of the younger population in platform-based economies has increased, and in the future, the hiring rate of gig workers is likely to rise.[37]

4.2.1. Key findings of NITI Aayog report

In the gig economy, employers evasively deny the obligation to follow the labour welfare legislation of the country. The report by NITI Aayog appreciated the rise of the gig economy and also stated that nearly one-third of the total gig workers are in the low-skilled category.[38] The NITI Aayog report further suggested that data containing information relating to gig workers shall be collected by designated government departments so that the welfare schemes as directed by the code on Social Security 2020[39] can be extended to gig workers working on

[36] *NITI Aayog (2022). India's Booming Gig and Platform Economy, Perspectives and Recommendations on the Future of Work. NEW DELHI: NITI Aayog, pp.10–25.*
[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*

various gig platforms.[40] With the adoption of modern technology, millions of Indian workers are now employed by gig platforms in various sectors and most of them are aged between 18 and 45. The report suggested that for the welfare and empowerment of gig workers, the government shall formulate a policy on passing quick and collateral-free loans for acquiring essentials including bikes for delivery purposes, smartphones, etc., be landed by the banks so that a beginner can begin his career in the gig economy as a platform worker.

4.2.2. RAISE: The way forward

The report suggested a R.A.I.S.E. framework for operationalizing the code of Social Security 2020.[41] Under this approach, social security concerns of gig workers through policy safeguards will be ensured. It is praiseworthy that Niti Aayog came forward with creative suggestions to implement labour welfare provisions for gig workers.

4.2.3. Criticism of the Niti Aayog report

The Niti Aayog report fails to shed light on challenges relating to implementation mechanisms for safeguarding the rights of gig workers in India. Laws and policies shall be directed towards effective compliance of labour social security policy by digital service-oriented platforms, which employ and utilise gig workers for their business purposes.

V. THE CODE ON SOCIAL SECURITY, 2020: A SAFETY NET FOR INDIA'S GIG WORKERS?

The gig economy in India has been flourishing for the past few decades, but it has remained highly unregulated. The low-skill gig workers were continuously exposed to exploitation and remained unheard and unrepresented. Before the enactment of the Code on Social Security 2020, the aggregators took advantage of the legal lacunae and shortcomings of outdated legal provisions contained in Indian labour law legislation to escape from their obligations. The Ministry of Labour & Employment was initially reluctant to recognise and formalise gig workers who are working on gig platforms but the first legislative attempt made by the union government to recognise and regulate gig workers in the country enacted the Social Security Code 2020. The code integrated several labour welfare provisions of existing laws and directed for implementation of various schemes and regulations. The key idea behind the inclusion of

[40] *Ibid.*
[41] *Ibid*

gig workers in the 2020 Code was the eradication of the malpractices done by aggregators and service providers in the gig economy. The Social Security Code 2020 has not yet been properly enforced by the government of India. The welfare provisions contained in the code do address the challenges being faced by gig workers and other platform workers in India.

5.1. Important Provisions of The Social Security Code 2020 For Gig Workers

A. Extension of Social Security to Gig Workers

Under provisions of Section 2(78)[42] just as in the case of unorganised sector workers, gig workers are now entitled to inclusion in Social Security-related schemes and policies, which will be formulated based on the new Social Security Code.

B. State Government's Role in Gig Worker Protection

Furthermore, under S-6[43], the state government is directed to formulate and monitor welfare schemes for gig workers and platform workers.

C. Central Government's Regulatory Framework

Under Section 45[44], the Union Government is directed to formulate a scheme for extending applicable benefits and labour rights to workers in the gig economy.

D. Social Security Benefits for Gig Workers

Under Chapter 9 of the New Social Security Code 2020[45], safeguards for protecting the rights of gig workers are elaborated, and now gig workers are entitled to accidental cover compensation for loss, old age protection education, and they are also entitled to seek benefits of other labour welfare schemes.[46] Under this chapter, both the state and central government have been entrusted with the responsibility to safeguard the interests of gig workers.[47]

E. Grievance Redressal and Dispute Resolution

Section 112 of the Social Security Code directs the appropriate government to establish call centres and helpline facilitation centres for addressing grievances and appropriately providing legal assistance in cases of exploitation of gig workers.[48]

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[42] *The Code on Social Security, 2020 s 2(78)*
[43] *The Code on Social Security, 2020 s 6.*
[44] *The Code on Social Security, 2020 s 45.*
[45] *The Code on Social Security, 2020 s*
[46] *The Code on Social Security, 2020 s 111-112.*
[47] *Ibid.*
[48] *The Code on Social Security, 2020 s 112.*

F. Enrolment in the National Portal for gig workers

It has also been stated that gig workers and other unorganised workers shall obtain enrolment in a database so that their interests can be well protected and suitable schemes can be formulated accordingly. However, under Section 113[49], the procedure for registration and the eligibility for registration are prescribed, and both the union and state governments are directed to act by the provisions to facilitate the registration of gig workers.

G. Governing Body for Gig Worker Welfare

Section 114 states that a Social Security Board shall be established by the union government to safeguard and formulate the rights and entitlements of gig workers through constant research.[50] Under section 114[51] **The provision granting the central government discretion to exempt aggregators from Social Security Code liabilities is a cause for concern.** Given the substantial revenues generated by major platforms like Ola, Uber, Zomato, and Swiggy, there is a risk that these companies could leverage their financial influence to secure exemptions, thereby undermining the code's intent to protect gig workers' social security.

H. Social Security Fund for Gig Workers

Furthermore, under Chapter 14, Section 141[52], there is a provision regarding the establishment of a fund for funding welfare schemes formulated to safeguard the interests of gig workers. However, various funds may receive funding through sources like aggregate state funds and even corporate social responsibility funds.[53] However, a significant flaw in this provision is the absence of a mandate for the central government to contribute to the fund. Moreover, the sources of funding for the fund's expenses are not specified. Consequently, even with a concerted effort to establish and manage the fund, the government may be constrained by the legislation from employing coercive measures to collect contributions.

[49] *The Code on Social Security, 2020 s 113.*
[50] *The Code on Social Security, 2020 s 114.*
[51] *Ibid.*
[52] *The Code on Social Security, 2020 s 141.*
[53] *Ibid.*

5.3. The Aftermath: Implementing the Social Security Code, 2020

India's labour and social security landscape sees a major reset with the Social Security Code, 2020 While it holds the potential to make processes more efficient and improve outcomes for workers, its application has been a difficult one in progress. The Code has the effect of imposing additional compliance obligations, which can increase costs and administrative burdens. However, it also streamlines some components and possibly helps you with benefits in the long run.

5.3.1. The Union Government's initiatives for safeguarding Gig Worker rights

Following are the main initiatives and steps Taken by the Central Government to Implement Provisions of the Social Security Code for the Protection of Gig Workers

A. E-shram portal for gig workers

The current progress of the Union Ministry of Labour and Employment, as reflected in parliamentary question answers by the honorable Minister, indicates that the Union Government has effectively activated the e-Shram portal to register unorganized and gig workers. Through registration on this portal, the government aims to extend Provident Fund-related benefits to gig workers at its expense. Since September 2022, the portal has been registering gig workers, but out of millions of gig workers, only around 45000 have enrolled thus far.[54] This data indicates that the implementation of the registration portal is ineffective, and a lack of education and awareness about the portal is a significant obstacle to ensuring social security for gig workers.

B. Provident fund and Career benefits initiative

Provident Fund benefits are also made available to gig workers through the MaanDhan portal under the Pradhan Mantri Shram Yogi Pension scheme for individuals aged 18 to 40 years. Payments are made using a unique registration number assigned to each registered gig worker.[55] The portal further offers access to the National Career Service portal, empowering gig workers to search for better employment opportunities based on their skills and

[54] *Government of India (2023). Government of India, Ministry of Labour and Employment, Lok Sabha Unstarred Question No. 2856, 7 August 2023.*
[55] *Ibid.*

requirements. Platform workers are now eligible for skill enhancement and apprenticeship opportunities through the digital portal of the Ministry of Skill Development, Government of India.[56]

5.3.2. State-Specific Strategies for Social Security Code 2020 Compliance

Although the Social Security Code, 2020 is a precedent to labour insurance, it requires jurisdictional enactment for proactive and continuous implementation. Considering the heterogeneity of the economic landscape and socio-demographic profile across different states in India, it seems that the prevailing one-size-fits-all implementation of this Code might be a tad overwhelming. States that have better digital infrastructure will be able to accelerate registration, claims and benefits disbursement processes. Some of the major state initiatives are as follows -

A. Karnataka State Gig Workers Insurance Scheme 2023

To give effect to the provisions of The Social Security Code 2020 the state of Karnataka has recently introduced a scheme to extend insurance benefits to gig workers within the state who are engaged on various platforms with market aggregators. This pioneering scheme covers all gig workers aged between 18 and 60. Notably, the entire financial burden of the insurance is borne by the Karnataka government. Karnataka is the first state in India to implement such a scheme, Karnataka offers coverage for various risks including accidental death, life insurance, and medical expenses incurred due to road accidents or other occupational hazards.[57]

B. The Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023

The first model law to implement the Social Security Code 2020's provisions was the Rajasthan Platform-Based Gig Worker (Registration and Welfare) Act 2023[58], which includes several provisions to put the Code of 2020's safeguards into effect.

Under the Act, the state has constituted a board for the welfare of gig workers. Section 3 and Section 8[59] outline the registration process for platform-based gig workers via a state

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[56] *Ibid.*
[57] *Karnataka State Government, 2024. Karnataka State Gig Workers Insurance Scheme. Available at: https://ksuwssb.karnataka.gov.in/info-2/Karnataka+State+Gig+Workers+Insurance+Scheme/en [Accessed 2 July 2024].*
[58] *The Rajasthan Platform Based Gig Workers (Registration And Welfare) Act, 2023.*
[59] *The Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023 s.8.*

government platform, ensuring the maintenance of a database and welfare ID, as well as the effective implementation of the scheme designed for their benefit.

Furthermore, Section 14[60] of the Act outlines a grievance redressal mechanism for platform-based gig workers. It establishes a quasi-judicial authority to resolve their grievances. Additionally, the Act provides for a right of appeal against the authority's decisions, which can be filed within 90 days of the order.[61]

5.4. The Social Security Code, 2020: Gap in Protection for Gig Workers

Although the Social Security Code 2020 is equipped to bring uniformity in the treatment of gig workers. The dynamic nature of employment in the gig economy poses several challenges that need to be addressed by filling the legislative gaps in the governance of gig workers. Furthermore, The Social Security Code 2020 is intended to strike a balance between the rights and obligations of the aggregator and gig workers, as there is a huge disparity and it is mostly the aggregator who dictates the rules by using the dominant position. These terms and conditions are accepted by the gig workers without any negotiation or alteration. Some major criticisms of the code are as follows: -

I. **Discriminatory treatment of gig-workers as a separate class:** The legislation is expected to formulate legislative enactments so that discrimination and disparities can be eradicated, but it is not wrong to say that the Social Security Code 2020 actually created a classification and is severely affecting the right to equality[62] enshrined under the Constitution of India by discriminating regular employees or labourers with gig workers merely on the ground that the latter is a partnership-based model and thus does not attract provisions and protections of the labour law of the land.

II. **Lack of effective dispute redressal mechanism:** Separation of classification in terms of the nature of work gives recognition to gig workers, but at the same time, it snatches the right of gig workers to bring disputed matters under adjudication. In cases of infringement of the rights and Entitlements of the gig workers, they cannot directly bring the dispute into the labour courts as the Social Security Code 2020 vested the responsibility of creating a helpline and grievance portal to the Central government but

[60] *The Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023 s.14.*
[61] *Ibid.*
[62] *Ind. Const. art. 14.*

the language used by the legislators is more of directory giving discretion to the union government for establishing the portal at its convenience. It is surprising to see that instead of empowering gig workers to directly approach judicial forums for violation of their rights an indirect way of dispute resolution has been created depriving the gig workers of their basic right to access courts and seek legal remedy.

III. **Lack of safeguards for minimum and living wages:** The code was supposed to eradicate the discrimination that is currently being caused between employees and gig workers by giving a free hand to aggregators. Two outright defy the grant of hourly or per-assignment minimum wages to gig workers. The Wages Code of 2019 does not even mention the gig workers' right to seek minimum wages or the legal records available, which is a major flaw in the Social Security legislation as it has failed to recognise a new form of work emerging in Indian jurisdiction.

IV. **Lack of penal provisions for causing deterrence:** For effective implementation of any welfare legislation, penal liability for non-fulfilment of obligations needs to be inflicted for violations of provisions through non-compliance. The Social Security Code 2020 directs states to develop welfare policies but fails to create penal provisions if the market aggregator fails to give effect to the provisions and scheme formulated for gig worker protection.

V. **Loose language and weak compliance mechanism:** Another criticism of the provisions for gig workers given in the Social Security Code 2020 is that although there are safeguards for protecting the rights of gig workers in the code, the language does not stipulate any deadline for giving effect to the provisions contained in the Social Security Code 2020. The tone of the legislation is advisory and directory-like instead of authoritative and mandatory; hence, the central government is not bound to give effect to the provisions contained in the Social Security Code 2020 for gig workers.

VI. CONCLUSION

Based upon a wide range of literature and reports analysed during the course of the study, it can be concluded that the engagement of gig workers is on the rise in most of the platform-based service sectors of India. As the gig economy expands and potentially becomes a major employment sector, addressing the challenges faced by gig workers is crucial. Gig workers in India face significant vulnerability due to their exclusion from the 'employee' definition, which leaves them unprotected from labour welfare provisions. While the Union government's approach to implementing the provisions of the Social Security Code 2020 for gig workers is commendable to some extent, significant efforts are still required to improve the conditions of gig workers in India. The Social Security Code 2020 is a great step but pinpointed strategies need to be formulated for effective implementation of the 2020 Code, and a deadline needs to be set for fulfilling the objectives of the 2020 Code. A balance needs to be created as the inclusion of gig workers in the category of regular employees would inflict a severe economic burden on market aggregators, potentially jeopardizing their profitability. Imposing stringent conditions solely on the private sector to ensure gig workers' social security is unrealistic. Instead, a collaborative effort between government and private sectors is essential for mutual support and cooperation in safeguarding the social security of gig workers. Lastly, International organizations such as the International Labour Organization should take the lead in formulating a global regulatory framework to ensure social security for gig workers worldwide. This framework could serve as a foundation for nations to adapt their domestic legislation.

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DARK PATTERNS THAT PLAGUE INDIAN E-COMMERCE

- *Swathi.S[*] and Sadhana S[**]*

ABSTRACT

This article intends to shed light on the various dark patterns prevalent in the Indian E-Commerce market. We have conducted a survey with a sample size of around 130 consumers, with the aim of spreading awareness regarding the various dark patterns in society and how these practices affect the everyday life of an average consumer and market. A general study of the multiple initiatives implemented at the global level and the differences in the rules and regulations governing traditional and digital markets have also been enumerated. A consolidated study of various ways to enforce positive changes in E-Commerce platforms has been presented.

Keywords: ***Dark patterns, Consumer protection, E-commerce, Unfair Trade Practices***

I. INTRODUCTION

We have all used an online platform to purchase goods or avail services. In today's day and age, it is impossible to live without utilizing various e-commerce websites. While these sites seem to have made our lives easier, they have all duped us in some way or another. We have all had to provide data to sites without our consent merely to avail ourselves of a service they offer. Haven't we all had to search for the unsubscribe button/delete button on an e-commerce website? Have you ever added an item to your shopping cart from an e-commerce site because of an apparent offer only to later realize the "offer" did not really lower the price? Have you ever bought something in a hurry merely because the site stated there were only a few products left in stock, only to come back a week later and find it has still not gone out of stock?

These are the consequences of a wide array of unfair trade practices these e-commerce sites use to fool the consumer. It may seem like a smart marketing tool to some, but the reality is

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that these are sinister tricks used to exploit innocent customers. This article investigates the dark practices of various digital platforms and how these practices can be curbed.

II. WHAT ARE DARK PATTERNS

The term "dark pattern" was first coined by a user experience specialist, Harry Brignull in 2010 that describes how websites trick consumers into doing something that is detrimental to their interests. “The US federal commissioner, Rohit Chopra, also recently defined dark patterns as features designed by companies or any online service to deceive, steer, or manipulate users' behaviour in a way that is profitable to the providers.”[1] The OECD committee defined dark commercial patterns as “business practices employing elements of digital choice architecture, in online user interfaces, that subvert or impair consumer autonomy, decision-making or choice. They frequently manipulate, coerce, or deceive consumers and are likely to cause direct or indirect consumer harm in a variety of ways, even though it may be challenging or impossible to measure such harm in many cases.”

Section 2 clause 1(r) of the Consumer Protection Act, 1986 defines “Unfair Trade Practices” as any trade practice that utilises unfair means to promote the sale, use or supply of any goods or services.[2] This definition of unfair trade practices can be interpreted to include some kinds of dark patterns. For instance, dark patterns such as misleading or disguised ads would amount to unfair trade practices. In simple words, “dark patterns” are tactics used to make consumers buy a product or subscribe to any service which they did not intend to. Dark patterns also come under the umbrella of “negative option marketing,” which refers to terms and conditions that allow the sellers to interpret the consumer’s silence as acceptance. Some of the examples include automatic renewal of subscriptions and free trial programs.

[1] *Federal Trade Commission, Dark Patterns in the Matter of Age of Learning, Inc. Commission File Number 1723186 September 2, 2020*

[2] *Consumer protection Act,1986*

2.1. Classification

Dark patterns in various digital platforms take different shapes[3] and forms[4]. A study by Princeton found that out of 10,000 websites, 1,200 use dark patterns to influence their consumers. They also identified twenty-two third-party entities that help integrate the dark patterns into websites[5]. It also classifies dark patterns into 15 types. Harry Brignull classifies Dark patterns into 12 types[6]. These include the following:

- Sneak in the Basket: Pre-checked boxes subscribe customers to products/services without informed consent. Instead, suggest additional items that can be added before checkout, allowing consumers to select products consensually.

- Forced Continuity and Expensive Auto-Renewals: Automatic subscriptions and renewals occur without notice. E-commerce websites should notify customers when trial periods expire and renew subscriptions only after voluntary agreement.

- Urgency and Fake Scarcity: False urgency or scarcity is created to rush purchases. Sites should maintain transparency and allow customers to explore all options without pressure.

- Hidden Costs: True costs of products are concealed. All costs should be disclosed upfront in the final cart to enable informed decisions. Unfair Presentation of Alternatives and Price Comparison

- Prevention: Viewing or misrepresenting alternative products is prevented. Sites should allow viewing of all options without presenting fake negative reviews of competitors.

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[3]The Organization for Economic Cooperation and Development, Highlights Concerns over "Dark Patterns" - October 29, 2022

[4] Beni Chugh & Pranjal Jain, Unpacking Dark Patterns: Understanding Dark Patterns and Their Implications for Consumer Protection in the Digital Economy, RS RR (Apr. 2021), https://rsrr.in/wp-content/uploads/2021/04/UNPACKING-DARK-PATTERNS-UNDERSTANDING-DARK.pdf (accessed Mar. 2, 2023).

[5] Arunesh Mathur et al., Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites, 81 ACM (Nov. 2019), https://arxiv.org/pdf/1907.07032.pdf (accessed Mar. 10, 2023).

[6] Harry Brignull, What are deceptive patterns? https://www.deceptive.design/ accessed on 10 March 2023

- Roach Motel Designing: It is easy to sign up but difficult to unsubscribe. Simplify the subscription cancelling process and introduce packages that motivate retention.

- Privacy Zuckering: Oversharing of personal data is forced. Sites should be truthful about the information required and its purpose, avoiding the sale of private data.

- Trick Questions: Confusing language is used to trick consumers. Clear, simple language should be used in questions and forms.

- Social Proof: Consumer reviews and testimonials are manipulated. Focus on providing higher quality products instead of relying on fake reviews.

- Bait and Switch: Consumers are led to unintended outcomes. Ensure actions lead to expected and intended results.

- Friend Spam: Access to contact lists is used to spam friends. Clearly state the intent of accessing contacts and provide opt-out options.

- Repeated Requests, Nagging, or Confirm Shaming: Annoying pop-ups and guilt-tripping are used. Show pop-ups sparingly, ensuring they do not disrupt the user experience, and confirm actions with simple, respectful messages.

III. CASE STUDIES OF DARK PATTERNS

Dark patterns are commonly found in the ecommerce industry, where businesses often employ manipulative design techniques to influence consumer behaviour. An examination of case studies of dark patterns can aid in comprehending the commonality and adverse consequences of such practices. A 2019 Princeton University study that analysed 53,000 product pages from 11,000 shopping websites found that 11% of the surveyed sites used dark patterns that were deemed aggressive, misleading, deceptive, and possibly in violation of the law.[7] The prevalence of these patterns in ecommerce can be attributed to the industry's competitive nature, as businesses often prioritize profits over user experience. However, the use of dark

[7] *Arunesh Mathur, Gunes Acar, Michael J. Friedman, Elena Lucherini, Jonathan Mayer, Marshini Chetty, and Arvind Narayanan. Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites , Article 81 (November 2019), 32 pages https://arxiv.org/pdf/1907.07032.pdf accessed on 10 March 2023*

patterns can lead to a loss of trust among consumers, which may ultimately harm a company's reputation and long-term success.

In India, consumer complaints regarding E-commerce increased by over 300% over the past few years.

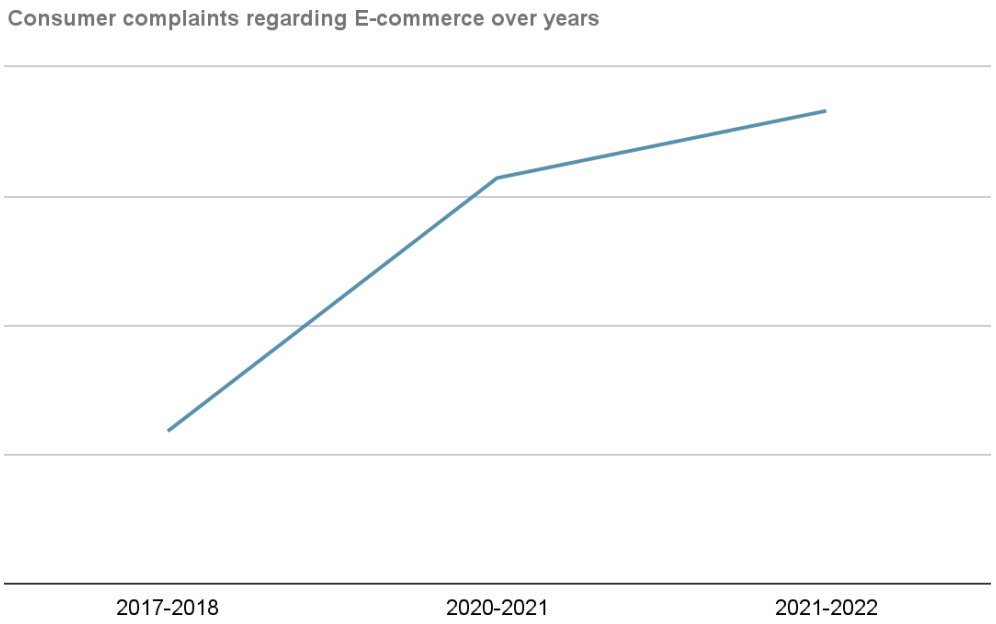

Fig. 2 Indicates the number of e-commerce complaints filed by consumers from 2017 to 2022[8].

[8] *Indo-Asian News Service, 'UP tops list as e-commerce complaints records 300% spike in last 5 years' The Economic Times (Originally published on Aug 21, 2022)*

Around 5.12 lakh complaints were filed through National Consumer Helpline between April 2019 to November 2021. [9]

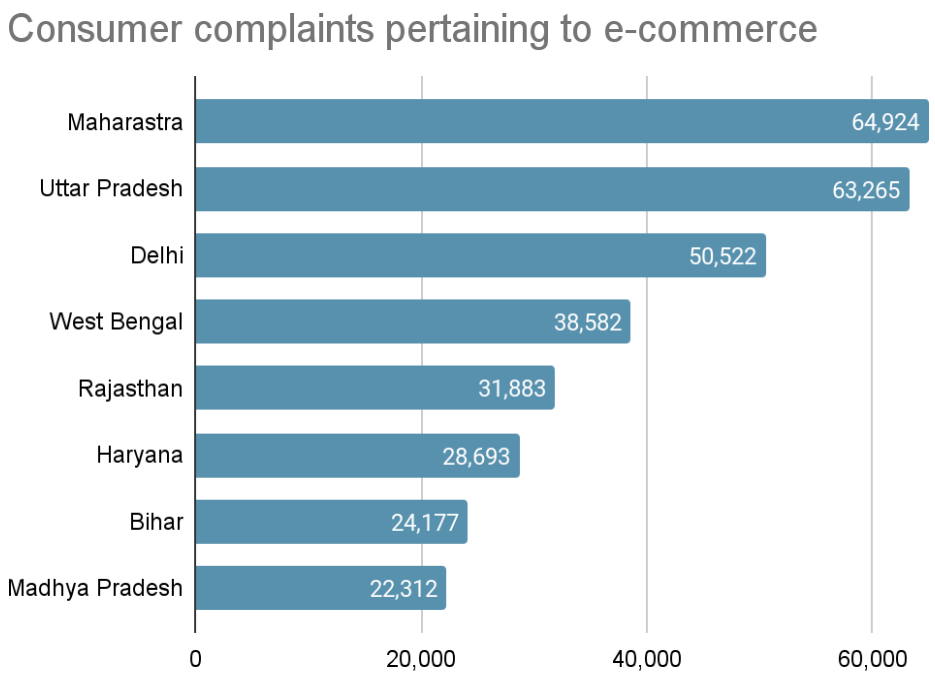

Fig.3 indicates the number of consumer complaints filed all over India through the National Consumer Helpline. [10]

3.1. Amazon

Amazon, the largest e-commerce platform on the market, is no stranger to dark patterns. There have been various cases filed against them. In 2014, in the case of *Federal Trade commission, v. Amazon.com, inc.,*.[11] Amazon faced a legal action by the FTC for their unfair practices. Amazon had released an app for kids which allowed the children to make in-app purchases without the account holder information. These purchases were discussed as "play." Amazon had to settle for over 70 million dollars.[12]

[9] *Supra 12*

[10] *Outlook, 'More Than 5.12 Lakh Complaints Registered Against E-Commerce Between April 2019-November 2021'* https://www.outlookindia.com/website/story/business-news-more-than-512-lakh-complaints-registered-against-e-commerce-between-april-2019-november-2021/405561 *accessed on 10 March 2023*

[11] *Fed. Trade Comm'n v. Amazon.Com Inc., No. C14-1038-JCC (W.D. Wash. Feb. 23, 2017)*

[12] *Shivam, 'Dark Patterns' on the Internet'* https://www.adda247.com/upsc-exam/dark-patterns-on-the-internet/ *accessed on 20 March 2023*

In *Dorobiala v. Amazon.com,* Inc.(2:22-CV-01600)[13] a class action suit filed on November 9, 2022, cited a report by Business Insider[14] in March 2022. The report stated that Amazon had reduced their cancellation rate by 14% simply by making the cancellation policy more difficult. They had tried to retain subscribers through a secret project called "Project Illiad." It prevented people from reaching the last stage of the cancellation process by "adding new offers and multiple layers of questions." According to the suit to start the cancellation process the user must wade through almost 3 pages and various questions. This is a type of Dark pattern called Roach Motel Designing. Despite the hurdles if a user reaches the last page they are confronted with pop-ups and manipulative messages. This tactic is called confirm shaming. And even after the user reaches the last page to cancel their membership it does not stand cancelled till they click the "end now" button.

3.2. Zomato

Zomato has a policy stating that they will provide on time delivery or the order is free. While this service is abundantly advertised the same is not practised. Instead of making true on this promise Zomato cancels orders that are predicted to be delivered late. This is a dark pattern followed by Zomato and they have been fined for the same.[15]

IV. INITIATIVES TO CURB DARK PATTERNS

Dark patterns can be detrimental to consumers, leading to reduced trust in brands, decreased engagement with online platforms. Consumers are becoming more aware of the manipulative tactics used by companies to influence their behaviour and are demanding greater transparency and accountability. Lawmakers and regulatory bodies are also taking notice and introducing new rules and regulations to protect consumers from the harmful effects of dark patterns. By

[13] *Dorobiala v. Amazon.com, No. 2:22-cv-01600-RSM (W.D. Wash. Jan. 4, 2023).*

[14] *Hannah Towey & Eugene Kim, Amazon used a sneaky tactic to make it harder to quit Prime and cancellations dropped 14%, according to leaked data, Business Insider (Mar. 16, 2022),*

[15]*Aneesha Mathur, 'Consumer forum asks Zomato to pay Rs 10,000 fine over cancelled pizza order' India Today (Aug 22, 2022)*

taking steps to curb the use of dark patterns, companies can build trust, loyalty, and long-term relationships with their customers.

4.1. Indian Laws

India's Ministry of Consumer Affairs has enacted The Consumer Protection Act, 2019, and the Consumer Protection (E-Commerce) Rules, 2020, effective since July 2020. These regulations mandate e-commerce businesses to disclose product and seller information, appoint a grievance officer, and acknowledge complaints within 48 hours. The changes empower consumers and enable authorities to take swift action.

4.1.1. Legal Metrology (Packaged Commodities) Rules of 2011

In accordance with the Legal Metrology Act of 2009, the Legal Metrology (Packaged Commodities) Rules of 2011 dictate that any e-commerce entity must take measures to display certain information on their digital and electronic network when conducting transactions. This includes details such as the manufacturer or packer or importer's name and address, maximum retail price (MRP), country of origin, common or generic name of the commodity, net quantity, month, and year of manufacture, as well as customer care details.

4.1.2. Consumer Protection Act 2019

The Consumer Protection Act of 2019 in India has widened the definition of "consumer" to include individuals who purchase or avail goods and services online through electronic means. As a result, consumers who buy products online are entitled to the same protections under the law as those who purchase goods in physical stores. Under this act, e-commerce and electronic service providers are also defined, and provisions are in place for consumers to file complaints against online retailers in case of internet fraud. This allows consumers to seek legal recourse in the event of any fraudulent activities, ensuring that online retailers are held accountable for their actions.

The Act also provides for data protection, and any disclosure of personal information by an electronic service provider is considered an unfair trade practice under Section 2(47)(ix) of the Act. To ensure consumer privacy, online retailers are required to protect the personal information of their customers and are prohibited from sharing this information without the consumer's consent. Another important provision introduced in the Consumer Protection Act

of 2019 is the concept of product liability. Despite the absence of any negligence on the part of the manufacturer, seller, or service provider, this rule permits consumers to pursue compensation for any harm or injury brought on by a product or service. This provision ensures that consumers are adequately protected against harm caused by faulty products and provides them with a legal avenue to seek compensation for any damages incurred. The introduction of product liability has shifted the responsibility from the buyer ("caveat emptor" or "buyer beware") to the seller ("caveat venditor" or "seller beware.)"[16]

4.1.3. Consumer protection (E-commerce) rules 2020

The rise of e-commerce has created new opportunities for traders to influence consumer behaviour and encourage purchases. However, concerns have also arisen about the potential for unfair or deceptive practices in this online marketplace. In response, the Consumer Protection Rules 2020[17] were introduced, with the aim of safeguarding the interests of both consumers and product/service providers.

Rule 4 of Consumer Protection Rules stipulates the responsibilities that E-commerce entities must adhere to when dealing with consumers. These obligations include refraining from imposing cancellation charges on consumers unless they bear comparable costs, ensuring prompt refund payments in response to consumer requests, and avoiding the imposition of unreasonable and unjustifiable expenses to generate profits.

Rule 5 of the Consumer Protection (E-Commerce) Rules, 2020 mandates that e-commerce entities operating in the marketplace must disclose certain information to consumers, and ensure that the information provided is truthful, accurate, and not misleading. They must also maintain a record of all relevant information. If an e-commerce entity provides false or misleading information, or withholds relevant information from the consumer, they may be subject to penalties and other legal consequences.

In accordance with Rule 6 of the Act, sellers in the online marketplace are prohibited from using any unfair trade tactics when offering consumers products or services. In addition, the

[16]*Sidharth Sethi, Bindu Janardhanan, Product Liability Under the Consumer Protection Act, 2019: Let the manufacturer/seller Beware! (Bar & Bench July 25, 2020) Product Liability under the Consumer Protection Act, 2019: Let the manufacturer/seller beware! accessed on 8 March 2023*

[17] *Consumer Protection (E-Commerce) Rules, 2020*

seller must not refuse to accept returns or provide refunds to consumers in cases where such returns or refunds are warranted. They must also clearly specify their return and refund policies to consumers before the purchase is made. The inventory e commerce entities also have the same duties and liabilities under Rule 7.

4.1.4. Advertising Standards Council of India (ASCI) code

In response to the growing issue of disguised ads, the Advertising Standards Council of India (ASCI) urged social media influencers to disclose promotions to ensure transparency and enable consumers to make informed decisions. The blurring of lines between content and ads raises questions about the ability of consumers to distinguish between the two. ASCI found that 29% of ads in 2021-2022 were disguised ads by influencers, which is a form of dark pattern. In 2021, the ASCI established a task force of twelve members to investigate the prevalence of various dark patterns in India's advertising landscape. The task force discussions led to proposed amendments to the ASCI code to address concerns related to advertising practices such as bait and switch, false urgency, drip pricing, and disguised ads.[18]

V. JUDICIAL DECISIONS:

Paras Jain v. Amazon Seller Services (P) Ltd[19]

Paras Jain had ordered a mobile phone from Amazon and had paid for the shipping charges. However, the phone started heating up soon after he received it, so he decided to return it. Unfortunately, he was unable to do so due to a sudden change in the return policy specifically for mobile phones. Jain argued that this sudden change in policy only for mobile phones amounted to unfair trade practices. He also pointed out that the website advertised an easy return policy, even though it did not apply to mobile phones. Thus, the advertisement is misleading and would attract punitive damages. However, the National Commission rejected Jain's plea, stating that the change in policy was made due to increased misuse by consumers

[18] *DARK PATTERNS The new threat to consumer protection- Discussion Document (ASCI 2022 Report) pg.10 - 13*

[19] *Paras Jain v. Amazon Seller Services (P) Ltd., Consumer Case No. 930 of 2017 (NCDRC 2021).*

and was widely publicized in various newspapers. Therefore, it did not amount to unfair trade practices.

All India Online Vendors Association vs Flipkart India Private Limited[20]

The Competition Commission of India (CCI) dismissed allegations of abuse of dominance by All India Online Vendors Association against Flipkart entities. CCI defined the relevant market as services provided by online marketplace platforms for selling goods in India, and found that no player was commanding a dominant position in the market. CCI noted that the B2B arrangements of Flipkart were non-exclusive and did not impose any restraints on resellers. The structural link with WS Retail existed only until 2012 and WS Retail was no longer a seller on Flipkart's marketplace. CCI concluded that no contravention of Section 4 of the Act was made out against Flipkart entities, as intervention in the nascent and evolving model of retail distribution in India needs to be carefully crafted to avoid stifling innovation.

Amazon Seller Services Pvt. Ltd. v. Central Consumer Protection Authority[21]

Amazon has been selling pressure cookers without the necessary BIS certification, which is in violation of the CPA 2019. However, the counsel on behalf of Amazon argued that they were not provided with the investigation report, which is required as the basis for action under Section 20 of the CPA. Additionally, it was argued that Amazon could be protected from liabilities under Section 79 of the Information Technology Act of 2000. However, the court rejected the plea and was instructed by the court to inform the buyers of the 2265 pressure cookers that were sold on its platform about the CCPA order. However, any actions related to the recall of these items and reimbursement have been delayed until the next hearing.***Amazon Seller Services Pvt. Ltd. vs Love Kumar Sahu & Anr***[22]

The complainant purchased a mobile phone from Amazon and requested it to be delivered to another person. However, the phone was found to be defective and was replaced thrice. Finally, the consumer demanded a refund, but Amazon refused, citing their policy of only offering refunds within 15 days of purchase. The complainant filed a complaint against Amazon for not

[20] *All India Online Vendors ... vs Flipkart India Private Limited & ... [2018] 20 of 2018*

[21] *Amazon Seller Services Pvt. Ltd. v. Central Consumer Protection Authority, [2022] W.P.(C) 13269/2022, CM APPL. 40236/2022 (Delhi HC).*

[22] *Amazon Seller Services Pvt. Ltd. vs Love Kumar Sahu & Anr. [2018] FA/2018/05*

providing the refund. Amazon argued that the complainant is not considered a complainant under the Consumer Protection Act and that the manufacturer should be held responsible for the defective mobile phone, not the intermediary. However, the court held that both the manufacturer and Amazon are jointly and severally liable for refunding the amount to the complainant.

Hamdard National Foundation (India) & Anr. vs Amazon India Limited & Anr[23]

The court directed Amazon sellers to disclose details such as the names of the sellers, their contact details, and the product listing. It also mandated the sellers to guide the consumers in finding the adequate details required for them to purchase the specific product.

Arun G Krishnan v. Deepinder Goyal[24]

The complainant claimed compensation from Zomato for not delivering the ordered pizza. The complainant contented that he had placed an order and made payment for on time delivery, later it was cancelled by Zomato which would amount to grave deficiency in service and unfair trade practices. Zomato contented that the non-delivery of the order was due to the unavailability of the consumer. However, the Chandigarh State Consumer Disputes Redressal Commission rejected the contention and ordered Zomato to pay reasonable compensation for the consumer.

VI. CONSUMER PROTECTION IN TRADITIONAL COMMERCE AND E-COMMERCE

Consumers are the major components of business growth. The need for protection of consumer rights is also important to ensure the smooth functioning of the business. The Consumer Protection Act of 1986 protects the rights of consumers in India. Lok Sabha made a clear announcement saying, the act will also be applicable to online commerce and the three-tier redressal mechanism shall also deal with the complaints regarding e-commerce as well[25].

[23] *Hamdard National Foundation (India) & Anr. vs Amazon India Limited & Anr CS (COMM)[2022] 607/2022 & I.As. 14189-92/2022*

[24] *Arun G Krishnan v. Deepinder Goyal,[2022]CC.161/21*

[25] *E-commerce now covered under Consumer Protection Act - Times of India (2 Dec 2014)*

Although this announcement partially addressed the problem, there were still many loopholes and jurisdictional concerns. For instance, consumers in traditional commerce can raise a complaint about a defective product or deficiency in service, whereas in online shopping, consumers can only see the product after it has been delivered, and they are unaware of the details of the seller to raise a complaint against.

The Information Technology Act 2000, gives recognition to e-contracts[26] under which the commercial activities that take place online are governed. The IT Act only regulates huge business transactions between companies and the government; there is no specific provision for consumer protection under the IT Act 2000. With the increase in e-commerce platforms, the number of consumers availing the services through electronic means has increased leading to an increased need for separate legislation protecting consumer's rights in e-commerce.

The Consumer Protection Bill of 2015 replaced the Consumer Protection Act of 1986 which provided the consumer with the right to file a complaint irrespective of the jurisdiction to which the company belonged.[27] The bill addresses the issues faced by consumers in online shopping. The bill also introduced a cooling-off period of thirty days for consumers; however, this does not confer rights directly on consumers; rather, it is being misused by the sellers to refuse to refund or replace the product after thirty days.[28]

Later, the consumer protection act 2019 was introduced with proposed amendments which addressed the needs of the consumers effectively. Additionally, in July 2020, the consumer protection (E-commerce) rules were introduced in 2020, which imposed duties and liabilities on the business entities to follow. However, since e-commerce entities are open for access across the world, the jurisdiction of the court remains an issue.

In July 2021, the department of Consumer Affairs released draft amendments to the 2020 rules[29] which is necessary to curb the widespread cheating and unfair trade practices in e-commerce platforms. According to the act, the e-commerce entity definition was widened to

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[26] Information Technology Act 2000,Section 10A

[27] Mrunali Mudoi, Proposed Amendments to the Consumer Protection Act,1986, 26 January 2015 <http://www.mondaq.com/india/x/368946/Product+Liability+Safety/Proposed+Amendments+To+The+Consumer+Protection+Act+1986 (accessed on 15th March 2016) > accessed on 10 March 2023

[28] Consumer Protection Bill 2015 Clause 2(41)(H)

[29] Draft Amendments to the Consumer Protection (E-Commerce) Rules, 2020

include an e-commerce entity involved in the fulfilment of orders and any related party of the entity. This mandates that even small stores that allow orders online should appoint a grievance officer and other officers as prescribed under the rules. The amendment proposed defines cross-selling and mis-selling and restricts the same. It also prohibits misleading advertisements. These draft rules are yet to be implemented and have the following limitations such as, the revised definition of an "e-commerce entity" may now include entities that do not conduct e-commerce operations. The marketplaces may find it nearly impossible to follow the rules. The issue of consumer protection in e-commerce is still partially unresolved despite the many rules and laws that have been passed to regulate it, and certain amendments are required to guarantee consumer protection to the fullest.

VII. CURRENT TRENDS

According to the survey[30] taken by us of around 130 consumers, we have deduced various implications of dark patterns and how common they are. This study employed a quantitative research approach, utilizing a structured survey to gather data on consumer experiences with dark patterns in the Indian e-commerce market.

7.1. Survey Design

Objective: The primary objective of the survey was to assess consumer awareness and experiences related to dark patterns on e-commerce platforms.

Sample Size: The survey targeted a sample size of approximately 138 consumers who actively use e-commerce platforms.

Sampling Method: A random sampling method was employed to ensure a diverse representation of participants across different demographics, including age, gender, income levels, and geographical locations.

Survey Instrument: A structured questionnaire was designed, incorporating both closed and open-ended questions. The questions focused on:

- Frequency of e-commerce usage.

[30] *Unfair practices on E-commerce platforms. (Responses)*

- Awareness of dark patterns.
- Experiences with misleading or manipulative practices.
- Impact of these practices on their purchasing decisions.

Data Collection: The survey was distributed through online platforms, leveraging social media and email networks to reach the target audience.

7.2. Limitation

Sample Size: While the sample size of 138 provides valuable insights, it may not be fully representative of the entire Indian e-commerce consumer base.

Self-Reported Data: The reliance on self-reported data may introduce biases related to memory recall or social desirability.

Generalizability: The findings may be more applicable to frequent e-commerce users and may not fully capture the experiences of less tech-savvy consumers.

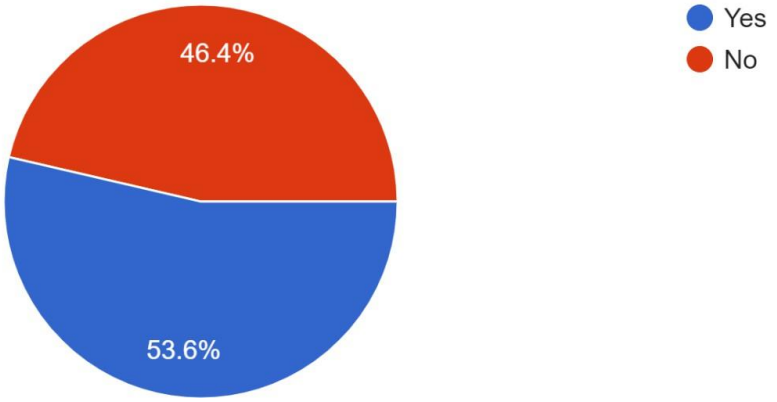
This methodology was designed to provide a comprehensive understanding of the prevalence and impact of dark patterns in Indian e-commerce, contributing valuable insights to the ongoing discourse on consumer protection in the digital marketplace.

7.3. Information gathered and Inferences

As per the survey almost everyone had purchased products from digital platforms and e-commerce websites. 53.6% of the consumers had received wrong or defective products and around 56.5% had experienced dissatisfactory services.

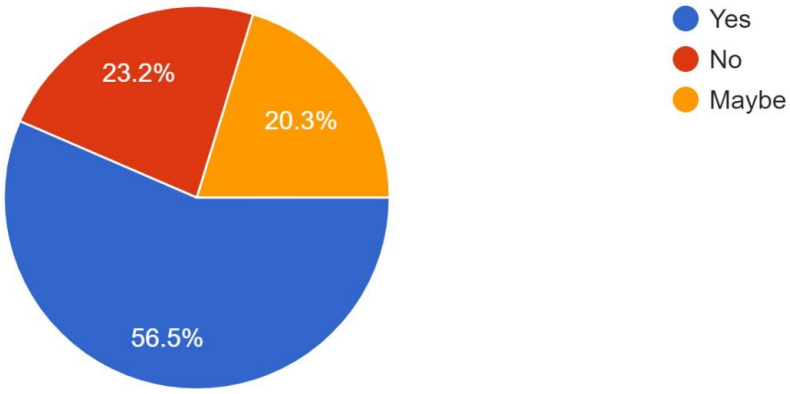
6. Have you ever received wrong product or defective product?

138 responses



7.Have you ever experienced dissatisfactory services?

138 responses



Among these consumers 37% had purchased any product or availed any services based on misleading advertisements. 47% of the consumers had to pay additional charges after the purchase of the goods or availing the services. More than 50% had faced difficulty unsubscribing from any service or cancelling any product ordered. More than 40% had purchased a product or availed a service merely because there was a sale or deal. This reflects the instances of how dark patterns have affected the lives of the consumers who purchase products from e-commerce websites. The information collected in this survey was filled by a majority of consumers who claimed to be aware of the rights available to the consumers. It is

disheartening to realise that even though they have been educated regarding consumer rights they have still been duped by the various dark patterns in e-commerce websites.

Luckily, the same survey shows that only 37% have purchased any product or availed any services based on misleading advertisements and only a mere 22.5 % of the consumers have been tricked by an online website into sharing private information. This shows that the policies framed curtailing the dark practices in e-commerce till now has not been in vain. Proper implementation of necessary rules provides the required results.

VIII. WAY FORWARD

Rules against dark patterns are still ambiguous and lack clarity. Various e-commerce service providers utilise these loopholes and lacunae in the laws to exploit consumers under the guise of persuasive marketing. It is high time for a standardized set of rules and regulations against these dark patterns. A 2022 study[31] suggests 2 ways forward for policymakers to address this uncertainty. The first approach is standpoint epistemology, and the second is through the pareto approach.

The standpoint of epistemology or perspectival differences investigates the relationship between social identities and knowledge. It states that our views and perspectives are closely related to our social location and, hence our knowledge is only partial. Thus, deciding whether an act is a dark pattern or simply a persuasive marketing technique is largely dependent on the policy maker's standpoint. In such situations the policy makers should not act on the basis of their opinions alone but according to the interests of the consumers.

The second way, the pareto approach,[32] benefits everyone not only the policy framers (the companies). According to this approach both the consumers and the companies stand to gain from mitigating dark patterns. The reduction of dark pattern will minimise impulsive buying. This will in turn lower the loss companies face due to returns, chargeback, and such.

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[31] *Sin R and others, "Dark Patterns in Online Shopping: Do They Work and Can Nudges Help Mitigate Impulse Buying?" [2022] Behavioural Public Policy 1 accessed on 11 March 2023*

[32] *MILLS STUART, "Nudge/Sludge Symmetry: on the Relationship between Nudge and Sludge and the Resulting Ontological, Normative and Transparency Implications" (2023) 7 Behavioural Public Policy 309 accessed on 11 March 2023*

There are three steps that can be taken to combat dark patterns. The first is the passing of rules and regulations by the legislature. The central government passed the Consumer Protection (E-Commerce) Rules, 2020 ("Rules') with effect from 23 July 2020. After the same was passed various interested parties filed complaints. Thus, the draft amendments were passed to curb dark patterns in 2021. Unfortunately, these amendments have still not been implemented. This step is perhaps the most effective

The second step would be to educate consumers regarding these dark patterns. Without the awareness that they are being manipulated consumers would not be able to raise their voice against the dark patterns. While there have been various consumer awareness initiatives against unfair trade practices, awareness regarding the frauds on online platforms are quite low. Additionally, even if consumers are aware of dark patterns they are not sure of how it affects their day-to-day life.

The last step would be to create tailor made solutions according to each dark practice. These solutions would have to be specifically designed considering the dark practice and the consumer’s needs and wants. To achieve this various Artificial intelligence and machine learning tools are being developed.

IX. CONCLUSION

Dark patterns in E-commerce affect the consumer's rights which increases the urgency to enact legislation regulating dark patterns. With less awareness about consumer rights, and the new tricks that business entities come up with, the users of e-commerce platforms become vulnerable to the dark patterns employed. As these tactics become more prevalent, it causes consumers to become wary of the online space. In the long term, this damages the overall customer experience, brand image, and loyalty, and leads to increased abandonment. Although it is vital to educate consumers about dark patterns, these tactics evolve quickly, making it difficult to provide adequate protection. Government encouragement to digitize everything would be detrimental if consumers using e-commerce platforms did not have a secure environment.

MEDIA TRIAL: A DOUBLE-EDGED WEAPON TO BE USED WITHIN LEGAL PARAMETERS

- *Swechha Malik*[*]

ABSTRACT

An independent and reliable media is crucial for the existence of democracy because it enlightens the citizens by giving correct information to them. The general public acquire information about the scams and techniques used by fraudsters only due to the active role played by the media. The 'media trial' involves declaring the accused as 'guilty' before his actual conviction by the Court. In the mad race of increasing TRPs, journalists become self-centred and do not think about the consequences of their actions on the accused or his family. The portrayal of accused as 'guilty' by the media seriously jeopardises his right to fair trial. The media presents a one-sided opinion which can affect the subconscious mind of the Judges to give verdict in favour of victim. The Judges may be reluctant to reverse the prevailing public opinion created by extensive media coverage. It also disturbs the psychological well-being of the accused and his family members and traumatize them for the rest of their lives. Even the acquittal of the accused is not useful in restoring his reputation in the society. It is possible that the identities and personal details of the victims may become public, which could put them at the risk of being subjected to social stigma and harassment. The disclosure of the identity of the witnesses by the media puts them under undue pressure and they try to distance themselves from the case. The media should give serious consideration to the true facts before naming anyone as guilty. Moreover, it is the responsibility of the Court to determine who is guilty for the crime. If the media makes a mistake, then the correction shall be published by them without any delay.

I. INTRODUCTION

India has seen a noticeable rise in the frequency of media trials in recent years. There has never been a legal system that has granted the media the authority to try a case.[1] The rapid growth of the internet has significantly expanded the reach and influence of the mass media. The

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[1] *Nikitha Suresh and Lucy Sara George, Trial by Media: An Overview, 4 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 267,269-272 (2021).*

continuous growth of viewers has endowed media organisations with an unparalleled capacity to influence public opinion. The information displayed by the media is assumed to be accurate without examining its veracity. All participants of the media are engaged in a mad race to increase the number of viewers.[2] While doing so, the media often damages the reputation of mere accused by labelling them as criminals. The act of sensationalising news by media is not a new thing, but stepping into the shoes of Judiciary by them is a cause for grave concern.[3] Media exerts pressure on the Courts to pass verdict in favour of the victims without verifying their allegations. The media ignores the fundamental principle that guides criminal trials in our country which is 'presumption of innocence until proven guilty.[4]' The media is engaged in determining the guilt of individuals. This can potentially cause confusion among the general public. The probability of incrimination of innocent individuals by media cannot be ruled out. The media's tendency to display only one-sided representations without making an effort to discover the truth can have serious consequences on the life of accused and their families.

II. MEDIA TRIAL: CONCEPT AND MEANING

The term "media trial" refers to the act of taking a case into its hands by media and determining who is ultimately guilty, even before the Court has made its decision.[5] It involves presentation of a preconceived notion about an accused by Journalists, which can damage his reputation and ultimately impact the outcome of the trial. It occurs particularly in cases involving celebrities or other prominent public figures. Besides that, it takes place when someone is murdered or raped. It refers to the influence of newspaper and television news on an individual's reputation by creating a public impression of guilt prior to the Court's verdict.[6] The media portrays the suspect as a 'criminal' even before any investigation has been started by concerned authorities. As a result, the society starts to condemn the individual and stop interaction with him and his

[2] *Shazia Shaikh, Law and Media Trial in India, 7 JOURNAL OF NATIONAL LAW UNIVERSITY DELHI 76,78-93 (2020).*
[3] *Neelam Kumari and Dr. Ramesh Chauhan, Media Trial: An overview in the context of Indian Media, Society and Judiciary,3 INTERNATIONAL JOURNAL OF RESEARCH PUBLICATION AND REVIEWS 64,67-69 (2022).*
[4] *Sheroy Broacha., Prevention of Arbitrary Media Trial and Need for a Legal Bound, IPLEADERS LAW BLOG (September 18, 2022), https://blog.ipleaders.in/prevention-of-arbitrary-media-trial-and-need-for-a-legal-bound/ (last visited February 26, 2024).*
[5] *Aparna Barpanda, Media Trial, Fair Trial, and Procedural Justice, 4 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 273,274-275 (2021).*
[6] *Dr. Foram Patel, Trial by Media: An Indian Perspective for Judicial Process,6 JOURNAL OF POSITIVE SCHOOL PSYCHOLOGY 4774,4776-4781(2022).*

family. This kind of social behaviour causes mental agony to the accused and his family. It also exerts pressure on the Judges to render a verdict consistent with the narrative presented in the media. The media extensively broadcasts interviews with victim's family, witnesses, and legal experts. This impacts the opinion of the public as the media quickly disseminates information to a wide audience. The actions of media on sub judice matters have the tendency to interfere with the decision-making process of the Court.

III. CONSTITUTIONAL SAFEGUARDS TO FREEDOM OF PRESS IN REFERENCE TO MASS MEDIA

In contrast to the American Constitution, the Article 19(1)(a) of Indian Constitution does not make explicit reference to the liberty of the press.[7] However, it has been consistently established that freedom of press falls under the umbrella of freedom of speech and expression. As a result of the fact that the editor of a press is only exercising the right to expression, there is no need to make any special mention of freedom of press. In "*Indian Express Newspapers v. Union of India*,[8]" it was observed that freedom of expression enables an individual to achieve self-fulfilment, to uncover the truth, and enhances the capacity of an individual to take part in decision making. It provides a mechanism to the people to bring about a change in society. Because of this, the right to know is of the utmost significance. The existence of freedom of speech is the backbone of the democracy and it is high time to value citizen participation in governance of a country. Therefore, when it comes to imposing taxes on newspaper industry-related matters, the government should exercise greater caution than when it comes to imposing taxes on other matters.

In "*Bennet Coleman Company v. Union of India*,[9]" the Newsprint Control Order which restricted newspaper publication to a maximum of ten pages was declared as violative of the freedom of press. The defence put up by the government that it would assist in the growth of smaller newspapers and would prevent large newspapers from gaining monopolistic dominance, was not accepted. The Supreme Court clarified that Newsprint Policy abridged Article 19(1)(a) because freedom to express lies both in circulation and content. Thus, the

[7] *KAILASH RAI, THE CONSTITUTIONAL LAW OF INDIA 220 (CENTRAL LAW PUBLICATIONS 2017).*
[8] *Indian Express Newspapers v. Union of India, (1985) 1 SCC 641.*
[9] *Bennet Coleman Company v. Union of India, AIR 1973 SC 106.*

publishers of newspapers have complete autonomy over their page counts, circulation figures, and new edition releases.

In "*R. Rajagopal v. State of Tamil Nadu (Auto Shanker Case)*[10]" the Apex Court held that public officials who think that they may be defamed could not stop the press from publishing the information by exercising 'prior restraint' on them. They could only take action after the information was published, if they could show that it was based on false facts. If it was based on public records including Court records, then they could not take any action against the press.

In "*Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*,[11]" the Supreme Court held that the monopoly over broadcasting by the government is inconsistent with free speech interest of citizens. The viewers have a right to have variety of views based on their respective interests. It was observed that broadcasting of a sports event where the main purpose is to educate, inform and entertain people is covered by Article 19(1) (a) of the Constitution. It was noted that a citizen has a right to telecast and broadcast any significant event for the benefit of the public through electronic media. The Court issued a directive to the government to establish an autonomous regulatory body that would liberate Doordarshan and Akashwani from the shackles of government control and ensure that freedom of speech can be meaningfully and effectively experienced by one and all.

IV. MEDIA TRIAL AND FREEDOM OF PRESS

Having a free press which is neither controlled by the government nor subject to censorship is an essential component of modern democracy.[12] Freedom of the media affords individuals the chance to acquire knowledge pertaining to critical public matters.[13] An independent and reliable press is crucial for the functioning of the government. A democracy system is characterised by citizen participation in the formation of the government. The citizens must be well-informed and must be capable of understanding and comparing the election manifestos as

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[10] R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264.
[11] Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal, AIR 1995 SC 1236.
[12]Anubhav Garg, The Fourth Pillar of Indian Democracy: Freedom of the Press, IPLEADERS LAW BLOG (June 5, 2020), https://blog.ipleaders.in/the-fourth-pillar-of-indian-democracy-freedom-of-the-press/ (last visited February 26, 2024).
[13]Shashwat Kaushik, Media Trial: An Analysis, IPLEADERS LAW BLOG (August 17, 2021), https://blog.ipleaders.in/media-trial-analysis/ (last visited February 26, 2024).

well as the work done by different political parties since they are called upon to elect the government.[14] The press keeps this discussion alive by providing information and so acting as a driving factor in public debate. It serves as a channel for communication between the people and their elected representatives. It also empowers the citizens as they can come forward and highlight their common problems by the help of media and the same can be communicated to the government.[15] Therefore, it is mandatory for individuals to possess knowledge regarding the current affairs of their country and the world. The media has a responsibility to educate the public on matters that can have an impact on their lives. It is a significant force in shaping the public opinion and has the ability to completely change the outlook of the public.

The issue is not with the media's exposure of societal wrongdoings. The issue arises when they exceed the authority bestowed upon them and engage in actions that are not within their purview. The fierce competition among various news channels to increase their viewers has led to a deterioration in the quality of news. The fabrication of facts and unwarranted intrusion into the private lives of the individuals is a serious concern posed by the irresponsible actions of the media. The media is instrumental in quickly transforming the hero into a villain. They do not focus on presenting the facts but start making bald allegations. Sometimes, they are even responsible for provoking the violence. Media organisations routinely disregard all the prevailing laws and standards for ethical journalism while reporting investigations and criminal activities.

V. MEDIA TRIAL AND RIGHT TO FAIR TRIAL

The media has a lot of power and influence in society. Its job is to make informed citizens by giving correct information to them. Although the media has the right to disclose the truth and educate the public, it has frequently exceeded this freedom. Consequently, the right to free expression of the media and the right to a fair trial of the accused come into conflict with each other. The media frequently declares the accused as ‘guilty’ before their actual conviction by

[14] *Saumya Krishnakumar, Freedom of the Press, 4 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 295, 296- 302 (2021).*
[15] *Khushi Sharma, Freedom of the Press and Its Significance in Entertainment Law, IPLEADERS LAW BLOG (Sep. 24, 2020), https://blog.ipleaders.in/freedom-press-significance-entertainment-law/ (last visited Feb 26, 2024).*

the Court.[16] It sometimes makes an issue more controversial leading to biased public opinion and even public outrage. The media presents a one-sided opinion which can affect the subconscious mind of the Judges to give verdict in favour of victim.[17] The Judges may be reluctant to reverse the prevailing public opinion created by extensive media coverage.[18] Negative publicity of the accused done by media prior to trial is detrimental to the fairness of a trial.[19] Media trials have exerted pressure on lawyers to avoid representing those who are perceived as 'guilty' by the public due to influence of the media.[20] The function of the media to ensure fairness is completely undermined when it starts interfering with the judicial process. The portrayal of the accused by media may not accurately reflect the reality. The truth can only be determined after the case has been heard by an impartial Judge after considering all evidence. Despite the appearance of justice being served, the accused is in a highly disadvantageous position. The portrayal of a suspect as 'guilty' by the media might influence public perception. 'Trial by media' interferes with norms of fair trial by compelling the accused to accept the destiny that the media has planned for him. If the identity of witnesses is made public, then their security may be compromised.[21] The witnesses will try to disassociate themselves with the case to come out of the mess created by the media.[22] The risk of changing the testimonies by the witnesses before the Court increases manifold due to media trial. Furthermore, it is necessary to maintain the anonymity of the victim to prevent any violation of their privacy. It is not acceptable for the media to take over the job of the Courts or to deviate from impartial and objective journalism. Undoubtedly, the media trial constitutes an excessive intrusion into the process of dispensing justice. Judges start considering the media criticism when reaching a verdict if it contradicts with the view presented by the media. As a result, in the majority of cases, the verdict rendered by the media is ultimately passed by the Trial Courts. It is imperative that decision makers should act rationally to reach fair and impartial verdicts.

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[16] Mohd. Aqib and Utkarsh Dwivedi, Judiciary and Media Trial: A Need for Balance, 5 INDIAN JOURNAL OF LAW AND HUMAN BEHAVIOR 155,160-161 (2019).
[17] Megha Mishra, Media Trial in India, 4 INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION 107,111-113(2022).
[18] Ibid.
[19] Nehal Misra, Social Media Trials: A Threat to the Society and Legal System, IPLEADERS LAW BLOG (Feb 3, 2021), https://blog.ipleaders.in/social-media-trials-threat-society-legal-system/ (last visited February 26, 2024).
[20]Shivani Nair, Constitutionality of Media Trials, IPLEADERS LAW BLOG (June 29, 2020), https://blog.ipleaders.in/constitutionality-of-media-trials-and-landmark-cases/ (last visited February 26, 2024).
[21] Max Croson, Reflection of the Media Trial as a Threat to Our Judicial System, IPLEADERS LAW BLOG (May 12, 2021), https://blog.ipleaders.in/reflection-media-trial-threat-judicial-system/ (last visited February 26, 2024).
[22] Ibid.

VI. MEDIA TRIAL AND RIGHT TO PRIVACY

The Supreme Court has recognized the right to privacy as a fundamental right under Article 21 of the Constitution.[23] Although the media plays a vital role in providing information and revealing issues of public interest, a balance must be maintained between the right of information to the public and the right of privacy of an individual. It can be hard to figure out what the public interest is and how it should be balanced against a person's privacy. Media trials often involve a detailed reporting on the personal life of a person which may violate their right to privacy.[24] The news channels often indulge in revealing the identity of a person in order to gain public attention. Media trials involve spreading of personal information of an individual by way of exaggerated headlines that may adversely impact the legal process. This type of reporting can lead to tarnishing of image of the accused before the society. It also leads to psychological discomfort for the accused and his family. It is possible that the identities and personal details of the victims may become public, which could put them at the risk of being subjected to social stigma and harassment. The breach of confidentiality of the witnesses by the media may subject them to intimidation by the accused or his associates. It is essential to protect their right to privacy to seek their cooperation in the investigation. There have been instances in which the individual against whom allegations were made by the media has been acquitted by the Court. But he nevertheless found himself in a difficult situation as a result of unnecessary media attention.

VII. JUDICIAL RESPONSE TO MEDIA TRIAL IN CRIMINAL JURISPRUDENCE

In "*Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi),*[25]" the accused Manu Sharma who was the son of a politician, murdered Jessica Lal because she declined to serve him alcoholic beverages at a party. The case was initially dismissed on the grounds of insufficient evidence by the Trial Court resulting in the acquittal of all the accused persons. However, the case was eventually reopened in response to public and media criticism, which ultimately resulted in conviction of the accused. While deciding the case, the Supreme Court

[23] *K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.*
[24] *Dr. S. Krishnan, Trial by Media: Concept and Phenomenon,6 INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH 889,897-900 (2018).*
[25] *Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1.*

observed that the Journalists should exercise utmost diligence to ensure the distinction between 'trial by media' and 'informative media' at all times.

In "*Santosh Kumar Singh v. State through CBI (Priyadarshini Mattoo Case)*[26]" the accused Santosh Kumar, the son of an IPS officer, murdered and sexually assaulted Priyadarshini Mattoo for rejecting his proposal. The media helped the ailing father of victim to get justice by raising its voice against the acquittal of the accused by Trial Court. The Supreme Court and Delhi High Court reprimanded the Trial Court for not doing justice despite strong evidence against the accused.

In "*Nupur Talwar v. State of U. P (Arushi Talwar murder case)*[27]"Arushi and her domestic worker Hemraj were found dead in her home. This case received wide coverage by media. The media was indulged in character assassination of Arushi and broadcasted news about her affair with Hemraj despite the absence of any solid proof supporting such claims. The media portrayed the parents of the victim as 'murderers' of their daughter. It can be argued that both parents were convicted by Trial Court as a result of pressure exerted by media on them. The Allahabad High Court held that there was no justification for convicting the parents for double murder solely on the basis of the fact that the deceased was last seen alive with them. The findings given by the Trial Court are inherently unlawful and tainted by the omission of material facts. The parents were held 'not guilty' for any of the charges that were framed against them. It is clear that this is not an open and shut case as claimed by media because there were other accused too who might have committed the murder.

In "*Shashi Tharoor v. Arnab Goswami*,[28]" the media asserted that Shashi Tharoor (former Union Minister) is responsible for the murder of his wife Sunanda Pushkar who died under mysterious circumstances in a hotel. The Delhi High Court remarked that the press must not "convict anyone" or indicate that someone is guilty, or make any other allegations that are not supported by evidence. The media must proceed with due care and diligence when reporting on subjects that are currently being investigated or that are awaiting trial. Media has the right to report news to the public but they should not violate the principle of 'innocent until proven guilty.' Journalists can look into things, but they cannot say that someone is guilty or make assumptions about the case when it is pending before the Court. The goal of every fair trial is

[26] *Santosh Kumar Singh v. State through CBI, (2010) 9 SCC 747.*
[27] *Nupur Talwar v. State of U. P.,2017(3) ACR 3010.*
[28] *Shashi Tharoor v. Arnab Goswami, 246 (2018) DLT 279.*

to give the accused the best chance possible to show his innocence. Both the accused and society as a whole stand to benefit from the outcome of a trial that is conducted in a fair manner.

In recent case of "*Nilesh Navalakha v. Union of India (Sushant Singh Rajput case)*[29] " the death of Bollywood actor Sushant Singh Rajput was reported by media in an extensive manner. The media broadcasted different kinds of stories on the news about Rhea Chakraborty doing "black magic," forcing Rajput to commit suicide, and getting drugs for him. The Bombay High Court held that the freedom of the media is not affected if erroneous channels are stopped by their respective authorities from breaching the Programme Code. If an innocent person is falsely accused by the media, then he suffers irreparable harm to his reputation which was built by him over years of hard work. It is possible that even the acquittal will not be of any assistance to the accused in rebuilding his reputation in the society. Excessive media coverage that portrays a person as guilty despite a pending verdict can be considered as improper influence on the process of rendering justice.

In recent case of "*Aryan Shah Rukh Khan v. Union of India*,[30]" Aryan Khan was taken into detention by the concerned authorities over the suspicion of illegally consuming and possessing drugs on a ship. The media attempted to investigate this matter even before the probe was initiated. He was alleged by media as 'guilty' for using the drugs as well as being involved with drug peddlers. The Court while granting bail to him noted that he was merely present at the site where drugs were being distributed and consumed by the people. He was subjected to a vicious 'media trial' and he was portrayed as a bad example for young Indians. Even though the case was pending before the Court, his mental health was totally destroyed by making him a daily news story.

The media has the capacity to inform the public regarding the truthful realities and pressing concerns of our society. This is a profession in which the dissemination of a single piece of incorrect information has the potential to entirely ruin the life of any individual or community. The Judiciary is obligated to fulfil the purpose for which they are formed, that is to guarantee justice to every person. The media must do what they are supposed to do, which is to spread correct information. This balance must always be maintained so that no innocent person has to face unnecessary hardships in his life.

[29] *Nilesh Navalakha v. Union of India, 2021(2) ABR 179.*
[30] *Aryan Shah Rukh Khan v. Union of India ,2021ALL MR(Cri) 4337.*

VIII. MEDIA TRIAL: GOOD OR BAD?

Media has the ability to influence perspective of a person towards looking at a particular situation. The media has played a significant role in putting an end to numerous illegal practices, such as child marriages and female infanticide.[31] In many cases, the media deserves to be respected. It has exposed numerous frauds, scandals, and instances of corruption. The general public acquire information about these scams only due to the active role played by the media. The media has created awareness among the people about the techniques used by fraudsters and enables them to protect themselves. Due to the media, people are better informed about the current happenings in their country and throughout the world. The media can talk about and react on decisions given by the Court, but they cannot initiate a trial over matters that are pending before Court.[32] The 'trial by media' disturbs the psychological well-being of the accused and their families. Such actions of media traumatize the individual for the entire life. In the mad race of increasing TRPs, journalists become self-centred and do not think about the consequences of their actions on accused or their families. The portrayal of suspect as 'guilty' by the media seriously jeopardises his right to fair trial. It is observed that even the acquittal of the accused is not useful in restoring his reputation in the society. As a result of media trials, Judges are subjected to immense societal pressure which hinders their ability to provide a fair trial to the accused.[33] It is affecting the decision-making process of the Court because Judges have a pre-conceived notion about the accused due to media. It may be challenging for the Judges to maintain their fairness in such situation. Media trials have been criticised for sensationalising crime, impeding investigations, and infringing upon the constitutional rights of the accused.[34] When coverage of a crime in the media is based on unverified facts, it has the potential to hamper the actual investigation. It poses challenge for law enforcement officers to carry out their duties properly which may result in the failure to arrest the true perpetrators of crime. The disclosure of the identity of the witnesses by the media puts them under undue pressure and they try to distance themselves from the case. It becomes a grave concern to ensure the safety of witnesses when their identity is revealed by the media.

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[31] Parul Sardana, Media Trial: Boon or Bane, IPLEADERS LAW BLOG (October 1, 2020), https://blog.ipleaders.in/media-trial-boon-or-bane/ (last visited February 26, 2024).

[32] Vanya Verma, Famous cases of media trials in India, IPLEADERS LAW BLOG (March 10, 2021), https://blog.ipleaders.in/famous-cases-media-trials-india/(last visited February 26, 2024).

[33] Samyak Mordia, Media Trials: A Bane or Boon for Democracy, 5 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 190,193 (2022).

[34] Smita Sonawane, A Critical Analysis of Media Trial and Its Effect on Indian Judiciary, IPLEADERS LAW BLOG (Apr. 25, 2021), https://blog.ipleaders.in/critical-analysis-media-trial-effect-indian-judiciary/ (last visited Feb 26, 2024).

The media does not even care about protecting the privacy of an individual. It frequently presents personal news pertaining to the individual, even if it is not relevant to the case at hand. The accused sometimes face the loss of their jobs with minimal chances of resuming them.

IX. CONCLUSION AND SUGGESTIONS

The media is the best way for the general population to learn about every single information. The media fulfils a critical function within a democratic society. The media exposes the problems in our system by disseminating information to the public in the hope that they will be solved. The responsibility is to enlighten the public about events that directly or indirectly affect society, without deriving conclusions. The role of the media should be to advance justice, not to defeat it. The media is quick to leap into a case, even if they do not have a thorough understanding of the facts. The 'media trial' puts an unreasonable amount of pressure on the Judge that is deciding the case. The media should refrain from passing judgement on any particular case. While the media is instrumental in uncovering corruption and injustice, it must be ensured that reporting is done by the media in an honest and responsible manner. Various news channels are currently engaged in a fierce battle for increasing their TRPs. Instead of addressing important issues, the media is now focused on celebrity issues that will increase their TRP. Though we cannot overlook the benefits of the media, its misuse must also be addressed. It is the responsibility of the media to function with transparency and present true facts to the public. The media should act in a responsible manner while broadcasting the news. The media should give serious consideration to the true facts before naming anyone as guilty. Moreover, it is the responsibility of the Court to determine who is guilty for the crime. The media should not indulge in violating the right to privacy of any individual. Also, people should not simply believe everything they read in the news because there is a probability that all the information presented by the media is not correct. It is especially unwise to conduct a 'trial by media' on mere suspicion when the matter is pending because the suspect too has constitutional rights like right to fair trial and right to privacy which needs to be protected. The media should not give an excessive amount of publicity to the 'victim', the 'accused' and the 'witnesses' because it hinders the investigation process. It is also important that the media should not name any witness because doing so raises the likelihood that he would become hostile. Journalists should be duly educated regarding the laws governing them as well as the limitations imposed

on the media. This will lead to early recognition of the responsibilities by them. It will also ensure adherence to the professional code of conduct by media persons. If the media makes a mistake, then the correction shall be published by them without any delay. Although the media is highly valued, there is a need to issue guidelines to exercise self-control on them while broadcasting news. It is a futile practice by media to engage in discussions on pending cases as it is impossible to show the true picture without a proper judicial trial.

INDIAN EDUCATION SYSTEM AND INCLUSIVITY: GAGING THROUGH THE POLICIES TOWARDS THE DIVYANG COMMUNITY

- *Vijoy Kumar Sinha*[*] *and Saheli Chakraborty*[**]

ABSTRACT

Education is the stepping stone in attaining enlightenment, inculcating a sense of self-respect and dignity, equipping oneself with rationale, logic, and science, developing a personality, and further instrumentalizing oneself to a sustainable life and livelihood. One cannot deny the significance of education in a child's life in actively contributing to a country's development. However, such development has ceased to only a certain socially accepted, historically applauded particular class of people under the veil of "Normalcy." Moreover, the ones who do not meet the criteria of certain normalcy have been compelled to adapt or perish. Divyang, the Community that probably does not have any exhaustive definition to be attributed to, has been the victim of such societal atrocities, translating to social ostracize, and has ceased with basic rights like accessible education. This paper attempts to critically examine the Indian Education System from the lens of inclusivity with reference to the Divyang Community. Furthermore, the paper shall analyse the New Education Policy 2020 as a catalyst for establishing an inclusive education system for the Divyang Community.

Keywords: ***New Education Policy, Divyang, India***

I. INTRODUCTION

Education, an essential component for a liberated society, entails expenses for numerous individuals. Despite the promise of education for all children, a concerning 5% of the child population in Asia and the Pacific, including children with disabilities, have been subjected to inconsistent policies and practices over the years.[1] Every child, regardless of their abilities or disabilities, is entitled to receive inclusive and high-quality education that accommodates them

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[1] *Eila Heikkila, 'Ten steps to give Children with disabilities a quality Education'<https://blogs.adb.org/blog/10-steps-give-children-disabilities-quality-education > accessed on 29 December 2023*

within the standard school curriculum. This education should enable their active participation in the country's development and allow them to lead a dignified life, with equal opportunities for employment.

The school system acknowledges the varying cognitive development of children as it embraces inclusive education. Moreover, the way in which each kid adjusts to the methods and techniques of teaching and learning varies depending on their aptitude for understanding, cognitive growth, and the physical and mental aspects involved in the learning process. An inclusive education system offers equitable possibilities, tailored to the individual adaptability of students. Hence, it may be inferred that there is no universal model that adequately addresses the diverse educational requirements of all children in mainstream schooling. There is a crucial requirement for a fundamental change in the techniques of approach, encompassing instruction methods, pedagogy, teaching aids, and individual-group activities. By implementing inclusive education, students will get personalised care and assistance tailored to their various needs and resources, fostering effective teaching and learning. This article outlines the progression of educational rights for individuals with disabilities, known as Divyang, under International Law. These rights have had a significant impact on the formation of National Education Policies in India. The recognition of fundamental rights, such as education, has been supported by several international treaties, which emphasise the need of an inclusive national education system. Moreover, the study seeks to analyse the Indian Education System in a critical manner, focusing on inclusion in relation to the Divyang Community. Finally, the report acknowledges the New Education Policy, 2020 as a crucial assessment in shaping inclusive education in the future.

II. EDUCATION SYSTEM FOR THE DIVYANG COMMUNITY: FROM THE NARROW LENS OF INTERNATIONAL LAW

Upon achieving inclusive education, it is worth examining international legal principles that guarantee education for children with disabilities:

2.1. The Universal Declaration of Human Rights[2]:

Article 26 of the Magna Carta of Human Rights acknowledges the universal entitlement to education, affirming that "Every individual possesses the inherent right to receive an education." The term "Everyone" unambiguously implies that this right should be extended to children with disabilities.

2.2. UNESCO Convention against Discrimination in Education[3]

This worldwide instrument represents a significant milestone in UNESCO's highly acclaimed global mission of 'Education for All' in 1990. The 1960 Convention serves as the principal written instrument that officially established the main components of the right to education. The word 'inclusive education' is not explicitly mentioned, but the document does outline the provision of equitable educational opportunities for all. Upon closer examination, Article 1(a) of the Convention specifies the actions that qualify as acts of discrimination, as defined by this Convention. Denying any individual or collective the opportunity to get education at a particular level is discrimination. This clause lacks detailed explanations of discriminatory conduct and does not provide a specific definition of the term 'discrimination' within its limited scope. However, due to the incomplete list of 'acts of discrimination,' it requires a subjective approach to interpreting the Article. Given that the Convention aligns with UNESCO's ideals of providing comprehensive and equitable educational opportunities for everyone, it might potentially encompass children from disadvantaged, marginalised, or vulnerable backgrounds, as well as children with disabilities. Thus, it may be stated that any action that denies children with impairments equal educational opportunity is discrimination. The Convention serves as the definitive measure for determining what qualifies as 'inclusive education,' since it is widely acknowledged as the foundation of the Education 2030 Agenda.

An important aspect relevant to this issue is that Article 4 requires the states to establish a systematic plan as a national policy. A policy must be developed to advance inclusive education by ensuring equal opportunities through the implementation of the following measures: (i) Free and Compulsory Education at the primary level, and (ii) Ensuring that the quality of education provided is on par with other institutions at the same level, without any compromise. (iii) Offering unbiased training to teachers or instructors.

[2] *The Universal Declaration of Human Rights*
[3] *UNESCO Convention against Discrimination in Education*

2.3. International Covenant on Economic, Social and Cultural Rights[4]

The International Covenant on Economic, Social, and Cultural Rights is a global agreement that addresses a wide range of human rights, including several rights related to economic, social, and cultural aspects. Within the context of Education, Article 13 of this document specifically addresses the 'entitlement of all individuals to receive education.' Equal access to education for all individuals is crucial in fostering the complete development of one's personality, promoting a sense of dignity, upholding human respect, encouraging societal participation, cultivating intolerance, and fostering a sense of fraternity. This, in turn, contributes to the transformation of society into one that is both free and egalitarian. To achieve these objectives, Article 13 (2) suggests several possible measures that states could implement. These measures include providing free and mandatory primary education, offering vocational and technical education at the secondary level, ensuring accessible opportunities for higher education, and providing sufficient financial support to reduce inequalities. This Convention does not explicitly refer to children with disabilities. However, the concept of 'education for everyone' encompasses all individuals, regardless of whatever obstacles they may face, via a comprehensive comparison of the offering.

2.4. The United Nations Conventions on the Rights of the Child[5].

An important global treaty that addresses the rights of children from various backgrounds. As a modern global agreement, it has endeavoured to address the diverse requirements of children. Article 23 of this Convention specifically addresses the rights of children with disabilities. It calls for nations to acknowledge the rights of mentally and physically challenged children to have a well-rounded existence that ensures their dignity, self-sufficiency, and meaningful engagement in society. The states are required to provide extraordinary care to these children, depending on the available resources. According to Article 23(3), education is considered an essential aspect that should be provided to impaired children, along with health care services, rehabilitation services, and fundamental human life necessities. To promote a supportive and all-encompassing attitude, it is advisable to provide this help at no cost, taking into account the varied backgrounds of the children. Education acts as a catalyst to promote the comprehensive growth and social inclusion of children.

[4] *International Covenant on Economic, Social and Cultural Rights*
[5] *The United Nations Conventions on the Rights of the Child*

2.5. United Nations Convention on the Rights of Persons with Disabilities[6]

This Convention serves as a permanent testament to the recognition of the fundamental worth and equitable entitlements of individuals, as declared in the United Nations Charter, and it signifies a profound acknowledgment of the varied requirements of individuals with disabilities. Individuals, particularly those with disabilities, have been subjected to severe discrimination and social exclusion. In addition to the diverse rights and freedoms outlined in this Convention, education is specifically addressed in Article 24. The Conventions require nations to ensure inclusive education at all educational levels, with the aim of promoting the whole development of human potential, fostering a feeling of dignity and self-worth, reinforcing respect for human rights, and embracing basic freedoms and human variety. To ensure the fulfilment of these superior rights, authorities should adopt measures to integrate children with disabilities into the regular education system and refrain from denying them access to free and mandatory primary education or education at any level due to their disability. To ensure inclusion, it is necessary to provide reasonable accommodation, prerequisite support, and aid that promote successful education and optimise cognitive and social development.

III. INDIAN EDUCATION SYSTEM: ABANDONMENT OR ACCOMMODATIVE TO DIVYANG COMMUNITY

The Indian Constitution's Preamble, ratified on November 26, 1949, clearly establishes that every individual is entitled to equal opportunities and social standing. Article 41 of the Directive Principles of the Indian Constitution guarantees the "right to employment, education, and public assistance in particular situations, such as disability."[7] Furthermore, Article 45 ensures that every child is entitled to compulsory and cost-free education until they reach the age of 14.[8] The Parliament has ratified the Constitution (86th Amendment) Act 2002, which enshrines education as an inherent entitlement for all children aged 6 to 14. This amendment stipulates that the government is required to provide free and compulsory education to children between the ages of 6 and 14. The preamble of the amendment specifically declares that the term "all" includes children with impairments as well. Nevertheless, it is inevitable that

[6] *United Nations Convention on the Rights of Persons with Disabilities*
[7] *Article 41, Constitution of India, 1949.*
[8] *Article 45, Constitution of India, 1949.*

significant unsolved matters about the rules and regulations that enable such activities have not been dealt with.

Despite the Supreme Court of India affirming that the Right to Life includes the Right to Education in the significant decision of *Unnikrishnan v. Union of India*[9], this right has been restricted to a particular segment of society that is considered 'normal' for a considerable period of time. As previously said, international agreements promote the establishment of an inclusive educational system that fosters the comprehensive development of individuals and contributes to the progress of the nation. However, this growth or development has the potential to transcend a single region of the country. It requires the active involvement of all individuals from disadvantaged, marginalised, and handicapped segments of society. The Right to Education Act of 2009 is a commendable law that requires free and mandatory education for children between the ages of six and fourteen. These inclusive, cost-effective, and legally enforceable educational opportunities ensure that children from all socio-economic backgrounds, disabilities, and educational dispositions have a just and equitable chance to gain fundamental information and get elementary level education. Nevertheless, does the education system possess sufficient inclusivity?

India, with its deep cultural heritage, has been kind in embracing many challenges. However, the concept of being specially abled has mostly been seen from the perspective of charity, which emphasises the need for assistance rather than advocating for equitable and impartial policy. Individuals afflicted with such disabilities were forced to endure social exclusion and reside in secluded environments, experiencing profound loneliness and receiving pity from others. Despite the fact that children with disabilities have a legitimate claim to basic rights and support, such as schooling, they have been deprived of these entitlements. Thus yet, no significant measures have been implemented to promote social inclusion. Education, which is crucial for eradicating social inequality and cultural domination, has not been primarily available to these youngsters.

India, seen as a developing nation, has witnessed the implementation of two unique educational systems in the last decade. One alternative is to offer specialised education in schools dedicated to children with disabilities, while the other option is to give education in mainstream schools for typically developing children who are socially considered as 'normal'. The emphasis on education for children with disabilities arose throughout the later part of the twentieth century,

[9] *Unni Krishnan, J.P. and Ors. Etc. v. State of Andhra Pradesh and Ors. 1993 AIR 2178.*

accompanied by encouraging strategies and efforts aimed at their growth and progress. An obstacle in society is the task of ensuring that education is inclusive, since it contradicts the discriminating policies and practices of the mainstream educational system.

Despite the existence of several international agreements emphasising the need of Inclusive Education, India has not yet established a strong basis in its educational system. Moreover, it is crucial for the phrase to be widely comprehended and accurately employed as a synonym for integration. Inclusive education entails the provision of education to students in a regular classroom setting, irrespective of their disabilities or other categorizations. The education system is accountable for implementing necessary modifications to cater to the needs of all pupils. Integrated education is the expectation that students with disabilities would conform to the regular school system while also obtaining supplementary assistance and resources. Numerous prior initiatives have been implemented to provide inclusive education throughout the nation. Nevertheless, despite the collective endeavours, this field necessitates more effective implementation owing to many variables. The National Education Policy 2020 (NEP 2020) seeks to improve the fairness and inclusiveness of the education system via a range of measures. The recommendations will be deliberated upon in the subsequent section.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995[10] mandates the provision of free education, without any fees, to all children in an appropriate environment until they reach the age of 18. It also emphasises their right to receive measures such as:

1. Offer transport services specifically tailored for children with impairments, or provide monetary incentives to parents or guardians to assist in ensuring their children with disabilities can attend school.
2. Removal of building obstacles in educational establishments, such as schools, colleges, or vocational training facilities.
3. It offers educational resources, such as books, clothing, and other things, to kids with impairments who are currently attending school.
4. The programme offers scholarships specifically designed for students with impairments.

[10] *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, Chapter V, SS. 26-30.*

5. They are creating appropriate forums to address parental concerns around the placement of their children with disabilities.
6. To accommodate blind students and students with restricted eyesight, the test procedure should be modified to simply remove mathematical issues.
7. Syllabus restructuring to optimise the educational encounter for children with disabilities.
8. The course of study is being redesigned to accommodate students with hearing impairment by offering them the option to select only one language as part of their academic programme.

The Sarva Shiksha Abhiyan (SSA)[11] was started with the aim of achieving universal basic education. This organisation adheres to an inclusive ideology that embraces all persons without any exceptions and integrates many systems and projects. The main objective of the SSA is to attain the Universalisation of Elementary Education (UEE). Three essential components of UEE are guaranteeing the accessibility, acceptance, and consistent participation of all students aged 6 to 14. The SSA has enacted a zero-rejection policy, ensuring that all Children with Special Needs, irrespective of their kind, classification, or degree of impairment, get appropriate and high-calibre education. The education for children with special needs has several elements, such as early diagnosis and identification, functional and formal assessment, educational placement, and the provision of assistance and devices. The services offered encompass a range of activities such as providing assistance, training teachers, offering resources, implementing individual educational plans, training parents, mobilising the community, planning and managing initiatives, improving special schools, eliminating architectural barriers, conducting research, and monitoring and evaluating the progress of girls with disabilities.

The SSA provides a maximum amount of Rs.1200/- per kid per year for the integration of children with disabilities, subject to specific requirements. The interventions implemented under the SSA for inclusive education comprise multiple components, such as identifying students with special needs, conducting functional and formal assessments, determining suitable educational placements, creating Individualised Educational Plans, providing aids and appliances, training teachers, offering resource support, removing architectural barriers, and conducting monitoring and evaluation activities. Furthermore, there is a distinct focus on

[11] *Sarva Sikshan Abhiyan, A program for Universal Elementary Education, Manual for Planning and Appraisal <https://dsel.education.gov.in/sites/default/files/2019-05/Manual_Planning_and_Apprisal.pdf>*

catering to the educational requirements of females with disabilities. The main objective of residential bridge courses for Children with Special Needs is to effectively equip them for schools, offering a superior level of inclusive education for these persons. Home-based educational services are provided to children who have severe and profound impairments in order to equip them with essential life skills, either to prepare them for formal schooling or to improve their capacity to manage everyday activities.

The Right of Children to Free and Compulsory Education Act, 2009[12] (hereinafter RTE Act) was enacted to ensure the fundamental right specified in Article 21A[13], which guarantees free and mandatory education for children. In 2012, the Act was amended to encompass children with impairments within the group of impoverished children, as specified in section 2(d).[14] According to Section 12(1)(c) of the Act, private schools are required to reserve 25% of their spots for disadvantaged populations.[15]

The government enacted the Rights of Persons with Disabilities Act, 2016 to enforce the requirements of the Convention on the Rights of Persons with Disabilities, 2006. The Act creates a comprehensive legal structure for the execution of inclusive education in India. As per Section 16[16], the appropriate Government and local authorities are responsible for ensuring that all educational institutions financed or acknowledged by them offer inclusive education to children with disabilities. Furthermore, section 17 delineates the measures to promote and enhance the accessibility of inclusive education.[17] These include particularly: -

1. In order to identify children with impairments, ascertain their unique needs, and assess the adequacy of the help they get, it is necessary to conduct a comprehensive evaluation of school-age children every five years.
2. To facilitate education, it is imperative to offer teachers with training and career prospects. This encompasses educators who have disabilities and possess expertise in sign language and Braille, as well as instructors who have undergone instruction in educating students with intellectual disabilities.

[12] *The Right of Children to Free and Compulsory Education Act, 2009*
[13] *Article 21 A, Constitution of India, 1949.*
[14] *Sec 2(d) and (cc) and Sec 3(3) of The Right of Children to Free and Compulsory Education Act, 2009*
[15] *Sec 12(1)(c) of The Right of Children to Free and Compulsory Education Act, 2009*
[16] *Sec 16 of Rights of Persons with Disabilities Act, 2016*
[17] *Sec 17 of Rights of Persons with Disabilities Act, 2016*

3. The goal is to offer instruction to educators and other personnel with the aim of promoting inclusive education at all levels of school education.
4. To enhance communication for those with speech, communication, or language challenges, it is crucial to promote the use of appropriate augmentative and alternative modalities, such as Braille and sign language. These communication methods act as complements to one's own voice and allow individuals to fulfil their everyday communication requirements. Through this approach, persons with disabilities are equipped with the ability to actively engage in and contribute to their society and community.
5. The aim is to offer books, other educational materials, and appropriate assistive technology to children with substantial disabilities free of charge until they become eighteen years old.
6. To offer scholarships to students with substantial disability who fulfil the required criterion.
7. In order to meet the needs of students with disabilities, it is essential to incorporate suitable modifications in the curriculum and examination system. These modifications may involve extending the time allotted for completing test papers, offering the support of a scribe or amanuensis, and exempting students from second and third language studies.

IV. JUDICIAL PRONOUNCEMENTS

The Supreme Court is commonly seen as the guardian of the Constitution and the multitude of rights established within it. The judiciary has played a crucial role in recognising and safeguarding the right to education. In the case of *Mohini Jain v. Union of India*[18], the Supreme Court established that the right to education is a fundamental right safeguarded by the Constitution. Furthermore, it has been shown that the entitlement to life is indivisible from the entitlement to education. In the subsequent year, in the widely recognised case of *Unni Krishnan v. State of Andhra Pradesh*, the Supreme Court reiterated the constitutional entitlement to education as articulated in Article 21. In response to this decision, the 86th Constitutional Amendment Act of 2002 was passed, which included Article 21A and 51A(1)(k) into the constitution.

[18] *Mohini Jain v. Union of India, 1992 AIR 1858, 1992 SCR (3) 658*

In the *Social Jurist v. Government of NCT of Delhi*[19] case, the Delhi High Court ruled that under the RTE Act, children with disabilities have the right to attend any school, irrespective of its financial assistance from the Government. The Court acknowledged that the absence of these amenities creates a harmful cycle, in which children with disabilities choose not to register in school because of the lack of these amenities, thereby making their right to education meaningless.

In the *Pramod Arora v. Governor of Delhi*[20] decision, the Court recognised that children with disabilities face heightened marginalisation compared to other children belonging to disadvantaged groups. Consequently, the government has a heightened obligation to implement positive measures, in line with the principle of equality stated in Article 14 and the legal framework, to guarantee the meaningful integration of these individuals into the school system.

In the case of *Kamal Gupta v. State of Uttarakhand*[21], the Uttarakhand High Court implemented a reporting mechanism that allows children with disabilities to be admitted to schools that have the appropriate resources to support them, whether they are aided or unsupported. However, it is clear that the RPWD Act requires all educational institutions to comply with the standards of reasonable accommodation. At the same time, Courts continue to reference the provisions of the prior Act to determine the scope of educational options for children with disabilities, even after the new Act has been passed.

The Delhi High Court scrutinised the scope of the obligations specified in the RPWD in the case of *Syed Mehedi v. Government of Delhi*[22]. The Court recognised that the provisions outlined in Sections 16 and 17 of the RPWD carry legal obligations. By reading the RTE Act and the RPWD Act in conjunction, the Court concluded that the provisions stated in Section 16 of the RPWD Act should be included into the regulations and benchmarks of the RTE Act. Ensuring that all schools completely adhere to the legal purpose of the RPWD Act is imperative.

V. NATIONAL EDUCATION POLICY(IES) – GAGING THROUGH INCLUSIVITY

[19] *Social Jurist v. Government of NCT of Delhi, 2012 SCC Online Del 4651*
[20] *Pramod Arora v. Governor of Delhi, (2014) 5 HCC (Del) 215*
[21] *Kamal Gupta v. State of Uttarakhand, 2018 SCC OnLine UTT 677*
[22] *Syed Mehedi v. Government of Delhi, 2019 SCC OnLine Del 9015*

The establishment of a distinct system for teaching underprivileged children, known as special education, commenced in the 1880s in India, apart from the mainstream school system.[23] The first school for those with hearing impairments was created in Bombay in 1883[24], while the pioneering school for individuals with vision impairments was formed in Amritsar in 1887.[25] In 1947, the number of schools providing education for those with visual impairments expanded to 32, while the number of schools exclusively serving individuals who are hearing impaired or have difficulty hearing rose to 30.[26] In addition, there were three schools specifically devoted to providing education for those with developmental disabilities. The proliferation of such institutions saw substantial and rapid expansion. By the year 2000, the quantity of specialised educational institutions had risen to more than 3000.[27] In the 1960s, the Indian government implemented a programme aimed at providing specialised training for teachers to educate children who had visual impairments. Gradually, similar programmes were developed to educate children with various impairments. However, the proficiency of the educated instructors remained questionable as a result of the lack of standardised curriculum for various courses, unclear prerequisites for entry to these courses, and a substantial scarcity of teacher educators and educational resources in the field. Therefore, in the 1980s, the Ministry of Welfare, Government of India acknowledged the crucial need for an organisation to supervise and regulate the activities in human resource development for handicap rehabilitation.

The National Policy on Education, 1986[28] (NPE, 1986), and the Programme of Action (1992)[29] highlight the significance of including students with special needs into regular groups. The stated objective of the NPE of 1986 is to promote the integration of individuals with physical and mental disabilities into the wider community as equal participants. It aims to facilitate their normal development and provide them with the necessary resilience and self-assurance to navigate through life. Following the implementation of the Rehabilitation Council of India legislation in 1992[30], it became mandatory for all special educators to be registered with the

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[23] Dr Goutam Patra, 'Inclusive Education in India and Its Present Perspectives' (11 November 2017) <https://gtmpatra.blogspot.com/2017/11/inclusive-education-in-india-and-its.html#:~:text=Historical%20Perspective%3A%20In%20India%20special,blind%20at%20Amritsar%20in%201887.> accessed on 29 December 2023

[24] Ibid.

[25] Ibid.

[26] Ibid.

[27] Ibid.

[28] National Policy on Education, 1986

[29] Programme of Action (1992)

[30] THE REHABILITATION COUNCIL OF INDIA ACT, 1992

council. The Act further mandates that each child with a handicap is entitled to receive education from a proficient teacher. It imposed penalties on educators who taught children with extraordinary needs without the required qualifications.

The NEP 2020 has been implemented after a hiatus of 34 years, in accordance with the recommendation put out by the Kasturirangan Committee in 2019. This plan is comprehensive, including all levels of schooling. The policy was segmented into four distinct components. School education refers to the provision of fair and comprehensive education that is accessible to all students.

The NEP 2020 is in accordance with the provisions of the RPWD Act 2016. Inclusive education, as per the definition provided by the RPWD Act 2016, pertains to an educational system in which students with disabilities and those without disabilities learn together. The teaching and learning methods are appropriately adjusted to cater to the diverse learning requirements of various types of students with disabilities.

The NEP 2020 encompasses various groups that face socio-economic disadvantages, including SEDGs, females, transgender individuals, SCs, STs, OBCs, minorities, individuals from specific geographical identities such as villages and small towns, children with disabilities, migrants, low-income households, victims of trafficking, and the urban poor. This ensures a comprehensive framework for promoting inclusive education in India. When critically evaluating the Contemporary NEP, it is evident that some of the proposals are important for promoting inclusive education.

The NEP, 2020 proposes guidelines for the development of institutions to provide support for children with special needs, referred to as CWSN. Proposals have been put up to establish Special Education Zones (SEZs) in regions of the country where there are substantial populations of individuals with all socio-economically disadvantaged groups (SEDGs). Given the significant challenges faced by individuals with disabilities and those belonging to marginalised genders, it is recommended that the Indian government establish a "Gender Inclusion Fund" to improve the country's capacity to offer equitable and high-calibre education to females and transgender individuals. More specifically, some suggestions are provided for those with disabilities, which are as follows:

1. Institutions that can cater to varying degrees of impairments: -
    1. Regular or Special schools - Children with benchmark disabilities
    2. Resource centres- Children with severe or multiple disabilities

3. Home-based – Children with severe and profound disabilities

2. Resource centres collaborate with special educators to address the rehabilitative and educational needs of children who have severe and multiple disabilities. Furthermore, they will assist parents/guardians in achieving excellent home-schooling and fostering skill development for these children, if needed.
3. Technology-based solutions will be utilised to offer assistance to parents/caregivers and extensively disseminate instructional materials, enabling them to actively support their children's educational needs.
4. Accessibility is facilitated via the presence of individual instructors and mentors, collaborative tutoring, adaptable educational programmes, proper facilities, and appropriate technology help. This can be particularly advantageous for children with disabilities.
5. Children with disabilities will be provided with assistive devices, technologically advanced tools, and instructional materials that are suited for their language. This will help them integrate into the classroom and communicate with their instructors and peers.
6. The National Assessment Centre, PARAKH, will formulate regulations and suggest evaluation tools encompassing the entire educational continuum, spanning from the fundamental stage to tertiary education.
7. NIOS will develop high-quality modules for teaching Indian Sign Language.
8. It is important to provide scholarships for CWSN.
9. Exceptionally talented and worthy students from all SEDGs will get support measures such as bridging courses, price waivers, and scholarships at the secondary level.

Despite the Indian Education system receiving a belated yet well-deserved boost from the recent NEP, 2020, it has been criticised for being more of an imaginatively conceived institution rather than a practical and efficient system. The fierce opponent of this strategy attributes its shortcomings to its ambitious and unrealistic goals. However, it has been a crucial cornerstone in shaping the future ideal form of the education system in the coming years. At the beginning of inclusive education, particularly in addressing the requirements of individuals with disabilities, the policy's extensive categorization may reduce the importance of prioritising specific themes that require greater attention compared to other groups. It might restrict the degree to which children with impairments receive comprehensive coverage from SEDGs.

The Policy emphasises the necessity of inclusive schools to facilitate the development of skills in children with disabilities. However, the limited availability of inclusive schools and special schools in many rural areas of the country serves as a concerning reminder of the difficulties, we have in attaining this goal. The present condition of inclusive education in numerous schools is inadequate and not achieving satisfactory advancement towards its objective. Moreover, there is a scarcity of resource centres and teachers with particular expertise. The efficacy of this guidance may be impeded by the difficulty of adopting technology-driven solutions that need parents and carers to acquire a specific degree of computer competency and literacy.

Significantly, the evaluation of home-based education, as mandated by RPWD, may not be deemed authentic because the inclusive education provision in RPWD necessitates accessible facilities and classrooms, along with personalised support to ensure comprehensive inclusion. There is an absence of comprehensive advice for home-based education, encompassing the curriculum, teaching strategies, and methods of evaluation. The presence of both instructors and tutors, along with technology interventions, will provide a substantial challenge in attaining objectives, especially in an area with an uneven student-to-teacher ratio. The absence of technology continues to be a notable deficiency in several educational institutions.

Additionally, the creation of SEZs will depend on the census report of the designated population. The verification of the accuracy of this report will depend on the meticulousness and legitimate methodologies employed by the authorities or organisations responsible for data gathering. Neglecting to comply with this requirement may lead to the omission of regions that explicitly require the mentioned provision for SEZs.

VI. CONCLUSION

The alignment of the Indian school system with the need of Divyang residents is a crucial milestone in the country's pursuit of comprehensive and equitable education. The NEP serves as a guiding framework that acknowledges the diverse educational requirements of all students, including those with disabilities. The NEP 2020 lays the foundation for a more comprehensive educational setting by giving importance to adaptability, availability, and a multifaceted approach to learning. The interaction with the Policy is an opportunity to evaluate and revamp the traditional structures within the Indian education system. The objective of the NEP is to provide an educational environment that fosters academic achievement, social integration, and

overall growth by recognising the unique challenges faced by individuals with disabilities and applying tailored strategies to empower them. An important benefit of personalised education, in addition to fostering children's academic and other talents, is its potential to enhance intellectual activities. Inclusive education begins with the teacher's attentiveness to the diverse needs of the children, rather than forcing them all into a single approach. This involves acknowledging their previous experiences and knowledge, as well as any physical or psychological obstacles they may face. Additionally, the teacher must establish a safe environment that fosters readiness for learning among the students.

CASE COMMENT: ANIL KUMAR V STATE OF KERALA

- *Priya Sharma*[*]

ABSTRACT

The case[1] *concerns the sexual assault and rape of a minor girl, which led to the accused's conviction under Section 376(2)(f) of the Indian Penal Code. The defendants challenged the validity of the victim's identification without conducting a test identification parade in an appeal to the Kerala High Court. During its deliberations, the court referred to important legal precedents, such as Amrik Singh v. State of Punjab and Malkhansingh v. State of M.P., to clarify the complex function of test identification parades in verifying witness identifications.*

The victim's identification of the perpetrator, which took place in the dock and one and a half months after the assault, was examined in this case. The identification was deemed believable by the court since the witness knew the accused well; the idea that she was an entirely new person who had only seen her briefly was rejected. The court emphasized the heightened status of the prosecutrix's testimony in rape cases, citing precedents such as Lillu @ Rajesh v. State of Haryana and State of UP v. Pappu, therefore the absence of an eyewitness did not lessen the evidentiary value.

The legal study looked at how the court can conduct test identification parades and admit identification facts by using Sections 9 of the Indian Evidence Act and 54A of the Code of Criminal Procedure. The court ultimately upheld the conviction, recognizing exceptions, negotiating the complex legal terrain involving identification evidence, and emphasizing the critical role that test identification parades have in maintaining a strong criminal justice system.

Keywords: ***Test Identification Parade, Indian Penal Code, Sexual Assault, Identification Evidence.***

[*] *RGNUL*

[1] *2023 INSC 965.*

I. BRIEF FACTS OF THE CASE

On 1st January 2004, at about 7 a.m. in the morning, a minor girl went to her property which was near the accused's home, to attend nature's call and she was also engaged in picking up the cashew nuts. The accused threatened the girl, sexually assaulted her and raped her. The additional sessions judge convicted the accused and sentenced the accused for the offence punishable under Section 376(2)(f) of the Indian Penal Code[2] and he was sentenced to undergo rigorous imprisonment and to pay fine for the said offence and in default of payment of fine. The convicted appealed to the Hon'ble High Court of Kerala and the legal questions that emerged out the proceedings were that what is the best evidence to prove the identification of an accused before a court and in what circumstances, test identification parade shall be insisted as corroborative piece of evidence to act upon the identification of the accused by the occurrence witness. The Hon'ble High Court dismissed the appeal and ordered the appellant to undergo the sentence given by the trial court.

II. THE COURT CONTEMPLATED THE CONUNDRUM AROUND TEST IDENTIFICATION PARADE

While positing the necessity of test identification parade and the aftermath in consequence thereof, the court referred to the decision of the apex court in *Malkhansingh & Ors. v. State of M. P*,[3] the Apex Court while dealing with *Section 9 of the Indian Evidence Act*,[4] held that "the evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger

[2] *The Indian Penal Code 1860, § 376(2)(f).*
[3] *Malkhansingh v. State of M.P., (2003) 5 SCC 746.*
[4] *Indian Evidence Act 1872, § 9.*

who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in court. But failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The identification parades belong to the stage of investigation, and there is no provision in the Cr.P.C[5] which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. These parades do not constitute substantive evidence. The substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration."[6]

In this connection, the Court also took into account a recent decision of the Apex Court reported in *Amrik Singh v. State of Punjab*[7] where the Apex Court considered the consequence of non-holding of test identification parade, in this case, as per prosecution, appellants came on a scooter and after throwing red chilli powder into the eyes of the complainant and killing the deceased by firing shot at him, took away their scooter and cash amounting Rs.5 lakhs lying in the dicky of the scooter – In the FIR, the complainant merely stated that the accused were three young persons out of which two were clean shaven and the one Sikh (sardar)who had tied a thathi having the age of 30-32 yrs. Complaint also not stated in his first version that he had seen the accused earlier and that he will be able to identify the accused. While identifying the appellants in court, complainant tried to improve the case by deposing that he had seen the accused in the city on one or two occasions and he specifically and categorically admitted in the cross-examination that it is incorrect that the accused were known to him earlier. Hence, non-conducting of TIP, held, fatal in the case and the conviction based solely on identification of the appellants by the complainant for the first time in court, was held non sustainable and thus was set aside.

Therefore, in such cases the prior conducting of test identification parade becomes important. Further, while identifying the accused in court, if the witness says that he had seen the accused

[5] *The Code of Criminal Procedure, 1973 (Act 2 of 1974).*
[6] *Malkhansingh v. State of M.P., (2003) 5 SCC 746.*
[7] *Amrik Singh v. State of Punjab, (2018) 14 SCC 245.*

on one or two occasions prior to the occurrence or the witness had occasion to identify the accused at the time of occurrence with certainty, without giving such a statement to police, the same is a serious omission to be read as contradiction to disbelieve the identification of the accused at the dock. The same is to be read as a vital and material improvement made by the witness/witnesses in Court, which would attract less probative value. In such cases, non-conduct of test identification parade (TIP), to be held as fatal and the conviction based solely on identification of the accused by the occurrence witness/witnesses for the first time in court is not sufficient.[8]

In the present case[9], The victim of the crime testified that approximately 1.5 months after the incident, she and her mother were going to visit another home when she discovered the accused sitting in an autorickshaw. When the accused noticed her, he moved to the back of the vehicle and covered his face. So, identifying the accused as the one who had abused her sexually. Her father informed the matter to the police and the accused was caught by the police and afterwards the accused at the dock was also recognized by the victim. In this instance, the court decided that there was no reason to doubt the accused's identification because the identifying witness was not an unknown person who only saw the accused briefly and had no reason to recall him. Moreover, the identity is not presented in court for the first time.

III. ABSENCE OF EYE-WITNESS DOES NOT RENDER THE EVIDENCE OF RAPE VICTIM INSIGNIFICANT

In the present case, there was no eyewitness and only the victim of the crime gave evidence in support of the occurrence, and the said evidence also failed to be shaken by way of cross examination. Moreover, the evidence of the injuries sustained by the victim were presented. Therefore, the Hon'ble Court relied on the judgment of the Apex Court reported in *Lillu @ Rajesh and Another v. State of Haryana*[10] and the decision reported in *State of UP v. Pappu*[11] and held that *a prosecutrix complaining having been a victim in an offence of rape is an accomplice after the crime and there is no rule of law that her testimony cannot be accepted*

[8] *Amrik Singh v. State of Punjab, (2018) 14 SCC 245.*
[9] *2023 INSC 965.*
[10] *Lillu v. State of Haryana, (2013) 14 SCC 643.*
[11] *State of UP v. Pappu, AIR 2005 SC 1248.*

without corroboration in material particulars, for the reason, that she stands on a much higher pedestal than an injured witness. The Court also observed another decision of the Apex Court reported in, *Narender Kumar v. State* (NCT of Delhi),[12] that held that "it is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the Court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the Court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of another witness; a high degree of probability having been shown to exist in view of the subject matter being a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the Court finds it difficult to accept the version of the prosecutrix on its face value, it any search for evidence, direct or substantial, which may lend assurance to her testimony."

IV. LEGAL ANALYSIS

Section 9 of the Indian Evidence Act, 1872[13] and Section 54A of the Code of Criminal Procedure, 1973[14] deal with the procedure and the legality of the Test Identification Parade. Section 9 of the Evidence Act[15] makes the test of identification of proper accused and properties admissible and relevant facts in a court of Law, but this act does not make it obligatory for the accused to present for the Test Identification Parade by the investigating officer.

The problem of Section 9 of the Evidence Act is tackled in Section 54A of the Code of Criminal Procedure, 1973. This section says that when the identification of an accused by the witness is considered necessary for investigation of such offense in which the accused is arrested, the

[12] *Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171.*
[13] *Indian Evidence Act 1872, § 9.*
[14] *The Code of Criminal Procedure 1973, § 54 A.*
[15] *Indian Evidence Act 1872, § 9.*

Court, having jurisdiction, may on the request of the officer in charge of a police station, direct the accused so arrested to subject himself to identification by witness or witnesses in such manner as the Court may deem fit.[16]

Moreover, by compelling an accused to stand up and show his face for the purpose of identification, Article 20(3) of the Constitution of India[17] is not violated. Additionally, for the purpose of identification, he can also be ordered to disclose any scar or mark on his body.

Test identification parades are a common tool used by law enforcement to validate the reliability of witnesses, particularly in situations when the witness has only ever seen the accused at the crime site. When conducting a test identification parade, the judicial magistrate is also required to take certain safety measures. For example, the parade must not be done in broad daylight and must respect private property. There should be no police officers present. Prison guards should not be present at the parade site if they are being held behind bars. If an accused person is wearing a noticeable clothing, the magistrate should try to make arrangements for others to wear similar items, but if that isn't possible, they should persuade the suspect to take off the garment. The accused will have the opportunity to express any objections to those in attendance. The witnesses who have been called for the parade should not be allowed to see suspects prior to the march and should be kept out of sight throughout it. The witnesses will be called in one at a time to identify themselves. The witness who has successfully completed the Test Identification Parade procedure is not permitted to interact with the other witnesses who have not yet provided their identity. The witness will be questioned about whether or not he has previously known any of the suspects he plans to name. Every additional event related to the identification parade needs to be meticulously documented.[18]

[16] *The Code of Criminal Procedure 1973, § 54 A.*
[17] *INDIA CONST., art 20, cl.3.*
[18] *Abhishek Kumar, ' Test Identification Parade An Evaluation Through Judicial Pronouncements, It's Utility and Veracity.'(Legal Service India) https://www.legalserviceindia.com/legal/article-10860-test-identification-parade-an-evaluation-through-judicial-pronouncements-its-utility-and-veracity.html accessed 30 January 2024.*

V. CONCLUSION

One could argue that this example contributes to the deciphering of the mystery surrounding Test Identification Parade (TIP). It also emphasized its evidential importance and the situations in which it will be relied upon as supporting evidence when the occurrence witness identifies the accused. The Hon'ble Court made the correct decision when it determined that the lack of an eyewitness does not negate the significance of a rape victim's evidence. If the Court is unable to accept the prosecutrix's version of events, it may look for any direct or substantial evidence that could support the victim's testimony.

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