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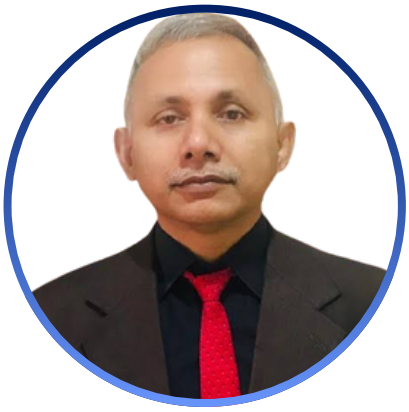

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MESSAGE
FROM
PROFESSOR-IN-CHARGE

Albeit delay, I am privileged to present to all our dear readers the 20th issue of our flagship journal titled *National Capital Law Journal ('NCLJ' in short)*, published by Law Centre-II. Throughout its publication journey, this journal has been widely acclaimed by the readers, mostly scholars, practitioners, and students of law in our country. At the time when this journal was first published in 1996, it was second only to *Delhi Law Review*, a publication from the Faculty of Law, University of Delhi. At that time, there was a dearth of quality journals in the national capital region.

So much water has flown down after that time and there is abundance of many journals and law reports in this region. However, the NCLJ has remained as the trusted source of reference for the members of academia and practitioners of law all over the country and abroad even today. Research articles submitted for publication in this journal are blindly peer-reviewed and matched with its aims and scope. The editor-in-Chief and the entire Editorial Board of this journal are very experienced and driven by the motto of excellence. The journal is published both in online and print formats.

The present volume has selected eleven long and short articles on contemporary topics, such as abortion rights, insolvency protocols, gender and climate change, child protection laws, criminal procedure, equality principle, law on occupied territory, powers of the President in the times of political instability, internal displacement induced by climate change, powers of President of Nigeria, and the scope for paperless judiciary. In addition, an attractive section, i.e., book review, adds another feather in the cap of this journal as it has selected one book on IPR and Bio-technology for it.

I take this opportunity to congratulate the entire editorial team for selecting the best articles and bringing out this issue with strict adherence to the highest standards of scholarly editing. I wish Professor Pinki Sharma, the editor, and her editorial team a huge success in broadening the base of readers of this flagship journal by sharing and tagging the journal to their social media profile and by such other electronic means. Last but not the least, the advisory board of this journal deserves kudos for their support and blessings for the journal.

PROF. DR. ANUPAM JHA (Editor-in-Chief)
PROFESSOR-IN-CHARGE
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UNIVERSITY OF DELHI

MESSAGE
FROM
EDITOR

It gives us enormous pleasure to present the latest issue of the National Capital Law Journal Vol XX, which endures our obligation to nurturing laborious academic review and critical rendezvous with contemporary legal issues. This issue brings together a miscellaneous assortment of contributions from academicians, research scholars and practitioners offering both doctrinal scrutinises and interdisciplinary perspectives.

Research articles in journals are not just theoretical exercises, but they are vehicles for knowledge conception and scholarly communications. Research articles published in journals are the foundation of academic discourse, intellectual growth and are a key mechanism for disseminating such results. They provide a professional means of expressing ideas, illustrating credentials, and contributing to the overall knowledge base. They safeguard that innovative ideas, critical evaluation, and empirical verdicts are shared with the widespread scholarly community. Amidst the fast-paced growth, research methodologies are in a constant state of evolution, punctuating the dynamic character of quest and exploration. The process of blind peer review adds credibility and preserves the integrity of research.

National Capital Law Journal (NCLJ) is a blind peer-reviewed, faculty-run journal published annually by Law Centre II, University of Delhi since 1996. Its aim is to promote academic research and foster debate on contemporary Legal and policy issues, both national and international, across all fields of law. NCLJ serves as important forum for the legal community, encouraging scholarly dialogue among academicians, judges, practitioners, researchers and prominent thinkers. This issue has received a positive response, highlighting the role of research in societal development and progress.

In this issue of NCLJ:

Olusola Babatunde Adegbite, in the article titled *"Scope of the President's Power to Remove a Central Bank Governor under Nigerian Law: A Critical Analysis",* discusses the constitutional and statutory framework governing the removal of Central Bank Governors in Nigeria. Using the 2023 removal of Governor Godwin Emefiele as a case study, he argues that the President lacks unilateral power to affect such removal, emphasizing the requirement of Senate approval to safeguard institutional independence, uphold the doctrine of separation of powers, and protect the Central Bank from political interference.

Sandhya Sharma and Versha Vahini, in the article titled *'Issue of Cross-Border Insolvency: Is Insolvency Protocol a success story in India?'* have discussed the importance of insolvency protocols as mechanism to address challenges arising from multinational corporations having assets and creditors across jurisdictions, with reference to the legal framework in India, development of protocols through landmark cases and the continuing uncertainty over their standardisation despite their emergence as a practical tool for managing cross-border insolvency.

Kanchal Gupta and Stuti Pandey, in the article titled *'Protecting Children from Sexual Offences- Challenges and Issues in the Implementation of POCSO Act, 2012'*, discuss the progressive features of the act such as gender neutrality, child-friendly procedures and creation of special courts, while also pointing out persistent challenges in its implementation. These include underreporting, social stigma, procedural delays, inadequate victim support, ambiguities around consent and uneven enforcement among others and argues that the act's promise can be achieved through sustained, multi-pronged reforms.

Pramod Tiwari and Shubam Pandey, in the article titled '*Margins to Mainstream: The Status of Transgender Persons' Right to Education in India*', have explored the historical, constitutional, and legal framework surrounding the educational rights of transgender individuals. It highpoints the progress made through landmark judgments, constitutional amendments, and legislation like the RTE Act and the Transgender Persons (Protection of Rights) Act, 2019. The article emphasizes tenacious challenges such as systemic discrimination, low literacy rates, and lack of institutional support, leading to exclusion from quality education. Recommendations for inclusive policies, anti-discrimination cells, gender-neutral facilities, and financial support mechanisms to ensure equitable access to education for the transgender community have been made.

Santosh Upadhyay, in the article titled *'Transformative Occupation of Iraq and International Law: A Legal Analysis',* discusses the far-reaching political, legal and economic changes introduced in Iraq by occupying powers violated the established law of occupation. The author argues that such transformative measures undermine sovereignty and self-determination and that lasting changes in occupied territories must come from people themselves, not from external force.

Nitesh Saraswat and Shivani Pundir in the article titled '*Political Stability vs. Federal Autonomy: A Study of President's Rule and Anti defection Law in India*' discuss the interplay between Article 356 and the Tenth Schedule. In regard to this, the authors highlight how these provisions, which are perceived as safeguards for constitutional crises and political stability are rather misused. The authors emphasize the urgent need for reforms, for instance, revisiting the merger clause, ensuring time-bound disqualification and strengthening institutional integrity to preserve India's federal balance, democratic resilience and constitutional accountability.

Balajinaika B. G., in the article titled *'Climate Change, Internal Displacement, and the 2030 UN Agenda for Sustainable Development: Issues and Challenges',* discusses how climate change-induced displacement poses a major threat to the achievement of SDGs. By highlighting the gaps in international and regional frameworks, the author emphasizes the urgency of including internally displaced persons as a distinct category within SDG policies, urging national and global efforts to strengthen capacities.

Tejaswini Misra and Sonam Dass, in the article titled '*Feminist Perspectives on Environmental Justice: Need for Gender Equity in Legal Frameworks in combating Climate Change*', have discussed how climate change disproportionately impacts women, critiquing India's largely gender-blind climate policies and that the implementation of gender issues at the state level is very diverse. Tracing the gaps between normative goals and actual policy approaches, the paper argues for

integrating intersectional vulnerabilities of sex, caste, class and resource access into climate governance.

Sona Khan in the article titled '*Abortion in US Politics : Some Reflections'* scrutinizes the argumentative role of abortion in shaping American law, politics, and electoral strategy. It is highlighting how restrictive state laws, the revival of old statutes like the Comstock Act, and inconsistent federal policies have deepened polarization. Through significant cases, legislative battles, and personal misfortunes, the author emphasizes the human and ethical costs of abortion bans. It concludes that abortion has become not just a healthcare issue but a defining marker of political identity, women's autonomy, and constitutional morality in the United States.

Zubair Ali and Ruhil B Raj, in the article titled '*From Tradition to Technology: Exploring the Feasibility of a Paperless Justice Delivery System in India'*, discuss the ongoing digital transformation of the Indian judiciary and the possibilities of moving towards a paperless system. Highlighting initiatives such as e-filing, virtual hearings, case management systems, and the Orissa High Court's near-paperless model, the author emphasizes that while digitisation can make justice more efficient, transparent, and accessible, its success ultimately depends on strong infrastructure, inclusivity, digital literacy, and bridging the technology divide to ensure that justice truly reaches everyone.

Amrendra Kumar reviews the book '*Biotechnology and Intellectual Property Rights: Legal and Social Implications'* written by Kshijit Kumar Singh. In his book, Dr. Kshitij explores the legal, social, and ethical dimensions of biotechnology patents across jurisdictions. The work highlights gaps in international frameworks and stresses the need for balanced reforms to ensure innovation serves both public welfare and global equity. The reviewer has made scholarly observations.

Thus, this issue of the Journal addresses various magnitudes that will provide treasured impetus for further research and a deeper understanding of the contemporary challenges faced by society.

On behalf of my editorial team members, I extend our deep gratitude to our Professor-In-Charge Prof. (Dr.) Anupam Jha for his constant unwavering support, valuable guidance, encouragement and insightful feedback for the successful publication of this Journal.

Wholeheartedly I extend my heartfelt appreciation to our esteemed authors for their scholarly insights, treasured advisory board members for their valued advice, sincere and honest reviewers, and the dedicated editorial team for their meticulous efforts in sustaining the high standards of the journal. Above all, my profound thanks to our readers for their continued support and sustained engagement, which remains the keystone of this journal's purpose. I wish all the best for future endeavours to all our authors who have contributed their perspectives on various contemporary issues by submitting well researched papers in our journal National Capital Law Journal, Volume XX Issue 2022.

PROF. DR. PINKI SHARMA (Editor)
PROFESSOR, LAW CENTRE-II,
FACULTY OF LAW, UNIVERSITY OF DELHI

MESSAGE
FROM
CO-EDITOR

With privilege and immense pleasure, I hail the legal fraternity for helping us to bring out the publication of this Journal. The luminaries of University of Delhi, Faculty of law, who have passed on the baton to us, and have previously helped illuminate legal minds, shape student personalities and have helped raised the stature of our faculty, are our guiding light to carry this mission forward. The endeavors we make today, should help the coming fraternity to follow the same path. The aim of this journal was to highlight the multifarious aspects of law to enlighten minds, which otherwise may not be mindful towards certain issues. It is with this vision, that I feel proud in being associated with the publication of this journal. I am grateful to the mind, labor, and efforts of all members, who helped to support and bring out this publication.

DR. SHABNAM (Co-Editor)
ASSOCIATE PROFESSOR
LAW CENTRE-II, FACULTY OF LAW
UNIVERSITY OF DELHI

CONTENTS

ARTICLES

SCOPE OF THE PRESIDENT'S POWER TO REMOVE A CENTRAL BANK GOVERNOR UNDER NIGERIAN LAW: A CRITICAL ANALYSIS

Olusola Babatunde Adegbite[*]

I. INTRODUCTION

Constitutional Law deals with the role and powers of institutions within the State, as well as the relationship between the State and its citizens.[1] One such institution is the Office of the President under a democratic set-up, where, as the nation's Chief Executive, he embodies the executive branch and encapsulates the pinnacle of authority, exercising a broad range of powers. These powers, generally referred to as 'executive powers', remain one of the most important subjects of contemporary constitutional law. They are defined in the Constitution, which operates as a country's fundamental law[2], as well as being a document carrying an inherent quality of sovereignty.[3]

The nature of executive powers in Nigeria's constitutional democratic governance cannot be appreciably understood without deep insights into a dimension of this power, referred to in this article as 'Presidential Removal Powers'. In liberal democratic systems that operate a presidential system of government, presidential removal power operates as a legitimate constitutional tool to keep the wheels of government running, in which appointees of the President are kept on their toes to deliver on their duties, so that the people whose mandate the President holds in trust, get good value for electing him. It also ensures that appointees of the President remain cooperative as well as level-headed and do not see themselves as bigger than the appointing power. It can therefore be considered a shield to ensure that government offices are not captured, and that the business of the state remains a going concern.

The Nigerian President wields enormous removal powers; powers granted him by the Constitution to ensure a smooth running of his government. Whilst a broad spectrum of this power can be exercised unilaterally, a marginal aspect is designed by law to only be exercisable by him acting together with the legislative arm of government, and in this case, the Senate. Since the promulgation of the 1999 Constitution,[4] the exercise of removal powers by different Presidents has been ubiquitous. At regular intervals, its operation has found its

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[*] LL.B (Hons.) (*Ife, Nigeria*), LL.M (*Ife, Nigeria*), LL.M (*Cardozo School of Law, Yeshiva University, New York, USA*), Ph.D. (*Hertfordshire, UK*), Visiting Lecturer, York St. John University, York, United Kingdom. I return all the Praise to God Almighty through My Lord Jesus Christ, for the wisdom and inspiration he supplied to prepare this Article. He alone takes all the glory.

[1] Hilaire Barnett, *Constitutional & Administrative Law* 4 (Routledge, 10th edn., 2013).

[2] The Constitution creates a national government and divides powers among the three branches. It is the framework of rules which dictate the way in which power is divided between the various parts of the State and the relationship between the State and the Individual. It indicates the form of government, and division of powers amongst the various institutions of the government and sets a limit of government authority. *See generally*, Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 3 (Wolters Kluwer Law and Business, 2011); Chris Taylor, *Constitutional and Administrative Law* 3 (Pearson Education Ltd., 2008); A.O. Okon, "Nigeria and a People's Constitution: The Imperative of Democracy and Change" 4(1) *The Constitution* 12 (2004).

[3] Olusola B. Adegbite, "Constitutional Sovereignty and Domestic Implementation of International Law: Balancing Constitutionalism with Human Rights Treaties in Nigeria" 5(1) *ABUAD Journal of Public and International Law* 4 (2019).

[4] Constitution of the Federal Republic of Nigeria 1999.

way to the front row of the country's constitutional practice, yet the extent, scope, and necessity of this power within the country's constitutional democratic setup have remained unsettled.

The intense debate about distinct but interrelated aspects of this power peaked when, on June 09, 2023, the news broke that the new President, Bola Ahmed Tinubu, had suspended the then-Governor of the Central Bank, Mr. Godwin Emefiele, and asked that he hand over leadership of the bank to the Deputy-Governor, Operations.[5] Mr. Emefiele was later arrested in Nigeria's commercial capital, Lagos, and flown to the Federal Capital City (FCT) Abuja by operatives of the Department of State Services (DSS) for interrogation.[6] For some time, the DSS had been investigating Mr. Emefiele for alleged criminal infractions related to the multi-billion-dollar lending programme initiated by him.[7]

Six weeks after his arrest and detention, he was charged before the Federal High Court in Lagos, not for economic crimes, but for illegal possession of firearms, *i.e.*, a shotgun and hundreds of cartridges.[8] The case was later withdrawn, and he was released by the DSS, only to be subsequently arrested by the Economic and Financial Crimes Commission (EFCC) for further interrogation.[9] However, a key point relevant to this article is that Mr. Emefiele's removal by the President was done without the necessary recourse to the Senate for a concurrent approval as required under section 11 (2) (f) of the Central Bank of Nigeria (CBN) Act.[10]

This unilateral exercise of presidential removal power triggered a national debate. Commentators who weigh in on the side of the CBN stand on the normative premise that such unilateral exercise of removal power is reckless, arbitrary, illegitimate, and undesirable for the notion of checks and balances, and that it makes the independence of the bank vulnerable to the pathologies of political interference. This is more so, as the CBN sits at the top of a list of several federal agencies legally construed as enjoying a degree of independence, based on which their heads can only be removed by the President with the approval of the Senate. Others, who disagree, do not take the point this far. They simply highlight the fact that there is a need to balance the President's removal powers and the independence of the bank.

A general understanding of the nature of the Office of the President is that this office is constrained by the doctrine of separation of powers and by the general weakness of the

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[5] Felix Onuah, "Nigeria's President Tinubu Suspends Central Bank Governor" *Reuters*, June 09, 2023, *available at*: https://www.reuters.com/world/africa/nigerias-president-tinubu-suspends-central-bank-governor-2023-06-09/ (last visited on May 22, 2024).

[6] Oluyemi Ogunseyin, "DSS Confirms Emefiele's Arrest" *The Guardian*, June 10, 2023, *available at*: https://guardian.ng/news/dss-confirms-emefieles-arrest/ (last visited on May 22, 2024).

[7] William Clowes, Emele Onu, *et.al.*, "Nigeria's Suspended Central Bank Governor Taken into Custody" *Bloomberg UK*, June 09, 2023, *available at*: https://www.bloomberg.com/news/articles/2023-06-09/nigeria-s-central-bank-governor-suspended-by-nation-s-president?embedded-checkout=true (last visited on May 22, 2024).

[8] Nduka Orjinmo, "Godwin Emefiele's Arrest: How Central Bank of Nigeria (CBN) Boss ended up in Court" *BBC News*, July 26, 2023, *available at*: https://www.bbc.co.uk/news/world-africa-66273223 (last visited on May 22, 2024).

[9] Abiodun Sanusi, "EFCC Detains Emefiele After DSS Frees Ex-CBN Governor" *The Punch*, Oct. 27, 2023, *available at*: https://punchng.com/breaking-efcc-detains-emefiele-after-dss-frees-ex-cbn-gov/ (last visited on May 24, 2024).

[10] Central Bank of Nigeria Act No. 7 of 2007 (Federal Republic of Nigeria Official Gazette No. 55, vol. 94 of June 01, 2007).

Chief Executive's formal powers.[11] However, provisionally thinking of removal power by the Nigerian President as the exercise of constitutional power towards ensuring the smooth running of government, leaves open the question of whether such power ought to be constrained, limited, or left to be exercised in absolute terms. More fundamentally, it raises underexplored questions for constitutional practice in Nigeria. At its most striking, it implicates the question of whether and to what extent the Nigerian President can exercise removal power over officers of the state, including those of so-called 'independent agencies' such as the Central Bank, without legislative oversight, such as Senate approval. The fact that this power has so far been unilaterally exercised to remove two Central Bank Governors and the seeming fragility of democratic norms in Nigeria's constitutional practice raise the stakes for understanding this power as well as answering these questions.

In light of the above, this Article undertakes the comprehensive examination of the exact nature and limits of the powers of the Nigerian President to remove the head of a specialised agency such as the Central Bank. It examines the extraordinary presence of this power within the country's contemporary politics, problematizing the law governing the removal of a Central Bank Governor and how it has been interpreted so far by the Courts, *i.e.*, whether it vindicates or indicts the exercise of removal power by the President. Also, the Article examines the constitutional understanding behind presidential control over statutory federal agencies, such as heads of Central Banks. It conducts this analysis, engaging key provisions in Nigeria's CBN Act as well as the Constitution of the Federal Republic of Nigeria 1999.

The central argument in this Article is that the President lacks the power to unilaterally remove the Central Bank Governor. It notes that the office is guaranteed a security of tenure and, more importantly, that the requirement of Senate approval as part of the removal process is designed to insulate this office from unnecessary political interference, and ultimately strengthen the doctrine of separation of powers. To realise the above, this Article is organised as follows: Part II examines the context of presidential removal powers in Nigeria, while Part III looks at the law governing the removal of a Central Bank Governor. Part IV provides concluding thoughts.

II. PRESIDENTIAL REMOVAL POWERS IN NIGERIA: BACKGROUND AND CONTEXT

The exercise of presidential removal powers by President Tinubu in removing the erstwhile Central Bank Governor, Mr. Emefiele, raises cogent issues on the scope of constitutional powers in the country. This is hinged on the far-reaching implications of the use of this power, both for the protection of the institution in question as well as the country's constitutional law jurisprudence. As Ndulo correctly notes, "this is a very important power because power over peoples' means of livelihood operates to render them amenable to the will of the person wielding the power".[12] This is more so as often, politicians may sometimes strategically manipulate vacuums in the President's constitutional authority to achieve predetermined partisan objectives.[13] In contemporary times, nation-states have settled on the fact that how and to what extent constitutional power is curtailed is central to the survival of democratic governance. Therefore, a proper understanding of the legality and

[11] Kenneth R. Mayer, "Executive Orders and Presidential Powers" 61(2) *The Journal of Politics* 455 (1999).
[12] Muna Ndulo, "Presidentialism in the Southern African States and Constitutional Restraint on Presidential Power" 26 *Vermont Law Review* 783 (2006).
[13] Jide Nzelibe, "Partisan Conflicts Over Presidential Authority" 53 *William & Mary Law Review* 392 (2011).

constitutionality of the Emefiele removal must derive from an understanding of the nature and significance of constitutional powers under the Nigerian constitution.

At the core of the apparatus of modern governments is the limitation of power. Whereas democracy has not always been the preferred form of government in human history, however, since the American Revolution and the adoption of the US Constitution, democracy has largely become synonymous with representative government, the very idea that those exercising constitutional powers do so in a delegated form.[14] As such, in today's world, unlimited power is incompatible with the notion of democracy.[15] One concept that encapsulates the constitutional objective of limiting power is the doctrine of separation of powers.

Under the doctrine of separation of powers, the power of a sovereign government is shared amongst the three arms of government, *i.e.*, the executive, legislature, and judiciary, to prevent the over-concentration of power in one arm.[16] Foremost Nigerian Constitutional Law Professor, Ben Nwabueze, captured this eloquently when he noted that "concentration of government powers in the hands of one individual is the very definition of dictatorship, and absolute power is by its very nature arbitrary, capricious, and despotic".[17] The Nigerian Constitution defines these powers by vesting them in the three arms of government.

While section 4 provides for legislative power, sections 5 and 6 govern Executive and Judicial power, respectively. In terms of functions, these three arms differ. Whereas the executive arm is concerned with formulating and directing domestic and foreign policies of the State, the legislative arm is empowered to make laws, appropriate funds, and ratify treaties and appointments, and the functions of the judicial arm border generally on the correct interpretation of the Constitution as well as other laws, towards adjudicating controversies.[18]

Executive powers have varied meanings. While the concept is expressed in various ways, it is mostly reduced to the idea that an entity referred to as the executive branch, wields the powers to oversee the political and administrative functions of the State.[19] In its simplest form, power in this regard is executive in nature, in the sense that the holder having been elected by the popular will of the people, through a democratically governed electoral process, is charged with the day-to-day running of the country.[20]

Executive power is predicated on the notion that the head of a country, having been elected as the custodian of the collective mandate of the people, is empowered to maintain the

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[14] Sam Amadi, "Executive Orders and Presidential Power in Nigeria: Comparative Lessons from the United States of America" 2 *NILDS Journal of Law Review* 78 (2019).
[15] *Ibid*.
[16] A.O. Nwafor, "The Lesotho Constitution and Doctrine of Separation of Powers: Reflections on the Judicial Attitude" 6 *African Journal of Legal Studies* 51 (2013); Olusola B. Adegbite, Oreoluwa O. Oduniyi, *et.al.*, "Separation of Powers under the Nigerian 1999 Constitution: The Core Legal Dilemmas" 3(2) *Sriwijaya Law Review* 236 (2019); Charles M. Fombad, "The Separation of Powers and Constitutionalism in Africa The Case of Botswana" 25(2) *Boston College Third World Law Journal* 306 (2005).
[17] Ben Nwabueze, *The Presidential Constitution of Nigeria* 32 (Sweet and Maxwell, 1981).
[18] *See* Brian Duignan (ed.), *The Executive Branch of the Federal Government: Purpose, Process and People* 21 (Britannica Educ. Publishing, 2010).
[19] Olusola B. Adegbite, "Constitutional Boundaries of Executive Powers and the Impasse Over the Appointment of an EFCC Chairman in Nigeria: Critical Comparative Perspectives from the United States Constitution" 4(1) *Bild Law Journal* 9 (2019).
[20] *Ibid.*

constitution and other laws validly made by the legislature. While executive power also means the power to execute laws or carry them into effect, in modern governments it extends to the administering of laws and the formulation of policies.[21] Indeed, there is much to be said in explaining how executive power works. Most notably, perhaps, is Vattel, who explains the concept as follows:

> *"The Executive power naturally belongs to the sovereign – to every conductor of a people he is supposed to be invested with it, in its fullest, when the fundamental law do not restrict it. When the laws are established, it is the prince's province to have them put in execution. To support them with vigour, and to make a just application of them to all cases that present themselves is what we call rendering justice."*[22]

An examination of the universe of executive power shows that it can be vested in a single Chief Executive or in a plurality of executives exercising coordinate authority. While in a presidential system of government such power is vested in a single person called the 'Executive President', in a parliamentary system of government it is vested in a plurality of executives.[23] Presidential removal powers can ordinarily be considered as a product of the broader executive powers under the Constitution. However, in certain instances, the exercise of presidential removal powers straddles both the executive and the legislature, implicating the question of whether it can strictly be deemed an offshoot of executive powers. That the exercise of presidential removal powers over certain agencies of the state, deemed as independent, requires Senate approval to be valid may be considered a manifestation of the doctrine of checks and balances. Indeed, this class of power must be considered a derivative of executive powers, but whose exercise is expected to be checked by the legislature.

The Office of the President of Nigeria is the highest in the land and is also a creation of the Nigerian Constitution. In creating this office, the Constitution vests the executive powers of the federation in a single individual; in this case, anyone who occupies the office at any point in time.[24] The holder is also granted constitutional discretion to exercise this power as he may deem fit.[25] There is considerable evidence of the influence of the US presidential system of government over what obtains in Nigeria. To understand this, one must examine the text and structure of section 5 (1) (a) of Nigeria's 1999 Constitution. This section, which grants the President broad executive powers, provides that:

> *"Subject to the provisions of this Constitution, the executive powers of the shall be vested in the President, and may subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice President and Ministers of the Government of the federation or officers in the public service of the federation."*[26]

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[21] Josephine N. Egemonu, "Presidential Powers under the Constitution of the Federal Republic of Nigeria 1999 A Comparative Analysis" 25(6) *Journal of Legal, Ethical and Regulatory Issues* 1–10 (2022), *available at*: https://www.abacademies.org/articles/presidential-powers-under-the-constitution-of-the-federal-republic-of-nigeria-1999-a-comparative-analysis-15458.html (last visited on May 25, 2024).

[22] Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, Bk. I, Ch. XIII, 187 (Liberty Fund, Indianapolis, 2008).

[23] *Supra* note 21.

[24] *Ibid.*

[25] *Ibid.*

[26] *Supra* note 4, s. 5 (1)(a).

Complementing the above, section 5 (1) (b) adds that, this power:

> *"Shall extend to the execution and maintenance of the Constitution, all laws made by the National Assembly, and to all matters to which the National Assembly has, for the time being, power to make law."*[27]

This concentration of power in the President is designed to ensure the effective mobilisation of and management of natural and human resources, as well as the exigency of effective foreign representation.[28] One issue that has often trailed the provisions of section 5 of the Constitution, is the question of the exact scope of this power. From the definition in section 5 above, the power in view relates to three key matters, *i.e.*, the execution and maintenance of the Constitution, all laws made by the National Assembly, and all matters with respect to which the National Assembly has, for the time being, powers to make laws.

Aside from clear provisions of the Constitution which must be executed by the President, a perusal of the Exclusive Legislative List contained in the Second Schedule to the 1999 Constitution will reveal 66 important items over which the President can exercise full executive powers. For the most part, the execution of government and its functions is governed by specific powers granted by the Constitution.[29] Therefore, in a practical sense, the President symbolises the zenith of political power, and the grant of executive power under the Constitution is the vehicle for demonstrating this power.

In the exercise of the executive powers, the President's actions are driven by his intentions, and he generally acts based on his deliberate judgment. By his position, he controls the executive arm of the government, while also exercising a degree of authority over the legislature, such as the power to proclaim their initial plenary as well as over the judiciary, e.g., the power to appoint heads of the courts. He equally controls major institutions of the state, such as the Military, the Police, as well as Ministries, Departments, and Agencies. He is the Commander-in-Chief of the Armed Forces of the Federation, and he alone has the power to declare war on another nation.

The executive powers of the President are extended to the power to appoint persons as he deems fit into the various departments and agencies of the government, appointments which could be political or statutory.[30] The concentration of executive powers in a single individual President is to allow for a fluid running of the modern State, insofar as he holds the collective mandate of the people, something acquired through a free, fair, and legally sanctioned general election. Aside from the Vice President, who is elected on the same joint ticket as the President, every other officer of his cabinet and, in extension, the broader executive branch, except where clearly stated by the Constitution, holds their appointment at the pleasure of the President. Section 147 of the 1999 Constitution declares:

> *"[T]here shall be such offices of Ministers of the Government of the Federation as may be established by the President; any appoint to the offices of Ministers of the Government of the Federation shall, if the nomination of any person that office is confirmed by the Senate, be made by the President."*[31]

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[27] *Id.*, s. 5(1)(b).
[28] *Supra* note 14 at 81.
[29] *Supra* note 21.
[30] Olusola B. Adegbite, "Limit of Presidential Power of Appointment under the 1999 Constitution (As Amended): An Appraisal of Section 154" 52 *Journal of Law, Policy, and Globalisation* 197 (2016).
[31] *Supra* note 4, s. 147(1)(2).

The meaning is that the President can hire anyone he pleases. Alongside the President's appointment powers, are also concurrent removal powers, to the end that where he is dissatisfied with the performance or conduct of an appointee, he can remove such a person, as he pleases.

However, this does not apply in all situations. For certain offices and institutions deemed as enjoying a measure of independence, the President's removal powers are limited and otherwise tied to concurrent approval by the Senate. As Amadi notes, in designing the country's constitutional framework, the drafters of the constitution, drawing inspiration from the American framework, limited the Powers of the President such that "he or she can do all the good he or she can and none of the evil he or she could".[32] This power, which is similar to that under article 2 of the US Constitution,[33] is personally and singularly donated to the President.

As it is argued, this provision puts the President in a position whereby he can behave as an "elected monarch" as well as act as a "delegated representative of the people".[34] Within the constitutional language of executive powers, the President is deemed to operate in three offices. First, is his power as the Chief Executive of the Federation, with full oversight over the administration of the States, with related powers to hire, fire, and coordinate the national economy.[35] Second, is his office as Commander-in-Chief of the Armed Forces of the Federation, which grants him wide war powers to deploy the Armed Forces against external aggression and to protect the State's territorial integrity.[36] Third, is his power to act as the Sole organ of the State, representing it in foreign affairs. [37]

Executive power under Nigeria's constitutional framework is patterned after that of the US framework by limiting the power of the single individual President, such that he or she can do all the good he/she can and none of the evil he/she could.[38] Scholars are in one accord that executive power is subordinated to legislative power. As noted by Mortensen:

> *"The implementatory essence of executive power was most often expressed in terms of Locke's vision of law as an interlocking tripartite phenomenon: First the law must be legislated, then in at least some cases it must be adjudicated, and then its requirements must be executed. The definition of executive power necessarily entailed both its subsequence and its subordination to the legislative power."*[39]

It must be borne in mind that whereas section 5 of Nigeria's 1999 Constitution provides for wide powers, it does at the same time circumscribe these powers by stating that the exercise thereof is subject to "the provision of this Constitution" as well as subject to "the

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[32] Sam Amadi, "Executive Orders and Presidential Powers in the Nigerian Constitutional Democracy" *The Guardian*, Oct. 17, 2018, *available at*: https://guardian.ng/features/executive-order-and-presidential-power-in-the-nigerian-constitutional-democracy/ (last visited on May 25, 2024).

[33] Article II of the US Constitution vests executive powers in the President, who has a duty to "*take care that the laws are faithfully executed*".

[34] *Supra* note 32.

[35] *Ibid.*

[36] *Ibid.*

[37] *Ibid.*

[38] *Supra* note 14 at 81.

[39] Julian D. Mortensen, "Article II Vests the Executive Power, Not the Royal Prerogative" 119(5) *Columbia Law Review* 1238, 1239 (2019).

provision of any law made by the National Assembly".[40] The meaning is that the President can only exercise his very expansive powers in accordance with the Constitution, or any law validly made by the National Assembly".[41] One such law is the CBN Act, which governs the appointments deemed to enjoy statutory flavour, *i.e.*, backed by law. The next section in this Article will examine how the exercise of presidential removal powers is defined under this Act, as well as the judicial response to the removal of officers whose appointments enjoy statutory flavour.

III. STATUTORY FRAMEWORK GOVERNING REMOVAL OF A CENTRAL BANK GOVERNOR IN NIGERIA

Under the principles of interpretation, the golden rule states that in the interpretation of statutes, "the grammatical or ordinary sense of words is to be adhered to unless it would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument…"[42] In *Ishola* v. *Ajiboye*,[43] the Supreme Court of Nigeria, per Ogundare, JSC, provided a useful understanding in this regard, stating that a statute cannot be interpreted in a vacuum, but that all relevant provisions must be examined in order to arrive at a fit and proper conclusion. Accordingly, apprehending the correct intent of the drafters of the CBN Act, concerning how the process of removal of a Central Bank Governor is to be conducted, would require an examination of section 11(2) (f) of the CBN Act in the light of other relevant provisions. Section 1(3) of the Act provides that:

> *"In order to facilitate the achievement of its mandate under this Act and the Banks and Other Financial Institutions Act, and in line with the objective of promoting stability and continuity in economic management, the bank shall be an independent body in the discharge of its functions."*[44]

Section 2 provides that:

> *"The principal objects of the Bank shall be to - (a) ensure monetary and price stability; (b) issue legal tender currency in Nigeria; (c) maintain external reserves to safeguard the international value of the legal tender currency; (d) promote a sound financial system in Nigeria; and (e) act as Banker and provide economic and financial advice to the Federal Government."*[45]

Section 6 (1) provides for a board stating that:

> *"There shall be for the Bank a Board of Directors (in this Act referred to as the Board) which shall be responsible for the policy and general administration of the affairs and business of the Bank".*[46] *Section 6 (s) states that "the board shall consist of - (a) a Governor who shall be the Chairman; (b) four Deputy-Governors; (c) the Permanent Secretary, Federal Ministry of Finance (d) five Directors; and (e) Accountant General of the Federation."*[47]

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[40] *Supra* note 4.
[41] *Supra* note 32.
[42] *Grey* v. *Pearson* (1857) 5.
[43] (1994) 6 NWLR [Pt. 352] 506.
[44] *Supra* note 10.
[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid.*

The Act provides for a Governor to operate as the Chief Executive of the Bank. Section 7(1) states that:

> *"The Governor, or in his absence one of the Deputy Governors nominated by him, shall be in charge of the day-to-day management of the Bank and shall be answerable to the Board for his acts and decisions."*[48]

Section 8 (1) states that:

> *"The Governor and Deputy-Governors shall be persons of recognized financial experience and shall be appointed by the President subject to confirmation by the Senate on such terms and conditions as may be set out in their respective letters of appointment."*[49]

Section 8 (4) also provides that:

> *"The CBN Governor shall appear before the National Assembly at semi-annual hearings as specified in sub-section (5) regarding - (a) efforts, activities, objectives, and plans of the Board with monetary policy and; (b) economic developments and prospects for the future described in the report required in sub-section 5) (b) of this section."*[50]

Section 8 (5) states that:

> *"The Governor shall, from time to time - (a) keep the President, informed of the affairs of the Bank including a report on its budget; and (b) make a formal report and presentation in the activities of the Bank and the performance of the economy to the relevant Committees of the National Assembly."*[51]

When read together, these provisions reveal an important intention of the drafters, *i.e.*, that to prevent any form of abuse, the Office of the Central Bank Governor is designed to be under the oversight of the Board of Directors, the President, and the National Assembly.[52] Section 9 states that:

> *"The Governor and Deputy Governors shall devote the whole of their time to the service of the Bank and while holding office shall not engage in any full or part-time employment or vocation, whether remunerated or not except such personal or charitable causes as may be determined by the Board and which do not conflict with or detract from their fulltime duties: Provided that the Governor or any of the Deputy-Governors may, by virtue of his office, be appointed with the approval of the Board to - (a) act as member of any Commission established by the Federal Government to enquire into any matter affecting currency or banking in Nigeria; (b) become Governor, Director, or member of the Board, or by whatever name called, of any international bank or international monetary institution to which the Federal Government shall have an interest or give support or approval; and (c) become Director of any Corporation in Nigeria in which the Bank may participate under Section 31 of this Act."*[53]

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[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*
[52] *Supra* note 10, ss. 7(1), 8(4) and 8(5).
[53] *Supra* note 10.

The Act provides for *two* instances in which a person vacates Office as a Central Bank Governor. The first instance deals with disqualification. It states, according to section 11 (1) that "a person shall not remain a Governor, Deputy-Governor, or Director of the Bank of the is (a) a member of any federal of State legislative house; (b) a Director, Officer, or employee of any Bank licensed under the Banks and Other Financial Institutions Act".[54] From one standpoint, given that the Act captions this aspect of the document 'disqualification' it would appear, from the use of this word, that the understanding to be drawn is that once a person is established as holding any of the above offices, such is disqualified from being considered for appointment as a Central Bank Governor, Deputy-Governor, or Director. However, on the flip side, the expression "a person shall not remain a Governor, Deputy-Governor, or Director of the Bank…" seems to suggest an appointment that has been made, only to be vacated upon the discovery that the person appointed is not qualified. This lack of clarity opens the Act to subjective interpretations, which reinforces the need for a reconsideration of this provision.

The second instance deals with the cessation of an appointment. In this regard, section 11(2) of the Act states that:

> *"The Governor, Deputy Governor or Director shall cease to hold office in the Bank if he - (a) becomes of unsound mind or, owing to ill health, is incapable of carrying out his duties; (b) is convicted of any criminal offence by a court of competent jurisdiction except for traffic offences or contempt proceedings arising in connection with the execution or intended execution of any power or duty conferred under this Act or the Banks and Other Financial Institutions Act; (c) is guilty of a serious misconduct in relation to his duties under this Act; (d) is disqualified or suspended from practicing his profession in Nigeria by order of a competent authority made in respect of him personally; (e) becomes bankrupt; (f) is removed by the President: Provided that the removal of the Governor shall be supported by a two-thirds majority of the Senate praying that he be so removed."*[55]

The question may be asked, why the additional layer of approval, with respect to the removal of a Central Bank Governor? The answer can be traced to the Supreme Court's decision in *Olaniyan* v. *University of Lagos*,[56] where the Court identified three forms of a contract of employment, namely those regarded as being one of master and servant; those where the employee holds office at the pleasure of the employer; and those protected by statute *i.e.*, with a statutory flavour.[57] In the case of the third, *i.e.*, where an appointment is regulated by statutory provision, such appointment is deemed to be of a statutory flavour.[58] Oftentimes, agencies of the State created under an enabling statute fall within this category. However, whether a contract of employment would be deemed as being of statutory flavour was clarified by the Supreme Court in *Power Holding Company PLC* v. *I.C. Offoelo*.[59] In this case, the court stated that "the mere fact that an employer is a creation of Statute, that it is a

[54] *Id.*, s. 11(1).
[55] *Id.*, s. 11(2).
[56] (1985) 2 NWLR (Pt. 9) 599.
[57] *Olanrewaju* v. *Afribank Plc* (2001) 7 NSCQR 22 at 31.
[58] *Shitta Bay* v. *Federal Civil Service Commission* (1981) 1 SC 40; *The West African Examinations Council v. Obisesan* (2008) LPELR-8500 (CA).
[59] LPELR (SC7/2006) Dec. 14, 2012.

statutory corporation, or that the government has shares in it does not elevate its employment to one with statutory flavour. Rather there must be a nexus between its employee's appointment with the statute creating the employer and corporation".[60] Also, in *Council of Enugu University of Science and Technology & Ors* v. *E.N. Ude*,[61] the Court stated that "an employment is said to have statutory flavour when the appointment and termination of such employment is governed by statutory provision. In other words, where the contract of service is governed by the provision of statute or where the contract of service are contained in regulations derived from statute".[62]

In cases where a public servant alleged that he was unjustly removed, the Courts have always maintained that the rules must be complied with.[63] Accordingly, in *Musibau Olatodoye Adeniyi* v. *Ejigbo Local Government*,[64] the Court noted that "where an employee is sought to be removed in a contract with statutory flavour of employment, wherein the procedures for employment and discipline including dismissal are spelt out, such a contract must be terminated in a way and manner prescribed by statute. Any other manner of termination is inconsistent with the relevant statute and is thus null, void, and of no effect".

This rule was reaffirmed by the Supreme Court in *Comptroller General of Customs & Ors* v. *Gusau*,[65] where it opined that "the law is settled that the only way to terminate a contract of service with statutory flavour is to adhere strictly to the procedure laid down in the statute".[66] The status of a public servant whose employment enjoys statutory flavour is different from that of the ordinary servant.[67] Such a contract of service vests the employee with a higher legal status than that of the ordinary master/servant relationship.

In this instance, while the employment of other staff of the CBN may not be of statutory flavour, due to the direct nexus between the appointment of the Central Bank Governor and the statute creating the CBN, it is clear that the appointment of the Central Bank Governor is one with a statutory flavour. This office is one created by Statute, with clear rules governing the procedure for removal. Where an employment enjoying statutory flavour is not terminated in line with well-stipulated procedures, such is considered a violation of the rule of law and an endangerment of the constitutional democratic framework. In *Federal Medical Centre Ido Ekiti* v. *Alabi*,[68] the Court of Appeal stated that "where an employee's contract is one with statutory flavour, the employee may not be disciplined, or his employment terminated and or dismissed except in accordance with the rules and regulations governing such employment".[69] Therefore, where an employee with a contract of service with statutory flavour is unlawfully dismissed, he would be entitled to reinstatement as well as damages for unlawful dismissal.[70]

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[60] *Ibid.*
[61] (2014) (Court of Appeal, Enugu Judicial Division) LPELR-23013 (CA).
[62] *Ibid*.
[63] Kayode O. Fayokun, "Removal of Public Officers from Office: Law and Justice in a Flux" 5 *Journal of Science and Sustainable Development* 93 (2012).
[64] (2013) LPELR-SC, 22017 (CA); *Obot* v. *Central Bank of Nigeria (CBN)* (1993) 2 SCNJ 90; *UBN* v. *Ugbon* (1995) 2 NWLR (Pt. 380) 647; *Jubril v. Milad Kwara State* (2007) 47 WRN 63 at 88.
[65] (2017) LPELR-SC, 42081 (SC); *Bamgboye* v. *University of Ilorin* (1999) 10 NWLR (Pt. 622) 290; *Olatunbosun* v. *N.I.S.E.R Council* (1988) 3 NWLR (Pt. 80) 25.
[66] *Ibid*.
[67] *Supra* note 63.
[68] (2012) 2 NWLR [Pt. 1285] 411 at 460.
[69] *Ibid*.
[70] *Musibau Olatodoye Adeniyi* v. *Ejigbo Local Government* (2013) LPELR-SC, 22017 (CA).

To be sure about what may indeed be the mind of the drafters on cessation of the appointment of a Central Bank Governor, a look at the first five grounds shows that the drafters intended that any Central Bank Governor to be removed from office must have had his guilt proved one way or the other. For example, section 11(2) (a)-(e) provides for grounds such as becoming of unsound mind or inability to carry out his duties, criminal conviction, suspension from practicing his profession, being found guilty of serious misconduct, and bankruptcy. The consequence of any intellectually serious interpretation of section 11(2) (a)-(e) is clear. It means all these grounds are indicative of a process of proving the guilt or otherwise of a Central Bank Governor, before his removal. In the same context, the clear requirement of approval of two-thirds majority of the Senate is suggestive of the fact that the drafters intended that the Senate would investigate these grounds on which the Central Bank Governor is to be removed, to determine whether it carries weight or not. It is also suggestive of the fact that with such a Senate investigation, the Central Bank Governor in question would be able to exercise his right to a fair hearing by defending himself either personally or through a legal representative.[71] Section 11(2) (a)- (e) explains front and centre, how it would be unconstitutional to simply remove a Central Bank Governor, without first proving his guilt through a well-constituted body.

At this juncture, it would be important to examine the role of the Senate's approval in the exercise of presidential removal powers, the legal significance of the word 'removal', and how the court responded to an earlier removal of a Central Bank Governor, *i.e.*, the 2014 case of Lamido Sanusi Lamido. This is because, ordinarily, whoever has the power to appoint ought to have a corresponding power to remove. Indeed, Section 11 of the Interpretation Act[72] provides that where a statute confers on a body the power to appoint a person to office, that power necessarily includes the power to suspend or remove him. But can this be a justification in the case of a Central Bank Governor, whose employment enjoys statutory flavour? Where an extant law has defined a particular process for exercising powers so granted, can that procedure be bypassed? This point was stressed in *Ude* v. *Uwara*,[73] where the Court noted that:

> *"It is trite that once the law has prescribed a particular method of exercising a statutory power, any other method of exercise of it is excluded. Except where the law gives discretion to a public functionary, he can only act in accordance with the express provisions of the law, as to do otherwise would enthrone arbitrariness."*[74]

A Central Bank Governor is expected to be appointed through a process in which the executive and legislative arms play separate but complementary roles, with neither having unfettered powers to act. The purpose of designing a framework in which more than one arm of government determines the appointment of public officials was clarified by the Supreme Court in *Elelu Habeeb* v. *Attorney General of the Federation*,[75] where the Court noted that:

> *"It is in the Spirit of the Constitution in ensuring checks and balances between the three arms of government that the role of the Governor in*

[71] *Supra* note 4, s. 36.
[72] CAP 123, LFN 2004.
[73] (1993) 2 NWLR (pt. 278) 661, para. D, 664 para. E-F.
[74] *Ibid*.
[75] (2012) 13 NWLR (1318) 423.

appointing and exercising disciplinary control over the Chief Judge of his state is subjected to the participation of the National Judicial Council and the House of Assembly of the State in the exercise to ensure transparency and observance of the rule of law."[76]

With respect to vacating the Office of the Central Bank Governor, the CBN Act only speaks of disqualification and cessation of appointment. Nowhere is the word 'suspension' mentioned. Yet, it has become the go-to approach in removing Central Bank Governors from office in Nigeria. Words are of an important gradient in legal interpretation, and so determining the legal effect of the word 'suspension' is important to the analysis in this article. What is the legal effect of this word, and does it have the same effect as 'removal'. In *Longe* v. *First Bank of Nigeria Plc*,[77] the Supreme Court said this concerning suspension "suspension is usually precluded to dismissal from employment. It is a state of affairs which exists while there is a contract in force between the employer and an employee, but while there is neither work being done in pursuance of it or remuneration being paid".[78]

The above argument on the President lacks of powers to unilaterally remove a Central Bank Governor from office had been made by lawyers in 2014 when President Goodluck Jonathan sacked the then Central Bank Governor Sanusi Lamido Sanusi.[79] He was suspended from office on the allegation that over $20 billion in crude oil revenue was not remitted to the federation account by the Nigerian National Petroleum Corporation (NNPC).[80] In separate suits, Mr. Sanusi approached the Federal High Court (FHC) Abuja to enforce his rights,[81] while also asking the court for a correct interpretation of section 11(2) (f) of the CBN Act. Delivering judgement, Justice Gabriel Kolawole agreed with the Lawyers of the Federal government that the matter was a labour matter and ought to have been filed before the National Industrial Court (NIC) instead of the FHC, Abuja. He, therefore, triggered section 12 of the NIC Act 2012 and ordered that the case be transferred to the NIC. Furthermore, the Court held that according to sections 251 and 254 of the Constitution, the CBN is a creation of the National Assembly and that the Central Bank Governor is a Public Officer. Based on this, the Court held that whereas the President could not unilaterally remove the Central Bank Governor from office as provided under section 11(2) (f) of the CBN Act, however, it stated that the Central Bank Governor is a public officer, and that the President could exercise disciplinary control over him, including suspension. That judgement was never appealed by the then-suspended Governor Sanusi Lamido Sanusi, thereby depriving superior courts of an opportunity to indeed pronounce on the matter.

Given the highly sensitive nature of the case and the important office that the Central Bank Governor occupies both constitutionally and fiscally, the FHC Abuja ought to have

[76] *Ibid.*
[77] (2010) 6 NWLR (Pt. 1189) 1 at 60.
[78] *Ibid.*
[79] Jiti Ogunye, "Sorry, The President Cannot Suspend a CBN Governor" *Premium Times*, Feb. 24, 2014, *available at*: https://www.premiumtimesng.com/opinion/155645-sorry-president-suspend-cbn-governor-jiti-ogunye.html (last visited on May 28, 2024).
[80] Ben Ezeamalu, "Sanusi Floors Nigerian Govt; Court Awards Him 50 Million Damages" *Premium Times*, Apr. 03, 2014, *available at*: https://www.premiumtimesng.com/news/157991-breaking-sanusi-floors-nigerian-govt-court-awards-him-n50million-damages.html (last visited on May 29, 2024).
[81] *Ibid.*

decided the matter one way or the other.[82] However, as it would seem, the FHC Abuja did not pronounce on the merit of the matter and so did not directly state that the President had the power to unilaterally remove the Central Bank Governor from office.[83]

IV. CONCLUDING THOUGHTS

This article has examined the exercise of presidential removal power in Nigeria, locating it in the context of the removal of the erstwhile Central Bank governor, Mr. Godwin Emefiele. It has examined the law governing the dismissal of a Central Bank Governor, exploring whether the framework relates to special institutions such as the CBN and employees enjoying statutory protection. What this Article has established is that the President lacks the power to unilaterally remove the Central Bank Governor from office. Even if he wants the Central Bank Governor gone at all costs, he can only do so with the assent of the Senate or by a valid order of the court.[84]

Indeed, there are some drawbacks and genuine costs to the President unilaterally firing the head of a statutorily important body such as the Central Bank. For instance, section 2 of the CBN Act provides that the Bank's principal duties shall include ensuring monetary and price stability, issuing of legal tender currency in Nigeria, maintaining the country's external reserves to safeguard the international value of its currency, promoting a sound financial system, and acting as Banker and provide economic and financial advice to the Federal Government.[85] With such a very important mandate, which may in fact be considered a matter of national interest, it is clear the office cannot be left to the shenanigans of politics, or the whims and caprices of the President. Ensuring adequate guardrails must have informed the dual requirement on the procedure for removing the Central Bank Governor.

In closing, beyond lacking the power to unilaterally remove a Central Bank Governor, the President has an obligation to faithfully execute the provisions of the Constitution and every other law in the country. To this end, it is imperative that the current framework on the removal of the Central Bank Governor is not just respected, but importantly, it must be defended vigorously by all stakeholders in the constitutional system, with the President leading from the front. This is the only way to ensure the continuous development of the country's constitutional democratic framework.

[82] Chukwuemeka O. Ginikanwa, "The President Cannot Remove the Governor of the Central Bank of Nigeria Alone" *Nigerian Lawyer*, June 14, 2023, *available at*: https://thenigerialawyer.com/the-president-cannot-remove-the-governor-of-the-central-bank-of-nigeria-alone/ (last visited on May 29, 2024).
[83] *Ibid.*
[84] *Ibid.*
[85] *Supra* note 10.

ISSUE OF CROSS-BORDER INSOLVENCY : IS INSOLVENCY PROTOCOL A SUCCESS STORY IN INDIA?

Sandhya Sharma[*]
Versha Vahini[**]

I. INTRODUCTION[1]

Over the last twenty years, global economies have experienced an increased interconnectivity, leading to the growth of multinational corporations that possess assets and creditors in multiple jurisdictions.[2] The increasing inevitability of cross-border insolvencies[3] necessitates an examination of how these insolvencies will be efficiently and effectively managed.

The insolvency Protocols have emerged as a response to this issue, with judges establishing protocols that encourage coordination, cooperation, and communication between the courts, between the courts and the parties, and between the parties themselves.[4] Guidelines and model laws[5] came into being as a result of the growing popularity of these insolvency protocols.[6] These guidelines and laws were intended to serve as guidance on how to draft these protocols.

Nevertheless, it is imperative to acknowledge that these protocols, inherently tailored to individual cases, are subject to continuous evolution.[7] Their primary purpose is to cater to the unique circumstances of each case, thereby augmenting the repertoire of resources that future cases can draw upon when implementing similar protocols.

II. CROSS-BORDER INSOLVENCY ISSUE IN INDIA

The present regulatory framework pertaining to cross-border insolvency assistance in India is plagued with a notable degree of ambiguity and unpredictability.[8] The existing

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[2] Paul H. Zumbro, "Cross-Border Insolvencies and International Protocols-An Imperfect but Effective Tool" 11(2) *Business Law International* 157 (2010).
[3] In this paper, the terms Cross-Border Insolvency, International Insolvency, and Trans-national Insolvencies are used Interchangeably.
[4] Oriana Casasola and Stephan Madaus, "Mean of Implementation of Cooperation, Coordination, and Communication Duties under the European Insolvency Regulation Recast" 33 *European Business Law Review* (2022), *available at*: https://doi.org/10.54648/eulr2022036 (last visited on Mar. 17, 2024).
[5] UNCITRAL Model Law on Cross-Border Insolvency (New York; 1997).
[6] Akshaya Kamalnath, "Cross-Border Insolvency Protocol: A Success Story?" 2 *International Journal of Legal Studies and Research* 172 (2013).
[7] *Ibid*.
[8] Priya Misra, "Cross-Border corporate insolvency law in India: Dealing with Insolvency in Multinational Group Companies-Determining Jurisdiction for Group Companies" 45(2) *Vikalpa: The Journal for Decision Makers* 93 (2020).

literature highlights a notable dearth of certainty pertaining to the acknowledgment and execution of judgements and orders associated with foreign insolvency matters.[9] The Code of Civil Procedure of 1908 establishes a procedural framework for the acknowledgment and implementation of foreign judgements. Decisions rendered by courts of foreign jurisdictions are typically regarded as binding and final, with certain limited exceptions provided under section 13[10] of the Code of Civil Procedure 1906. Further, section 44A[11] of the Code of Civil Procedure delineates the provisions pertaining to the execution of a foreign court judgement within the territorial limits of India. This statutory provision mandates the fulfilment of specific conditions, including the requirement that the judgement in question emanates from a superior court and originates from a jurisdiction that maintains a reciprocal arrangement with India.[12]

The aforementioned judgements will have comparable outcomes to those that are delivered by a local District Court. In India, the recognition of judgements and orders from foreign courts has traditionally been governed by the principle of comity of courts[13], operating outside the purview of the Code of Civil Procedure. The Delhi High Court recently entertained a lawsuit brought forth by a Japanese Bankruptcy Trustee, who sought injunctive relief in accordance with the judgement issued by the Japanese Bankruptcy Court.[14]

India is currently in the final phases of revising the Insolvency and Bankruptcy Code (IBC, 2016) in order to incorporate the adopted version of UNCITRAL Model Law on Cross-Border Insolvency 1997 (referred to as the 'Model Law'). The implementation of the *Part-Z*[15] will facilitate the acknowledgment in India of international insolvency orders that authorise the inclusion of a corporate debtor in bankruptcy proceedings. This will result in providing the protective measures that aimed at safeguarding the assets of the corporate debtor in India. As previously mentioned, the CPC alone permits the acknowledgment and execution of foreign judgements. The implementation of insolvency-related orders issued by foreign courts continues to be a subject of debate and disagreement. Moreover, within the context of foreign insolvency procedures, the insolvency representatives possess the authority to render decisions

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[9] *Ibid.*

[10] A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except
(a) where it has not been pronounced by a Court of competent jurisdiction;
(b) where it has not been given on the merits of the case;
(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [India] in cases in which such law is applicable;
(d) where the proceedings in which the judgment was obtained are opposed to natural justice;
(e) where it has been obtained by fraud;
(f) where it sustains a claim founded on a breach of any law in force in [India].

[11] Execution of decrees passed by Courts in reciprocating territory. (1) Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in [India] as if it had been passed by the District Court.

[12] Naresh Thakkar and Rhia Marshall, "Litigation: Enforcement of Foreign Judgment in India", *available at*: https://www.lexology.com/library/detail.aspx?g=681612a7-f920-4ad5-8fbb-c37912bb8644 (last visited on May 17, 2024).

[13] *Alcon Electronics Private Limited* v. *Celem SA of FAO 34320 Roujan, France and Another* (2017) 2 SCC 253. Also *see*, Arjan Kumar Sikri, "Cross Border Insolvency: Court-To-Court Cooperation" 51(4) *Journal of the Indian Law Institute* 482 (2009).

[14] *Toshiaki Aiba* v. *Vipan Kumar Sharma & Anr*, Delhi High Court CS (COMM) 1136/2018 and I.A. No. 7598/2020 ('Toshiaki Aiba').

[15] The Insolvency Law Committee, in its reports on the Cross-Border Insolvency titled as *Draft Part-Z*, which is the proposed Chapter on Cross-Border Insolvency, to be included in the Insolvency and Bankruptcy Code, 2016.

in situations that lack recognition from any provision outlined in the Code of Civil Procedure, 1906.

The inclusion of cross-border insolvency framework hold great importance in the globalised world today and inclusion of cross-border insolvency law will enable foreign representatives to immediately approach Indian courts for the acknowledgment and support of cross-border insolvency procedures.[16] Consequently, it will be not necessary for a foreign representative to delay the recognition of insolvency proceedings in India until the completion of foreign insolvency proceedings and the issuance of a foreign judgement or order.[17]

III. WHAT ARE INSOLVENCY PROTOCOLS?

United Nations Commission on International Trade Law, in its publication on *Practice Guide on Cross-Border Insolvency* defined Insolvency protocol as an "agreement entered into, either orally or in writing, intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between the courts, between the courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest."[18]

The adoption and approval of protocols typically occur within the purview of the courts, in accordance with the prevailing local laws and practices specific to each jurisdiction.[19] Notwithstanding as mentioned above, the advantageous characteristic of an insolvency protocol is that, in contrast to a binding treaty or convention, protocols have the capacity to be customised and tailored in accordance with the unique requirements of each individual case.[20] Therefore, protocols exhibit a degree of specificity depending on the particular case, while also aiming to tackle fundamental challenges commonly seen in cross-border insolvency situations.[21] Typically, insolvency protocols indicate their objective, which may involve helping the re-organisation of the firm, safeguarding the integrity of the administrative process, or establishing effective and prompt processes for resolving disputes related to claims.[22]

Additionally, they commit to establishing a structure that enables courts to coordinate their efforts, ensuring that any legal action can be resolved by a single court.[23] The issue of court communication, particularly the organisation of joint hearings, is also discussed.[24] The equitable treatment of all parties across jurisdictions is vital component that is addressed through the implementation of specific processes. Ensuring that all relevant stakeholders have

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[16] Ishita Das, "The Need for Implementing a Cross-border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016" 45 *Vikalpa: The Journal of decision Makers* (2020), *available at*: https://doi.org/10.1177/0256090920946519 (last visited on May 08, 2024).

[17] *Ibid*.

[18] United Nations, *UNICTRAL Practical Guide on Cross-Border Insolvency Cooperation* (United Nations Publications, New York, 2010).

[19] Evan D. Flaschen and Ronald J Silverman, "Cross-Border Insolvency Cooperation Protocols" 33 *Texas International Law Journal* 587 (1998).

[20] *Ibid*.

[21] *Ibid*.

[22] *Supra* note 4.

[23] Akshaya Kamalnath, "Cross-Border Insolvency Protocol: A Success Story?" 2 *International Journal of Legal Studies and Research* 172 (2013).

[24] *Ibid*.

the opportunity to express their views is equally significant.[25] And lastly the matter of retaining and compensating professionals is another important issue that is dealt under this.

A. Development of Insolvency Protocols: From Maxwell to Lehman and Madoff

Significant endeavors have been undertaken both at the international and national levels to formulate comprehensive frameworks, guidelines, and principles for insolvency protocols. These principles were not arbitrarily established but rather emerged as a result of practical necessity in response to complex problems that arose in specific instances.[26] The utilisation of protocols in cross-border bankruptcy proceedings by courts and practitioners did not originate solely from the implementation of the Model Law and the E.U. Regulation. In fact, the initial protocols of the contemporary age were developed in the United States during the early 1990s, at a time when there was no provision similar to the current versions of article 27(d) of the Model Law [as implemented by section 1527(4) of the U.S. Bankruptcy Code].

(i) In re Maxwell Communication

In re Maxwell Communication[27] was famous for being the first major case where an insolvency protocol was negotiated.[28] The Protocol aims to optimise the value of the estate and promote efficiency in the procedures, with the goal of reducing wastage, expenses, and conflicts related to jurisdiction.[29] The framework established under the Maxwell protocol facilitated the management of corporate governance of the Maxwell estate by U.K. administrators. However, significant decisions pertaining to borrowings and asset realisations necessitated the assent of the U.S. examiner or approval from the U.S. court. There were few issues which remain unaddressed under this framework for instance the matter about the method in which creditors would be distributed and the final conclusion of the lawsuit. These were the issues which ultimately resolved through the implementation of separate plans of reorganisation and schemes of arrangement by the involved parties. The plan of reorganization and scheme of arrangement was reached within 16 months which as Justice Tina Brozman later said, "helped save hundreds of well-known companies that Maxwell had owned"[30].

(ii) Nakash – The First Protocol with a Civil Law Country

It is the most recent protocol which added another significant dimension to the cooperation facilitated by the protocol. The case of *In re Joseph Nakash*[31] emphasised on organised actions of parties as well as on improved coordination of court procedures and

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[25] *Ibid*.

[26] The history of protocol was started at various points in history, for instance at the international insolvency case of Ammanati Bank in 1302. Or at the first treaties between Verona and Trento in 1204 or Verona and Venice in 1306 or perhaps the treaty regarding mutual recognition of Bankruptcy declarations between the States of Holland and the State of Utrecht in 1689.

[27] 93 F.3d 1036 (1996).

[28] Evan D. Flaschen and Bingham McCutchen, "How the Maxwell Sausage was Made", *available at*: http://evanflaschen.net/Maxwell%20Sausage.pdf (last visited on Nov. 12, 2023).

[29] *Ibid*.

[30] Testimony of Justice Tina L. Brozman, Chief Bankruptcy Judge for the Southern District of New York, before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, U.S. House of Representatives, on H.R. 1596, The Bankruptcy Judgeship Act of 1997, June 19, 1997. *Available at*: http://judiciary.house.gov/legacy/590.htm (last visited on Nov. 14, 2023).

[31] 190 B.R. 763 (1996).

collaboration among judiciaries. Apart from this, it is the first protocol between a civil law nation Israel and a common law country. This fact is significant because the civil law (in the instant case Israel) mandates strict adherence to the statutory law. So, under the civil legal system, an Israeli court could not merely mandate and sign a cooperation agreement with a foreign court under the framework of its "general equitable or inherent" mandate. Instead, the Israeli court was asked to find an explicit legislative authorization for entering into the Nakash Protocol, which it duly accomplished.[32] In addition, a civil court also assumes the responsibility of fact-finding, necessitating a higher level of court participation. The Nakash Protocol prioritised the synchronisation of court proceedings and judicial actions in both jurisdictions, in addition to coordinating the parties involved.[33]

The aim of the Nakash protocol was to standardise and synchronise the two different legal proceedings and thereby upholding the credibility of the two courts. Moreover, the protocol additionally ensures the protection and enhancement of the debtor's assets on an international level, and finally, streamlines operations and facilitates the sharing of information to reduce costs and avoid duplication.

(iii) Olympia and York

Olympia and York[34] was the first case of cross-border insolvency between the United States and Canada, with Maxwell case serving as a prior legal precedent. The debtor in question was a real estate company which was based in Toronto, Canada and had assets which were located in multiple location in Canada, the UK and the US. So, to safeguard and protect the assets which were located in multiple locations. This resulted in significant ambiguity as the creditors who had previously held security interests in the subsidiary and were considered as secured creditors became the unsecured creditors of the parent company. This protocol addressed the payment of professionals' issue by adopting a more territorial approach. It allowed professional of both countries to receive payments as per the payment regulation for professionals its respective states. In addition to this, the protocol primarily emphasised the corporate governance of the entity.[35]

(iv) Livent

In *Livent*, the protocol involved utilising a multicast satellite television feed after obtaining court approval for the sale of Livent's theatre assets in both countries. Following a two-day hearing, both courts issued complementary orders that permitted the sale of theatre assets in both cases to a single buyer.

(v) The Lehman Protocol

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[32] The Nakash Protocol is also unusual in that, not only did the debtor not sign the Protocol (which was also the case in Maxwell), but also the debtor actively opposed the approval of the Protocol and has appealed such approval in both the U.S. and Israel. The parties to the Nakash Protocol are the U.S. Examiner and the Official Receiver of the State of Israel.

[33] *Supra* note 19 at 588.

[34] Sean Dargan, "The Emergence of Mechanisms for cross-border insolvencies in Canadian Law" 17 *Connecticut Journal of International Law* 121 (2001).

[35] Edward T. Canuel, "United States – Canadian Insolvencies: Reviewing Conflicting Legal Mechanisms, Challenges and Opportunities for Cross-Border Cooperation" 4(1) *Journal of International Business and Law* 15 (2005).

The bankruptcy filing of *Lehman Brothers*[36] is the most extensive and intricate international bankruptcy case in history. The event not only led to twenty-two more Lehman affiliates filing for Chapter 11 petitions in New York but also resulted in seventy-five separate legal proceedings worldwide.[37]

The protocol outlined its objectives as the reduction of expenses and the optimisation of recoveries for all stakeholders, while efficiently handling each individual case with uniform outcomes.[38] The objective was to accomplish this by means of international coordination and synchronisation of proceedings, communication among all authorised representatives and committees, among committees themselves, among tribunals and between courts, sharing of information and data, preservation of assets, an efficient and transparent claims process, maximisation of recoveries, and fostering comity.

IV. THE JET-AIRWAYS CROSS-BORDER INSOLVENCY PROTOCOL: A SUCCESS STORY

Jet Airways, once of the India's renowned and popular airline, started experiencing significant difficulties and turbulence since 2018. The company started facing financial crunches and faced challenges in meeting its financial obligations, including employee's salaries and aircraft lease expenses. Despite making multiple efforts to secure funding and in the midst of investigations into financial misconduct within the company, the company was compelled to cease flying operations on April 17, 2019.[39] Subsequently, an application for insolvency was submitted against the company to the Mumbai Bench of the National Company Law Tribunal (herein after referred as 'NCLT'), which then commenced the insolvency resolution process through its order dated June 20, 2019.[40]

Prior to the initiation of insolvency proceedings in India, Jet Airways was declared bankrupt in the Netherlands on May 21, 2019. Shortly after that Jet Airways was admitted to CIRP (Corporate Insolvency Resolution Process) in India, the administrator appointed by the Dutch Court approached NCLT, Mumbai Bench, requesting recognition of the insolvency proceedings in the Netherlands. The administrator also requested that the CIRP proceedings in India be put on hold, as bankruptcy proceedings were already underway against the airline in the competent court in the Netherlands, claiming jurisdiction under article 2(4) of the Dutch Bankruptcy Act.[41] The administrator argued that having two parallel proceedings in different jurisdictions would undermine the restructuring process and negatively impact the creditors.

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[36] *In re Lehman Bros. Holdings Inc*., No. 08-13555 (Bankr. S.D.N.Y. filed Sept. 15, 2008).

[37] Michael J. Fleming and Asani Sarkar, "The Failure Resolution of Lehman Brothers", *available at*: https://www.newyorkfed.org/medialibrary/media/research/epr/2014/1412flem.pdf (last visited on May 20, 2024).

[38] Rosalind Z. Wiggins, Thomas Piontek and Andrew Metrick, "Lehman Brother Bankruptcy: An Overview", *available at*: https://ypfsresourcelibrary.blob.core.windows.net/fcic/YPFS/001-2014-3A-V1-LehmanBrothers-A-REVA.pdf (last visited on May 20, 2024).

[39] Ambrish Pandey, "Cross-Border Insolvency in India & the Case of Jet Airways", *available at*: https://www.taxmann.com/research/ibc/top-story/105010000000016987/cross-border-insolvency-in-india-the-case-of-jet-airways-experts-opinion (last visited on May 21, 2024).

[40] *State Bank of India* v. *Jet Airways (India) Limited*, *available at*: https://ibbi.gov.in/webadmin/pdf/order/2019/Jun/20th%20Jun%202019%20in%20the%20matter%20of%20Jet%20Airways%20(India)%20Limited%20CP%201938,1968%20&%202205%20(MB)-MB-2019_2019-06-21%2016:52:41.pdf (last visited on May 23, 2024).

[41] Gausia Shaikh, "The Airways Cross-Border Insolvency Protocol: A Success Story", *available at*: https://ccla.smu.edu.sg/sgri/blog/2021/01/26/jet-airways-cross-border-insolvency-protocol-success-story (last visited on May 23, 2024).

An appeal was submitted to the National Company Law Appellate Tribunal resulted in an unprecedented ruling issued by the tribunal. The appellate authority requested a consensus between the Indian resolution professionals and the trustees appointed by the Netherlands court to ensure collaboration and synchronisation of the two parallel proceedings in order to maximise the worth of the insolvent estate while the proceedings ran simultaneously. As a result, a protocol for handling insolvency cases across borders was established between the two court-appointed officials. This protocol was later accepted by the NCLAT on September 26, 2019.[42]

A. Jet Protocol

Although there is no single standardised format for the cross-border insolvency protocols, but the paper from the International Insolvency Institute explains that these protocols are typically employed to address gaps in legislation and promote consistency in procedural matters, rather than substantive issues, that arise from simultaneous insolvency proceedings in different jurisdictions.[43] The protocol is defined as a means of expressing the intentions of the two officials with the objective of minimising expenses and optimising the value of the company, as well as enhancing the recoveries of creditors. This will be achieved through the exchange of information and the execution of associated tasks by the officials.

The Cross-Border Insolvency Protocol, which was entered between Dutch trustees and Indian Resolution Professionals is known as the Jet Protocol.

Key features of the Protocols:

1. The protocol designates India as the Centre of Main Interest (COMI), which refers to the jurisdiction where the primary proceedings take place.[44] This determination is typically made by bankruptcy courts based on the location of the company's registered office. In the case of Jet Airways, being an Indian company, India is identified as its COMI. After receiving the approval from the Dutch Court and NCLAT, for the jet protocol, added another degree of certainty and judicial scrutiny for the classification between the main and non-main proceedings.
2. Guidelines for the officials appointed by the Noord Holland. Among the other things, the following are other requirements of this protocol:
    i. The Dutch trustee is required to refrain from making decisions that would harm the company’s value maximisation and must inform the Indian resolution professional if compelled to make such decisions.
    ii. The Dutch trustee is also urged to assist in submitting a reorganisation plan that aligns with a bid approved in the IBC proceedings.
    iii. Additionally, the Dutch trustees were expected to look into the progress of the Indian proceedings before making any significant decisions in the Dutch proceedings.

    An analysis of the protocol shows that the language employed in provisions pertaining to guidelines for the Dutch trustee has a non-binding tone. The Dutch Trustee is not

[42] *Jet Airways (India) Ltd. (Offshore Regional Hub/Offices Through its Administrator Mr. Rocco Mulder)* v. *State Bank of India & Anr.*, Company Appeal (AT) (Insolvency) No. 707 of 2019, *available at*: https://ibbi.gov.in/uploads/order/b7bbd5ba93be73bb4602dfe25f25cdd4.pdf (last visited on May 24, 2024).
[43] *Supra* note 41.
[44] *Supra* note 39.

obligated by any enforceable requirements, but instead, the success of the two proceedings depends on a shared understanding and agreement regarding the importance of cooperation and coordination.

3. Preserving companies Assets – The protocol explicitly includes the company's assets situated in the Netherlands and requires their preservation to the best of the company's abilities.[45] Additionally, it documents that in the event that the trustee decides to sell off any of these assets, in that case the resulting funds would be placed in a separate bankruptcy account and the allocation of these sale proceeds would be carried out only after the consultation and advise of the Indian resolution professional.
4. Right to appear in and present in the proceedings – The jet protocol has given officials of both countries to attend the proceedings in person in both the jurisdictions without being legally bound by the laws of any jurisdiction apart from their own.[46]

V. CONCLUSION

The use of cross-border insolvency protocols is expected to rise due to the growing volume of cross-border commerce and corporate transactions, which frequently include organisations possessing assets and incurring liabilities in many jurisdictions.

As evident from the discussion in this paper that, insolvency protocols have emerged out of necessity and will persist in that manner. The protocol in Maxwell served as an innovative mechanism to resolve the dispute between the legal procedures of the United States and the United Kingdom. The protocol that was implemented in Lehman and Madoff case provided the streamlined communication, synchronisation, and exchange of information. Therefore, each protocol caters to the requirements of a particular scenario, rendering it highly attractive tool in cross-border insolvency cases.

If courts and judges enthusiastically advocate insolvency protocols, they may become the standard norm and allow parties to pre-arrange with creditors regarding protocol terms. This would reduce uncertainty in insolvency proceedings, easing concerns among creditors of huge multi-nation corporations. Still, there is no clarity whether courts would be upholding such pre-existing commercial agreements, as while doing so it will restrict the ability to customise the protocols as per the need and requirement of each case.

[45] *Supra* note 42.
[46] *Supra* note 39.

PROTECTING CHILDREN FROM SEXUAL OFFENCES - CHALLENGES AND ISSUES IN THE IMPLEMENTATION OF POCSO ACT, 2012

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Stuti Pandey[**]

I. INTRODUCTION

India has the largest population of children in the world, almost one-third of the child population of the entire world. As per the 2011 census data, nearly 43% of India's total population, around 472 million, comprises children below the age of 18 years, out of which one quarter of India's population is comprised of children as young as 0 to 14 years old.[1] India has the largest population of children in the world—almost one-third of the entire world's child population. As per the 2011 census data, nearly 43% of India's total population, around 472 million, comprises children below the age of 18 years, out of which one quarter of India's population is comprised of children as young as 0 to 14 years old. Our visionary founding fathers analysed the vulnerable condition of the children, so they embedded various Articles in the Constitution of India for their safeguarding. Article 15(3) empowers the state to create special provisions for the benefit of women and children; article 21A guarantees the fundamental right to education for all children aged 6–14; and articles 23 and 24 augment this protective legal structure. Article 23 focuses on broader human rights issues, such as prohibiting trafficking in human beings and forced labour. Article 39(f) of the Constitution of India mandates that states formulate policies to ensure that children are provided with opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.[2]

Not only does our Constitution protect children from being harmed, but it also protects them from being compelled to enter activities that are not suitable for their age or strength due to factors such as economic need. In spite of the safeguards for children that are provided by the Constitution, children continue to be a vulnerable population in our country and are victims of a number of crimes that are committed against them.[3] Criminal acts committed against children, particularly those of a sexual nature, have a negative influence on the child who is the victim and leave them with a trauma that lasts a lifetime. In the last five decades, the number of sexual harassment cases against the children in India has increased drastically, as per the United Nations International Children's Education Fund research conducted from 2005 to 2013, which indicated that the prevalence of sexual abuse among Indian girls was 42%.[4] In 2007, the Ministry of Women and Child Development released the Study on Child Abuse: India 2007. The study included a sample of 12,447

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[1] Registrar General and Census Commissioner of India. (2011). Census of India 2011: Primary Census Abstract.
[2] Bharti Ali, "Sexual Abuse of Children and the Child Protection Challenge" in Enakshi Ganguly (ed.), *India's children continue to challenge our conscience* 186 (HAQ: Centre for Child Rights, New Delhi, India, 2019).
[3] S. Kumar, *Access to Justice and Sexual Violence against Children in India: An Empirical Study of the Reforms under the POCSO (Protection of Children from Sexual Offences) Act 2012* (2023) (Unpublished Doctoral dissertation, Birkbeck, University of London).
[4] Government of India, "Study on Child Abuse: India 2007" 30 (Ministry of Women and Child Development, 2007).

children, 2,324 young adults, and 2,449 stakeholders from 13 states. The study examined several forms of child abuse, including physical abuse, sexual abuse, emotional abuse, and neglect of female children, across five evidence groups: children in familial settings, children in educational institutions, children in the workforce, children living on the streets, and children in institutional care.[5]

The principal conclusions of the study encompassed: 53.22% of youngsters indicated they had experienced sexual abuse. Of the total, 52.94% were male and 47.06% were female. Andhra Pradesh, Assam, Bihar, and Delhi exhibited the highest rates of sexual abuse across both genders, alongside the greatest frequency of sexual assaults. 21.90% of child responders experienced serious sexual abuse, 5.69% were sexually assaulted, and 50.76% reported other types of sexual abuse.[6] Children in street situations, engaged in labour, and residing in institutional care exhibited the highest prevalence of sexual assault. The survey indicated that 50% of abusers are familiar to the child or in a position of trust and responsibility, and the majority of youngsters had not disclosed the issue to anybody.

There was no specific law that addressed sexual offences against children prior to the Protection of Children from Sexual Offences (POCSO) Act, 2012. The Indian Penal Code (IPC), 1860 (now the *Bharatiya Nyaya Sanhita* 2023) is the only substantive law that defines crimes and how to punish those who commit them. Although there were no specific provisions in the IPC that addressed sex offences committed against children, sections 322 (physical grievous hurt), 354 (outraging modesty of female), 375 (rape), and 377 (unnatural offences) were present and often applied in cases of sexual assault or harassment. However, the POCSO Act, 2012 and amendments to the IPC have significantly altered the nation's sexual crime regulations. The act was enacted to protect children from sexual assault, harassment, and pornographic crimes, as well as to provide a juvenile court system for cases involving these offences. In order to protect children throughout the legal process, the "best interest of the child" concept is above all other factors. There is no gender bias in the Act of 2012.[7] It defines a minor as someone under the age of eighteen and protects all children from sexual abuse. Sexual abuse may manifest as a single incident or a pattern of behaviour over time. In addition to unwelcome physical contact, sexual abuse also includes the sexual exploitation of minors through actions or behaviours associated with pornography, which depicts young people promoting or indulging in prostitution.[8] This research paper aims to analyse the Challenges and Issues in the Implementation of POCSO Act 2012 even after a decade of its implementation.

II. JOURNEY OF THE POCSO ACT

The enactment of the POCSO Act, 2012, was a culmination of various legislative efforts and advocacy. The process began in 2009 with the Ministry of Women and Child Development's (MWCD) draft Offences against Children Bill. By early 2010, child rights organizations, including Tulir Centre and HAQ, were consulted by the National Commission

[5] Shantha Sinha, "Sexual Offences on Children—Principles of Child Jurisprudence and NCPCR" 19(3) *Journal of Indian Association for Child and Adolescent Mental Health* 239-242 (2023).
[6] *Ibid*.
[7] R. Sharma, "The Evolution of Child Protection Laws in India: From IPC Provisions to the POCSO Act" 8(2) *Indian Journal of Legal Studies* 112-130 (2015).
[8] R.K. Handa and Shivani Goswami, "The Protection of Children from Sexual Offences Act (POCSO), 2012: The Precincts of the Law and Judicial Expositions" 7(2) *Journal of Victimology and Victim Justice* 191-204 (2024).

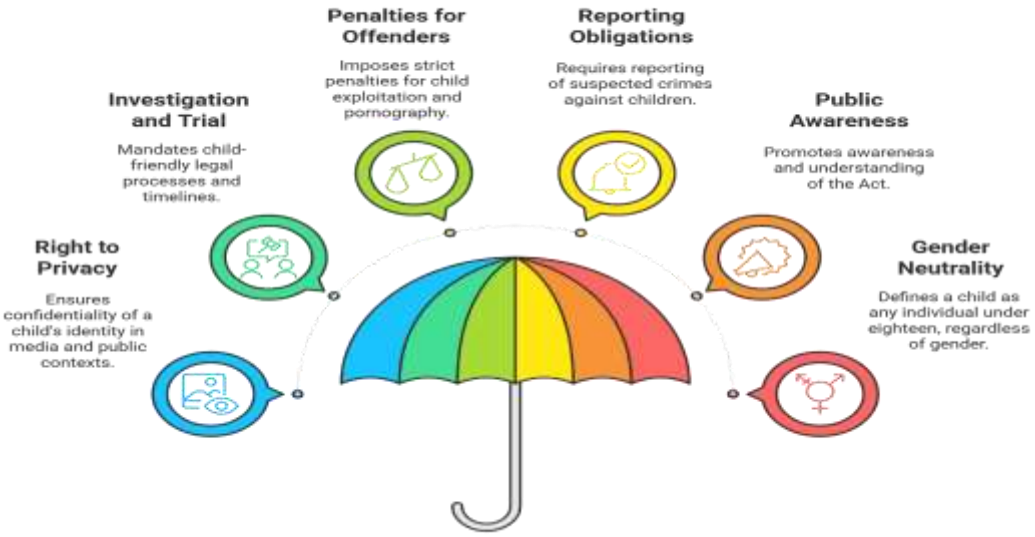
for Protection of Child Rights (NCPCR) and the Ministry of Law and Justice regarding the proposed legislation. Public pressure, intensified by women's rights organizations and protests like the *Ruchika Girhotra* case in 2010, further propelled legislative action. This led to multiple parallel drafting attempts: the Ministry of Home Affairs' Criminal Law (Amendment) Bill 2010 aimed to modify the IPC, CrPC, and Evidence Act for sexual offenses, including against juveniles. Simultaneously, the Ministry of Law and Justice and the MWCD each circulated their own distinct draft bills on child sexual offenses in July 2010. The NCPCR, reviewing the MWCD's initial draft, rejected it and developed a comprehensive alternative. Ultimately, the Protection of Children from Sexual Offences Bill, 2011, was introduced by the MWCD in the Rajya Sabha, leading to the Act and its Rules coming into effect on November 14, 2012. Following its passage, the Ministry of Health and Family Welfare drafted Guidelines for Medical Examination, and the MWCD formulated Model Guidelines under section 39 of the Act.

III. SALIENT FEATURES OF THE POCSO ACT

i **Right to privacy:** The POCSO Act ensures the confidentiality of a child's identification in media and public contexts. According to section 23 of the Act, no comments or stories regarding any kid shall be permitted from any media source without possessing authentic or comprehensive information.[9] The media is required to refrain from revealing the child's identity, which encompasses family members, neighbourhood, address, and other related details. If the media violates this clause, it shall be penalised for a minimum of six months, potentially extending to one year.[10] It may also incur a fine or both. Section 24 of the Act imposes an obligation on police officers to refrain from revealing the child's identity during the documentation of the child's comments. [11]

ii **Investigation and trial completion:** Under the POCSO Act, Special Courts are mandated to record a child's evidence within 30 days of taking cognisance, and the trial must be concluded within one year from the date of cognisance. The proceedings shall be conducted in the presence of the child's parents or in camera to ensure a child-friendly setting. Assistance from educators and translators may be sought if deemed necessary for the trial. If the perpetrator is a minor, he shall be processed and adjudicated in accordance with the Juvenile Justice Act, 2015.[12]

[9] V. Thangavel, "The Analysis of Research Review for the Protection of Children from Sexual Offences Act (POCSO)" (2023).
[10] Sanjucta Kabasi and Shubhankar Kabasi, "The Rights of Minor Victims of Sexual Offences under the POCSO Act" 5(1) *Indian Journal of Law and Legal Research* 1 (2023).
[11] Veenashree Anchan, Navaneetham Janardhana, *et.al.*, "POCSO Act, 2012: Consensual Sex as a Matter of Tug of War between Developmental Need and Legal Obligation for the Adolescents in India" 43(2) *Indian Journal of Psychological Medicine* 158-162 (2021).
[12] Damini Chauhan, "An Analysis of POCSO Act, 2012)" 3(1) *Indian Journal of Law and Legal* 1 (2021).



Picture 1: Showing The Salient Features of the POCSO Act

iii **Penalty for utilising a child for pornography and sexual gratification:** If an offender exploits a child to satisfy his deviant desires and for pornographic purposes, he shall face imprisonment for five years.[13] However, if he perpetrates the same offence subsequently, he shall be subject to a penalty of up to seven years and a fine. If an individual keeps, has, shares, transmits, or distributes pornographic material involving minors for commercial purposes, they shall be subject to imprisonment for three years, a fine, or both penalties.[14]

iv **Significance to children's interests and welfare:** The POCSO Act sought to effectively combat crimes against children and establish a secure and protective environment for them. A female police officer, at least of sub-inspector level, shall, according to section 24 of the POCSO Act, document the kid's remarks at their residence or another location that is convenient for the child.[15] The Act stipulates the performance of a medical examination on the kid, regardless of whether a complaint has been lodged against the accused.

v **Reporting mandated by the POCSO Act:** The Act stipulates that every individual is obligated to report to the local police or Special Juvenile Police Unit when there is a suspicion that a crime has been perpetrated or is about to be perpetrated against a child. It is the responsibility of individuals as well as media outlets, hotels, hospitals, studios, and clubs to report cases. Failure to report the aforementioned shall result in a penalty of six months jail or a fine. Any anyone who disseminates harmful or misleading information shall be subject to a penalty of six months' imprisonment or a fine; however, a kid providing incorrect information shall not incur any punishment.

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[13] *Ibid*.

[14] Nowsheen Goni, M. Goyal, *et.al.*, "A Questionnaire-based Study of Knowledge and Attitude in Healthcare Professionals about Child Sexual Abuse related to POCSO (Protection of Children from Sexual Offences) Act: A Cross-sectional Study" 15(1) *Indian Journal of Forensic Medicine & Toxicology* 1398-1405 (2021).

[15] *Supra* note 3.

vi **Public awareness of the Act by the Government:** Section 43 of the POCSO Act mandates the dissemination of information about the Act and its provisions by both the Central and State Governments to the general public. Awareness and publicity shall be conducted at regular intervals through various media, including television, radio, and print. Central and State government officials shall receive periodic training on the implementation of the Act's provisions.[16] The authority to establish regulations and rectify anomalies in the POCSO Act shall reside with the Central Government. The National Commission for Protection of Child Rights and the State Commission for Protection of Child Rights are responsible for overseeing the effective implementation of the Act.

vii **Gender-neutral:** According to section 2(d) of the POCSO Act, 2012, a child is defined as any anyone under the age of eighteen. A victim under the Act may be either a male or female youngster. This regulation is gender-neutral and ensures the welfare and protection of children regardless of gender.

IV. LANDMARK CASES UNDER THE ACT

In *Ranjeet Kumar* v. *State of Himachal Pradesh and Ors*[17], the Himachal High Court determined that an agreement aimed at preserving the peaceful family life of the married parties involved can lead to the dismissal of a case concerning child sexual maltreatment under the POCSO Act. It is essential for the judiciary to ensure that the victim's agreement was given freely and that the resolution does not serve as a way to circumvent accountability prior to concluding such matters.

In *State of Maharastra* v. *Maroti*,[18] the Supreme Court had observed that prompt and precise reporting of offences under the Act is essential, and it can be stated unequivocally that neglecting this duty would contravene the fundamental purpose of the Act. In the course of examining a case related to the POCSO Act, conducting a medical examination of both the accused and the victim can yield significant and essential insights. According to section 27(1) of the POCSO Act, it is imperative that a medical examination of a minor, who is a victim of an offence under the Act, is conducted in accordance with section 164A of the CrPC, regardless of whether a FIR or complaint has been lodged for the offence. We highlight the previously mentioned provisions to stress the critical importance of promptly reporting offences under the POCSO Act. This will enable the victim to undergo immediate examination, and if the offence was perpetrated by an unidentified individual, it will facilitate the prompt initiation of the investigation by the relevant agency, ultimately leading to the apprehension and medical assessment of the offender.[19]

In *Bachpan Bachao Andolan* v. *Union of India*,[20] the Supreme Court instructed the Principal Secretary to the Department of Women and Child Welfare Uttar Pradesh to convene a meeting, assess the facts, take necessary actions, and establish rules or guidelines concerning various matters. The Ministry of Women and Child Development of the Central

[16] J.S. Ganesha, "Issues and Challenges in the Implementation of POCSO Act: A Review" 9(3) *International Journal of Social and Economic Research* 2 (2019).
[17] 2023 SCC OnLine HP 1625.
[18] (2023) 4 SCC 298.
[19] Mukesh Yadav and Rakesh K. Gorea, "Medicolegal and Social issues of False implication and Abuse of Process of Law in POCSO Cases: A Critical Review" 10(1) *International Journal of Ethics, Trauma & Victimology* 28-31 (2024).
[20] 2023 SCC OnLine SC 1031.

Government was instructed to inform the NCPCR of the aforementioned judgement, which led to the NCPCR submitting an affidavit detailing the actions taken. Additionally, the state of U.P. submitted an affidavit revealing the supplementary guidelines established following the Court's order regarding the provision of a support person.

In the *State of Madhya Pradesh and Ors* v. *Bhupendra Yadav*,[21] the Supreme Court determined that if witnesses in a child sexual assault case turn hostile during the trial and the complainant withdraws her allegations, the acquittal in the case cannot be deemed unblemished. In *State of U.P.* v. *Sonu Kushwaha*[22], the Allahabad High Court determined that, under the provisions of the POCSO Act, the act of penetration of the penis into the mouth of a minor does not qualify as aggravated penetrative sexual assault. Consequently, the court overturned the judgment of the fast-track court that had initially addressed the case, resulting in a modification of the sentencing period. The high court concluded that the respondent was guilty of penetrative sexual assault, rather than aggravated penetrative sexual assault, following a contested ruling.[23] The Supreme Court determined that the respondent had perpetrated an aggravated penetrative sexual assault offence due to the assault on a minor under the age of 12. In this case, section 5(m) applies. The High Court has observed that the respondent's actions are categorised as penetrative sexual assault, which is unexpected. Consequently, by determining that the incident did not constitute an aggravated penetrative sexual assault, the high court committed a significant error. The evidence clearly indicates that the individual in question was under the age of 12 at the time the offence took place. Consequently, our sole option is to overturn the decision of the higher court in question and restore the ruling made by the trial court.[24]

V. OFFENCE UNDER THE ACT

Under five main offences, chapter II of the Act thoroughly defines several sexual offences against children: Penetrative Sexual Assault (section 3), Aggravated Penetrative Sexual Assault (section 5), Sexual Assault (section 7), Aggravated Sexual Assault (section 9), and Sexual Harassment (section 11).[25] The Act removes legal uncertainty by separating penetrative from non-penetrative offences, therefore guaranteeing clarity. Penetrative sexual assault (section 3) entails penetration into any portion of a child's body with a minimum sentence of 10 years, extendable to life imprisonment, together with a fine meant for the victim's medical and rehabilitation expenditures. With a minimum punishment of 20 years, extendable to life imprisonment or even the death sentence, and an obligatory fine for the victim's welfare, severe Penetrative Sexual Assault (section 5) covers incidents involving police officials, public servants, or other severe conditions. Section 7, Sexual Assault, defines non-penetrative physical contact with sexual intent and carries fines and three to five years of incarceration.[26] Section 9, aggravated sexual assault, covers public servants or individuals in positions of trust and entails a minimum term of five years, up to seven years, together with a fine.[27] With a maximum penalty of three years and a fine, sexual harassment which covers

[21] 2023 LiveLaw (SC) 810.
[22] 2023 LiveLaw (SC) 502.
[23] *Supra* note 5.
[24] *Ibid*.
[25] Pradeep Kulshrestha and Kush Kalra, "Child Trafficking and Sexual Violence Against Children: Issues & Challenges" 4(1) *GIBS Law Journal* 1-10 (2022).
[26] *Ibid*.
[27] K. Sanoria, "Crime against Children: Aggravated Form of Sexual Offence under POCSO" 3 *Indian Journal of Law and Legal Research* 1 (2022).

verbal, visual, and physical acts meant for sexual gratification in Section 11 contains Apart from fines, the use of children for pornographic purposes (section 13) attracts a minimum sentence of five years, which rises to seven years for repeat violations.[28] This organised approach emphasises the legislative intention to fully handle sexual offences against children, therefore guaranteeing strict penalties and protection of victim rights.

Statutory Provision	Offence	Punishment	Additional Details
Section 3 (4)	Penetrative sexual assault	- Minimum 10 years, may extend to life imprisonment - Fine	- Involves penetration into various parts of a child's body - Fine should be reasonable and used for victim's medical expenses and rehabilitation
Section 5 (6)	Aggravated penetrative sexual assault	- Minimum 20 years, may extend to life imprisonment or death - Fine	- Includes cases involving police officers, public servants, and other aggravated circumstances - Fine must cover victim's medical and rehabilitation expenses
Section 7 (8)	Sexual assault	- Minimum 3 years, may extend to 5 years - Fine	- Involves physical contact without penetration - Sexual intent is a key factor
Section 9 (10)	Aggravated sexual assault	- Minimum 5 years, may extend to 7 years - Fine	- Covers assaults by police officers, public servants, and other aggravated cases
Section 11 (12)	Sexual harassment	- May extend to 3 years - Fine	- Includes verbal, visual, and physical harassment for sexual gratification
Section 13 (14)	Use of child for pornographic purposes	- Minimum 5 years, may extend to 7 years on subsequent conviction - Fine	- Involves using children in any media for sexual purposes - Additional punishments exist for specific acts in sub-sections

Table 1: Outlines statutory provisions, offences, and punishments given under Chapter II, POCSO Act

VI. CHALLENGE IN THE ACT

[28] Janice Du Mont, "Charging and Sentencing in Sexual Assault Cases: An Exploratory Examination" 15(2) *Canadian Journal of Women and the Law* 305 (2003).

i The POCSO Act, despite several revisions, still has significant flaws, particularly regarding the issue of consent. The Act does not specify what should be done if a child or adolescent refuses to undergo a health screening, even if family members or investigators insist on it. It is advisable to obtain informed consent from parents for children under twelve, and from both the adolescent and parents for those aged twelve to eighteen. However, in life-threatening situations, immediate treatment should be provided regardless of consent issues.[29]

ii Another challenge arises with the medical examination of victims. The Act mandates that female child victims be examined by a female doctor, but also requires that urgent care be provided by any available medical professional. Additional legal provisions require immediate examination by the duty government medical officer.[30] The scarcity of female doctors often creates legal and practical complications in fulfilling these requirements.

iii The provision of free medical care to victims is also problematic. While the Act requires hospitals to provide free treatment, limited resources or expensive procedures can strain healthcare facilities. In such cases, the state should cover the costs; otherwise, victims may receive inadequate or delayed care.[31]

iv The laws concerning consent under the POCSO Act are excessively rigid and complex. The Act prohibits all sexual contact with children, regardless of consent, sexuality, marital status, or age. Some experts suggest that consensual sexual activity between adolescents, or between an adolescent and an adult, should not always be criminalized. However, the 2013 amendment to the Indian Penal Code sets the age of consent at eighteen, making any sexual contact with a minor statutory rape and increasing the number of reported sexual offences.[32] Healthcare professionals are also required to report all medical terminations of pregnancy for those under eighteen.

v There is a pressing need for education and training among professionals in medicine, education, law, and justice about the POCSO Act. Challenges include collecting and maintaining records and raising awareness among stakeholders. Comprehensive care requires that all involved parties receive adequate training, and medical students and primary care clinicians must learn child-friendly interviewing, evaluation, evidence collection, treatment for HIV/STDs, parental counselling, and follow-up procedures.

vi Addressing child sexual abuse requires specialized skills because such cases rarely present clear physical evidence. Proper assessment involves specialized interviewing, thorough history-taking, and careful examination. Mental healthcare specialists should be involved during court proceedings and follow-up therapy to address psychological consequences, as child sexual abuse can have both short-term and long-term mental health impacts.[33] Counselling, family support, and rehabilitation are essential for the recovery of victims.

vii Sentencing under section 10 of the POCSO Act presents another challenge, as it mandates a minimum five-year prison term without allowing courts to consider mitigating factors such as the convict's age or first-offender status. This rigidity may not always serve the interests of justice in every case.

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[29] S. Maan, "Protection of Children from Sexual Offences: An Analysis of the POCSO Act, 2012" 4 *Indian Journal of Law and Legal Research* 1 (2022).
[30] *Ibid*.
[31] A.P. Narayan, "Unveiling the POCSO Act: Expectations and Experiments" *Satraachee* 67.
[32] *Supra* note 16.
[33] R. Renu and G. Chopra, "Child sexual abuse in India and the Protection of Children from Sexual Offences (POCSO) Act 2012: A Research Review" 6(2) *Integrated Journal of Social Sciences* 49-56 (2019).

viii Underreporting and social stigma are persistent problems. Most cases of child sexual exploitation remain unreported due to feelings of shame, fear of re-victimization, and societal judgment.[34] The process of medical examination and court proceedings can be traumatic for victims and their families, discouraging them from seeking justice.

ix Finally, contradictions between the POCSO Act and certain personal laws, which still permit child marriage, add to the legal confusion. Any future amendments to the law must address these inconsistencies to ensure better protection for children and clarity in legal proceedings.[35]

VII. CONCLUSION AND SUGGESTION

A. Conclusion

More than a decade after the enactment of the POCSO Act, critical analysis demonstrates that the legislation has made significant strides in enhancing the legal protection of children against sexual offences in India. The establishment of specialised courts, the introduction of child-friendly procedural safeguards, and the gender-neutral scope of the Act represent notable legislative achievements. Nevertheless, a pronounced gap persists between the legislative objectives and the realities of implementation. Systemic barriers such as underreporting due to social stigma, procedural delays in investigation and trial, insufficient victim support services, and regional disparities in enforcement continue to undermine the Act's effectiveness. Additional challenges include ambiguities regarding consent, rigid sentencing provisions, and contradictions with personal laws, such as those permitting child marriage. These complexities impede the consistent application and overall efficacy of the Act. Therefore, while the POCSO Act provides a robust legal framework for child protection, its transformative potential can only be realised through sustained, multidimensional interventions that address these entrenched challenges.

B. Suggestions

To ensure that the POCSO Act's legislative promise is realised in practice, a comprehensive and multi-pronged approach is essential. The following recommendations are advanced in an academic spirit, integrating empirical findings and best practices:

i **Comprehensive and Continuous Capacity Building:** Expand and institutionalise regular, integrated training programmes for all stakeholders—including law enforcement, judiciary, medical professionals, and support persons—emphasising child-sensitive approaches, evidence preservation, and trauma-informed care.

ii **Structured, Age-Appropriate Awareness Initiatives:** Develop and implement educational modules on personal safety, online abuse, and healthy relationships for children in schools and community settings. Extend awareness and training to parents, teachers, and non-school environments such as coaching centres, recreational facilities, and transport hubs, thereby fostering a culture of vigilance and responsibility beyond the classroom.

iii **Judicial Reforms and Legal Clarity:** The judiciary should establish clear, context-sensitive guidelines for cases involving consensual relationships between adolescents,

[34] Guru Prasad Singh and Mamta Sharma, "The Gender-Neutral Approach of the Protection of Children from Sexual Offences (POCSO) Act, 2012 in Safeguarding Children's Rights" 7(4) *International Journal of Law Management & Humanities* 559 (2024).
[35] *Ibid*.

ensuring that the law is not misapplied to criminalise consensual behaviour. Periodic review and amendment of statutory provisions are necessary to resolve ambiguities concerning consent and age thresholds, and to harmonise the POCSO Act with personal laws.

iv **Strengthening Support Systems and Victim Care:** Institutionalise district-level support networks and ensure the availability of adequately trained support persons, counsellors, and rehabilitation specialists. Guarantee free, prompt, and holistic medical, psychological, and legal services for victims, with special attention to children from marginalised or vulnerable backgrounds.

v **Infrastructure and Procedural Reforms in Special Courts:** Enhance the physical and procedural infrastructure of Special Courts to ensure child-friendly, non-intimidating environments. This includes separate waiting areas, use of video testimonies, and minimising direct contact between victims and accused.

vi **Robust Monitoring and Data Systems:** Establish independent monitoring bodies at state and district levels to oversee case progress, identify procedural bottlenecks, and recommend corrective action. Standardise data collection and reporting mechanisms across Child Welfare Committees and Special Courts to facilitate evidence-based policy interventions.

vii **Community and Civil Society Engagement:** Mobilise community leaders, civil society organisations, and local institutions in awareness campaigns and victim support. Encourage the formation of community-based child protection committees as first responders and advocates for children's rights.

viii **Leveraging Technology:** Develop secure, child-friendly digital platforms for reporting offences, accessing support services, and tracking case progress. Utilise technology to facilitate remote testimonies and reduce the trauma associated with court appearances.

ix **Special Focus on Marginalised and High-Risk Groups:** Tailor interventions to address the unique vulnerabilities of street children, children with disabilities, and those in institutional care or conflict zones. Develop specific guidelines and additional safeguards for these populations.

x **Research and Policy Review:** Promote regular empirical research and policy analysis to assess the impact of the Act, identify emerging challenges, and integrate global best practices in child protection.

xi **Parental and Community Workshops:** Introduce meaningful workshops for parents and interactive sessions for children to impart education about the POCSO Act, sex education, and reporting mechanisms, thereby reducing stigma and empowering families.

xii **Adequate Resource Allocation:** Ensure sufficient funding and personnel for investigating agencies, Special Courts, and victim support services to expedite investigations and trials, and to ensure comprehensive care for victims.

xiii **Victim and Witness Protection Mechanisms:** Develop robust victim and witness protection protocols, including safe housing, anonymity, and protection from intimidation or retaliation, to encourage reporting and participation in judicial processes.

xiv **Integration with Child Welfare and Education Policies:** Align the implementation of the POCSO Act with broader child welfare and education policies to ensure a holistic approach to child protection, prevention, and rehabilitation.

MARGINS TO MAINSTREAM: THE STATUS OF TRANSGENDER PERSONS' RIGHT TO EDUCATION IN INDIA

Pramod Tiwari[*]
Shubham Pandey[**]

I. INTRODUCTION

Education is a key milestone in shaping an individual's life. It brings about significant change and marks a phase of personal growth, enabling a person to evolve into a better version of themselves. As a system, it equips individuals with knowledge, skills, and methods, empowering them to understand their rights and responsibilities toward their family, society, and nation. Education also broadens one's vision and perspective, allowing them to view the world differently. Moreover, it strengthens a person's ability to stand up against injustice, violence, and other negative elements in society.

India, the second most populous nation in the world, is home to approximately 1.38 billion people (as per 2020 statistics). This vast population encompasses individuals of various genders, religions, and languages, yet they are all governed under a single Constitution. Within this immense demographic, a small but significant group known as transgender individuals continues to face societal exclusion. This is largely due to persistent stereotypes and a limited societal understanding of gender, which often only recognizes binary identities – male and female.

A. Who Are the Transgender Individuals?

Although the terms 'gender' and 'sex' are frequently used as synonyms, they actually have different meanings. 'Sex' relates to the biological characteristics of humans and animals, such as physical features, chromosomes, gene activity, hormones, and anatomy. On the other hand, 'gender' pertains to the social and cultural roles, behaviors, expressions, and identities associated with males, females, and those who identify outside the traditional binary[1]. Although society generally recognizes only two genders—male and female—transgender people have been a part of Indian society for centuries. The term 'transgender' broadly refers to those whose gender identity, expression, or behavior differs from the sex assigned to them at birth.

B. The Historical Evolution of the Transgender Community in India

Transgender individuals have historically held a significant place in Indian society, recognized in ancient texts as *tritiyaprakriti* or *napumsaka*, referring to those outside the male-female binary.[2] Hindu epics like the *Ramayana* and *Mahabharata* feature transgender figures such as Mohini, Shikhandi, and Aravan, reflecting early gender diversity.

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[1] A. Balu, "Confront Issues on Education of Transgenders in India" 9 *Global Journal for Research Analysis* 12 (2020), *available at*: https://www.worldwidejournals.com/global-journal-for-research-analysis-GJRA/article/confront-issues-on-education-of-transgenders-in-india/MTQyNjc=/?is=1&b1=5&k=2 (last visited on Apr. 20, 2024).

[2] M. Michelraj, "Historical Evolution of Transgender Community in India" 4 *Asian Review of Social Sciences* 17 (2015), *available at*: https://arssjournal.org/index.php/arss/article/view/1304 (last visited on Apr. 20, 2024).

During the Mughal era, they held respected roles as advisors and administrators, enjoying power and privilege. However, British colonial rule introduced rigid moral codes and criminalized non-heteronormative behavior, leading to the marginalization of the transgender community and a decline in their societal status, erasing centuries of inclusion and cultural reverence.[3]

Transgender people have played a significant role in Indian society throughout its history. Historical and religious texts acknowledged a 'third gender' through terms like *tritiyaprakriti* and *napumsaka*, referring to those who did not conform to the binary notions of male and female. These identities were embedded in early Vedic, Puranic, and mythological literature. For instance, Hindu epics such as the *Ramayana* and *Mahabharata* feature characters like Mohini, the female avatar of Vishnu, Aravan, and Shikhandi, all of whom reflect gender fluidity and the recognition of transgender existence. In one account from the *Ramayana*, transgender individuals remained in the forest awaiting Lord Rama's return, as his instructions had only been directed to men and women, thus positioning them as a distinct group.

Throughout the Mughal period, transgender people occupied prominent roles as royal *advisors*, *administrators*, and *guardians* of harems. They enjoyed considerable respect, wealth, and social status, with figures like Itimad Khan trusted with significant responsibilities in Akbar's court. European travellers also documented their privileged lifestyles. However, with the advent of British colonialism, Victorian moral codes and discriminatory laws were imposed, leading to the criminalization of non-heteronormative identities. This drastically reduced the societal standing of transgender individuals and marked the beginning of their systemic marginalization in modern India.

The community should be actively included in the nations' overall development initiatives and protected from all forms of abuse and exploitation. One of the fundamental issues to address is the education of transgender children. Within the framework of inclusive development, they are entitled to receive an education while preserving their true identities and without experiencing societal discrimination. Furthermore, it is essential to provide them with a supportive social and psychological environment that is free of barriers, allowing them to fully exercise their rights like any other child. This paper aims to explore the educational and rehabilitation requirements of transgender children in the context of a progressively inclusive society.[4]

II. Educational Right of Transgenders

A. Rights under Indian Constitution

The Preamble to the Indian Constitution guarantees justice, liberty, equality, and fraternity, ensuring the dignity of every individual. Despite these assurances, the transgender community remains one of the most marginalized and underprivileged groups in society.

[3] Ariba, "Explained: A brief history of India's transgender community" *The Indian Express,* July 10, 2023, *available at*: https://indianexpress.com/article/explained/explained-culture/starbucks-history-transgender-community-india8616767/ (last visited on Apr. 25, 2024).

[4] A.A. Singh and Joseph G. Kosciw, "Introduction to the Special Issue: School Counselors Transforming Schools for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Students" 20 *Professional School Counseling* 1096 (2017).

Many among them are unaware of their fundamental rights protected under articles 14, 15, 16, 19, and 21 of the Constitution. This widespread lack of awareness can be attributed to a range of factors, including limited access to education, unemployment, inadequate healthcare, homelessness, social stigma, hormonal misuse, substance abuse involving alcohol and tobacco, and various other challenges.

Article 14 of the Indian Constitution ensures that each individual living inside and outside India is entitled to equality under law and equal protection of the laws. Article 14 of the Constitution of India mandates that state action must not be arbitrary and discriminatory. It must also not be guided by any extraneous considerations which are antithetical to equality.[5]

Article 15 of the Indian Constitution manages the forbiddance of separation on the ground of religion, race, position, spot of birth, and sex; here sex incorporates male, female and transsexual. In a landmark judgment, the Supreme Court ruled that the term *sex* should be interpreted more broadly and not be confined to the traditional binary understanding of male and female.[6]

In the case of *Mx. Alia SK* v. *The State of West Bengal and Ors*.[7], the court held that:

> *"Transgender persons have the right to seek admission into universities. The judgement is important because it signified the role of courts in ensuring that special accommodations and adjustments are made to include transgender people in the process of public university applications and admission process where none exist".*

Article 21 of the Constitution of India manages the protection of life and individual freedom, further expresses that no individual will be denied his life or personal freedom besides as indicated by the strategy set up by law.

In the Indian Constitution, education was initially classified as a state subject. However, with the 42nd Amendment in 1976, five subjects, including education, were moved from the State List to the Concurrent List. This shift allowed both the Central and State governments to have the authority to legislate on matters related to education. The rationale behind placing education in the Concurrent List was to enable coordinated efforts between both levels of government, covering all aspects from early childhood education to higher education. This change also empowered the Central government to directly implement educational policies across all States.

The Eighty-Sixth Constitutional Amendment Act of 2002 introduced article 21A into the Indian Constitution. This provision made the right to free and compulsory education a fundamental right for all children aged six to fourteen. Article 21A obligates the State to ensure that children within this age group receive free and mandatory education. The core objective of this article is to prevent any child from being deprived of education due to financial constraints, the high cost of schooling, or social marginalization.

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[5] *Senior Divisional Commercial Manager* v. *S.C.R. Caterers, Dry Fruits, Fruit Juice Stalls Welfare Association*, (2016) 3 SCC 582.
[6] *Suresh Kumar Koushal* v. *Naz Foundation* (2014) 1 SCC 1.
[7] *Mx. Alia SK* v. *The State of West Bengal*, W.P. Nos. 21587 (W) of 2019 (Cal. H.C.).

As per the 2011 health statistics, India's transgender population was estimated at around 4.9 lakh individuals. The data also revealed that this community ranks among the lowest in terms of educational attainment, with only 46% of transgender individuals being literate, compared to 74% literacy in the general population. Additionally, the amendment modified article 51A by inserting clause (k), which places the responsibility on every parent or guardian to provide education to their children or wards between the ages of 6 and 14.

Despite education being recognized as a fundamental right under Part III of the Constitution, it is unfortunate that the State has struggled to effectively implement this provision, particularly for marginalized communities.

Regarding the right to education, its content and limits can also be clarified through the Directive Principles of State Policy (DPSP) under Part IV of the Indian Constitution, including articles 41, 45, and 46, which require the state to formulate laws related to education.

B. Right of Children to Free and Compulsory Education Act, (RTE) 2009

Right of Children to Free and Compulsory Education Act, (RTE) 2009 has empowered the legislation enacted to give effect to article 21A of the Indian Constitution. This Act came into force on April 1, 2010, with the primary objective of providing free and mandatory full-time elementary schooling for all children aged 6 to 14 years. Under this law, no child or their parents are required to pay any direct or indirect fees for elementary education.

The Act places the responsibility on both the government and local authorities to cover all costs related to the provision of elementary education. It also lays down specific guidelines regarding student-teacher ratios, infrastructure standards, class capacity, and instructional hours. According to section 12(1)(c) of the RTE Act, 2009, both government and private schools are required to adhere to these standards. Additionally, the law mandates that private unaided schools reserve at least 25% of their seats for children from economically weaker sections and disadvantaged groups residing in the neighbourhood.

The Lt-Governor of Delhi, Najeeb Jung, issued a notification in 2014 stating that transgender children are identified as 'children belonging to the deprived group' under section 2(d) of the RTE Act, 2009. It further added that transgender children are included under the economically weaker section and hence are given reservation in Delhi schools under a 25 per cent quota that is meant for the disadvantaged students' category for admission, empowering them to peruse free of cost education under the RTE Act, 2009.[8]

C. The NALSA Judgment [9]

The NALSA decision should undoubtedly be commended for rejecting gender-based discrimination and for offering hope and opportunity to a group that has traditionally existed outside the legal system. The courts, with great faith and vision, have granted legal identification to all those whose bodies do not conform to recognised gender norms at birth. One ground-breaking feature of the verdict had a significant impact on present marriage, adoption, labour, and inheritance laws, which will now have to evolve away from the binary

[8] *Ibid.*

[9] *National Legal Services Authority* v. *Union of India* (2014) 5 SCC 438.

system of men and women in order to accommodate transgender people's legal rights. Additionally, one cannot ignore the irony that the ruling was handed only a few months after the case of *Suresh Kumar Koushal and others* v. *NAZ Foundation and Others*[10] established the legitimacy of section 377 of the Indian Penal Code, 1860. Accepting that section 377 is discriminatory against transgender people, the Court stated that "the decision leaves the *Koushal* issue unresolved, focusing solely on the legal recognition of the transgender community". One of the most novel aspects of the verdict was the incorporation of fundamental rights straight from the Constitution, particularly the application of article 19, which served as a bold motivator for recognising the rights of a transgender person.[11]

The solutions that the Court grants are also intriguing. As of now, three mandates have been mentioned: *hijras* are currently viewed as the third sex, trans-persons have the right to choose between being male, female, or providing a home with the third gender, and trans-persons are to be given advantages that are duly offered under government policies regarding minorities, because they would qualify as a socially disadvantaged, backward sex. The Court then goes on to issue a slew of different orders, including some specific ones (like providing user-friendly toilets and treatment for HIV-positive trans-people) and some broad ones (like directing doctors to provide them with medical care in all facilities), laying out various social welfare plans for their advancement, and finding a way to raise public awareness to ensure their safe.

D. The Transgender Persons (Protection of Rights) Act, 2019

The Lok Sabha passed the Transgender Persons (Protection of Rights) Bill, 2019. This originates from the passage of at least three different versions of the bill through Parliament – first in 2014, then in 2016, and then eventually in 2019. Transgender individuals have historically endured widespread discrimination and unequal treatment within society. The introduction of the Transgender Persons (Protection of Rights) Bill, 2019, marks a significant step within a progressive legal framework aimed at safeguarding their rights—a long-overdue advancement.

The important Highlights of the Bill can be listed as follows:

i The Bill defines a transgender person as one who is partly female or male, or a combination of female and male, or neither female nor male. In addition, the person's gender must not match the gender assigned at birth, and includes trans-men, trans-women, persons with intersex variations, and gender-queers.

ii A transgender person must get a certificate of identity to establish their transgender status and to exercise their rights under the Bill. The District Magistrate, on the recommendation of a Screening Committee, would award such a certificate. A medical officer, a psychologist or psychiatrist, a district welfare officer, a government official, and a transgender person would serve on the Committee.

iii The Bill outlaw's discrimination against transgender individuals in a variety of settings, including education, work, and healthcare. It mandates that the federal and state governments establish social programs in these areas.

iv Offenses such as forcing a transgender person to beg, denying them entrance to a public location, and physical and sexual assault would carry a maximum sentence of two years in prison and a fine.

[10] *Supra* note 6.
[11] *Supra* note 9.

E. Gaps in the Act: Education of Transgender People

One of the most crucial aspects addressed by the Act is education, specifically covered under section 13, at school, a trans child's first experience with society outside of the familial barrier occurs. At school, the concepts of self-identity and self-worth begin to take shape. As a result, measures must be developed to ensure that trans children are admitted to schools and feel safe and secure.[12] To promote inclusion, society needs to become more aware of the challenges faced by the transgender community. Section 13 of the relevant legislation requires 'all government-recognized educational institutions to offer equal opportunities for participation in sports, recreational, and leisure activities without discrimination'. However, the law does not address the complexities of gender-segregated sports or clarify whether transgender individuals can join teams that align with their gender identity.

In contrast, *the National Collegiate Athletic Association* (NCAA) in the United States allows transgender athletes to compete in gender-specific sports consistent with their gender identity, provided they undergo hormone therapy. For example, transgender women are permitted to compete on women's teams after completing at least one year of testosterone suppression treatment. As India continues to grow its presence in the world of sports, it is crucial to establish clear policies that ensure fair and inclusive participation, while also optimizing the use of existing resources.[13]

This marginalized group continues to lag in accessing education, as many schools either deny them admission or fail to provide a supportive environment. Even when transgender students manage to enrol, they often drop out after completing basic education due to ongoing discrimination and social exclusion. There are merely 1%-3% of transgender who can complete their higher education. Further, as they are not able to get proper education, it is really difficult for them to get employment. In most of the cases, it been seen that these people earn by singing in trains, buses, begging at traffic lights, forcibly blessing people in public places, and a few people end up in prostitution.[14]

III. RESERVATION POLICY FOR TRANSGENDER

Despite this strong historical presence; we somehow forgot their existence while drafting our supreme law of the land. Although, Fundamental rights were guaranteed to all persons and it can be interpreted that 'person' includes third gender as well. Article 14 of the Constitution of India states that "*the state shall not deny 'any person' equality before the law or the equal protection of laws within the territory of India*". Equality entails the full and equal access to all rights and freedoms, and it also imposes a positive obligation on the State to provide equal legal protection by carrying out essential social and economic reforms. Article 14 of the Indian Constitution does not restrict the term 'person' to just male or female individuals. Therefore, transgender individuals—who do not identify strictly as male or female—are included within the meaning of 'person' and are thus entitled to the same legal protections as any other citizen.

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[12] Aastha Sawhney and Sanya Grover, "The Transgender Persons (Protection of Rights) Bill 2019: Divergent Interpretations & Subsequent Policy Implications" 6 *Indian Journal of Law & Public Policy* 5 (2019).
[13] *Ibid.*
[14] Anugya Mittra, "Educational Inequality in India: A Review Paper for Transgender Population"2 *International Journal of Trend in Scientific Research and Development* 1580 (2017).

Article 15(1) of the Constitution of India prohibits discrimination on the ground of sex. But we see gender discrimination with third genders prevalent in our country. Articles 15 and 16 prohibit discrimination against any citizen on certain enumerated grounds, including the ground of 'sex'. In fact, both the Articles prohibit all forms of gender bias and gender-based discrimination.

However, it took us more than six decades to recognise that 'third gender' exists. This delay in recognition badly affected the development of the transgender community. Finally, in the year 2014, a bench comprising Hon'ble Justices K.S. Radhakrishnan and A.K. Sikri declared that *hijras*, beyond the binary notion of gender, should be recognized as the third gender to ensure the protection of their rights under Part III of the Constitution, as well as under laws enacted by Parliament and State Legislatures.[15] The Court *inter alia* gave the following direction:

> *"We direct the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments".*[16]

This is the direction which motivated Grace Banu[17] to file a writ petition before the Hon'ble Supreme Court to seek clarification as to horizontal reservation. The Supreme Court has dismissed this petition. Before discussing the rationale of this dismissal, it is important to understand the Indian reservation system first.

Article 14 provides "the right to equality to all Indian citizens". Reservation system constitutes an exception to this equality clause. Reservation can be categorized into two types: 'vertical' and 'horizontal'. Vertical reservation refers to the quotas allotted specifically for Scheduled Castes, Scheduled Tribes, and Other Backward Classes. In contrast, horizontal reservation spans across all vertical categories, ensuring affirmative action for disadvantaged groups within those categories. Article 15(3) of the Constitution addresses the provision of horizontal reservation.

Grace Banu, a Transgender Rights Activist, demanded horizontal reservation. Senior Advocate Jayna Kothari represented the applicant. Banu in the application noted the Supreme Court in its judgement in the *NALSA* case, directed the Central government to treat transgender persons as a socially and educationally backward class and provide them reservations in education and public employment. However, the Court did not provide specific guidelines on how the reservation should be enforced. As a result, the petitioner pointed out that several states have still not implemented these provisions.

The applicant contended that the most effective approach to granting reservations for transgender and intersex individuals is based on gender and disability, similar to the provisions made for women and persons with disabilities. The application also mentioned that in September 2021, the Ministry of Social Justice submitted a cabinet proposal to classify transgender persons under the Other Backward Classes category. Additionally, the Tamil Nadu government has decided to recognize transgender individuals within the *Most Backward Class* (MBC) category. Karnataka is the only state where they have been given

[15] *Supra* note 9.
[16] *Ibid.*
[17] *Grace Banu* v. *The Chief Secretary, Government of Tamil Nadu,* AIROnline 2021 Mad 1791.

horizontal reservation to the extent of 1% The applicant further prayed that reservations for transgender persons should include concessions in cut-off marks, and age. The following were the reliefs sought in the application:

i Clarify/modify the judgement dated 15.04.2014 passed in Writ Petition (Civil) No. 400 of 2012 that the reservations meant for transgender persons are horizontal reservations:
ii Clarify/modify the judgement dated 15.04.2014 passed in Writ Petition (Civil) No. 400 of 2012 to the effect that reservations for transgender persons should also provide for concessions in age, cutoff marks and physical criteria, as provided to other reserved categories;
iii Clarify/modify the judgement dated 15.04.2014 passed in Writ Petition (Civil) No. 400 of 2012 to the effect that reservation should be provided for transgender persons in addition to public employment and public education also in allotment of housing sites, schemes and in local bodies.[18]

IV. Status of Transgender Education in India

Transgender individuals were officially recognized in the national population count for the 1st time during the 2011 Census, when the government decided to include them as a distinct category. Prior to this, the census only offered two gender options: male and female, excluding any acknowledgment of a third gender. In a landmark decision in 2014, the Supreme Court of India recognized transgender people as a third gender. While is gender men and women continue to advance across various fields—especially in education—the transgender community still faces a gap in access and opportunities. Despite these challenges, transgender individuals strive to move forward and pursue both basic and higher education to gain general and specialized knowledge. As stated in the *Universal Declaration of Human Rights*, "Everyone has the right to education".[19] At the very least, education shall be free during the primary and fundamental phases. Education at the elementary level and the fundamental phases. Primary schooling shall be mandatory. Technical and professional education must be universally accessible, and higher education must be equally available to all based on merit.

Among India's 35 states and union territories, *Uttar Pradesh* reported the highest number of transgenders, totalling around 13,000. *Bihar* followed with 9,987, and *West Bengal* ranked third with 9,868. Educational attainment within this community shows that approximately 27% completed basic schooling, 10% reached middle school, another 10% finished higher secondary education, and 27% completed high school. Additionally, around 26% pursued undergraduate and postgraduate studies. Despite these figures, the overall literacy rate among the transgender community remains low at 46%, significantly below the national average of 74%. This disparity is largely attributed to the ongoing discrimination, social exclusion, and legal challenges faced by transgender individuals. The table provided below throws light on the same.

[18] *Ibid*.
[19] Neha K. Vats and Manju Purohit, "Right to Education and Employment: A Step Towards Empowering Transgender Community" 5 *Kathmandu School of Law Review* 113 (2017).

Table: State & Literacy[20]

State / UT	Transgender Population	Children (0–6)	SC Transgenders	ST Transgenders	Literacy Rate (%)
India (all)	487,803	54,854	78,811	33,293	56.07
Uttar Pradesh	137,465	18,734	26,404	639	55.80
Andhra Pradesh	43,769	4,082	6,226	3,225	53.33
Maharashtra	40,891	4,101	4,691	3,529	67.57
Bihar	40,827	5,971	6,295	506	44.35
West Bengal	30,349	2,376	6,474	1,474	58.83
Madhya Pradesh	29,597	3,409	4,361	5,260	53.01
Tamil Nadu	22,364	1,289	4,203	180	57.78
Odisha	20,332	2,125	3,236	4,553	54.35
Karnataka	20,266	1,771	3,275	1,324	58.82
Rajasthan	16,517	2,012	2,961	1,805	48.34
Jharkhand	13,463	1,593	1,499	3,735	47.58
Gujarat	11,544	1,028	664	1,238	62.82
Assam	11,374	1,348	774	1,223	53.69
Punjab	10,243	813	3,055	0	59.75
Haryana	8,422	1,107	1,456	0	62.11
Chhattisgarh	6,591	706	742	1,963	51.35
Uttarakhand	4,555	512	731	95	62.65
Delhi (NCT)	4,213	311	490	0	62.99
Jammu & Kashmir	4,137	487	207	385	49.29
Kerala	3,902	295	337	51	84.61
Himachal Pradesh	2,051	154	433	118	62.10
Manipur	1,343	177	40	378	67.50
Tripura	833	66	172	181	71.19
Meghalaya	627	134	3	540	57.40
Arunachal Pradesh	495	64	0	311	52.20
Goa	398	34	9	33	73.90
Nagaland	398	63	0	335	70.75
Puducherry	252	16	40	0	60.59
Mizoram	166	26	1	146	87.14
Chandigarh	142	16	22	0	72.22
Sikkim	126	14	9	37	65.18
Daman & Diu	59	10	1	2	75.51
Andaman & Nicobar Is.	47	5	0	3	73.81
Dadra & Nagar Haveli	43	5	0	22	73.68
Lakshadweep	2	0	0	2	50.00

[20] Population Census, "Transgender in India", *available at*: https://www.census2011.co.in/transgender.php (last visited on May 24, 2024).

V. CHALLENGES OF TRANSGENDER EDUCATION IN INDIA

The transgender community in India faces significant educational challenges, reflected in a low literacy rate of 56.1% (2011 Census) compared to the national average. Discrimination, bullying, and lack of inclusive school environments lead to high dropout rates. Many faces rejection from families and society, resulting in isolation and mental distress. Even when enrolled, transgender students struggle with harassment, inadequate hostel facilities, and unclear government policies. These systemic barriers also impact their future employment opportunities, particularly in professional fields like law and medicine.[21].

In 2019, Minister Ramesh Pokhriyal revealed that, aside from IGNOU enrolling 814 transgender students in five years, no other central universities reported transgender students or staff. The All-India Survey on Higher Education 2018-19 also excluded transgender data from its 37.4 million enrollees. Despite University Grants Commission (UGC) initiatives – like adding a transgender category in forms and promoting scholarship inclusion: "*transgender representation in higher education remains minimal, highlighting the ongoing gaps in accessibility, visibility, and institutional support for the community*".[22]

Professor Rajesh Kumar of Delhi University's Transgender Resource Centre highlighted that official statistics underrepresent transgender individuals due to societal stigma, which discourages self-identification. He stressed the importance of sensitization and gradual inclusion in higher education, beginning with enrolment under the transgender category. Critiquing the Transgender Persons (Protection of Rights) Bill, 2019, Kumar argued it restricts self-identification and lacks empowerment. He called for legislation that affirms transgender identities without relying on external certifications, emphasizing the need for genuine inclusion and protection against discrimination.[23].

Only Savitribai Phule Pune University has enrolled 41 transgender students, while the others report none. Despite government promises to cover higher education costs for transgender students in public institutions, enrolment remains low. While initiatives like adding a 'TG' category in forms and exploring alternative accommodations exist, they fail to create a genuinely inclusive and supportive educational environment, demanding stronger, proactive action.[24]

Transgender individuals in secondary education face many of the same challenges as those in higher education, such as concerns about safety, access to appropriate bathrooms and healthcare, and having their gender accurately reflected on official documents. Facing rejection from both their families and educational institutions, many transgender individuals are forced to leave school, which significantly limits their career prospects. Studies and conversations with community members and stakeholders identify this lack of support as a major factor contributing to the high dropout rates within the transgender population. On

[21] Devesh Srivastava, "Trans Students in Higher Education: Low Numbers, Non-Existent Facilities in Pune's Institutes" *The Indian Express*, Dec. 09, 2023, *available at*: https://indianexpress.com/article/cities/pune/trans-studentsin-higher-education-low-numbers-non-existent-facilities-9060656/ (last visited on May 19, 2024).

[22] Eram Agha, "No Transgender Students in India's Central Varsities, Indicates Govt Data. But Here's the 'Other' Side" *News18*, Dec. 04, 2019, *available at*: https://www.news18.com/news/india/no-transgender-students-inindias-central-universities-govt-data-indicates-but-theres-the-other-side-2410993.html (last visited on Apr. 30, 2024).

[23] *Ibid*.

[24] *Supra* note 21.

average, transgender people attain education only up to the secondary (matriculation) or senior secondary level. Enrolment rates among them are notably low, and dropout rates at the primary and secondary stages remain alarmingly high. Addressing the issues of gender disparity and social exclusion continues to be a significant challenge for the community.

VI. Conclusion And Suggestions

Despite various legal reforms and official support, the transgender community continues to face violence and discrimination. The social status of transgender individuals has seen little improvement through these legislative measures. While a small, informed segment of the community benefits from these changes, a large portion still suffers injustice and marginalization. To reduce the vulnerabilities faced by transgender people in India, there must be widespread collaboration across all sectors of society. Society's perception of transgender individuals needs to shift significantly. Due to limited opportunities, many are forced into begging and sex work, exposing them to abuse and social stigma. Rather than judging their means of livelihood, society should develop greater empathy and understanding toward their circumstances.

One of the major obstacles to transgender individuals securing decent employment is the lack of access to quality education. Every transgender child should be guaranteed their fundamental right to education, free from any discrimination at both primary and higher levels. The government must enforce strict penalties against institutions that deny admission based on gender identity. The following steps can be taken to improve the conditions of the transgender community:

a) **Kinnar Vidayalaya:** This idea was recently launched by the NGO, *Shri Mahasakti Charitable Trust*. The school aims to offer free education alongside vocational training and skill development workshops in areas such as handicrafts, waste management, beauty, and interior decoration. This initiative represents a significant step toward securing the right to education for the transgender community. To expand its impact, budgetary provisions should be made to establish similar programs across multiple districts throughout India.
b) **Transgender Cell (anti-discrimination cell):** Every educational institution and university should set up an anti-discrimination cell dedicated to addressing and preventing any form of bias or mistreatment against transgender individuals. Similar to the strict functioning of anti-ragging cells, there must be a policy of zero tolerance towards any incidents or complaints of discrimination.
c) Access to Restroom facilities: Provide education to both staff and young people on the concept of gender identity to ensure awareness and acceptance of transgender youth. Where possible, establish gender-neutral restrooms and locker rooms—facilities that can be used by individuals regardless of their gender identity or expression.
d) **Confidentiality:** Ensure that the program upholds strict confidentiality concerning the gender identity, gender expression, sexual orientation, and sexual behavior of all participating youth.
e) Provide Financial Assistance: The government should offer fee waivers, reimbursements, scholarships, free textbooks, and subsidized hostel accommodations, along with other support services, to make higher and professional education more accessible for transgender students. Additionally, specialized coaching should be made available to help candidates prepare for competitive exams.

f) **National Law and Policies to protect children in school:** Creating a supportive policy and legal framework is essential for eradicating violence in schools. This involves not only enacting appropriate laws and regulations but also implementing effective systems for their monitoring and enforcement.

g) **Setting up a National Commission for Transgender Persons:** The current lack of comprehensive materials addressing the issues faced by the transgender community, along with insufficient surveys and evaluations of government schemes, can be addressed by establishing a dedicated statutory body focused solely on the welfare of transgender individuals. This organization could lead sensitization and awareness initiatives in educational institutions nationwide to combat stigma and discrimination against transgender people. Additionally, it could organize workshops and conferences in partnership with national and international organizations working for transgender rights, targeting both students and the general public. The body could also encourage research by providing funding and support for studies and policy development related to transgender welfare, involving civil society groups, schools, colleges, and other relevant institutions.

h) **Education system has to adopt the holistic approach of access, equity, environment and employment:** Ensuring the accessibility of education for transgender students in schools and other institutions is crucial, which includes preventing denial of admission and upholding their right to education regardless of their financial situation. The 2014 directive by the UGC to add a category for transgender individuals to indicate their gender should be implemented across all educational institutions. Promoting equity in treatment requires raising awareness and sensitizing the public and students about adopting gender-neutral practices. A supportive environment is created by implementing measures such as addressing students by their names rather than gender, providing gender-neutral restrooms or allowing students to use the facilities they identify with, offering gender-neutral uniforms, and arranging seating without gender-based divisions, among other inclusive policies.

TRANSFORMATIVE OCCUPATION OF IRAQ AND INTERNATIONAL LAW: A LEGAL ANALYSIS

Santosh Upadhyay[*]

I. INTRODUCTION

It has been more than two decades that one of the most extensive reforms in West Asia was undertaken in Iraq. These far-reaching reforms were done when Iraq was under foreign occupation. Many Iraqi laws were changed and the Iraqi economy became the most open economy. The occupying powers issued almost a hundred orders, seventeen memorandums, and twelve regulations in Iraq.[1] The occupying powers gave many reasons for introducing such long-lasting changes in Iraq. These reasons went beyond the permissible grounds for changing the laws of occupied territory under the law of occupation. The legality of these changes has been in much debate under international law and this article will highlight this in next few pages.

In the current scenario, the world is also witnessing many armed conflicts and the situations of intervention and occupation. The occupation of enemy territory is the common by-product of conflicts. Thus, it is the right time to critically engage with the arguments given in support of the transformative occupation of Iraq. This is pertinent because it will highlight whether imposed reform by the occupant would bring a sustainable peace and prosperity. This will also help in locating the legal contours of administration in occupied territory.

To this end, the article is divided into six parts, including introduction given in part one. Part two discusses the commencement of the occupation in Iraq and some important legal and political developments. Part three discusses the transformative occupation of Iraq in little detail. The purpose is to highlight the wide arguments taken by the occupying powers to introduce changes in Iraq. Part four discusses the legality of the arguments that are made by the occupying powers in support of their transformative ambitions. Part five discusses the other dangers of transformative occupation, Part six concludes the paper with suggestions. The author adopts the doctrinal research method to examine and analyze the legalities of transformative occupation of Iraq.

II. COMMENCEMENT OF OCCUPATION IN IRAQ

The occupation of Iraq occurred after a long political battle and in almost one-sided war. UN Security Council (UNSC) Resolution 687 of 1991 prescribed for regular inspection and destruction of Iraq's nuclear, chemical, and biological weapons under the international supervision.[2] This was followed by many claims and counter claims between Iraqi authorities and UN inspectors as to the role of inspectors in Iraq. Subsequently, UNSC Resolution 1441 of

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[1]This article is an abridged version of a few chapters of the authors' M.Phil. Dissertation submitted to CILS/SIS/JNU. The author also thanks the anonymous peer reviewers for their valuable comments and suggestions. However, mistakes in the article are the sole responsibility of the author.

Coalition Provisional Authority (CPA) Official Documents, *available at*: https://govinfo.library.unt.edu/cpa-iraq/regulations/index.html#Regulations (last visited on May 25, 2024).

2002 found Iraq in material breach of its obligations and offered Iraq a final opportunity to comply with its obligations.[3]

The United States of America (USA) claimed that Iraq failed to comply with its obligations and sought authorization from the UNSC to intervene in Iraq. The consensus at UNSC failed, and the USA along with United Kingdom (UK), unilaterally launched hostilities against Iraq on March 18, 2003. The US forces entered Baghdad on April 09, 2003, and the US President declared the end of military operations in Iraq on May 01, 2003. Iraq was placed under the occupation of the joint forces of the US and the UK. Coalition Provisional Authority (CPA) was created, and the same was communicated to the President of the Security Council by the permanent representatives of the USA and the UK on May 08, 2003.[4] The administrator of CPA, Mr. L. Paul Bremer, was receiving salary from the US army, and the CPA was reporting to the US Defence forces and the US President.[5] The UNSC Resolution 1483 of May 22, 2003, declared these forces under the unified command as the occupying power.[6]

CPA, through its regulation no. 6, created the Iraqi Governing Council on July 13, 2003.[7] It consisted of twenty-five members appointed by the CPA. Neither the people of Iraq nor the Special Representative of the UN Secretary General in Iraq had any say on this. The constitution of the Iraqi Governing Council was welcomed by the UNSC as a step towards the formation of a democratic government in Iraq, but its role was mostly consultative.[8] The Iraqi Governing Council lacked any democratic input. Most of the orders and resolutions of the CPA used the consent of the Iraqi Governing Council as one of the arguments to bring far-reaching changes in Iraq.

III. TRANSFORMATIVE OCCUPATION OF IRAQ

The occupation of Iraq is a classic case of a transformative occupation. Transformative occupation means an occupation with transformative purposes. Range of these transformative purposes is not clear. The law of occupation does not allow the transformation of the occupied territory and it provides only for trusteeship administration by the occupier. Occupier is authorized only to change those laws of occupied territory that affect its security and that put hindrances in fulfilment of its obligation under the law of occupation.[9] The transformative occupation is such occupation that involves 'transformation away from repressive closed

[2] UN Security Council, SC Res 687, SCOR, UN Doc S/Res/687 (Apr. 03, 1991), *available at*: https://docs.un.org/en/S/RES/687(1991) (last visited on May 25, 2024).

[3] UN Security Council, SC Res 1441, SCOR, UN Doc S/Res/1441 (Nov. 08, 2002), *available at*: https://docs.un.org/en/S/RES/1441(2002) (last visited on May 25, 2024).

[4] Letter from the Permanent Representative of the UK and the US addressed to the President of the Security Council, UN doc S/2003/538 of May 08, 2003, quoted in Adom Roberts "The End of Occupation: Iraq 2004" 54 (1) *International Comparative Law Quarterly* 31 (2005).

[5] L. Elaine Halchin "The Coalition Provisional Authority (CPA): Origin, Characteristics and Institutional Authorities" *Congressional Research Service Report* (2005), p.no. 14, *available at*: http://www.au.af.mil/au/awc/awcgate/crs/#iraq (last visited on May 27, 2024).

[6] UN Security Council, SC Res 1483, SCOR, UN Doc S/Res/1483 (May 22, 2003), *available at*: https://docs.un.org/en/S/RES/1483(2003) (last visited on May 27, 2024).

[7] CPA Official Documents, s*upra* note 1, CPA Reg. No. 6.

[8] UN Security Council, SC Res 1500, SCOR, UN Doc S/Res/1500 (Aug. 14, 2003), *available at*: https://docs.un.org/en/S/RES/1500(2003) (last visited on May 27, 2024).

political systems and towards democratic systems that more closely adhere to international standards of governance and individual rights'.[10] The changes introduced in Iraq went too long and attempted to change political and economic spectrum of Iraq forever.

The changes affected almost all sphere of Iraqi nation including its political, legal, and economic structures. Since laws relating to belligerent occupation do not permit transformation of occupied territory, the supporters of this concept take the help of other sources. In the case of Iraq, mandate from the Security Council and developments in other fields of international law were largely argued for such negation of the strict application of law of occupation.

The following table highlights the broad arguments given by the occupying powers to bring long-lasting changes in Iraq.

Grounds given by CPA for the changes made in Iraq[11]

CPA Order No.	**Area of Change/ Enactment**	**Grounds/Reasons provided for the change**
Order No. 1	De ba'athification of Iraq	• Human Rights violations by Ba'ath party. • Continuation of Ba'ath party was a threat to Iraq
Order No. 2	Dissolution of entities	• These entities were used by previous regime to oppress Iraq's people
Order No. 7	Penal Code	• In violation of International Human Rights norms
Order No. 12	Trade Liberalization Policy	• To develop a free market economy in Iraq

[9] I. Maxine Marcus, "Humanitarian Intervention without Borders: Belligerent Occupation or Colonization" 25(1) *Houston Journal of International Law* 137 (2002).

[10] Gregory H. Fox, "Transformative Occupation and the Unilateralist Impulse" 94(885) *International Review of the Red Cross* 241 (2012).

[11] Reasons/Grounds given in the table have been taken from the preambles of the respective orders of CPA. Various grounds have been mentioned in the respective orders, here only some of them have been mentioned according to their importance for the present discussion. This table discusses only those orders of CPA which were in patent discord with the law of occupation. This table was originally part of the M. Phil. Dissertation submitted by author to CILS/SIS/JNU.

Order No. 13	The Central Criminal Court of Iraq	• To develop judicial system • To ensure due process
Order No. 15	Establishment of the Judicial Review Committee	• For order and security • Due process and rule of law
Order No. 17	Status of CPA, MNF-Iraq	• To clarify their status
Order No. 20	Trade Bank of Iraq	• To uplift Iraqi economy
Order No. 22	Creation of New Iraqi Army	• For stability and security • To build the national self defence of Iraq
Order No. 23	Code of Military Discipline	• For stability and security in Iraq • To discipline and maintain Iraqi army
Order No. 27	Establishment of the Facilities Protection Services	• For improving security and stability in Iraq
Order No. 28	Establishment of the Iraqi Civil Defence Corps	• To contribute to the conditions of security and stability in Iraq.
Order No. 31	Modification of Penal Laws and Criminal Proceedings Law	• For security and stability

Order no. 37	Tax Strategy for 2003	• Review of taxes
Order No. 39	Foreign Investment	• Effective administration of Iraq • To solve the problems of the then existing laws regulating commercial activity • For market economy
Order No. 42	Creation of the Defence Support Agency	• For security and stability • Welfare of the Iraqi people
Order No. 48	Delegation in respect of Iraqi Special Tribunal	• To fix accountability for the crimes during Ba'ath Party era • For public order • Rule of law according to international law.
Order No. 64	Amendment to the Iraq's Company Law	• Some provisions of old laws hinder Iraqi economic growth.
Order No. 67	Ministry of Defence	• For welfare of the Iraqi people • To further the Iraqi people's right to have national self defence capabilities.

Order No. 69	Delegation of Authority for Iraqi National Intelligence Services	• For welfare of Iraqi people
Order No. 74	Interim Law on Securities Market	• To make these laws modern, efficient, transparent
Order No. 80	Amendment to Trademark Laws	• To meet international standards.
Order No. 81	Patent Laws	• To meet international standards.
Order No. 83	Amendment to Copyright Laws	• To meet international standards.
Order No. 94	Banking Laws of 2004	• To promote the economic reconstruction and sustainable development.

Thus, it is clear from the above given table that most of the grounds provided by CPA to bring the changes in Iraq do not comply with exceptional limits under which the occupant is permitted to legislate. These reasons vary from permissible limits to non-permissible limits under international law. On close scrutiny, it seems that occupying powers had argued unscrupulously whatever they pleased. The occupying powers have argued the various grounds in a manner which is in complete disregard with the principle of sovereign equality among nations and hence, discussion on their legality becomes pertinent.

IV. TRANSFORMATIVE ARGUMENTS AND INTERNATIONAL LAW

It seems that the reasons for the changes vary from the permissible exceptions under international humanitarian law to the transformative purposes of the occupiers. It is beyond doubt that the nature of most of the changes goes beyond the temporary authority of the occupiers. These were motivated to transform the social, political, and economic structure of Iraq. Though sovereign government of Iraq which was to come after occupation, was authorised to rescind these changes; but taking note of the nature and effect of such changes and further vulnerability of new incoming government along with various other legal and non-legal strangles imposed on it, it could be proved in unambiguous terms that occupiers were working to transform the Iraqi society and had no respect for the law of occupation.

Most of the economic changes had turned Iraq from one of the centrally state-controlled economy to the most open free market economy of the world.[12] These changes did not relate either to the military necessity or daily administration on a temporary basis. Most of these changes referred to various grounds in support of the transformative purposes. Some of these grounds were used as common. These were consent of the Iraqi Governing Council, mandate of the Security Council, and developments in other fields of international law. The author now proceeds to evaluate them separately.

A. Consent of Iraqi Governing Council

The consent of the Iraqi Governing Council was largely quoted as one of the reasons for changes introduced in Iraq. But this meant nothing. The Governing Council was a nominated body by occupant and nothing more than a council created by the occupying powers themselves. It lacked a democratic voice and could not be considered an independent council free from the effects of the occupying powers. Experiences of two world wars proved that such bodies had always been prone to be used by the occupants according to their own whims.[13] Some authors also argued to curb such practices of the occupant.[14] Furthermore, articles 8 [15] and 47 [16] of the Fourth Geneva Convention of 1949 (GC IV) specifically mention that protected persons in occupied territory could not be deprived of their rights in any circumstances. Obligations and restrictions imposed under this law could not be waived even by ousted sovereign.

B. Mandate from the Security Council

Some of the CPA orders also noted the mandate of respective UNSC Resolutions specially Res. 1483 of May 22, 2003 to bring such long lasting and transformative changes. This invites one important point to elaborate whether UNSC Resolution 1483 had actually granted such mandate to transgress the well-defined body of international humanitarian law.

It is pertinent to analyse the UNSC Resolution 1483 in respect of the law of occupation. Following points are worthy to be mention in this regard. Firstly, this resolution specifically recognised the USA and the UK as occupying powers. Secondly, it further called upon the CPA that it should promote the welfare of Iraqi people through the UN Charter and international law[17]. Thirdly, a special representative for Iraq (was to be appointed by the Secretary General of the United Nations) was called to assist the people of Iraq in coordination with the CPA in performing some tasks and bringing some changes of humanitarian nature.[18] Fourth, it supported

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[12] Robert Kolb "Occupation in Iraq since 2003 and the Power of the UN Security Council" 90 (869) *International Review of the Red Cross* 39 (2008).

[13] Jean S. Pictet, *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 243 (The International Committee of the Red Cross, Geneva, 1958).

[14] G. Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* 74 (The University of Minnesota Press, Minneapolis, 1957).

[15] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), 75 *UNTS* 287 (hereinafter mentioned as 'Geneva Convention IV'), art. 8.

[16] *Id.*, art. 47.

[17] *Supra* note 6.

[18] *Id.,* operative para. 8.

the constitution of an interim Iraqi administration by the people of Iraq with the help of the CPA.[19]

These references of effective administration, setting of performance agenda and establishment of an interim Iraqi administration have been the central points of debate among scholars and some of them interpreted it, though criticising this resolution, as mandate to pursue transformative ambition of occupiers and state building.[20] But this does not seem to be the final truth. In the words of Robert Kolb, the adoption of this position "is to presuppose something that needs to be proved".[21] There are alternative approaches also which do not consider UNSC resolution 1483 as a blank mandate for occupying powers to carry on transformative purposes.[22]

This resolution neither mandates the occupiers to take a reformist agenda nor endorses any such effort by them in clear terms. Though it mentions some reformist agenda, but they are not to be carried solely by the occupants and respect for the law of occupation was always demanded.[23] It does not expressly or impliedly deny the applicability of these laws even during carrying out such tasks. UNSC Resolution 1483 in its operative paragraph 5, demands the occupying powers to fulfil their obligations under international law. The occupation-related obligations are derived from customary international humanitarian law as well as from the GC IV and the Hague Regulations 1907 (HR IV). This is a clear indication towards applicability of law of occupation and it should be interpreted as an effort to restrain the occupant's authority to unilaterally undertake transformative purposes.[24]

Some of the problems of interpretation are caused by the ambiguous and broad language of operative paragraph 4 of the UNSC Resolution 1483. This paragraph called the CPA to promote the welfare of the Iraqi people through the "effective administration" of the territory. It further called it to restore and create the conditions of security and stability in Iraq so that political future of Iraq could be freely determined by the Iraqi people. These mandates were supposed to be carried out according to the UN Charter and other rules and principles of relevant international law. CPA had used this reference of effective administration in most of its orders.

The subjective nature of phraseology like "welfare of the Iraqi people" and "other relevant international law" is argued by David J Scheffer in favour of transformative purposes[25].

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[19] *Id.*, operative para. 9.

[20] Carsten Stahn, " "Jus ad Bellum", "Jus in Bello", "Jus Post Bellum"? - Rethinking the Conception of the Law of Armed Forces" 17(5) *European Journal of International Law* 929 (2006).

[21] *Supra* note 12 at 38.

[22] Nehal Bhuta, "The Antinomies of Transformative Occupation" 16(4) *European Journal of International Law* 735 (2005). Also see, Marco Sassoli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers" 16(4) *European Journal of International Law* 681-682 (2005); and Gregory H. Fox, "The Occupation of Iraq" 36(2) *Georgetown Journal of International Law* 295 (2005).

[23] *Supra* note 6, operative para. 8.

[24] Nehal Bhuta, s*upra* note 22 at 735.

[25] David J. Scheffer, "Beyond Occupation Law" 97 (4) *American Journal of International Law* 844 (2003). Author observes: "to pull Iraq out of its repressive past and return it to the community of civilized nations, the Authority will aggressively employ international human rights law, principles of democratization, economic initiatives, and perhaps controversial use of force principles in the name of domestic security. Many of the principles advanced by the authority will not have occupation laws as their source; some may have their own *jus cogens* identity or deeply rooted in the normative principles of the United Nations Charter."

Supporter of the transformative occupation argues that though this reference to other international law includes the law of occupation; but it also includes the developments in other fields of international law[26]. Thus, they argue for the conflation of various fields of international law, and hence make the situation a blurred one.

But this problem could easily be solved by considering the *lex specialis* nature of international humanitarian law. International humanitarian law has its own history and purposes. They are made to be applied in most subtle and vulnerable situation. They have their own harsh realities and experiences, and thus, the protection granted under them should not be taken away merely on the grounds of development in other fields of international law.[27]

There is another problem of such conflation. It negates the rule of self-determination and further denies the indigenous cultural voices in such imported changes. It seems the long-lasting effects of such conflation on occupied territory is also contrary to the basic understanding of international law that occupation is a temporary measure and occupier is prohibited to decide the destiny or future course of action of the occupied territory beyond the period of occupation.

Further, if it is argued that the Security Council has mandated such transformative changes in Iraq by the CPA then, its parallel corollary should also be checked. It means whether the Security Council has authority to disapprove the CPA actions in Iraq? The answer is simple negative. Apart from this, there is no obligation on the CPA to report to the Security Council. CPA reported to the USA Department of Defence and the USA President. Security Council has no direct or indirect control over the CPA. Thus, the argument that Security Council has mandated such changes is an attempt to legalise what is illegal *per se*.

C. International Humanitarian Law and the Security Council

Apart from this as the International Humanitarian Law obligations fall under *jus cogens*, an expert argues that even UNSC Resolutions should not derogate from it.[28] Nevertheless, there are opposite views also and it is argued that the UNSC may give mandate to derogate from *jus cogens*.[29] However, the question that who will decide whether the Security Council Resolutions has violated *jus cogens* seems problematic.

But without going in to this debate, it seems reasonable to draw a line of concurrence that there is always be a presumption that the UN Security Council has not derogated from the international humanitarian law norms and any such claimed derogation must be explicit in unambiguous terms.[30] Any ambiguity in its resolutions must be resolved in favour of

[26] *Ibid.*

[27] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, (1996) *ICJ Reports*. Dissenting opinion of Judge C. Weeramantry, pp. 443-445.

[28] Marco Sassoli, s*upra* note 22 at 681.

[29] Bernd Martenczuk, "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?", 10(3) *European Journal of International Law* 545-546 (1999).

[30] *Legal consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), Advisory Opinion,* (1971) *ICJ Reports*, p.no. 53, para. 114. Also see, Alexander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions" 16 (1) *European Journal of International Law* 68, 78-79 (2005); and Marten Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation"

international humanitarian law norms. Any measures authorised by the UN Security Council in generic terms, as in the case of Iraq, should be implemented in a manner that respects international humanitarian law. This argument is also supported by the fact that Security Council has also called upon the occupying power to take actions to end the violations of IHL.[31]

Thus, it seems that UN Security Council resolutions should be interpreted in harmonious manner to avoid any conflict with principles of international humanitarian law and more particularly with the principles of law of occupation. They could not deny the existence of a situation of occupation. Any such attempt would amount to change the basic framework of preservationist approach of law of occupation. In essence the belligerent occupation is conflict of interest between occupiers and occupied.

It is a situation which is very prone to be used according to the whims and caprices of the occupying powers for their own benefit. This makes the conditions of inhabitants vulnerable. Thus, the law of occupation is an attempt to provide some help to the occupied. Lord Mc Nair observed that "the law of belligerent occupation is an attempt to substitute for chaos some kind of order, however harsh it may be".[32] Thus, any such mandate given by the UN Security Council in most generic words should be interpreted in favour of preservationist approach of occupation laws.[33]

D. Developments in Other Fields of International Law

There is another approach which supports the transformative purposes in Iraq. It is argued that occupation laws have become old and does not meet the challenges of contemporary international law.[34] Advocates of this approach mention about the development in other branches of international law, and thus, feel uncomfortable in balancing the occupation laws with respect to those developments. Mainly, they discuss the developments in human rights jurisprudence. Some authors also argue that occupation laws should not be applied in specific situations which demand transformation.[35]

The advisory opinion of the International Court of Justice in the Wall Case confirms the applicability of the International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights 1966, and United Nations Convention on the Rights of Child 1989 in occupied territory.[36] Hence, occupant is obliged to implement provisions of such conventions and to abolish the regulations and institutions of the occupied territory which contravene the standards of human rights laws. This also gives right to the individuals of the occupied territory, either in side in occupied territory or outside, to demand

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86(856) *International Review of the Red Cross* 762 (2004).

[31] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion* (2004), *ICJ Reports*, p.no. 200, paras. 159-160.

[32] Lord McNair and A.D. Watts, *The Legal Effects of War* 371 (Cambridge University Press, Cambridge, 1966).

[33] Jose E. Alvarez, "Hegemonic International Law Revisited" 97(4) *American Journal of International Law* 873-888 (2003).

[34] Davis P. Goodman, "The Need for Fundamental Change in the Laws of Belligerent Occupation" 37(6) *Stanford Law Review* 607 (1985).

[35] David J. Scheffer, s*upra* note 25 at 848-849.

[36] *Supra* note 31 at 191-192, para. 134.

redress for their human rights violations from the occupying power.[37] However, criticism of this approach is also available.[38]

As regards abolition of institutions of the occupied territory which are in contravention of the standards of human rights norms, it should always be taken into mind that such contravention should be of substantive nature and not be only in nature of procedure of implementation. Procedure of implementation should conform to local cultural and legal patterns. According to ICRC commentary on GC IV, occupying authority must not touch the local legislation 'merely to make it accord with their own legal conceptions'.[39] Existence of a similar law in occupying power's own country is not the proper test.[40] While implementing such changes the occupant should always keep in mind that it is not the sovereign of the territory and only such changes may be introduced that are absolutely necessary to comply with its obligations.[41]

However, there are other practical problems in merging of human rights and humanitarian laws. Mostly human rights laws are individual centric justifies the limiting of rights for the sake of multiple reasons. As compared to the international humanitarian law which considers people under occupation as protected person, the human rights discourse places everyone on equal plane without any distinction between occupied and occupier. This equalisation of occupied and occupier may lead to a distorted picture that finds the situation as conflict of rights.

Further, human rights discourse treats individual localized violations as exceptions. However, in occupation where norm is the denial of rights, the human rights based study of the situation may depict the instances of denial of right as exception but in reality, it is the normal factual assentation. Thus, individual win of human rights may create the myth of a "benign occupation" that protects human rights even though they are mostly denied.[42] About such merger of human rights laws with laws of occupation, Aeyal M. Grass observes that "transplanting human rights to a situation of occupation may thus blur its inherently undemocratic rights denying nature, and confer upon it the perceived legitimacy of an accountable regime."[43]

Apart from this, there are some other differences between humanitarian law and human rights law. These are as follows: First, humanitarian laws treaties are all universal and there is no regional variation. Second, there is no classification under the humanitarian law like the different generations of rights. International humanitarian law is a compact whole to protect the individuals in the grimmest situations of armed conflicts and their aftermaths. Third, there is no

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[37] Steven R. Ratner, "Foreign Occupation and International Territorial Administration: The Challenges of Convergence" 16(4) *European Journal of International Law* 704 (2005).

[38] Michael J. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation" 99(1) *American Journal of International Law* 141 (2005). Also see, Michael J. Kelly, "Critical Analysis of the International Court of Justice Ruling on a Israel's Security Barrier" 29(1) *Fordham International Law Journal* 228 (2005).

[39] *Supra,* note 13 at 336.

[40] Marco Sassoli, s*upra* note 22 at 677.

[41] *Ibid.*

[42] Aeyal M. Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?" 18(1) *European Journal of International Law*, 8 (2007).

[43] *Id,* p. 33.

such political rights or right as to the form of governments under international humanitarian law.[44] These specialties of humanitarian laws make this body a coherent system of law free from any political biases and more susceptible to enjoy universal application without any controversy.

The above-mentioned differences between these two bodies of laws should not be considered as arguments against the application of the well-established norms of human rights laws in occupied territories, but this article only argues that these specialties and differences must always be kept in mind and the occupant must not use this capacity for altering the political system of the occupied territory under the pretext of human rights reforms.

V. OTHER DANGERS OF TRANSFORMATIVE OCCUPATION

There are other reasons also to discard arguments made in favor of transformative purposes. Any such acceptance of the logic of transformative purposes would certainly mean the enhanced capacity of the occupant without any clear and unambiguous mandate. Enhanced authority without any clear mandate and effective reporting system are always prone to be used according to the whims of the occupying powers. Indicating the potential danger, Marco Sassoli observes that "simple encouragement of international efforts to promote legal and judicial reform by an occupying power is certainly too vague to justify an occupying power to legislate beyond what IHL permits."[45]

Further, such permissive interpretation of laws of occupation may lead to consequential problems in other areas of international law. These may be as follows:[46] First, it may blur the line between occupation and annexation. Limited powers of the occupiers and its temporary character might be harmed by such wide interpretation and it may lead to the situation that would amount to annexation in disguise of occupation for the time being. Second, it may dilute the principle that the applicability of international humanitarian law is free from the justness of use of force. This may be utilized by an intervener to realize those war aims under the garb of occupation laws which are prohibited according to the rules of use of force. This would amount to an additional catastrophe for international law in the form of humanitarian occupation, a step forward from humanitarian intervention.

Third, it has the potential to negate the principle of autonomy of states. The principle that "every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state" would cease to apply in case of occupied territory. Fourth, the unconstrained occupier would face no barrier to enact legislation that could result in the incurred international liability of the occupied territory by the temporary occupant.

Thus, transformative occupation would always be of the unilateralist impulse and deny the multilateral nature of international law. It would challenge and compromise many edifices of international law. The legal status of the territories of weak states would always remain

[44] Louise Doswald Beck and Sylvain Vite, "International Humanitarian Law and Human Rights Law", in M. K. Balachandran and Rose Varghese (eds.), *Introduction to International Humanitarian Law,* 139 (New Delhi: International Committee of the Red Cross, 1999).
[45] Marco Sassoli, s*upra* note 22 at 681.
[46] Gregory H. Fox, s*upra* note 22 at 264-269.

precarious on the good will of the powerful states; and thus, would compromise the basic right of self-determination to the inhabitants of the occupied territory.

VI. Conclusion and Suggestions

Thus, it is clear from the above points and arguments that most of the changes made in Iraq have transgressed the law of occupation. There are also some arguments in favour of such transgression, but it seems that those arguments are in themselves flawed and baseless. Though Iraq has lived up with these changes for more than two decades, but they always remain precarious on the direct or indirect support of the erstwhile occupying powers. This would significantly compromise the sovereign space of the state. The occupying powers should desist from introducing long-lasting changes in the occupied territory and such changes should come from the organic native voices. The contemporary scenario in the Occupied Palestinian Territory must also be informed that long lasting changes in the occupied territories must not be brought by the occupant. It is neither legal nor legitimate.

POLITICAL STABILITY V. FEDERAL AUTONOMY: A STUDY OF PRESIDENT'S RULE AND ANTI-DEFECTION LAW IN INDIA

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Shivani Pundir[**]

I. INTRODUCTION

Given the diversity in our country, the founding fathers of the Constitution thought it best to set up India as a federal nation. Simply put, federalism is set up which envisions governance at two levels – one for the entire country (Centre) and the other at the provincial or regional level (State). There is a clear division of powers between the two; both work as checks & balances for the other. However, it would be wrong to say that India practices absolute federalism, as the Centre enjoys wider powers than the States. For instance, there are residuary powers with the Centre, single citizenship, veto over state bills, emergency provisions, etc.

Time and again, the Supreme Court of India has recognized the federal character of Indian Constitution. In reality, our country is a federal nation with a strong Centre. No account of the Centre-State relation can be successfully made without bringing into the picture the majestic Article 356. This provision allows the Centre to overthrow a democratically chosen provincial government and replace it with the President's rule.

Although this Article was brought in to protect the 'Constitutional Machinery' in the State, but with the passage of time, it has been misused by parties for political gains. Such was the scope of its misuse that it was not allowed to be inserted in the erstwhile Government of India Act, 1935.

II. EVOLUTION OF ARTICLE 356: PRESIDENTS' RULE

A bare reading of Section 93 of the Government of India Act, 1935, makes it clear that it is the inspiration for Article 356 of the Constitution.[1] This Section enabled the Governor to assume all the powers vested in the provincial body, Ministry, or Legislature if he was satisfied that a situation had arisen in which the provincial government could not be carried on in accordance with the provisions of the Act.[2] The Governor could discharge all the functions as per his discretion except the powers of the High Court.[3]Although this Section was made only partly operational, amid widespread criticism from nationalists and the onset of World War II.[4]

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[1] National Commission to Review the Working of the Constitution, "Article 356 of the Constitution" 7 (2001), *available at*: https://legalaffairs.gov.in/sites/default/files/Article%20356%20of%20the%20Constitution.pdf (last visited on May 21, 2024).
[2] The Government of India Act, 1935, s. 93.
[3] *Ibid*.
[4] *Supra* note 1.

It is important to understand that Section 93 was insisted upon by the colonial government, with the objective of enacting a 'controlled democracy' or 'restricted democracy' in India.[5] Therefore, the prospect of continuing this provision in the independent, federal republic was vociferously opposed by the members of the Constituent Assembly.[6] Prof. Shibban Lai Saxena cautioned the members against the misuse of such provision and remarked:

> *"we are decreasing Provincial Autonomy to a joke. These Articles will decrease the State Government to incredible subservience to the Central Government"*[7]

Further, Kazi Syed Karimudin warned against the misuse of this provision in the following words,

> *"Suppose, for example, in West Bengal the party which is in opposition to the Centre is elected, then even though the Government for West Bengal may feel that the internal disturbance in West Bengal is not sufficient for suspending the Constitution, still the will of the Centre will be imposed and the ideologies of the Centre will be imposed on the state."*[8]

Naziruddin Ahmed, criticized the ambiguous nature of the phrase *'failure of constitutional machinery',* in this Article in the following words:

> "*This Article says practically nothing. It says almost everything. It enables the Centre to interfere on the slightest pretext and it may enable the centre to refuse to interfere on the gravest occasion. So carefully guarded is its vagueness, so elusive is its draftsmanship that we cannot but admire the drafting committee for its vagueness and evasions."*[9]

It is important to appreciate the foresight of the founding members of the Constitution, who were able to envision the potential exploitation of this Article, by the Centre. However, Dr. B.R. Ambedkar and T.T. Krishanamachari defended this provision, in view of the problems that the Indian republic was expected to face soon after independence.[10] As the Chairman of the Drafting Committee, Dr. B.R. Ambedkar stated,

> *"I do not altogether deny the possibility of these Articles being abused or employed for political purposes. But that objection applies to every part of the Constitution which gives power to the Centre to override the Provinces. (The) proper thing we ought to expect is that such Articles will never be called into operation and that they would remain a dead letter. If at all they are brought*

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[5] *Id.* at 8.
[6] Rakesh Kumar, "Article 356 of the Constitution of India: An Analysis in the Present Scenario" 8(5) *International Journal of Law* 130 (2022), *available at*: https://www.naac.iqaccdlu.in/dt_dir/supportDocument25/1708410683_supportDocument25.pdf (last visited on May 21, 2024).
[7] *Ibid*.
[8] B. D. Dua, "President's Rule In India: A Study In Crisis Politics" *Asian Survey* 613-614 (June, 1979).
[9] Chhyal Singh and Rishi Kumar, "Constitutional Debates on Article 356 of Indian Constitution" 9(12) *International Journal of Multidisciplinary Educational Research* 154, 158 (2020), *available at*: https://s3-ap-southeast-1.amazonaws.com/ijmer/pdf/volume9/volume9-issue12(5)/23.pdf (last visited on May 19, 2024).
[10] *Ibid*.

into operation, I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces… I hope the first thing he will do would be to issue a clear warning to a province that has erred, that things were not happening in the way in which they were intended to happen in the Constitution."[11]

It is evident from the above remarks that the erstwhile Articles 277-A and 278 (corresponding to Articles 355 and 356) were aimed to be used sparingly and cautiously.[12] Given the transformation of Indian society from feudal to democratic system and the vast differences among the people (with respect to language, religion, culture, etc), the retention of such a controversial provision was considered important.[13] Though it was emphasised that the 'invasion' by the Centre of the Provincial field "must not be an invasion which is wanton, arbitrary and unauthorised by law".[14]

With time, it was abundantly clear that the Centre resorted to abuse of this provision. Even the Sarkaria Commission Report noted that on several occasions, the State Governments were dismissed even when they enjoyed a majority in the Assembly; they were dismissed without giving them an opportunity to prove their strength on the floor of the House.[15]

III. FREQUENT USE/MISUSE OF ARTICLE 356

Abandoning the concept of 'cooperative federalism', the Centre indulged in the incessant use/misuse of Article 356, to overthrow the duly elected State Government, merely because – it belonged to the opposition. So far, this provision has been invoked more than a hundred times.[16]

Until 1959, this provision was used six times. The first instance of its imposition was in the State of PEPSU (Punjab), wherein the sitting Chief Minister (from Congress), handed over the reins to the opposition, amidst growing factionalism.[17] Thereby, the Nehru government imposed President's rule in Punjab in 1953 [18] , which drew sharp criticism from Dr. Ambedkar, who called it "the most rough sort of assault on the Constitution".[19]

Further, this provision was used to bypass the claim of J.P. Narain to form a coalition government in the State of Andhra Pradesh, when the Congress's T. Prakasam lost majority.[20] Later on, President's Rule was imposed in Kerela in 1959, to dislodge the first ever

[11] *Supra* note 1.
[12] *Ibid*.
[13] *Ibid*.
[14] Report of the Sarkaria Commission, "Chapter VI Emergency Provisions, 1987", *available at*: https://interstatecouncil.gov.in/wp-content/uploads/2015/06/CHAPTERVI.pdf (last visited on May 25, 2024).
[15] *Ibid.*
[16] Express News Service, "PM Modi Says Congress Govts used Article 356 '90 Times': A Breakdown" *The Indian Express*, Feb. 10, 2024, *available at*: https://indianexpress.com/article/political-pulse/pm-says-cong-govts-used-article-356-90-times-breakdown-8435047/ (last visited on May 25, 2024).
[17] Shubhabrata Bhattacharya, "Congress Factionalism Gave Life to Article 356" *The Sunday Guardian*, Apr. 09, 2019, *available at*: https://sundayguardianlive.com/opinion/4067-congress-factionalism-gave-life-article-356-3 (last visited on May 18, 2024).
[18] *Ibid*.
[19] *Supra* note 6.
[20] *Supra* note 17.

democratically elected communist government formed anywhere in the world.[21] [22] Some speculate, that it was done, to placate the rising pressure from the USA, while others blame Congress for tacitly supporting the protestors, against the educational reforms of the ruling government.[23]

In the 1960s, this provision was invoked eleven times. Interestingly, Indira Gandhi used it seven times in the short span of two years (1967-1969).[24] Later, the President's rule was ordained nineteen times between 1970 and 1974.[25]

Eventually, the Janta Party government used Article 356 to dismiss the Congress-led government in nine States. In fact, the President's rule was imposed, in twelve states in 1977, which remains a record till date.[26] Upon return to power in 1980, Indira Gandhi, dismissed the opposition governments in nine States.[27]

Upon examining the historical application of Article 356, it can be concluded that the Union has resorted to the arbitrary use of this provision. In 1992, State Emergency was declared in four states ruled by the Bhartiya Janta Party (BJP), *i.e*., Uttar Pradesh, Madhya Pradesh, Rajasthan, and Himachal Pradesh, by the Congress.[28]

After further investigation, it can be concluded that the principles of 'Cooperative Federalism' were best appreciated by a longer, more secure government.[29] For instance, P.V. Narsimha Rao, Atal Bihari Vajpayee, and Dr. Manmohan Singh were cautious of imposing President's Rule.[30]

The following table showcases the frequency of imposing the President's Rule[31] [32]:

S. No.	Decade	Invocation of President's Rule
1.	1950-1970	20
2.	1971-1990	63
3.	1991-2010	27
4.	2011-2019	06

[21] *Supra* note 16.
[22] *Supra* note 17.
[23] *Ibid*.
[24] *Supra* note 16.
[25] *Ibid*.
[26] *Supra* note 6.
[27] *Ibid*.
[28] *Ibid.*
[29] Amitabh Dubey, "Fact-Check on the Use and Abuse of President's Rule in India" *The Quint*, Apr. 02, 2016, *available at*: https://www.thequint.com/news/infographics/fact-check-on-the-use-and-abuse-of-presidents-rule-in-india#read-more (last visited on May 25, 2024).
[30] *Ibid.*
[31] *Supra* note 6.
[32] Kamal Jeet Singh and Manu Sharma, "Political Defections: The Insight Cause for Abuse of Article 356" 9(2) *India Journal of Gender Studies* 143, 147-148 (2020), *available at*: https://www.researchgate.net/publication/353120979 (last visited on May 22, 2024).

The recent instances of abuse of Article 356, include the bypass of State machinery in Jammu & Kashmir, from 2019 till 2024 (September). In 2016, the Congress-ruled government in Uttarakhand was dismissed by the Centre, citing 'governance breakdown', after nine MLAs withdrew support.[33] The President's Rule was imposed without floor test.[34] This decision was challenged in the High Court, which struck down the said Proclamation on the ground that the Governor's actions were driven by bias.[35] The Supreme Court upheld the decision of the High Court and reiterated the sanctity of the floor test.[36]

Such reckless use of Article 356 clarifies that this provision has remained far from the redundant 'dead letter', as was expected by the framers of the Constitution. It is in this light that there is a need to re-examine the checks upon this provision.

IV. FEDERALISM IN INDIA

India is a Union of States, but citizens retain single citizenship only, unlike the United States of America. Based on the Canadian Model, India is a federal state with a strong centre/union. In India all the basic features of a federal republic can be identified, such as – division of power between Centre and State, a written constitution, supremacy of the constitution, bicameralism, an independent judiciary, etc.[37] But certain non-federal features undermine the authority of the State and give supremacy to the Centre, for instance – emergency provisions, single constitution, single citizenship, the appointment of State Governor by the President, an integrated judiciary, flexibility of the constitution, destructible nature of States, etc.

Interestingly, there are different opinions as to the true nature of the Indian Federal structure. According to K.C. Wheare, Indian Constitution is 'quasi-federal' in nature[38], whereas others called it a federation with strong unitary features.[39] Granville Austin aptly described the Indian brand of federalism as 'co-operative federation', which reserves a strong Centre but does not necessarily result in weak provincial governments.[40] In reality, the Indian Republic is ordinarily federal in nature, with the ability to transform into a Unitary Government, in times of emergency.[41]

The Emergency provisions outlined in Part XVIII of the Indian Constitution have been adopted from Germany. The Article 352 to 356, introduced three kinds of emergency, *i.e.*, National Emergency, State Emergency and Financial Emergency. The proclamation of National Emergency, was justified during the Indo-China War (1962-1968) and Indo-Pakistan War (1971). However, the abuse of this provision was made during the implementation of National Emergency by Indira Gandhi government on superfluous ground of 'internal disturbances'.

The Janta Government upon being elected, deleted 'internal disturbances' from Article 352 and replaced it with 'armed rebellion'. The requirement (introduced by 44th Amendment

[33] *Harish Singh Rawat* v. *Union of India*, 2016 AIR CC 2455 (UTR) (2016) (India).
[34] *Ibid*.
[35] *Supra* note 33.
[36] *Ibid*.
[37] J.N. Sharma, *The Union and The State: A Study in Fiscal Federation* 5 (Sterling Publishers, 1st edn., 1974).
[38] K.C. Wheare, *Federal Government* 27 (Greenwood Press, 4th edn., 1963).
[39] *Supra* note 37.
[40] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 187 (Oxford, Clarendon Press, 1972).
[41] *Ibid*.

Act, 1978) to get written consent of the Cabinet, mandatory approval of Parliament every six months, and provision for revocation by one-tenth of members has been able to restrict the misuse of this provision.

While the Central Government holds some degree of superiority over the State, but it is supposed to upheld the federal character of the Constitution and not to curtail the same. The power vested in Article 356 is an example of such dominance but should be used only under extreme situations.

> *"For the common good of all the members of a federal system, it is necessary for the individual States to sacrifice some of their powers to the Union"*[42]

The provision of State Emergency was thought to be important to meet such exigencies. But over time, it was misused by the Centre to sabotage a sitting government in the province. Therefore, reforms under Article 356 are required to curb the frequent misuse on a superficial ground of 'failure of constitutional machinery' or exploiting the loopholes of Anti-defections laws.

V. SARKARIA COMMISSION REPORT

After the manhandling of Article 356 in the 1970s, the Sarkaria Commission was constituted in 1983, to investigate ways for improving Centre-State relations. Headed by Justice R.S. Sarkaria, the commission elaborates upon the rampant use of President's Rule in India. Briefly put, the commission pointed out the proper use of Article 356 in scenarios include – a hung assembly where no party secures majority, internal subversion, deliberate constitutional violations, resignation of a ministry without the possibility of forming an alternative majority, or physical breakdowns endangering state security.[43]

Thereafter, certain instances of abuse of Article 356 include – imposition of President's rule without conducting floor test, solely on allegations of maladministration, corruption (without proper warning), internal disturbances not amounting to subversion or breakdown, misuse of internal party disputes etc.[44]

The Report elaborated upon the valid grounds for imposing President's Rule[45]:

a) **Political Crisis** – It is a dead-lock or hung assembly where no party gets majority. If any other party, fails to form the government, Governor may impose the President's Rule and hold fresh elections.
b) **Internal Subversion** – It is a corollary to the duty of the Union to preserve democratic Parliamentary form of government in the States, as contemplated by the Constitution under Article 355.
c) **Physical Break-down** – When the Ministry refuses or fails to discharge its responsibilities to deal with a situation of 'internal disturbance' or a natural calamity endangers the security of the State.

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[42] James Madison, "The Alleged Danger from the Powers of the Union to the State Governments Considered" *Independent Journal* (1988), *available at*: https://guides.loc.gov/federalist-papers/text-41-50#s-lg-box-wrapper-25493409 (last visited on May 19, 2024).
[43] *Supra* note 1
[44] *Ibid*.
[45] *Ibid.*

d) **Non-compliance of Directions of Union** – Where a direction is issued by the Union under Article 256 (Obligation of States and the Union), 257 (Control of the Union over States in certain cases), 339 (Control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes) or 353 (Effect of Proclamation of Emergency) of the Constitution and the State fails to comply with it, the President's Rule may be invoked.
Further, if public order of any magnitude endangering the security of the State, takes place and the State fails to contain it, the Union may give certain directions to the State. Upon failure to comply with the directions, despite adequate warning, the President may be invoked.

The Commission made the following recommendations in this regard:[46]

1. **Last Resort Measure** – Article 356 must be used sparingly, as a measure of last resort. It must be used in extreme cases when all available alternatives fail to prevent or rectify a break-down of constitutional machinery in the State. The alternatives may be bypassed only when the failure to impose the President's Rule will lead to disastrous consequences.
2. **Prior Notice / Warning** – Before the imposition of Article 356, a warning/notice must be issued to the errant State, for carrying on government as per the Constitution of India. Further, any explanation, in response to such warning/notice must be taken into account by the Union.
3. **Duty under Article 355** – In case the 'external aggression' or 'internal disturbance' has the potential to paralyze the State administration and potential breakdown of Constitutional machinery, the Union must take all the alternative courses to perform its duty under Article 355.
4. **Duty of the Governor to Find Alternative Govt.** – In the situation of a political breakdown, the Governor must explore all the possibilities of forming a government, with majority support. In case of such failure, the Governor must ascertain, if fresh elections can be held without delay. Thereafter, he should ask the outgoing Ministry, to continue as caretaker government (provided there were no allegations of corruption or maladministration). Then the Governor should dissolve the Legislative Assembly, leaving the resolution crisis to the electorate. Ideally, the caretaker government should refrain from making any major policy decisions.
5. **Place the Proclamation before the House of Parliament** – Every Proclamation should be placed before each House of Parliament at the earliest, before the expiry of two months, as contemplated by Article 356.
6. **Amend Article 356** – The State Assembly should not be dissolved prior to the placing of the Proclamation, before the Parliament. This Article should be amended, to ensure this.
7. **Judicial and Parliamentary Review** – The material facts and grounds for implementing Article 356 should be made an integral part of the Proclamation. This will lead to better transparency and effective decision-making by both the Judiciary and Parliament. This report should be a 'speaking document', containing all the material facts and grounds, on which the decision or 'satisfaction' of the President was based.
8. **Report to be made Public** – The report must be placed before the public and be given wide publicity, so as to ensure better transparency and trust.

[46] *Supra* note 1.

9. **Governor's Report for Proclamation** – The general rule should be the implementation of State Emergency, upon the Governor's Report only.
10. This power should not be used to sort out internal differences or intra-party problems of the ruling party.
11. This power should not be exercised solely on the allegations of corruption or stringent financial exigencies of the State.

VI. INTERPRETATION OF ARTICLE 356: *S.R. BOMMAI* CASE

The turbulent circumstances that led to this case are a classic example to understanding how the proclamation of State Emergency, is enabled with the use of horse trading or defection in India. In this case nineteen Members of the Legislative Assembly (MLA) withdrew support from the S.R. Bommai government. By the time, the order of President's Rule was issued, seven MLAs had rejoined the party, which claimed the majority. The then Governor of P. Venkatasubbaiah never gave Bommai the chance to prove his majority. Thereafter, he moved to the Karnataka High Court to challenge the imposition of President's Rule, but his petition was rejected.

Thereafter, a nine-judge constitutional bench considered the matter and laid down certain guidelines to limit the arbitrary use of Article 356. Remarking that this provision is '*An awesome power indeed.*'[47], court interpreted various parts of Article 356. The court primarily deciphered the true meaning of – 'failure of constitutional machinery'. It is important to note, that this phrase is used in the title of Article 356 but isn't used in the main body of the provision.

The court elaborated that the meaning of 'failure of constitutional machinery' shall be read with the corollary under Article 356(1), that 'a situation has arisen in which Government of the State cannot be carried on in accordance with the provisions of this Constitution'[48]. The court explained:

> *"It is not every situation arising in the State but a situation which shows that the constitutional Government has become an impossibility, which alone will entitle the President to issue the Proclamation."*[49]

Further, the use of the words 'if the President…is satisfied', is not indicative of subjective/ personal satisfaction of the President. Given that the President is obliged to act upon the aid and advice of the Union Council of Ministers,[50] this phrase refers to the satisfaction of the Union Council of Ministers, with the President as its head.[51] This said 'satisfaction' may be based on the report of the Governor as to the breakdown of constitutional machinery or on the basis of other information received by him or both.[52]

As to the power to dissolve the Legislative Assembly, the court observed that this power is implicit in Article 356, but considering the scheme and spirit of the Constitution, the

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[47] *S.R. Bommai* v. *Union of India* (1994) 3 SCC 1 at 264.
[48] *Id*. at 52.
[49] *Id.* at 60.
[50] The Constitution of India, art. 74.
[51] *Supra* note 47 at 280.
[52] *Id*. at 281.

President should be dissolved only when Parliament approves his satisfaction, that a situation had arisen where the State Government could not be carried on in accordance with the Constitution.[53]

The Supreme Court further clarified that - in case of a Hung Assembly, the Governor shall not jump to send the report for the imposition of the President's Rule. If no party is able to secure the majority, then the Governor shall invite the leader of the single largest party, to form the government. Additionally, the court observed that it would be open for the High Court or Supreme Court to check the validity of the Proclamation before the approval of the Parliament is approved. Additionally, if the court finds the exercise of this power to be unconstitutional, then the said Proclamation may be set aside, despite the approval of the Parliament.[54] The necessity of judicial review in such cases was elaborated in the following words:

> *"If the court cannot grant the relief flowing from the invalidation of the Proclamation, it may as well decline to entertain the challenge to the Proclamation altogether. For, there is no point in the court entertaining the challenge, examining it, calling upon the Union Government to produce the material on the basis of which the requisite satisfaction was formed and yet not give the relief. In our considered opinion, such a course is inconceivable."*

The court further declared that it retains the power to review the decisions made during the President's Rule and may strike down any decision that is unconstitutional. [55] Therefore, this case paved the way, for upholding the federal character of the Indian Constitution and reinstating the provincial government, that got ousted by the abuse of Article 356.

Finally, the Supreme Court upheld the imposition of President's Rule in Uttar Pradesh (1992), Madhya Pradesh (1992), Rajasthan (1992) and Himachal Pradesh (1992) on the grounds that secularism is the 'basic feature' of the Constitution. However, the apex court rejected the validity of such a proclamation in Nagaland in (1988) Karnataka (1989) and Meghalaya (1991). The court observed that no State Assembly shall be dissolved without Parliament's approval and the test of strength could be conducted on the floor of the house.[56] This decision proved path-breaking in terms of limiting the arbitrary use of Article 356. With the requirement of floor-test, it became difficult to destabilise coalition government. But even this judgment could not entirely wipe out the potential misuse of President's Rule. A new mischief can be identified, when this the ruling party in the province has small or precarious majority.

VII. ANTI-DEFECTION LAW IN INDIA

'Political defection' means leaving one's party or leader under whose leadership one contested election.[57] Although the term 'defection' isn't defined under Schedule tenth but it excludes 'splits' or 'mergers'.[58] Defections are undemocratic as it negate the electoral verdict.

[53] *Id.* at 289.
[54] *Id*. at 291.
[55] *Id.* at 292.
[56] *Id.* at 407.
[57] *Supra* note 32.
[58] The Constitution of India, sch. X, rule 4.

The party which won the election may not be able to form a government or retain its power due to the menace of defection.

The relationship between defection and imposition of the President's Rule is closely intertwined in India, as defections may be used by the Centre, to create political instability in the State. India's anti-defection law reflect an effort to maintain political stability in a highly diverse and fluid party system. Despite the safeguards recommended in the Sarakaria Commissions, the guidelines provided by the court in *S.R. Bommai* case[59] and Anti-defection law in India – the abuse of the President's Rule continued in several cases. The dismissal of State Government in Gujarat (1996), U.P. (1996), Goa (1999), Bihar (2005), Arunachal Pradesh (2016), Uttarakhand (2016), is said to have been made, to enable horse-trading or defection amongst the ruling party members and subsequent imposition of Article 356.[60]

According to a study, Article 356 has been invoked 33 times out of 116 (from 1950 to 2019), which amounts to 28 percent of the total cases.[61] This means that almost one-third of the instances are driven by political defection. Post-independence, defections were rampant due to the lack of stringent anti-defection laws. Many state governments collapsed due to the political instability arising from defection. The infamous '*Aya Ram, Gaya Ram*' slogan was coined against the constant horse trading in the 1960s.[62] India enacted anti-defection laws in 1973 to contain the menace of 'floor crossing' or 'horse trading'. Simply put, when different parties ruled in Centre and State, the Centre may try to lure some MLAs, to withdraw support or defect from their affiliated party in exchange of some lucrative portfolio or other benefits. Such *quid pro quo* is essentially a common feature in democracies, like India, Israel, Portugal, Bulgaria, Ukraine, etc.[63] Hence, such countries have laws addressing defection. But the well-established democracies like – USA, UK, France, Germany, etc. do not require such provisions.[64] New Zealand and South Africa recently did away with such laws.

Despite the introduction of the Anti-Defection Law, splits, counter splits, defection, counter defection became common. The amendment in 2003 introduced stricter provisions, where members can be disqualified for voluntarily giving up membership in their party or voting against party directives in the parliament (i.e. the 'whip').[65] This law strengthened party discipline, by penalizing the disobedient members. Although certain reforms are still require, to eliminate this menace.

In hindsight, this law has been able to reduce defections to some extent, but some political manoeuvring still occurs. For instance –

i) In Arunachal Pradesh (2016), defections from the ruling Congress party to BJP, created instability and President's Rule was imposed, following a recommendation

[59] *Supra* note 3.
[60] *Supra* note 9.
[61] *Supra* note 32.
[62] Reference Note, Parliament Library and Reference, Research, Documentation and Information Service (July 2022), *available at*: https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/15072022_111659_1021205175.pdf (last visited on May 28, 2024).
[63] Kenneth Janda, "Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments" Working Paper Series 02/09, 4, 5-11 (Northwestern University, Aug., 2009), *available at*: https://www.partylaw.leidenuniv.nl/uploads/wp0209.pdf (last visited on May 28, 2024).
[64] *Ibid.*
[65] *Ibid*.

by the Governor, citing breakdown of constitutional machinery.[66] Although such usurpation was declared illegal by the Supreme Court and the Congress government was restored.[67]

ii) In Maharashtra (2022), when the majority of the members withdraw support from the ruling party, it is not considered defection. This happened recently in Maharashtra, where the Ek Nath Shinde faction, gained a majority with the support of BJP & broke the Shiv Sena-NCP alliance.[68] This is a classic case of exploitation of rule 4 of the Anti-defection law, which saves the party members upon defection, when two-thirds of members form a group and merge with the other party (usually the party in the Centre).

In view of the aforesaid examination, it can be surmised that the introduction of the Tenth Schedule in the Constitution, has limited the instances of defection to some extent. By introducing the requirement of two-thirds members to avoid disqualification, a bar on defecting members from assuming any remunerative post, and bar on independent candidates from joining a political party (after six months of election), the problem of defection has been somewhat contained. But in the scenario of a strong Centre, exceptions to defection, are exploited for greater benefit.

VIII. Combined Impact on Political Stability in India

India's democratic framework is built on the delicate balance between strong central government and autonomous state units, as well as between legislative independence and party discipline. Two key constitutional mechanisms designed to preserve this balance and ensure political stability are Article 356 (President's Rule) and the Anti-Defection Law (Tenth Schedule). However, both have faced criticism for being used as tools of political expediency rather than as safeguards of constitutional governance.

Despite judicial intervention, the provision remains vulnerable to misuse. The lack of transparent criteria and the partisan role of Governors & Speakers continue to pose threats to federalism and democratic stability. Article 356 is frequently invoked to topple state governments where the opposition rules. Such imposition of President's Rule often follows orchestrated defections within the state legislature – sometimes even encouraged by the ruling party. The merger clause is susceptible to engineered defections, and in the absence of a fixed timeline, the Speaker may act as a party functionary and delay the action against defecting members.

This intersection creates a political environment where stability is manufactured rather than originally achieved. Both provisions have contributed to the centralization of power, weakening the spirit of federalism. Though they were aimed at safeguarding political stability, their misuse has often undermined the very democratic ideals they were meant to protect. It is high time that these provisions are reformed to ensure that political stability does

[66] Express Web Desk, "Arunachal Pradesh Verdict: The Timeline of The Case So Far" *The Indian Express*, Jul. 13, 2016, *available at*: https://indianexpress.com/article/india/india-news-india/supreme-court-verdict-on-arunachal-pradesh-nabam-tuki-congress-kalikho-pul-bjp-jp-rajkhowa-2910600/ (last visited on May 28, 2024).
[67] *Nabam Rebia and Bamang Felix* v. *Deputy Speaker and Ors*, AIR 2016 SC 3209 (India).
[68] HT News Desk, "Eknath Shinde Takes Oath as Maharashtra CM, Devendra Fadnavis as his Deputy" *The Hindustan Times*, June 22, 2022, *available at*: https://www.hindustantimes.com/india-news/eknath-shinde-takes-oath-as-maharashtra-chief-minister-devendra-fadnavis-as-his-deputy-101656597041770.html (last visited on May 26, 2024).

not come at a cost of federalism, democratic dissent, and constitutional morality. The way forward demands not just legal reforms but a renewed political will to uphold the spirit of the Constitution. Transparency and non-partisan governance must replace opportunism and authoritarian tendencies. Reclaiming political stability, therefore, requires not just stronger laws, but a stronger commitment to democratic ethics.

IX. GLOBAL OUTLOOK

Most anti-defection laws in the region (Southeast Asia), particularly in Bangladesh, Bhutan, and Sri Lanka, heavily favour party discipline over individual conscience. The elected members are reduced to mere numbers in Parliament, unable to express divergent views—even if those views reflect the public will or constitutional values. For instance, Article 70 in the Constitution of Bangladesh prohibits MPs from voting against the party on any matter, making it one of the strictest provisions globally. In Sri Lanka, there is an absolute ban on floor-crossing, whereas in Pakistan, both the Party Head and the Election Commission (ECP) are involved in defection matters. The recent political turbulence (e.g., the removal of Imran Khan) showed the law being used for political engineering instead of stabilizing the economy.[69]

Although some criticise India's Anti-defection laws as a violation of individual member's freedom of expression – by forcing them to prioritize party loyalty over public accountability. In older democracies (like the USA, Canada, Australia & the UK), there are no sanctions upon party switching or cross voting. In fact, party switching is seen as a legitimate exercise of political freedom.

However, in newer democracies like India, where political systems are still stabilizing, these laws are considered essential to prevent the chaos caused by frequent defections. Similarly, in South Africa, party switching was allowed during "window periods", without losing seats. This led to gross abuse and instability in the government and was therefore abolished in 2009. Interestingly, in Singapore, there is no anti-defection law, but party switching is an exception, and defectors struggle to survive politically.

So, the countries that have anti-defection laws, tend to follow party-centric systems, treating elected members as agents of the party. It endorses the belief that people voted for the party and not the individual. Although this may silence dissent, but preserves political stability and manipulative power hogging. It is important to prevent the weaponization of such defection laws by ruling via - delaying disqualifications or incentivize mass defections (split/merger). On the other hand, the countries that do not have anti-defection laws, prioritise individual autonomy instead of party loyalty. Defection is not considered a legal offense and the enforcement is left to public opinion and electoral cycles. Thereby, voter backlash acts as a natural deterrent.

[69] India Today Web Desk, "Pakistan PM Imran Khan Ousted In No-Trust Vote: What Has Happened So Far And What's Next?" *India Today*, Apr. 10, 2022, *available at*: https://www.indiatoday.in/world/story/imran-khan-ousted-pakistan-pm-top-developments-what-will-happen-next-1935661-2022-04-10 (last visited on May 26, 2024).

X. Suggestions for Curbing the Arbitrary Use of Article 356

Given that the parties are finding new ways to exploit the President's Rule, there is a need to reinvent the safeguards. Thus, the following measures are suggested to contain against the said manipulation:

1. The maximum time limit for imposing President's Rule, should be reduced to one year (from three years in present) under Article 356(4). In order to meet any exigencies, which may require the extension of this period for more than one year, approval of the Parliament shall be obtained by Special Majority. This would act as a deterrent for the Union to engage in inciting political defection in the State or oust the ruling party.

2. The defecting members shall not be allowed to form an independent alliance, until the declaration of the next elections.

3. An independent member should be covered under Schedule X of the Constitution.[70]

4. Defected members should be blacklisted from contesting elections for the next two terms, *i.e.*, 10 years.[71]

5. An individual member used to defect, due to the lure of a lucrative office or ministry, in the newly formed government, but the same problems remain in the case of a merger. When two-third members of a party, form a group and merge with another party, it is considered an exception to defection and they are exempted from disqualification. But it might be possible, that they are offered the same benefits as an individual member.[72] Therefore, a ban of sorts may be imposed on mergers, during the tenure of the ruling party to avoid horse-trading and widespread corruption.

6. The registration of new political parties should freeze for three years after general elections so that the defecting party members cannot bypass the verdict of the people.

7. There remains ambiguity in defining 'voluntarily giving up membership', in the Anti-defection law. This loophole gets exploited by the legislators, by resigning and recontesting elections with a different party, without facing any penalty.[73]

8. Any reports of defecting members taking bribes, shall be automatically handed over to the Central Bureau of Investigation to deter, the members from changing sides to obtain favours.

9. Given the fact that the Anti-defection law fails to consider valid exceptions, where the legislators may wish to vote against the party's stance (in view of ethical conflicts or representing local conflicts). Some mechanisms should be introduced to allow the legislators to express dissent. For instance, the whip system may be made applicable, for critical votes only (such as those affecting the stability of the government).[74]

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[70] *Supra* note 32.
[71] *Ibid*.
[72] *Supra* note 58.
[73] *Supra* note 63.
[74] *Ibid.*

10. The disqualification of members on the ground of defection, is entirely upon the prerogative of the Speaker[75]. Provided that the Speaker enjoys support & membership of the ruling party, his decisions may be driven by political considerations (and thereby do not remain impartial).

11. When a proclamation under Article 356 is overturned by the Supreme Court on the grounds of abuse, the Centre shall be liable to pay substantial damages to the provincial government.

12. When there is a severe law & order situation in a State, the Centre should not jump to dismissal of the Legislative Assembly but must overtake only the Executive powers of the State, until the situation is contained.

13. Some responsibility must be fastened upon the Governor, for wrongful invocation of Article 356. For instance, he may be ordered to discontinue or resign from his office or may be asked to tender an apology to the public at large, for trying to sabotage the fairly elected government.

14. Given the proposed 'one nation one election' policy, there must be some provisions, in case a person dies, defects, turns insane or is convicted of a serious offense, re-elections must be considered if there remains more than a year's tenure.

15. Since the parties retain the power to exercise whip and even expel any member arbitrarily, there remains no avenue for the wronged member under this law. There is a dire need to introduce, internal party democracy or adherence to principles of natural justice, for all parties, to ensure fairness & transparency in decision-making.

16. Since defections are often caused by systematic planning, time is of the essence in maintaining political stability in the State. Therefore, a time-bound framework may be provided to prevent the chain of allurements/horse trading and ensure quick resolution of disputes.

17. An independent committee may be formed to review the need for the Proclamation after one month of its imposition. The members of this committee may include former Chief Justice of the respective High Court, two former judges of the Supreme Court, the State Election Commissioner, and the State Lok Pal. This committee's report must be widely publicized and considered by the courts, in judicial review.

XI. CONCLUSION

The interplay between President's Rule under Article 356 and the Anti-Defection Law enshrined in the Tenth Schedule, reflects the complex constitutional architecture designed to preserve the federal balance and democratic integrity of India. Both provisions were introduced as corrective mechanisms – President's Rule to address genuine constitutional crises in states, and Anti-Defection Law to curb the menace of political horse-trading and ensure stability in legislatures.

[75] *Supra* note 58, rule 6.

Yet, over the decades, these tools have often been deployed not merely as constitutional safeguards, but as instruments of political strategy. The misuse of Article 356, exposed its vulnerability to executive overreach. Similarly, the Anti-Defection Law while successful in reducing overt defections, has drawn criticism for legitimising mass resignations or orchestrated defections, under the garb of mergers. Thus, there is an urgent need to revisit the merger clause, introduce time-bound decisions on disqualification by an independent authority (possibly the Election Commission), and reinforce the democratic sanctity of the legislature.

Ultimately, both provisions must evolve to meet the twin objectives of democratic resilience and constitutional accountability. Their effectiveness lies not merely in textual safeguards, but in the strength of institutional integrity, judicial vigilance, and the political will to uphold the spirit of the Constitution.

CLIMATE CHANGE, INTERNAL DISPLACEMENT, AND THE 2030 UN AGENDA FOR SUSTAINABLE DEVELOPMENT: ISSUES AND CHALLENGES

Balajinaika B.G.[*]

I. INTRODUCTION

The phenomena of climate change, the displacement caused by it, and the United Nations' target to achieve 'Sustainable Development Goals' (SDGs) are closely interlinked. The international community is presently facing many challenges, and addressing the problems of climate change is one of them. Internal displacement is one of the worst consequences of climate change.[1] As estimated, by 2050, well over 216 million people will be displaced due to climate change, and the majority of these people will attempt to settle in third-world countries.[2] Unfortunately, the developed countries that are the main contributors of climate change, are unwilling to address the problems of climate change, adopting *non-entry* policies to keep displaced people and migrants at the border of developing countries.[3] The UN adopted the SDGs to eradicate poverty, and Goal 13 addresses the problems of Climate change. The criticism against the SDG is that the document fails to address the problems of displacement.

Therefore, the paper argues that unless the problems of climate-induced displacement is taken seriously, it is very difficult to achieve the SDG.[4] In this context, the paper is divided into five sections. The first section is an introduction to the problems of displacement. The second section outlines the existing international legal norms that provide rights to the internally displaced, which include the climate-induced displaced groups. The third section identifies the link between climate-induced displacement and problems in achieving SDGs. The fourth section identifies the reasons for the lack of the word 'displacement' in the SDGs and its impact on achieving the target of the SDGs by 2030. Finally, the conclusion summarises the arguments outlined in the paper and urges conscious attempts at reframing policies that include displaced vulnerable people as their exclusive category, instead of being overlooked as part of the disadvantaged people that SDGs aim to address.

The Internal Displacement Monitoring Center (IMDC) argues that the current number of internally displaced people in the world today is as high as fifty million, if not more. Such massive scale displacement comes as a result of climate change, disasters, conflict, and other human rights violations.[5] The phenomenon of internal displacement continues to be a glaring

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[1] Sanjoy Biswas and Md. Akterul Alam Chowdhury, "Climate Change Induced Displacement and Migration in Bangladesh: The Need for Rights-Based Solutions", *available at*: http://www.mcrg.ac.in/rw%20files/RW39_40/13.pdf (last visited on May 19, 2024).

[2] Climate Crisis, "Climate change could displace 216 million by 2050: Report" *AlJazeera*, Sep. 14, 2021, *available at*: https://www.aljazeera.com/news/2021/9/14/climate-change-could-displace-216-million-by-2050-report (last visited on May 22, 2024).

[3] B. Mayer, "The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework" 22(3) *Colorado Journal of International Environmental Law and Policy* 358-416 (2011).

[4] Christelle Cazabat "The Elephant in the room: Internal Displacement Sidelined at the UN's SDG forum" (July 25, 2018), *available at*: https://www.internal-displacement.org/expert-analysis/the-elephant-in-the-room-internal-displacement-sidelined-at-the-uns-sdg-forum/ (last visited on May 20, 2024).

[5] IDMC, "Global Review People Displaced by Conflict and Violence", Internal Displacement Monitoring Center, Norwegian Refugee Council, *available at*: http://www.internal-displacment.org/ (last visited on May 20, 2024).

challenge of protecting human rights before the international community.[6] The Internally Displaced People, or the IDPs have fallen into a grey zone as far as the responsibility of the State is concerned. Not only have they been abandoned by the national authorities of their host states, who were responsible for protecting their fundamental rights, but they also do not enjoy the protective measures on an international scale that other vulnerable groups do, such as refugees.[7] The international community is also restricted by the principle of sovereignty that stops them from providing IDPs with protection and assistance. This has resulted in a significant vacuum within the international legal framework concerning the protection of IDPs.[8]

The IDPs do not have an exclusive legal framework or humanitarian organization dedicated to addressing their problems. One the one hand, the refugees are protected by separate international convention and on the other hand, they have separate international institution.[9] The only international attention came in the form of the 1998 'UN Guiding Principles on Internal Displacement' there is otherwise no special attention from the international community to address the problems of these people. Regionally, the African and Asian countries host a massive number of internally displaced people. However, when compared, it is evident that the Asian region is struggling to provide adequate and effective assistance to IDPs. The African countries collectively adopted the African Union Convention, which codified the protection and assistance to the Internally Displaced People as a binding legislation.

However, the Asian is the only region does not have any similar normative framework for dealing with the plight of the IDPs. It is important to note that this region is currently fails to develop any regional human rights mechanism altogether. Hence, the object of this paper is that the 2030 agenda, which seeks to 'leave no one behind', has to address the problem of internal displacement and particularly the impact of climate change on internally displaced people. This paper argues that the global community needs to include IDPs as one of the main agendas of 2030.

II. PROTECTION OF IDPS: LEGAL FRAMEWORK

The existing scholarship discussing the concerns of IDPs is in agreement that the lack of an international and binding legal instrument explicitly designed to address the protection of IDPs, something similar to the 1951 Refugee Convention, is a major trigger behind the insufficient responses concerning issues of internal displacement. The existing international legal guidelines only protect limited, specific needs of the vulnerable groups in question.

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[6] Francis M. Deng, "The Global Challenge of International Displacement" 15(12) *Washington University Journal of Law and Policy* 141-142 (2001).

[7] Francis M Deng, "Divided Nations: The Paradox of National Responsibility" 19 *Macalester International* 79 (2007).

[8] Roberta Cohen and Jacques Cuenod, "Improving Institutional Arrangements for the Internally Displaced: Internally Displaced Persons" *Brookings Institution*: Refugee Policy Group (1995), *available at*: https://www.brookings.edu/research/improving-institutional-arrangements-for-the-internally-displaced/ (last visited on May 25, 2024).

[9] Guy S. Goodwin-Gill, "International Protection and Assistance for Refugees and Displaced: Institutional Challenges and United Nations Reform" *Refugee Studies Centre Workshop 'Refugee Protection in International Law: Contemporary Challenges* (2006), *available at*: http://www.unhcr.org/47e8d2a82.pdf (last visited on May 24, 2024).

It is critical to note that there are a significant number of grey areas within existing international legal frameworks that do not convey clarity on matters of protection of IDPs. The closest to a framework exclusively addressing IDPs that has been developed so far is the Guiding Principles on Internal Displacement. The principles were developed in 1998 at the request of the UNHCR and the UN General Assembly, guided by experts and scholars, meant to instrumentalise and redirect international attention to the phenomenon of internal displacement and measures addressing the same.[10]

The Guiding Principles, a total of 30 in number, set forth the expectations with regard to the rights the IDPs were entitled to, and the obligations that state and non-state actors alike were expected to uphold.[11]

However, these principles only exist on paper in the form of recorded discussions and advice. They have not been acknowledged legally by any of the member states, nor have they been ratified, and therefore, are discounted as binding international law. Nevertheless, the principles compel state and non-state actors alike to reflect on other fields of international law addressing humanitarian concerns – specifically, 'Human Rights law', 'Humanitarian law', and 'Refugee law'. Nearly all thirty principles can be traced back to either of these three larger sub-themes.[12] The Guiding principles, although touched upon in the existing larger conventions, aim to draw attention to the protection of the IDPs, as these are the grey areas in international legal frameworks at the moment.[13]

Africa, as a region, has been struggling with high rates of 'socio-economic' inequality and deprivation. The forcible displacement of its population has been an additional major concern. It has been observed that Africa has been particularly trying to initiate significant efforts to address the problem of internal displacement, especially in the Great Lake region. Multiple 'regional' and 'sub-regional' agencies have stepped up to deal with the problem of internal displacement.[14]

The first legally binding framework aimed at protecting the internally displaced persons in the 'African region' was adopted at the special summit on Refugees, Returnees and IDPs held in 2009.[15] The convention is considered to be a landmark in terms of normative contribution to the dynamic protection measures for the IDPs. It is essentially a comprehensive legal document that strives to cover in detail all phases of displacement – from prevention, to protection, to assistance, and sustainable resolutions. The convention also focuses on the extensive list of triggers behind the issue of internal displacement – including

[10] Francis Deng, "Guiding Principles on Internally Displacement" 33(2) *International Migration Review* 484-493 (1999).
[11] *Id.* at 489.
[12] Roberta Cohen, "The Guiding Principles on Internal Displacement: A New Instrument for International Organization and NGOs" 2 *Forced Migration Review* 31-33 (1998).
[13] Roberta Cohen, "The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting" 10(4) *Global Governance* 459-480 (2004).
[14] Internal Displacement Monitoring Centre, "Internal displacement in Africa has reached unprecedented levels", Dec. 06, 2019, *available at*: https://www.internal-displacement.org/news/internal-displacement-in-africa-has-reached-unprecedented-levels/ (last visited on May 29, 2024).
[15] African Union, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (2009), *available at*: http://www.refworld.org/docid/4ae572d82.html (last visited on May 28, 2024).

but not limited to civil wars, generalized violence, human rights violations, natural and man-made disasters, and development projects.[16]

Additionally, the 'Great Lake Pact' also lays down specific terms for targeting goals that are indicated in the four key priority areas identified. First one, 'economic development and regional integration', second 'democracy and good governance', third 'peace and security', and fourth 'humanitarian and social issues'.[17] The last area is crucially relevant to the IDPs in the African region, and is generally addressed by protocols discussing the human rights of the IDPs. These include the 'GLR Protocol on the Property Rights of Returning Populations' and the another one is the 'Protocol on the Protection and Assistance of Internally Displaced Persons'.[18]

The legal framework in question is followed with adequate sincerity and in accordance with the existing internation legal instruments of humanitarian law, as well as the Guiding Principles on internal displacement. The countries in the 'Great Lake' region recognized the crucial nature of the issues of displacement and that immediately addressing them was the need of the hour, as they were directly relevant to concerns of 'peace, security, and development'. One of the main targets has also been create a long-lasting, sustainable condition of security and stability – not to mention reconstructing the region as a whole. The framework played a crucial role in establishing a legally binding structure focused on helping set up a system that prioritizes the needs and protective measures for the IDPS, as well as setting up a stable foundation for the region. In fact, the 'Great Lake' region adopted a protocol on IDPs even before the regional convention was adopted, which played a major influential role on the latter[19]. Therefore, the Asian countries, in their attempt to set up a regional mechanism to protect the IDPs, can infer valuable lessons from the African regional instrument.[20]

III. INSTITUTIONAL FRAMEWORK

Internal displacement or the forced displacement usually arises during the armed conflict and other human rights violations. The situations of displacement are very vulnerable because in most of the situations the state involve in displacing the people and they will not protect the interest of these people. In such a difficult situation, in order to protect the interest of these people, the role of human rights and developmental oriented organization is very crucial. Unfortunately, there is no separate international organization established for the protection of these people.[21] In this situation, what is required is the utilization of different international agencies that are involved in providing humanitarian assistance to the

[16] *Id*., Preamble of Kampala Convention.
[17] International Conference on the Great Lakes Region, "Pact on Security, Stability and Development in the Great Lakes Region" (2006), *available at*: https://www.lse.ac.uk/collections/law/projects/greatlakes/Pact%20on%20Security%20Stability%20&%20Development.pdf (last visited on May 26, 2024).
[18] Protocol on the Protection and Assistance to Internally Displaced Persons (Great Lake Protocol), *available at*: http://www.refworld.org/pdfid/52384fe44.pdf (last visited on May 26, 2024).
[19] International Conference on the Great Lakes Region, "Protocol on the Protection and Assistance to Internally Displaced Persons", Nov. 30, 2006, *available at*: http://www.refworld.org/docid/52384fe44.html (last visited on May 26, 2024).
[20] S. Chiam, "Asia's Experience in the Quest for a Regional Human Rights Mechanism" 40 *Victoria University Wellington Law Review* 127 (2009).
[21] L. M. Sheridan, "Institutional Arrangements for the Coordination of Humanitarian Assistance in Complex Emergencies of Forced Migration" 14 *Georgetown Immigration Law Journal* 941 (1999).

vulnerable communities. This includes the existing UN human rights organisations. the different origination will come together in providing assistance to the IDPs. This method is often called as a collaborative system. Unfortunately, this system was failed due to the lack of coordination among the different UN agencies.[22] In order address this problem, the 'UN Inter Agency Standing Committee' (IASC) was formed to reform the system and finally the 'cluster approach' was adopted for the well coordinate with the existing different agencies to address the problems of IDPs.[23]

The adoption of 'cluster approach' enable different humanitarian organization involve in providing assistance to these people. The main purpose of this method is to provide effective coordination with 'humanitarian', 'human rights' and 'development agencies'. Under the new 'cluster approach', the system function at the 'global' and 'country level' and functions even during natural disasters and complex emergencies.[24] Additionally, this system will hold agencies accountable for specific aspects of the global and 'country-specific' humanitarian response.[25] In this way, the IASC tried to fill the gap of 'accountability and responsivity' which was lacking under the existing international humanitarian agencies.

In summary, the existing international, regional, legal, and institutional frameworks for the protection of IDPs are still in the evolving stage. Unfortunately, today, the number of displaced people is on a sharp rise. As per the statistics, the number of displaced people will reach well over 200 million by the year of 2050. One of the major contributors to this trend is climate-induced displacement. Although the problem is serious, the international community is still not adequately addressing the issue of displacement. For instance, the UN Sustainable Development Goals impose an obligation on countries to achieve the SDG targets by 2030. Many scholars are of the view that it is highly unlikely to achieve the SDG target without addressing the problems of displacement. The following section identifies the link between climate-induced displacement and UN SDG goals.

IV. CLIMATE-INDUCED DISPLACEMENT AND THE ROLE OF SDGS

A serious impediment in the way of successfully achieving SDGs is internal displacement, mostly triggered by the phenomenon of climate change. Multiple consequences follow climate change, from a rise in the sea level to Desertification to great floods – all of which can cause in large-scale displacement of population while remaining within their own national borders. The driving principle behind SDGs is 'leave no one behind'[26] – which makes it difficult to achieve SDGs unless countries take active steps to address concerns of climate-induced displacement. The SDGs, also known as the Global Goals, were adopted by the UN to primarily address challenges faced by the global community, as well as to ensure equal opportunities towards a better life without further compromising our environment. The

[22] UN General Assembly Resolution on the "Protection of and assistance to internally displaced persons", also see "implementing the Collaborative Response to Situations of Internal Displacement, Guidance to UN Humanitarian Coordinators and/or Resident Coordinators and Country Teams, Inter-Agency Standing Committee", Sep. 2004, *available at*: https://interagencystandingcommittee.org/focal-points/documents-public/implementing-collaborative-response-situations-internal-displacement (last visited on May 24, 2024).
[23] T. Morris, "UNHCR, IDPs and Clusters" 25 *Forced Migration Review* 55-56 (2006).
[24] *Id.* at 55.
[25] *Id.* at 56.
[26] Department of Economic and Social Affairs, "Transforming our world: the 2030 Agenda for Sustainable Development", United Nations, Oct. 01, 2020, para. 4, *available at*: http://sdgs.un.org/2030agenda (last visited on May 28, 2024).

SDGs were intended to succeed the Millennium Development Goals (MDGs), which expired in 2015. Hence, it is important to discuss the MDGs in the context of SDGs.

The Millennium Summit of the United Nations, which was conducted in 2000, saw in its wake the formation of the Millennium Development Goals – a total of eight developmental goals to be fulfilled by 2015. All 191 member states of the UN agreed to collectively help achieve these MDGs – including the elimination of extreme poverty, the empowerment of women, and the promotion of gender equality, eradicating HIV/AIDS, ensuring environmental sustainability, and building a global partnership aimed at collective development.[27]

The gaps in both the conceptualization and eventual fulfillment of these MDGs are what led to the United Nations adopting the SDGs. These are a total of 17 collective goals that are meant to be a blueprint for building a better, more sustainable future for the collective humanity. These SDGs were adopted in 2015 by the UN General Assembly with a focus on achieving them by the year 2030. The SDGs are essentially a call for action involving all member countries in achieving the common goals of eradicating poverty, improving the infrastructure of health and education, and the immediate resolution of the impacts wrought by climate change on the global environment.[28]

V. CLIMATE CHANGE, REFUGEES AND PROBLEMS IN ACHIEVING SDGS

The massive impact of climate change on human populations within respective national borders has long been acknowledged. The first report of the Intergovernmental Panel on Climate Change in 1990 clearly stated that the single most noticeable impact of climate change will be evident in the patterns of human migration.[29] The report also estimated that nearly 150 million people, by the end of 2015, could be experiencing displacement triggered by factors such as floods, storms, water scarcity, desertification, and other climate-change induced conditions. Scholars and practitioners alike have stood on the agreement that not only would climate change result in a mass exodus of people, but it is also the developing countries most likely to bear the costs of such displacement. In fact, it may also result in further limiting people from accessing basic human rights, not to mention the fulfillment of the SDGs.[30] Scholars have also noted the need for caution as conditions of climate change can even lead to rising conflicts, thus triggering displacement.

The UN 'General Assembly' adopted a resolution in the year December 2009 that went on to recognize that even natural disasters can trigger internal displacement. Concerns were also raised that the phenomenon of climate change could also speed up the impact of natural disasters like droughts or mudslides.[31] To this effect, the 'Conference of the Parties to

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[27] United Nations, United Nations Millennium Development Goals, *available at*: https://www.un.org/millenniumgoals/ (last visited on May 25, 2024).
[28] *Supra* note 26.
[29] Brookings Institution, "Climate Change and Internal Displacement" (2014), *available at*: https://www.brookings.edu/wp-content/uploads/2016/06/Climate-Change-and-Internal-Displacement-October-10-2014.pdf (last visited on May 27, 2024).
[30] Emily Wilkinson, Lisa Schipper, *et.al*., *Climate Change, Migration and the 2030 Agenda for Sustainable Development* (London: Overseas Development Institute, 2016), *available at*: https://media.odi.org/documents/11144.pdf (last visited on May 29, 2024).
[31] UN General Assembly, *Protection of and assistance to internally displaced persons*, GA Res 64/162, GAOR, UN Doc A/RES/64/162 (Dec. 18, 2009), *available at*: https://docs.un.org/en/A/RES/64/162 (last visited on May 29, 2024).

the United Nations Framework Convention on Climate Change' that was held in 2010 recognized on principle that mobility, including planned relocations, would serve as an important strategy against climate change.[32] The 'Cancun Adaptation Framework' advocated for all involved parties to make better efforts in terms of understanding and taking steps to address displacement caused by climate change, and planned relocation efforts on both national and global levels.[33]

VI. Impact of Climate Change and Internal Displacement

Drastic changes in living conditions as a consequence of climate change may result in mass migrations, generally within the same national borders as people seek stable, secure living conditions in addition to better employment opportunities. However, if such intentional relocations are not successful or people move to urban overpopulated areas that cannot accommodate them, they may be victims of a second displacement. This displacement can often be cyclical in nature as people are forced to move from their original roots in the hope of better security and livelihood conditions.[34]

The impact of 'climate change' on internal displacement is also dictated by factors such as a growing population, rapid urbanization, increased 'human mobility', and 'food', 'water', and 'energy security'.[35] Even regional factors such as governance conditions can affect the extent of displacement happening. Within such a context where pre-existing socio-economic factors play a role – climate change can become a multiplier, magnifying the already-happening impact. That is to say that, alongside the obvious negative impacts, the phenomenon of climate change may also trigger potential conflicts leading to further displacement. It may also result in increased demand over limited resources, including habitable space and employment opportunities – all of which may lead to additional displacement.

Unpredictable natural calamities such as floods or cyclones are expected to become even more intense and untraceable due to climate change, leading to mass displacements of unplanned nature. Traceable, slow moving conditions such as food scarcity or lack of jobs also trigger displacements – already observed throughout the world. Particularly in Asia and Africa, the already-vulnerable populations are the ones most affected by climate change. An estimated 12 million people in the Horn of Africa required large-scale humanitarian assistance due to the 2011 drought. In particular, Somalia faced multiple obstacles due to drought, including crop failures and rising inflations and even food scarcity. The end result was a massive famine that put nearly 4 million people at risk, necessitating large-scale humanitarian assistance.[36] It is difficult to establish direct causal relationships between climate change and the displacements it triggers. The triggers of climate change are multifold, as are the results. For example, melting glaciers can be caused by climate change, but also due to deforestation, which is a human action. Since it is difficult to differentiate

[32] UN, "United Nations Framework Convention on Climate Change", *available at*: https://unfccc.int/resource/docs/convkp/conveng.pdf (last visited on May 29, 2024).
[33] UNFCC, "Cancun Adaptation Framework", *available at*: http://unfccc.int/adaptation/items/5852.php (last visited on May 28, 2024).
[34] *Supra* note 29.
[35] *Supra* note 30 at 209.
[36] Elizabeth Ferris, "Climate Change and Internal Displacement: A Contribution to the Discussion" *Brookings-Bern Project on Internal Displacement* (2011), *available at*: http://www.refworld.org/pdfid/4d6e0bfe2.pdf (last visited on May 30, 2024).

between the different factors behind displacement, it is also critical that we take a holistic approach to understand the impact of climate change on mass migration.

VII. INTERNAL DISPLACEMENT AND THE 2030 AGENDA FOR SDGS

Achieving the fulfillment of SDGs is not removed from the fate of displaced populations. Rather, forced migration plays a massive role in the implementation of the SDGs, whether triggered by climate change or any other factors.[37] However, it is completely unjust that the agenda of SDGs do not explicitly include the plight faced by displaced populations. The UN secretary general in his synthesis report, went to clearly state that the new framework has to remedy such an injustice and 'must not exclude displace persons, or persons affected by conflict.' In order for the states to prove their commitment to development that protects the vulnerable, special attention must be reserved for the plight of vulnerable people, including displaced persons.[38]

Even though migrants and refugees are included in the framing paragraph of the SDGs, only two out of the 169 stated targets actively include refugees or migrants. On the other hand, displacement is referred to in the Paris Climate Agreement. Making the problems of internal displacement part of humanitarian planning is the immediate need of the hour.[39]

In fact, while each of the goals explicitly focus on equality and universality, the needs of Internally Displaced Persons still need to be integrated into the implementation of SDGs – from policies to funding to explicitly marked funds. The first goal of complete eradication of poverty, and the second goal of eradicating hunger, must also consider the socio-economic consequences climate change poses for the vulnerable groups. The fifth goal of achieving gender equality, the eighth goal of achieving economic parity, and the thirteenth goal dealing with climate justice will require that both the design and the delivery of these development programs make space for the displaced people as well. Refugees and displaced people will need to play a significant role with regard to peace-building process in conflict zones.[40]

The SDG 'Goal 10' provide provision for reduced 'inequalities and SDG 'Goal 13' stress on the 'climate action' need to include IDPs as a subject to focus on their development. In 'Goal 16' discuss on 'peace, justice and strong institution', unless the internal displacement or the problems of forced migration properly addressed it is difficult to achieve peace in the region.[41]

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[37] Internal Displacement Monitoring Centre, "Leaving no one behind: internal displacement and the 2030 agenda for sustainable development", *available at*: http://www.preventionweb.net/publications/view/45943 (last visited on May 30, 2024).

[38] Tackling internal displacement through the SDGs, *available at*: http://www.sustainablegoals.org.uk/tackling-internal-displacement-sdgs/ (last visited on May 28, 2024).

[39] Derek Osborn, Amy Cutter, *et.al*., "Universal Sustainable Development Goals: Understanding the Transformational Challenge for Developed Countries", Stakeholder Forum, commissioned by the UN Development Program (Geneva, Switzerland: UNDP, 2015), *available at*: https://sustainabledevelopment.un.org/content/documents/1684SF_-_SDG_Universality_Report_-_May_2015.pdf (last visited on May 30, 2024).

[40] UNDP, "Sustainable Development Goals- Background on the Goals", *available at*: http://www.undp.org/content/undp/en/home/sustainable-development-goals/background.html (last visited on May 29, 2024).

[41] *Ibid.*

In order to achieve the 'SDGs' by 2030 – the government need to address peoples' vulnerabilities in order to truly address the needs of 'sustainable development'. Similarly, humanitarian agencies and actors must also join hands to address the unique need of displaced populations. To summarize, it will be a great disservice to one of the most critically vulnerable groups if states and non-state actors indeed fail to include addressing the concerns of displaced people within the implementation agenda of SDGs.

VIII. CONCLUSION

The 'phenomenon of internal displacement' is likely to have an adverse impact on the achievement of Sustainable Development Goals. While the SDGs are indeed committed to 'leaving no one behind', they cannot be fulfilled without making space for solutions to address the issue of displaced people on a global level. Both climate change and displacement are two major global concerns – both in need of cooperation on both national and international levels. The 2030 agenda aim to bring countries together to achieve a common future of dignity and safety where everyone has access to essentials, education, healthcare, and legal documentation to secure a stable future. Strong advocacy that will take on the battle for the displaced people's inclusion in regional SDG achievement plans, is the need of the hour. It is critical that we reiterate the significance of fortifying capacities to deal with the imminent needs of displaced people at both national and global levels.

FEMINIST PERSPECTIVES ON ENVIRONMENTAL JUSTICE: NEED FOR GENDER EQUITY IN LEGAL FRAMEWORKS IN COMBATING CLIMATE CHANGE

Tejaswini Misra[*]
Sonam Dass[**]

I. INTRODUCTION

The menace of climate change is real and upon us, the wildfires, prolonged draughts, heat waves, and early onset of summers, rising levels of sea, melting glaciers and the consequent floods, other climate related disasters all over the world have been a constant reminder of the need to adaptive and mitigative measure to combat climate change. However, the said adaptive and mitigative measures need to be proportionate and accessible to those who are touted to be the worst victims of climate change.[1] At the same time, communities need to be helped to become more resilient to the unavoidable effects of climate change. It is necessary to expand the scope and availability of assistance to help underprivileged populations adjust to the effects of climate change. The existing susceptibilities of certain disadvantaged groups make them all the more vulnerable to the exigencies of climate change and related disasters.[2] While on one hand it has been established that those who have the least contribution towards environmental degradation and the resultant climate emergency are the worst victims of climate change.[3] One such traditionally disadvantaged group is women.

Feminist perspectives bring an essential analytical framework to the study of environmental law and policy. The theory of intersectional feminism challenges the archetypal legal paradigm that have been long established under an androcentric worldview, which often ignores the female identity of a victim, in this case the burden of female identity of victims of climate injustices. The intersection of feminist theory and environmental justice within the context of legal frameworks addressing climate change in India need to be explored. Integrating feminist theory into environmental justice frameworks would ensure social equity while creating more effective legal responses to climate change. This article critiques the systemic ignorance of the role played by gender in climate change related injustices which is also absent from our legal frameworks, such as the National Action Plan on Climate Change (NAPCC), Nationally Determined Contributions (NDCs) etc.

The purpose of this article is to contribute to discussions on climate change and policy-making by offering insights on the perspectives and experiences of Indian women. This article addresses the theoretical underpinnings of feminist perspectives on environmental justice while analyzing how India's legal frameworks have addressed, or neglected, gender equity in combating climate change. It also proposes innovative, gender-responsive legal reforms to enhance environmental resilience and social equity.

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[1] Julie-Anne Richards and Simon Bradshaw, *Uprooted by Climate Change: Responding to The Growing Risk of Displacement* 3 (Oxfam, UK, 2017).

[2] *Ibid.*

[3] Ashfaq Khalfan, Astrid Nilsson Lewis, *et.al.*, *Climate Equality: A Planet for the 99%* 8 (Oxfam, UK, 2023).

While examining feminist perspectives on environmental justice within the milieu of India's environmental and climate change challenges it is pertinent to analyze how gender inequalities intersect with environmental degradation, focusing on the disproportionate burdens faced by women in agriculture, water collection, and caregiving roles. The shortcomings of legal frameworks like the NAPCC and the transformative impact of gender sensitive climate action can be assessed by integrating feminist theory with doctrinal legal analysis and case studies to suggest gender-responsive legal reforms for sustainable climate resilience.

The NAPCC[4] recognizes climate change as an imminent challenge before the world and the adverse impact that could be caused by climate change on the disproportionate distribution of resources between different groups, thus aggravating disparities and affecting the livelihood of the people. In 2008, this was a great step towards recognizing the far-fetched impacts of climate change on the marginalized groups. The foremost principle enshrined under the document is to protect the poor and vulnerable sections of the society from the impacts of climate change, however, that does not seem to take any tangible form under the policies formulated. The NAPCC has, under its aegis, eight national missions that simultaneously cater to different fronts through mitigation and adaptation. The document does not specifically cater to women as a marginalized group.

A review of India's NDCs[5] under the Paris Agreement also paints a similar picture as the NAPCC. The NDCs do not make any binding commitments in any specific sectors rather makes an all-encompassing commitment to reduce its overall emission and improve its energy efficiency. The target is to achieve a net zero by 2070. In 2023, as a party to the United Nations Framework Convention on Climate Change (UNFCCC) and its Paris Agreement, India achieved its first NDC in the year 2015 comprising, *inter-alia,* of following two quantifiable targets[6]:

i. To reduce the emissions intensity of its GDP by 33 to 35 percent by 2030 from 2005 level; and
ii. To achieve about 40 percent cumulative electric power installed capacity from non-fossil fuel-based energy resources by 2030.

With reference to the NDCs, and National Adaptation Policies, a recent report of the UNFCCC secretariat has showcased how the performance of four-fifths of the parties to the UNFCCC has improved on the front of gender inclusivity as evident in the documents submitted to the secretariat. The report[7] focuses on reporting of gender-responsive climate policies, plans, strategies and action in nationally determined contributions, national adaptation plans, national communications, long-term low-emission development strategies

[4] Harshal T. Pandve, "India′s National Action Plan on Climate Change" 13 *Indian Journal of Occupational And Environmental Medicine* 17-19 (2009).

[5] Government of India, India's Updated First Nationally Determined Contribution under Paris Agreement (2021-2030), *available at:* https://unfccc.int/sites/default/files/NDC/2022-08/India%20Updated%20First%20Nationally%20Determined%20Contrib.pdf (last visited on May 19, 2024).

[6] Press Information Bureau, "India achieves two targets of Nationally Determined Contribution well ahead of the time", Dec. 18, 2023, *available at:* https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1987752 (last visited on May 21, 2024).

[7] U.N. Framework Convention on Climate Change, *Implementation of Gender-Responsive Climate Policies, Plans, Strategies and Action as Reported by Parties in Regular Reports and Communications Under the UNFCCC*, U.N. Doc. CP/2024/5 (2024).

and biennial transparency reports. In this context, it becomes a more imperative for India to evaluate its performance on the parameters of feminist perspectives of climate justice.

A. Environmental Justice and Gender

Climate change is inherently gendered. Women, especially in developing countries, are often more vulnerable to its impacts due to social, economic, and cultural factors. For instance, in many rural communities, women are already responsible for securing water, managing household energy needs like collecting firewood and cooking on environmentally degrading fuel, and ensuring food security. When climate change disrupts these essential services, the burden of adaptation and mitigation disproportionately falls on them.[8] This gendered impact of climate change extends beyond immediate resource management to affect women's education, health, and economic opportunities. In times of climate-induced scarcity or disaster, girls are often the first to be pulled out of school to assist with household duties or to be married off as a coping strategy. Additionally, women's health can be compromised due to increased exposure to water-borne diseases, indoor air pollution from traditional cooking methods, and malnutrition when food becomes scarce. In general, women are disproportionately harmed by climate change, disasters, and related displacement – particularly women living in poverty or those who are marginalized because of their social status, race, ethnicity, or other factors. During extreme situations like drought, women in poorer communities are typically responsible for travelling increasing distances to collect water and food, and traditionally, in such difficult scenarios where food is rationed, women are the last to receive food, in turn impacting their overall nutrition.[9]

Moreover, women often face barriers in accessing climate information, resources, and decision-making processes that could help them adapt to changing conditions. This exclusion from climate-related planning and policy-making at local, national, and international levels, amounting to distributed injustice, further exacerbates their vulnerability and limits their capacity to contribute their valuable knowledge and perspectives to climate solutions.[10] A Report[11] published by the Women's Environment Centre in 2010 pointed out that the intersection between gender and climate change reveals profound inequities. Women, frequently experiencing higher poverty rates and constrained by traditional gender roles, face unique climate-related vulnerabilities. Climate disasters disproportionately claim female lives while survivors often endure heightened workloads, economic hardship, deteriorating health, and increased exposure to violence.[12] When climate pressures force displacement or male migration, women bear additional burdens. Their responsibilities for resource gathering particularly water and fuel collection intensify under environmental stress, triggering cascading health consequences. During food shortages, women typically sacrifice their own nutrition first, while simultaneously managing the effects of price volatility on household

[8] Matt McGrath, "Climate Change 'Impacts Women More than Men" *BBC News*, Mar. 08, 2018, *available at:* https://www.bbc.com/news/science-environment-43294221 (last visited on May 21, 2024).
[9] Christine Haigh, Bernadette Vallely, *et.al.,* "Gender and the Climate Change Agenda: The Impacts of Climate Change on Women and Public Policy" *Women's Environmental Network, London* 22 (2010).
[10] Karen Bell, "Bread and Roses: A Gender Perspective on Environmental Justice and Public Health" 13(10) *International Journal of Environmental Research and Public Health* 1005 (Oct. 12, 2016).
[11] Women's Environmental Network**,** *Gender and the Climate Agenda: The Impacts of Climate Change on Women and Public Policy* 1 (2010), *available at*; https://genderclimatetracker.org/sites/default/files/Resources/Gender-and-the-climate-change-agenda-212.pdf. (last visited on May 19, 2024).
[12] *Ibid*.

food security.[13] Pre-existing health disparities worsen under climate pressures. Meanwhile, competition for dwindling resources frequently sparks conflicts where women face elevated risks of violence, including sexual assault. Society simultaneously expects women to implement climate adaptation strategies while managing increased domestic responsibilities.[14] Paradoxically, certain climate solutions, including commercial reforestation and biofuel initiatives, can inadvertently harm women by restricting access to resources they depend on for subsistence and livelihoods.[15] This demonstrates how gender-blind approaches to both climate problems and solutions can reinforce ever more strongly existing inequalities rather than address them.

The inconsistency in addressing gender-specific climate impacts is evident across various sectors and regions within India. For instance, agricultural policies may fail to account for the unique challenges faced by women farmers, who often have limited access to land ownership, credit, and agricultural technologies. Similarly, disaster risk reduction strategies may overlook the specific needs of women and other marginalized gender groups during extreme weather events, such as their increased vulnerability to violence in evacuation centers or their role as primary caregivers. This disconnect between policy and practice has far-reaching consequences. It perpetuates existing gender inequalities and exacerbates the vulnerability of women and other marginalized gender groups to the adverse effects of climate change. For example, women in rural areas may face increased water scarcity due to climate-induced droughts, leading to greater time poverty and health risks as they travel longer distances to collect water.

Additionally, climate-related migration may disproportionately affect women, who often bear the burden of maintaining households and communities when male family members migrate for work to bridge this gap and ensure more effective climate adaptation strategies, it is crucial for policymakers and implementing agencies to prioritize gender mainstreaming across all levels of climate action. This includes conducting comprehensive gender impact assessments, promoting gender-responsive budgeting, and actively involving women and diverse gender groups in the design and implementation of climate policies and programs. By addressing these shortcomings, India can work towards a more inclusive and equitable approach to climate change adaptation, ultimately enhancing the resilience of all its citizens in the face of environmental challenges. In the following sections, the paper discusses specific instances of gender biases in policy formulations of Climate Change.

II. THEORETICAL FRAMEWORK: LAW AND POLICY ANALYSIS VIS-À-VIS THE GENDER-CLIMATE NEXUS

The evolution of legal frameworks addressing climate change has seen a shift away from traditional regulatory methods and toward more comprehensive, rights-based approaches. International agreements like the UNFCCC and the Paris Agreement have served as a foundation for global collaboration, but they frequently fail to explicitly recognize gender inequities.

A. International Legal Framework

[13] *Ibid*.
[14] *Ibid.*
[15] Intergovernmental Panel on Climate Change (IPCC), "Summary for Policymakers", *Climate Change 2022 – Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* 3–34 (Cambridge University Press, 2023).

The evolution of legal frameworks addressing climate change has transitioned from traditional command-and-control regulatory models to more holistic, rights-based approaches that emphasize human rights, equity, and sustainability. International agreements such as the UNFCCC[16] and the Paris Agreement[17], along with the NDCs, represent landmark shifts in global climate governance. A report[18] of the OHCHR, in 2015, had particularly highlighted the need to inculcate equitable, equal, and non-discriminatory climate action that celebrates human rights while prioritising vulnerable communities. The Paris Agreement that followed this report embodies a rights-based paradigm by linking climate action with broader human rights objectives, encouraging transparency, accountability, and stakeholder participation, including women. The Sustainable Development Goals (SDGs) also aid in combating climate change through integration of climate action into national policies, strengthening resilience, and promoting mechanisms for effective climate-related planning and management, ultimately aiming for a low-carbon, climate-resilient world.[19] These instruments have been instrumental in fostering global collaboration, driving policy reforms, and setting ambitious emission reduction targets. However, despite their transformative potential, they often fall short in explicitly addressing the gendered dimensions of climate change.

A glance at the UNFCCC's website takes one to a link wherein a sub-topic titled 'Women' has been listed under the 'Explainer' section.[20] The section explains how women being a large section of consumers, farmers, first care-givers in a family and the first responders in a disaster have to be the 'agents of change' in combating climate injustices. However, the words feel hollow as it just burdens the women with more roles without giving them more autonomy in decision making and a louder and decisive say in policy making. This approach merely treats women as pawns in the hands of an essentially male dominated political discourse on climate action.

From a feminist perspective, the failure to integrate gender considerations into these international instruments is significant. Women, particularly those in marginalized communities, are disproportionately affected by climate change due to pre-existing inequalities in social, economic, and political spheres. Their roles in agriculture, mostly as farm labourers and seldom as farm owners,[21] water collection, and community caregiving expose them to unique vulnerabilities, yet the language of these international instruments rarely acknowledges these gender-specific challenges. The UNFCCC, while it has gradually opened up space for discussions on gender and climate, typically treats gender as an ancillary

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[16] United Nations Framework Convention on Climate Change**,** May 09, 1992, 1771 U.N.T.S. 107, *available at:* https://unfccc.int/resource/docs/convkp/conveng.pdf (last visited on May 22, 2024).

[17] Paris Agreement**,** Dec. 12, 2015, 3156 U.N.T.S. 3, *available at:* https://unfccc.int/sites/default/files/english_paris_agreement.pdf (last visited on May 26, 2024).

[18] Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

[19] United Nations, "Climate Action & Synergies", U.N. Department of Economics & Social Affairs, *available at:* https://sdgs.un.org/topics/climate-action-synergies (last visited on May 26, 2024).

[20] United Nations, "Women & Climate Change", *available at:* https://www.un.org/en/climatechange/science/climate-issues/women (last visited on May 26, 2024).

[21] Charu Jain, Disha Saxena, *et.al.,* "Women's Land Ownership in India: Evidence from Digital Land Records" 133 *Land Use Policy* 106740 (2023). This article presents data on land ownership by women over a period of time and states that the maximum ownership of agricultural land in women has been 13.9 % in 2015-16 as per the agricultural census. This data is not is not disaggregated for single and joint ownership; the Agriculture Census data considers only the sex of the head of household, meaning that the actual ownership and authority of women on their land might be even lesser. The authors also point out that where the agricultural land was owned by women, it would either be smaller in size or inferior in quality or both.

issue rather than a core component of its framework. Similarly, the Paris Agreement, despite its inclusive rhetoric and emphasis on human rights, does not contain binding provisions or robust mechanisms to ensure gender-responsive policies are implemented at the national level.

Feminist critiques argue that for these legal frameworks to be truly transformative, they must go beyond abstract commitments to human rights and integrate gender-disaggregated data, explicitly recognize women's traditional ecological knowledge, and mandate the inclusion of women in environmental decision-making processes. For instance, incorporating binding gender-responsive measures within international climate treaties could catalyze national governments to design policies that directly address the gendered impacts of climate change. Such measures might include women-specific strategies, enhanced support for women-led community initiatives, and mechanisms for monitoring and reporting on gender-specific outcomes.

B. National Policies

The NAPCC introduced by the Government of India in 2008, outlines eight missions addressing various dimensions of climate change.[22] The eight missions of the NAPCC are: National Solar Mission, National Mission for Enhanced Energy Efficiency, National Mission on Sustainable Habitat, National Water Mission, National Mission for Sustaining the Himalayan Ecosystem, National Mission for a Green India, National Mission for Sustainable Agriculture, and National Mission on Strategic Knowledge for Climate Change.[23] While the policy outlines technological and economic strategies, a closer look reveals major gaps in gender inclusion. For example, the National Mission on Sustainable Agriculture focuses on modern farming techniques and increasing productivity but overlooks the crucial roles women play as farm laborers, primary cultivators, water collectors, and caregivers in rural India. It also fails to address the deep-rooted issue of land ownership, which remains concentrated in the hands of upper-caste men, leaving the women and marginalized communities working on these farms without recognition or support.[24] The mission's objectives and operational guidelines lack targeted interventions to mitigate the gender-differentiated impacts of climate variability on agricultural communities.

Gender-biases in policy design is a recurring theme across the NAPCC's missions. Taking the National Water Mission as an example, the policy framework prioritizes efficient water usage and infrastructure development. Yet, it fails to address the disproportionate burden on women responsible for water management or the gendered role of women in walking to far off places in extreme weather conditions to collect water for household chores.[25] This oversight is not isolated; the National Mission for Enhanced Energy Efficiency similarly concentrates on industrial and urban energy needs while neglecting household energy dynamics, where women's consumption patterns are starkly absent or overlooked while formulating policies. Such policies mostly subsidise cleaner energy in industries, energy-efficient machinery in factories etc. but it fails to improve energy efficiency where

[22] National Action Plan on Climate Change, India (2008), *available at:* https://moef.gov.in/wp-content/uploads/2018/04/NAPCC.pdf (last visited on May 20, 2024).
[23] *Ibid*.
[24] Bina Agarwal, *Gender and Green Governance: The Political Economy of Women's Presence Within and Beyond Community Forestry* 31-53 (Oxford University Press, 2010).
[25] U.N. Women, *Gender Equality in the Context of Climate Change* (2014), *available at:* https://www.unwomen.org/sites/default/files/2024-10/feminist-climate-justice-a-framework-for-action-overview-en.pdf (last visited on May 24, 2024).

women are the primary consumers. Moreover, the absence of gender-specific language and metrics in these missions underlines a systemic failure to integrate gender perspectives, thereby perpetuating existing inequalities.

Structurally, the NAPCC exhibits limitations arising from its top-down formulation. The plan was primarily developed by central governmental agencies with a strong focus on technological innovation and economic growth, relegating socio-cultural dimensions such as gender equity to a secondary status. The introductory sections and strategic objectives of the NAPCC do not mention gender or identify women as key stakeholders in climate mitigation or adaptation.[26] This omission is significant because it leaves no room for the integration of feminist insights or the validation of women's traditional ecological knowledge—elements that have been shown to enhance community resilience and sustainable development.

The NDCs, under the Paris Agreement to the UNFCCC, are a Country's self-decided commitments, reflected in the form of their national policies and legal instruments, on how they aim to contribute to the global goal of limiting temperature rise to well below 2°C and pursuing efforts to limit it to 1.5°C. NDCs represent the cornerstone of the Paris Agreement's implementation strategy. These country-specific climate action plans establish the foundation for fulfilling the Agreement's ambitious objectives, particularly accelerating toward peak global emissions followed by substantial and swift reductions. The iterative design of the NDCs requires nations to revisit and strengthen their commitments on a five-year cycle, progressively escalating their emission reduction targets and associated climate actions to collectively address the growing urgency of the climate crisis. India, particularly, updated her NDCs in 2022.

A recent synthesis report by the Secretariat to the UNFCCC presented a study on gender integration in the policy documents submitted by 195 parties to the Paris Agreement between July, 2022 and 2024.[27] The report states that gender was referenced by 85.2 % of the all the documents and 81.5% of the NDCs referred to during the study. However, the updated NDCs submitted by India in August, 2022 the said period doesn't mention the terms 'gender' or 'women' even once, making us part of the less than 19% of the parties not referencing gender bias or women centric issues and policies in our NDCs. India's (NDCs assert a commitment to mobilizing resources for gender equality and women's empowerment. However, this declaration remains largely rhetorical—vague and generic in nature. When examining the operative sections of the document, which detail India's eight specific commitments, there is a conspicuous absence of concrete measures addressing gender concerns.[28] While India has shown great leadership in climate action of other fronts like International Solar Alliance (ISA), Coalition for Disaster Resilient Infrastructure (CDRI) and industry transition track to promote voluntary action for low carbon transition (LeadIT), it has significantly lacked in gender inclusivity in climate action. Another report by Ministry of Environment, Forest and Climate Change[29] submitted to UNFCCC in 2022 has fleeting

[26] *Supra* note 22.

[27] *Supra* note 7.

[28] Kanika Jamwal, "Accounting for Gendered Vulnerabilities to Climate Change in India's Nationally Determined Contributions" *FeminisminIndia.com*, Feb. 04, 2022, *available at:* https://feminisminindia.com/2022/02/04/where-are-the-women-accounting-for-gendered-vulnerabilities-to-climate-change-in-indias-nationally-determined-contributions/ (last visited on May 24, 2024).

[29] Ministry of Environment, Forest and Climate Change, "India's long-term low-carbon development strategy", Government of India (2022), *available at*: https://unfccc.int/sites/default/files/resource/India_LTLEDS.pdf (last visited on May 22, 2024).

mentions of the term women and gender without any significant reference to any substantial policies to address the disproportionate impact borne by women pursuant to climate change.

While the afore-mentioned policy documents exude gender bias, often times it is not the law/rules/policy itself that sets out the bias, rather the bias exists in its implementation. One example where the policy itself is not biased, however the bias is evident in the implementation is the Environmental Impact Assessment Notification, 2006. The notification establishes that for Category A and B1 projects, barring certain exceptions, there ought to be public consultation before granting environmental clearance, a process which would allow the stakeholders to express their concerns regarding the proposed project. The public consultation usually happens in traditionally male-dominated spaces like gram sabhas or public meetings. What is mostly seen is that such public gathering is devoid of female voices either entirely or the token female representation in such public gathering is negligible or not enough to make any significant difference. In such cases it becomes all the more imperative upon policymakers to formulate such policies and establish such processes that account for societal bias against women and already include provisions to engage women in decision-making processes and encourage an inclusive environmental governance.

III. LESSONS FROM WOMEN LED ENVIRONMENTAL MOVEMENTS

The Chipko Movement and the Narmada Bachao Andolan serve as powerful examples of how female leadership can redefine environmental justice in India. The Chipko Movement's strategy of "tree hugging" symbolized a nonviolent resistance against deforestation, mobilizing rural women and emphasizing community-based resource management. Similarly, the Narmada Bachao Andolan challenged the developmental paradigms that prioritized large-scale infrastructure projects over the rights and livelihoods of local communities.

These movements demonstrate that when women lead environmental struggles, they often call for a more holistic approach that integrates social, cultural, and ecological dimensions. Their success underscores the importance of embedding feminist principles in environmental policy to foster sustainable and inclusive development. Women-led movements have consistently pushed for broader definitions of who can bring environmental cases to court, moving beyond property ownership to usage rights and community impacts. These movements have expanded legal conceptions of environmental harm to include social impacts, cultural losses, and women's health concerns previously invisible in environmental law. Women-led movements have consistently advocated for and won legal requirements for community consultation and participation in environmental decision-making.

Women in India have developed rainwater collection systems during monsoons, securing water for crops during dry periods and safeguarding food production to combat drought and similar situations.[30] These efforts of Indian women in rainwater harvesting are a key strategy for ensuring water availability during dry periods. These systems help secure water for crops during dry spells, safeguarding food production and enhancing agricultural resilience.[31]

[30] United Nations Development Programme, *Women Water Champions* (UNDP India, Delhi, 2021), *available at*: https://nwm.gov.in/sites/default/files/Women%20Water%20Compendium_July%2021.pdf (last visited on May 29, 2024).
[31] *Ibid.*

IV. Conclusion and Suggestions

While gender concerns are explicitly mentioned in India's climate policy discourse, their operationalization at the subnational level remains uneven and inconsistent. In most State Action Plans on Climate Change in India, significant gaps persist between normative goals[32]—such as reducing differential vulnerability and empowering women—and the policy approaches adopted, which range from gender-blind and gender-neutral to, at best, gender-specific, gender-sensitive, or even gender-transformative measures. These disparate approaches underscore a critical disconnect between the rhetoric of gender equity and the substantive integration of gender considerations in environmental governance. To be truly effective, the conceptualization of gender must evolve beyond a narrow focus on the binary differences between women and men. Instead, it requires a comprehensive engagement with the intersecting dimensions of sex, caste, class, and access to resources, recognizing that these intersections significantly shape vulnerability and adaptive capacity in the face of climate change.[33]

The rights-based approach inherent in international instruments and national policies ideally offers an avenue for integrating feminist insights into climate governance. A rights-based framework can empower women by recognizing their agency, securing their rights, and promoting their participation in decision-making processes. In practice, however, the absence of explicit gender language and concrete targets in the UNFCCC and the Paris Agreement means that national policies derived from these instruments often mirror the gender-blindness of their international templates. This gap undermines efforts to ensure that climate adaptation and mitigation strategies are equitable and inclusive. To ensure a more gender inclusive environmental governance, below are a few suggestions:

i Mandatory gender impact assessments alongside environmental impact assessments;
ii Substantive representation requirements (beyond quotas) in environmental decision-making bodies;
iii Legal recognition of use-based and commons-based rights alongside property ownership;
iv Procedural accommodations recognizing women's time constraints and mobility limitations;
v Redefinition of "expertise" to include traditional ecological knowledge often held by women;
vi In the light of this information, the report of Women's Environmental Network, "The impacts of climate change on women and public policy"[34] concludes that remedial action is required on three fronts:
a) Gender-sensitive strategies to mitigate climate change
b) Addressing gender inequality
c) Gender-sensitive strategies for adapting to climate change – the more radical the cuts in emissions in the next few years, the better chance there is of limiting the negative effects of climate change on women. to suffer climate injustice – until gender inequality is addressed, women will continue strategies adequately take account of women's considerations.

[32] *Ibid*.
[33] *Ibid*.
[34] *Supra* note 9.

Countries such as Bangladesh, Nepal, and Uruguay are emerging as global exemplars in formulating gender-inclusive climate action policies, offering valuable lessons for India. In Bangladesh, for instance, climate adaptation programs explicitly integrate gender considerations by involving women at the community level, ensuring that their unique knowledge and needs are addressed in disaster risk reduction strategies. Bangladesh has also specifically targeted two fronts to involve women in their climate action, namely, ensuring food security, social protection and health are prioritized for marginalized communities like women and secondly capacity building.[35] Nepal has similarly pioneered the integration of gender-responsive budgeting in its climate policies, thereby directing resources specifically to women-led initiatives and ensuring that the impacts of climate change are mitigated through an inclusive approach.[36] Uruguay, on the other hand, has developed participatory platforms that bring together diverse stakeholders, including women from marginalized communities, to co-create climate resilience strategies. These initiatives emphasize the transformative potential of inclusive governance, where decision-making processes are designed to reflect the lived experiences of women and promote equitable access to climate finance.[37]

India can draw significant insights from these examples. By adopting gender-responsive budgeting mechanisms similar to Nepal's, India could allocate dedicated resources to women-focused projects, thereby directly addressing the gender-specific impacts of climate change. Furthermore, as Bangladesh has demonstrated, empowering local communities by incorporating women's traditional ecological knowledge into disaster preparedness and adaptation measures can enhance resilience and promote sustainable development. India's climate action framework could also benefit from establishing participatory platforms modeled on Uruguay's approach, ensuring that women and other marginalized groups are actively involved in policy formulation and implementation.

By learning from these global pioneers, India can move beyond a merely rhetorical commitment to gender equality, as is seen in the fleeting mentions of women empowerment and gender inclusivity in our policy documents, by integrating concrete, transformative measures into its climate policies. Such an approach would not only strengthen climate resilience but also promote social equity and inclusiveness in the face of escalating environmental challenges.

In conclusion, while the evolution of climate change legal instruments has marked a significant departure from conventional regulatory models towards more rights-based approaches, a feminist review reveals persistent shortcomings in addressing gender inequities. To fully realize the potential of these instruments, there is an urgent need for a more explicit incorporation of gender considerations that recognizes the intersectional vulnerabilities and capacities of women, ensuring that global climate governance becomes truly inclusive and just. While explicitly mentioned, gender concerns are unevenly operationalized in India's subnational climate policy.[38] This research paper reinforces with compelling evidence the pervasive indifference and apathy toward women within the realm

[35] UNDP, *Bangladesh Climate Change Strategy and Action Plan* (2018), *available at:* https://www.adaptation-undp.org/sites/default/files/resources/bangladesh_climate_change_actiona_plan.pdf. (last visited on May 29, 2024).

[36] Asian Development Bank, *Gender Responsive Climate Change Policy in Nepal* (2019), https://lpr.adb.org/resource/climate-change-policy-2019-nepal. (last visited on May 29, 2024).

[37] Maria Tanyag "Feminist governance and climate change" in Marian Sawer, Lee A. Banaszak, *et.al.* (eds.), *Handbook of Feminist* Governance 262-273 (Edward Elgar Publishing, 2023).

[38] Chandni Singh, Divya Solomon, *et.al.,* "How Does Climate Change Adaptation Policy in India Consider Gender? An Analysis of 28 State Action Plans" 21 *Climate Policy* 958 (2021).

of climate justice, urging policymakers to rethink and reformulate strategies in new, more inclusive ways.

By broadening the lens through which gender is understood, there exists a transformative potential for gender-inclusive environmental governance that not only addresses the immediate inequities but also lays the foundation for long-term, equitable climate resilience. This vision for equitable climate resilience demands a systemic rethinking of policy frameworks, where the transformative power of inclusive governance is harnessed to ensure that marginalized voices, particularly those of women, are not merely acknowledged but are actively involved in the formulation and implementation of climate action strategies.

ABORTION IN US POLITICS : SOME REFLECTIONS

Sona Khan[*]

I. INTRODUCTION

In the process of last US election for the election of the President, various ways emerged to gain leverage by one party over the other. Issue of abortion was one of them and is now again prominently appearing in formulating policies of the new administration.

There is wider apprehension that President Trump's administration is planning to bar nearly all abortions at Veterans Affairs medical facilities, overturning a Biden-era policy that provided such access to pregnant women. Thus, pregnant Veterans would not be allowed to get abortions performed at the facilities of Veterans Affairs hospitals even in the cases of rape, incest or when the pregnancy threatens their health seriously.

Few months after the Supreme Court ended the constitutional right to access to abortion services as a matter of right in 2022 in overturning its earlier decision in *Roe* v. *Wade*[1], the Biden administration changed the rule by allowing for the first time, to provide abortion services for veterans and eligible family members in limited circumstances, including in states where access to abortion services was banned. According to Veterans, such policy change was essential.

Recently, Trump administration called the 2022 rule change inappropriate and legally questionable. The Trump administration's move to again restrict abortion access has received praise from conservatives who strictly oppose federal funding for abortion services of any kind. However, Veteran Administration responded by emphasizing that it would continue to provide care to pregnant patients in life-threatening circumstances.

Lindsay Church, executive director of Minority Veterans of America, is concerned that if the said new abortion rule takes effect, the Veterans would be highly disappointed and may go to unsafe places to access needed services. However, the proposal also states that the department will continue treating veterans who miscarry or have an ectopic pregnancy, when the embryo implants outside the uterus. Ectopic pregnancies are never viable. The proposal has been floating for months.

It is hoped that Veteran Administration would be back in line with historical norms. Previously, from 1999 to 2022, Veteran Administration excluded nearly all abortions and its counseling for Veterans and their spouses, children and others covered by the department's benefits package. It is now being said that Joe Biden initiated the change for "political purposes" in fact, Biden administration's change of rule to expand abortions through Veteran Administration, was one of the few strategies officials could leverage to protect access to the abortion procedures after the Supreme Court overturned its *Roe* v. *Wade* ruling. But that protection applied only in rare cases.

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[1] 410 U.S. 113 (1973).

In fact, the changed Veteran Administration rule was a policy level decision of the Defense Department, which can perform or pay for abortions services of its members and their beneficiaries only in cases of rape, incest or to save the life of the mother. Biden-era Veteran Administration had said in 2022 that it was "unconscionable" that Veterans did not have access to these same critical services following their transition to civilian life. The policy was to protect Veterans living in states hostile to access to abortion services, especially in the South, the region that most severely restricted abortion access after *Roe* v. *Wade* decision was overturned.

In some of those states, lawmakers unhappy with the rule change during Joe Biden Presidency, by threatening that they would punish Veteran Administration workers, who performed abortions not allowed under State law. The Justice Department responded that it would give legal defense to Veteran Administration medical workers, regardless of their location. In 2022, it was guessed that more than 1,000 abortions for Veterans and beneficiaries each year shall be provided under the rule change. Now the Trump administration says in its proposal that the number is much lower, fewer than 150 abortions annually.

More than 100 Democratic lawmakers already sent a letter to Veteran Administration Secretary Douglas A. Collins, pleading with him to keep the earlier policy going. Consequently, Veteran Administration officials had a meeting with the Alliance Defending Freedom, a Christian Legal Organization that strongly opposed abortion. In a written submission, the response was that the Biden rule change was an instance of federal overreach, also stating that increased abortions mean fewer births and that pro-abortion policies place our nation's labor force and entire economic future at great risk.

II. THE FLORIDA ADVERTISEMENT CONTROVERSY

Before the last presidential election, a group known as 'Floridians Protecting Freedom', filed a lawsuit requesting for an injunction to restrain the State of Florida's Health Department from warning and trying to pressurize local TV stations from not airing an advertisement of the group on the issues of abortion. The Health Department's order directed the stations to immediately refrain from playing the broadcast of the said advertisement failing which, criminal charges against those broadcasting stations could be initiated.

This advertisement was an indirect attempt to suggest to voters to seek a change in the existing abortion laws by using their right to vote. It advised the people of Florida to vote "yes" on a ballot initiative that would add language to the state constitution allowing abortions until fetal viability. The sought amendment would thus override Florida's after six-week abortion ban. The campaign's advertisement depicted a woman, named Caroline, suffering from terminal brain cancer, wished to receive treatment which may extend her life, and therefore required to end her current pregnancy.

The letters from the health department sent to the broadcast stations also added that the description in the advertisement was incorrect and harmful because Florida's current abortion law makes an exception in case the life of the mother is in danger. It was also impugned that with that kind of advertisement being broadcast, pregnant women may go out of the state to seek

abortion services which could be highly detrimental for their health. Chief U.S. (Federal) District Judge Mark Walker accepted the prayer of the petitioners and issued an injunction against the Health Department's order. While issuing the temporary restraining order, the judge based his order / judgment on the freedom of speech, enshrined in the first amendment[2] of the American Constitution. While recognizing the fact that the state had been campaigning, opposing the above ballot, and asking for the removal of the said advertisement Caroline, would amount to censorship, thereby, a violation of the First Amendment.

In response to the judge's decision, Lauren Brenzel, campaign director of the 'Yes on 4' ballot initiative, called it a 'crucial victory'. Florida's Protecting Freedom group stated in their lawsuit that not only a preliminary injunction to prevent the Health Department from threatening TV stations be issued but the Department should also be liable for payment of punitive damages for a violation of the right, of the petitioners, to free speech. Moreover, the cease-and-desist letters were an escalation of a broader State campaign to use public resources and government authority to attack the people's ballot initiative, which is illegal to begin with.

In 1975, in India, similar arguments were presented by a politician, late Mr. Raj Narain, while challenging the election[3] of the then Indian Prime Minister, Mrs. Indira Gandhi, which led to her disqualification for indulging in electoral malpractice by the Allahabad High Court. The principles of electoral ethics and constitutional morality seem to be the same in India and the US. It is interesting to note that the Health Department's attorney, John Wilson, resigned after a week of sending the letters in question to the TV stations. Abortion is a state subject in the US and every state of the Union of USA has its own local laws and provisions, for gaining access to abortion services. Like Florida, many other states (14 of them) have similar restrictions on accessing abortion services of the state.

To change the local constitution and to facilitate access to abortion services till 24 weeks of pregnancy, is a crucial issue in this fight besides of course the American women's individual rights and freedom to decide about their own motherhood.

III. TEXAS CASE: LIZELLE GONZALEZ AND PRIVACY RIGHTS

It is interesting to observe the fall out of another case from the state of Texas. Lizelle Gonzalez, a Star County, Texas, resident, filed a civil rights complaint, wherein the hospital staff passed on information about her abortion, her private information, to prosecutors and the county sheriff, whereby, she was charged with murder.[4] The facts are that Gonzalez admitted that she went to a hospital emergency in January 2022 after having taken 'Cytotec estrogen 400 mcg', also known as "misoprostol", one of the two abortion pills to have an abortion at 19 weeks of pregnancy. The state of Texas has several abortion related restrictions. However, it is not a crime for a woman to abort herself. The abortion ban alludes to and concerns anyone, including a

[2] Constitution of the United States, amend. I.

[3] *Indira Nehru Gandhi* v. *Raj Narain*, AIR 1975 SC 2299.

[4] Nadine El-Bawab "A woman who took an abortion pill was charged with murder. She is now suing prosecutors", *ABC News*, *available at:* https://abcnews.go.com/US/woman-abortion-pill-charged-murder-now-suing-prosecutors/story?id=112300737&utm (last visited on Apr 23. 2024).

physician, who helped her in getting aborted. The state law places civil and criminal penalties on anyone who aids a woman in obtaining abortion care, except when the life of the mother is at risk. Gonzalez' allegations are that the prosecutors and the sheriff violated her Fourth and Fourteenth Amendment rights and sought over $1 million in damages in her suit. Two prosecutors, District Attorney Gocha Allen Ramirez and District Attorney Alexandria Lynn Barrera, as well as Starr County Sheriff Rene Fuentes and the Starr County, are all respondents in the lawsuit. On examination, no contractions were found and a fetal heart rate, so Gonzalez was discharged from the hospital and told to come back later. She was discharged in less than an hour. When she complained of abdominal pain and vaginal bleeding, and was taken in by the hospital. A caesarean section was performed on detecting absence of fetal cardiac activity. As per reports, she delivered a stillborn child.

Gonzalez further stated that the hospital staff gave her private medical information to the state prosecutors and the sheriff, which lead to her arrest, thereby, violating federal privacy laws.[5] According to the plaintiff, the district attorney's office and the Starr County Sheriff's Office had agreements with a local hospital to report such types of cases. She further claimed that there are other women, whose health information was also shared for the purpose of investigations and conviction.

It is her claim that two district attorneys and the Starr County's sheriff gave false and misleading information to the grand jury to secure an indictment against her. As a result, she was arrested in April 2022 and held in jail for two nights. After furnishing bond of $500,000, she was released. Two days thereafter, all charges against her were dismissed. Gonzalez suffered huge humiliation which has permanently affected her standing in the community, as a result of the wrong arrest and indictment.

On the grounds of claiming absolute immunity against the individual claims against them, Ramirez and Barrera have sought to have the suit dismissed because action was taken as part of the judicial phase of criminal proceedings. The Sheriff claimed that he has 'qualified immunity' and stated there was claim against his office and not against him. However, the suit ended in a settlement of the claims.

Here is another instance of an attempt to legally manipulate the norms related to the abortion pill. It is interesting to note that some anti-abortion groups along with some doctors, filed a motion to appeal against the lower court's decision before the Supreme Court to restrict access to the permitted drug being used as an abortion pill, which was however opposed by Joe Biden's administration and sought to retain the wide access to the drug.

The said matter was heard by a nine-judge Constitutional Bench and their decision was unanimous in rejecting the plea.[6] They rejected the review petition of these anti-abortion groups for setting aside the order of a lower court of Texas. The Constitutional Bench opined that the petitioners had initially petitioned in the state of Texas in 2022, they lacked the locus for initiation of their motion and to establish how they are adversely affected by the FDA's orders, allowing

[5] *Ibid.*

[6] *FDA* v. *Alliance for Hippocratic Medicine,* 602 U.S. 367 (2024).

access to the said abortion pill. This was an appeal petition against the Texas lower court's order, rejecting their plea of seeking to ban and change the US Food & Drug Administration's (FDA) order declaring the use and access to the pregnancy termination pill, 'Mifepristone', to be legal. This drug is being prescribed and is also easily available.

IV. SUPREME COURT DECISIONS AND LEGAL PRECEDENTS

In 2022, two years ago, the American women's constitutional right to abortion was repealed by setting aside the *Roe* v. *Wade*[7], and the fundamental right to have access to abortion services was taken away. It was in the matter of *Dobbs* v. *Jackson Women's Health Organization*, the US Supreme Court set aside the *Roe* v. *Wade*[8] decision, which had previously guaranteed a constitutional right to abortion.

In *Roe* v. *Wade*,[9] the Supreme Court decided that abortion as a fundamental right was protected by the right to privacy guaranteed by the 14th Amendment. However, the government retained the power to regulate or restrict abortion access depending on the stage of pregnancy.

It is stated that after the decision of *Roe* v. *Wade,* the maternal mortality was significantly reduced. Records state that 39 women are said to have died from unsafe abortions in 1972. In 1975, only three women succumbed to death. In 1965, around 35% of pregnant women died due to unsafe abortions. Now with increased use of technology, only 0.2 per cent of the pregnant women need to be hospitalized due to abortion related complications.

While considering the matter of *Dobbs* v. *Jackson Women's Health Organization,* the US Supreme Court set aside the *Roe* v. *Wade* decision which had guaranteed abortion as a constitutional right. After this decision, some state constitutions, independently protect abortion rights or otherwise, they made changes by enacting laws in conformity with the spirit of this 2022 decision.

In *Roe* v. *Wade*, the Supreme Court decided that the right to privacy implied in the 14th Amendment, protected abortion as a fundamental right. However, the government retained the power to regulate or restrict abortion access depending on the stage of pregnancy and the governing policies of the state in this regard.

Roe v. *Wade*[10] decision significantly reduced maternal mortality. A total of 39 women is known to have died in 1972 on account of unsafe abortions and in 1975, only three. In 1965, number of deaths due unsafe abortion services were very high because abortion was not legal in those days. Now the situation is said to be different and there is hardly any hospitalization on account of abortion related complications.

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[7] *Supra* note 1.
[8] *Ibid*.
[9] *Ibid*.
[10] *Ibid.*

The US Supreme Court passed many decisions before setting aside *Roe* v. *Wade,* in accordance while deciding the case of *Dobbs* v. *Jackson Women's Health Organization*[11]. Some of them are:

i. In 1976, in the matter of *Planned Parenthood* v. *Danforth*,[12] the Supreme Court negated the law, requiring spousal consent for abortion.

ii. In 1979 in the matter of *Maher* v. *Roe*[13], the Supreme Court permitted States to exclude abortion services from Medicaid coverage.

iii. In 1979, in the matter of *Colauti* v. *Franklin*[14], the Pennsylvania law was declared unconstitutional that required physicians to try to save the life of a fetus that might have been viable. was declared to be unconstitutional.

iv. In 1980, in the matter of *Harris* v. *McRoe*[15]*,* the Supreme Court upheld the Federal law on Hyde Amendment, prescribing Federal funding abortions, except when necessary to save the life of the mother or when pregnancy was a result of rape or incest.

v. In 1981, in the matter of *L* v. *Mathewson*, in case of minor girl, living with parents, the law requiring notice to be sent to parents was upheld.

vi. In 1983, in the matter of *City of Akron* v. *Akron Centre for Reproductive Health*[16]*,* the Supreme Court set aside lots of limitations and restrictions on abortion, like waiting period, parental consent without courts permission and a ban on abortions outside of hospitals after the first trimester.

vii. In the matter of *Thornburgh* v, *American College of Obstetricians & Gynecologists*[17], the Supreme Court set aside the law, requiring informed consent to include about fetal development and alternatives to abortion.

viii. In 1989, in the matter of *Webster* v. *Representative Health Services*[18], Justice Rehnquist upheld rules requiring doctors to first test the viability of the fetus after 20 weeks in the case of a state employee participating in abortion services, state funding to be refused.

ix. In 1991, in the matter of *Rust* v. *Sullivan*[19], the law banning the use of some Federal funds for abortion referrals or counseling was declared legal.

x. In 2000, in the matter of *Hill* v. *Colorado*[20], the Supreme Court declared it legal, the law permitting protests and leafletting close to an abortion clinic.

xi. In 2000 also, in the matter of *Stenberg* v. *Carhart*[21], the Supreme Court set aside the ban on the dilation and extraction of abortion procedure in Nebraska.

xii. In 2007, in the matter of *Gonzales* v. *Carhart*[22], a ban on the dilation and extraction of abortion procedure was upheld.

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[11] 597 U.S. 215 (2022).
[12] 428 U.S. 52 (1976).
[13] 432 U.S. 464 (1977).
[14] 439 U.S. 379 (1979).
[15] 448 US 297 (1980).
[16] 462 U.S. 416 (1983).
[17] 476 U.S. 747 (1986).
[18] 492 U.S. 490 (1989).
[19] 500 U.S. 173 (1991).
[20] 530 U.S. 703 (2000).
[21] 530 U.S. 914 (2000).
[22] 550 U.S. 124 (2007).

Here it is important to point out that during the period between *Roe* v. *Wade*[23], decision and of *Dobbs* v. *Jackson*, lots of churning took place on the issue of right to abortion. In 1992, in the matter of *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*[24], petitioner filed a motion to repeal the *Roe* v. *Wade judgment*. Anti-abortion groups were vocal to seek from conservative Supreme Court judges, who they expected would set aside the decision made in *Roe* v. *Wade*. The anti-abortion activists were happy when Justices Anthony Kennedy, Sandra Day O'Connor, and David Souter, were appointed, they were certain that now needful would be achieved. In 1988 and 1989, the state of Pennsylvania enacted some new provisions on abortion services, to make it difficult to access, like the need for parental consent, spousal notification, a compulsory waiting period and an expanded informed consent process. The Planned Parenthood of Southeastern Pennsylvania group challenged the law and every one hoped that the constitutional right of abortion granted by the *Roe* v. *Wade* ruling would be done with. However, it was not so and thus the constitutional right to abortion was not disturbed.

However, the Court did replace trimester-by-trimester doctrine with a weaker level of protection and upheld elements of the Pennsylvania law, which did not unnecessarily affect the right to abortion. The petitioners pleaded to overrule *Roe* v. *Wade* but the court declined.

In a separate judgment by Justices O'Connor, Kennedy, and Souter explained that, it is correct that the judgments of the Supreme Court are relied upon in other such matters but to disturb a constitutional right, a strong cogent reason is needed to justify abandoning of *stare decisis* (the notion that precedents should be upheld), for such an intervention. No Supreme Court decision can be eternal. Citizens have accordingly organized their healthcare after the 1973 decision to have the right to abortion. In this matter court also recognized the right of equality of some to participate in the developmental and economic process of the country, if they are not able to get rid of the unwanted pregnancies.

In 2018, the state of Mississippi, banned abortions after 15 weeks of gestation period, except if it was defined as a medical emergency. The anti-abortion and pro-abortion groups found it to be a challenge. Jackson Woman's Health Organization, was the sole abortion provider in the state and it contested the said ban[25]. In the state of Texas, the court allowed the abortion ban. Now the conservative process had started their campaign and it culminated in setting aside of *Roe* v. *Wade*[26] decision.

In some cases, these measures seek to overrule their state courts' interpretations of the constitutional provisions. In others, there has been no court decision regarding the constitutional right to abortion. Other states have, in contrast, moved to expand or cement abortion rights, including through constitutional amendments.

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[23] *Supra* note 1.

[24] 505 U.S. 833 (1992).

[25] Emily Sullivan "U.S. Judge Strikes Down Mississippi Law That Bans Abortions After 15 Weeks" *NPR*, Nov. 21, 2018, available *at:* https://www.npr.org/2018/11/21/669878629/u-s-judge-strikes-down-mississippi-abortion-ban?utm (last visited on Apr 22. 2024).

[26] *Supra* note 1.

Dobbs matter also leaves a long list of unanswered practical questions. Can states ban women from traveling to obtain an abortion? How will they police the importation and use of abortion drugs? How will state courts handle the slew of "trigger laws by anti-abortion statutes" designed to come into effect upon the overturning of *Roe*? Just as *Roe* set off years of legal uncertainty over the precise boundaries of abortion rights, *Dobbs* has launched a long period of uncertainty over the power of states to restrict abortion in the absence of those rights. The three dissenting justices argued that the majority's ruling was:

a. Based on personal political opinions, not the constitutional law;
b. It went against legal precedent, a bedrock of US legal decisions that was affirmed in *Roe* v. *Wade* in relation to other closely related rights, which were reaffirmed in *Casey* v. *Planned Parenthood* [27].
c. It violated a long list of human rights, particularly women's human rights.

Some state constitutions independently protect abortion rights. However, after the *Dobbs* decision, the states were able to reframe their abortion laws, in conformity with the repealed decision, resulting in restricting the abortion and reproductive rights. At present, in the US Supreme Court, six judges are conservative and three are not, and that is how they were able to smoothly review the decision of *Roe* v. *Wade* in 2022. It is significant to note that in this matter, the key deliberated article of the US Constitution is the Fourteenth Amendment. , which states that:

> *"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*."

V. PUBLIC HEALTH AND ETHICAL IMPLICATIONS OF ABORTION BAN

The hidden implications herein are that the unborn child has rights too. Here, it is important to mention that though Donald Trump has said that he would not sign a federal abortion ban, and would veto one, even if passed by Congress. He made statements in support of I.V.F., in spite of opposition from some Republicans. Some anti-abortion activists hope that reversal of Federal guidance, which prescribe that even states with bans must allow doctors to provide abortion in cases of medical emergency; using administrative agencies to ban abortion pills; and using Federal executive powers to achieve the anti-abortion movement's ultimate aim of recognizing "fetal parenthood" in the Constitution. These actions would not need Congressional role and could be managed by Federal bureaucracy appointed by Donald Trump. Even if this was to be challenged in the court, the conservative judges, could take care of those challenges and make abortion more difficult, if not illegal, and override the state abortion rights ballot measures, which states have passed.

[27] 505 U.S. 833 (1992).

The anti-abortion activists need to pay attention to the misery of women meeting death in view of restrictions and stringent laws. Here are some examples:

i. Josseli Barnica, 28 years old, was seven weeks pregnant and went to HCA Houston Healthcare Northwest, Texas due to medical complications in an accurate state of pain and misery. The pregnancy did not survive and on September 3, 2021, she lost all hopes of the birth of the child. During the complications, it was found that the fetus was about to come out, its head pressed against her dilated cervix; a miscarriage was in progress, as per hospital records. Actually, after such diagnosis, the delivery should have been speeded, her uterus should have been cleaned immediately to prevent a deadly infection. According to several doctors, who studied the records, no appropriate medical services were made available.

   She relentlessly pleaded with the doctors to help her while suffering in pain and agony for 40 hours but to no avail. She delivered three days later and died of an infection. Under the strict abortion laws in Texas, doctors are prohibited from stopping the heartbeat of a fetus.

ii. Two Georgia women could have been helped to survive by giving them timely and efficient abortion services Suffering families of these unfortunate women did speak of their pain at political meetings.

   The anti-abortion activists contend that such laws protect life, both of the fetus and the mother. These suffering women did not want an abortion. Actually, doctors are hesitant of providing treatment in such cases for fear of prosecution, which may lead to prison time, fines, (99 years in prison and fines of $100,000), humiliation, and destroying their own lives.

   According to more than a dozen medical experts and doctors, who reviewed such cases, medical records and autopsy records, Barnica's life could have been saved. After reviewing the four-page summary, containing the timeline of care of the hospital, they all agreed that requiring Barnica to wait to deliver until after there was no detectable fetal heartbeat, in fact violated professional medical standards because it could allow time for an aggressive infection to become firm. According to them, there was a good chance Barnica could have survived, if an intervention was made earlier.

   Texas, like all other states, has a committee of maternal health experts to review such deaths. These experts, in good numbers, are OB-GYNs and maternal-fetal medicine specialists from all over the country. Apart from them, the committee includes researchers of prestigious institutions, doctors who regularly handle miscarriages, and experts who have served on state maternal mortality review committees and held posts at national professional medical organizations. After going through the records, they recommend ways to prevent such tragedies in the future. However, the committee's reports on individual cases are not made public. The committee has not yet completed their scrutiny of the cases of the year 2021. On further enquiry, members affirmed that they had as not yet reached up to examining the case of Barnica's death.

iii. A similar situation arose in 2012 in Ireland, when 31-year-old, Savita Halappavnar, died of sepsis c, when the hospital, refused to clean her uterus, on miscarriage of a 17-week pregnancy. The public outcry on Savita's death under these horrible circumstances was so intense and persistent that the country had to change its strict ban on abortion.

With regard to so many deaths in the United States due to lack of appropriate laws and consequently, deficiencies in the availability of efficient abortion services leading to deaths, people including political leaders, supporting anti-abortion laws need to take up the call for reforms of these norms and regulations.

VI. COMSTOCK ACT AND FEDERAL ABORTION REGULATION ATTEMPTS

The court could turn to Comstock Act of 1873, an easy way to solve the matter. Anti-abortion activists are pushing harder to the enforcing the Comstock Act. This Act has been inactive but is still valid. This was enacted in 1873 and it makes a federal crime to send or receive materials 'designed, adapted, or intended' for 'obscene or abortion-causing' purposes. This law would also criminalize the delivery or receipt of medical instruments used in abortion.

As understood by the anti-abortion lobby of lawyers, the Act could be used to criminalize buying or selling medications used in gender-affirming treatment or to prevent H.I.V infections which New York based lawyer Mitchell and colleagues in the anti-abortion movement have tried to ban.

A document called, 'Lincoln Proposal' was prepared by the group known as 'Americans United for Life' in 2021, which was like President Lincoln's way of asserting his constitutional powers to abolish slavery, despite the Supreme Court's affirmation in the matter of Dred Scott. They plan to advise Donald Trump to issue an executive order recognizing preborn persons as constitutional 'persons' entitled to the fundamental human rights of due process and equal protection of the laws as enshrined in the Fourteenth Amendment of the American Constitution.

A number of states limit abortions to a maximum of six weeks into pregnancy, usually prior to when the fetus could survive if removed from the womb. For comparative purposes, the youngest child thought to have survived a premature birth in the United States was Curtis Means, born on July 5, 2020, in Birmingham, Alabama, at a gestational age of 21 weeks and one day. Moreover, due to the Hyde Amendment, many states' health programs which poor women rely on for their health care, do not cover abortions. According to the ACLU, only 17 states-- as of 2023 cover it.

What is likely to emerge from this picture is an America, where in some states, women with unwanted pregnancies would be able to get abortions. However, to do so, they would need access to information about abortion providers in the more liberal states, and also develop the skills and discipline to keep their plans completely secret.

Kamala Harris, also contesting for the US presidency at that time, seriously made out a case against all those, including Republican officers of the administration for meddling with women's rights. She strongly condemned them for trying to bring in a nationwide ban on abortion. She also clarified that court's ruling on preserving the use of abortion pill does not change her plans at all to continue to fight for reproductive freedom.

It is clear that if abortion is banned, health issues of women would be a cause for severe concern. In Texas, there are huge pregnancy related complications. In the state of Florida,

considering the Amendment IV, no access to abortion services will be available till pregnancy is of six weeks. Medically, it has been asserted that many women may not be able to ascertain that they are pregnant in that short period of six weeks.

VII. GENDER POLITICS AND WOMEN VOTERS

Many voters in the US identified abortion as their top election issue. However, all other issues still may outrank abortion in many swing states, nevertheless, it is very important. It cannot be gauged, how important it can be, unless it is planned to overturn the *Roe* v. *Wade*.[28] It is more likely that when abortion is on ballot, more women are likely to come out to the polls. As was seen previously and in the last election, with women issues on the agenda, more and more women participate in the election process. The situation was same in India in 2019 election, for Muslim women regarding the issue of Triple Talaq.[29]

Considering the promise, Muslim women heavily voted in favor of Mr. Narendra Modi and his party, Bhartiya Janta Party (BJP) in the states of Bihar, Utter Pradesh and Gujrat and in some pockets of other states. Normally, they had always voted as per their husbands' suggestion and / or that of the community's collective decision, as who to vote for. The change in their voting pattern resulted in a thumping majority of the BJP because it would delete by law the evil tradition of Triple Talaq and that kind of process of divorce would be legally banned. And it was. However, it is a different matter as to how the changed law on the issue has been stipulated to operate. It is being strictly operated with the provision of punishment of three years for defying but no alternative provision for maintenance so divorced women has been made, on the husband is sent to jail. As a result, now most Muslim women do not agitate even when they are victims of such un-Islamic way of divorce by the tradition of Triple Talaq.

According to PhD research scholar, Layla Brooks from Emory University, abortion can be a powerful incentive for more women to go to the polls. While analyzing data from the 2022 midterms, she revealed that women vote in larger numbers, if abortion is a major election issue and when an abortion-related measure is on the ballot.

To assess the genuine desire of Donald Trump's change of his stand before the election, on abortion, is an interesting aspect of this presidential contest. He seems to defy the mandate of his party in this regard. The Republican Party's agenda has always been to restrict abortion. However, statements coming earlier from Donald Trump indicated a shift from this deep-rooted stand.

Donald Trump and his party were in aficionado on account of reproductive rights. Many voters thought that Donald Trump's non-strong mindedness and shifting approach cannot be trusted and relied upon. He made pro-abortion statements in order to somehow win pro-abortion voters. It was feared that this kind of approach may alienate some Republican voters. People know that he takes pro-abortion stand and does to ease the situation and may not stick to it later, especially on the issue of abortion.

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[28] *Supra* note 1.

[29] If the husband makes an announcement in front of two witnesses to divorce his wife (utters the word Talaq thrice in one go), the divorce becomes valid.

In 1999, while identifying himself as a democrat, Donald Trump said on a TV show on reproductive rights, 'Meet the Press', that "I am very pro-choice." Later by 2016, he became a confirmed Republican and said he was against abortion. He said at a presidential debate:[30] *"I am pro-life, and I will be appointing pro-life judges."* He fulfilled his commitment and appointed three such justices to the Supreme Court. He has also claimed credit for the repeal of Roe v Wade decision.

According to many election strategy watchers, Trump's assertion that he would be "great for women and their reproductive rights", has no takers. He cannot be relied on the matters of women's healthcare related reliefs. Donald Trump had often been claiming that the 2020 election was stolen from him, which is said to have given rise to January 6 Capitol attack.[31] The ethics of political morality seem to have fallen and hopefully will not continue to be so.

In 2023 and 2024, Donald Trump was found liable in civil proceedings for sexual abuse, defamation, and financial fraud. In May 2024, court also found Trump guilty on 34 felony counts of falsifying business records, thereby, becoming the first former U.S. president to be convicted of crimes. Apart from many, two issues have emerged very controversial and strongly emphasized, from that of his opponent Kamala Harris, they are immigration and abortion.

Most surveys indicated that Donald Trump was struggling hard to rally female voters. In order to win back some voters on the question of reproductive rights, could be hard for the Republican Party on the whole, so with shifting claims, he could possibly appeal to gullible voters or may have totally opposite results. He has often been ambiguous, especially on the subject of reproductive rights and in politics. Kamala Harris also made her stand on abortion access, of paramount importance.

Kamala Harris chose governor of Minnesota, Tim Waltz, her running mate and Donald Trump chose D. Vance, who has served since 2023 as the United States' junior senator from Ohio. He is an out spoken opponent of abortion. He is a sort of reassurance for conservatives for claiming to be "strong pro-life policies". With the heat of election, the issue of abortion gained immense controversy in the US. The number of women voters comprise approximately of 51 percent of the population; therefore, women's vote was likely to be a deciding factor.
Former President Barack Obama has pleaded vehemently with black men to support Kamala Harris. Except in one of the crucial swing states, Vice President Kamala Harris seemed to have a good amount of support from women, a positive sign for her. Somehow the last election had the streaks of turning into girl versus boy. Michelle Obama and Beyonce had vehemently endorsed Kamala Harris' candidature.

Former president, Bill Clinton had also supported Kamala Harris. He has pleaded with people to support her candidature for US Presidency wholeheartedly. There was a large number of other well-known women voters who stood in solidarity with Kamala Harris. A survey published by Emerson College found that Harris enjoyed a lead among women voters in six states, *i.e.*,

[30] Samantha Cooney, "The Mixed-Up History of Donald Trump's Abortion Stance(s)" *Time*, Oct. 21, 2016, *available at*: https://time.com/4538293/donald-trump-partial-birth-abortion-third-debate/ (last visited on May 23, 2024).
[31] Brian Duignan "January 6 U.S. Capitol Attack" *Britannica*, Aug. 04, 2021, *available at*: https://www.britannica.com/event/January-6-U-S-Capitol-attack (last visited on Mar. 25, 2024).

Georgia, Michigan, Pennsylvania, Wisconsin, Nevada, and North Carolina. However, the state of Arizona, seemed to support Donald Trump.

There were lots of uncomplimentary utterances too at the time of last election. The running mate of Donald Trump, J D Vance, termed Kamala Harris in the category of "Childless Cat Women", meaning, thereby, such women, like her, instead of bearing children of their own, love cats. It was a cruel and clothed attack on Kamla Harris's strong stand on pro-abortion rights.

VIII. KAMALA HARRIS'S BACKGROUND AND ADVOCACY

Abortion has been an issue for a long time in the US between Democrats and Republicans. Their stands are poles apart and have found no acceptable middle path. Mainly in view of their different political ideologies on gender issues. Differences on these issues have further widened with the review and repeal of the previous decision in the case of *Roe* v. *Wade*[32], by the US Supreme Court. Thereafter, the Issue of abortion assumed of huge proportions and became immensely prominent nationally and internationally (the said decision went also before the International Human Rights Forum). This decision has allowed states to pass restrictive abortion bans that prevented in some cases, women from accessing even life-saving reproductive healthcare, resulting in their deaths. With the conflict of ideologies, some happily endorsed the views flowing from the bench, while others found it appalling and unjust because it robbed American women the right to decide for themselves, to go through the pregnancy joyfully or terminate it, depending on their circumstances at that given time.

Both Republicans and Democrats continue to collect sympathies for their take on the issue of abortion. Various Church representatives also got involved in this matter. Internationally, many conservative countries, irrespective of their political ideologies agreed with the repealed decision. However, in Europe, the reactions are mixed. Catholic France made abortion completely legal last year as a matter of policy to grant women the right to make their own choices.[33] Now abortion there is a settled issue once for all for everyone.

On Trump's win, his proclaimed policies are taking effect not only on the matter of sexual and reproductive health rights (SRHR) but on a whole lot of women issues. Gender equality has also emerged as a sort of bench mark. Average politicians here are far behind their European counter parts in this respect. The whole world is curiously watching, due to many other reasons, like the immigration, investment, tariffs and trade related policies. Participation of skilled personnel, student status, aid to universities, immigration of undocumented people, collaboration in trade, science and technology and role of NATO etc.

Project 2025 has been criticized for advancing a deeply illiberal agenda that would undermine the fundamental motherhood rights of women to decide whether to continue a pregnancy. More than 80 conservative organizations, including powerful Catholic and Evangelical groups, have signed on to support abortion ban.

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[32] *Supra* note 1.

[33] "France becomes world's first country to enshrine abortion in constitution" *Al Jazeera*, Mar. 04, 2024, *available at*: https://www.aljazeera.com/news/2024/3/4/french-lawmakers-vote-to-enshrine-right-to-abortion-in-constitution?utm%20x (last visited on May 28, 2024*)*.

It has been stated that President Trump has been closely connected to "Project 2025". On the other hand, Kamala Harris stood for championing of abortion rights and made it a central focal point of her campaign.

Dangers of President Trump's administrative policies for women's and LGBTQIA+ rights were circulating on the down side. Under his previous presidency, laws relating to contraceptive rights, coverage, pay inequities, measures against gender-based and sexual violence, as well as legal protections for LGBTQIA+ people and gender rights were criticized. US funding for international abortion access under the "Global Gag Rule" was stopped. Based on his previous Presidency performance and considering the import of implementation of "Project 2025"[34], the gender situation is fearsome.

In India, girls were not valued, more before than now. All parents yearn for a son, who will continue their family line and its name and later would give 'Water' (*pind dan*)[35] to the deceased ancestors. It is a religious belief of the majority of the Indian population that a son can help them to attain 'Moksha' (eternal salvation of the soul) by performing certain religious rituals after their death. Scripturally, daughters cannot perform these rituals of a hard-core patriarchal society and they are considered to be a burden in terms of looking after them from a security point of view and to safe guard and ensure that they remain virgins till they are married. Purity of the physical body is an essential requirement for a proper ritualistic marriage amongst the majority of the Indian population. On the top of that parents are expected to give huge amount of dowry[36] at the time of marriage. If not given, often the woman is harassed for not bringing a good fat dowry. Therefore, girls are less welcomed and often little investment is made in their education etc.

In India, marriages are usually arranged by the parents, considering the religion, caste and clan to be associated (with in the same religion) and level of the groom's education, income earning capacity and employment status etc.[37] Dowry, though prohibited by law, yet is hugely in vogue and parents often outdo their capacity to pay it, by borrowing on high rate of interest. Therefore, birth of a girl is a burden in Indian society. Now things are changing but not much. In many cases, girls were killed at birth in rural India, like in the northern state of Punjab and Haryana. The sex ratio is highly uneven so the parents travel to other states to find a bride for their sons, even if they have to pay for it.

In India, abortion became an easy way out after sex determination tests, so instead of killing a newly born girl child, now if the fetus is found to be of a female, is killed in the nip, in the hope of getting a son with the next pregnancy. Such trends may not be rampant in southern parts of India, from where, Kamala Harris's mother's family hailed but the birth of a son certainly is always a yearning expectation in a Tamil Brahmin family too. Therefore, passion and zeal for protection of women's rights and her stand on abortion, has to be understood from that point of view too.

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[34] Project 25 Explained, *available at*: https://www.aclu.org/project-2025-explained? (last visited on Mar. 25, 2024).

[35] Mishra Khushboo Ashokkumar, "A Psycho-socio-economic Perspective of Pind Daan Practice: A Systematic Review" 63 *Economic Affairs* 591 (2018).

[36] The Dowry Prohibition Act, 1961 (Act 28 of 1961), s. 2.

[37] Cultural India, "Arranged Marriage in India – Facts, Customs, Processes & Significance", *available at*: https://www.culturalindia.net/weddings/arranged-marriage.html (last visited on Apr. 20, 2024).

It is true that Kamala Harris is an American through and through, only her mother was an Indian American and father was an African American, therefore, she is qualified to be a black American woman. In the first television debate with her, she was scornfully remarked at her being Indian and said it is not known, where she got 'Harris' from.

IX. MTP ACT AND IMPLICATIONS IN INDIA

Talking of abortion in India, the law, Medical Termination of Pregnancy Act was passed in 1971[38] by the Parliament and this Act is applicable to all the parts of India. Thereafter, abortion became legal, except in advanced state of pregnancies, beyond the period of 24 weeks. Even in some of those special cases, courts have allowed pregnancy to be aborted, if it is a matter of endangering the life of the incumbent mother. An unmarried mother is also allowed to abort her unplanned pregnancy.[39]

In India, unintended pregnancies are a cause for adversely affecting the health and welfare of young women and their children. Association between unintended pregnancy and socio-demographic factors among young female population in India was a subject of intense study during the period from 2015–19, called UDAYA[40]: "Understanding the Lives of Adolescents and Young Adults" conducted in 2015–16. (Wave 1) and 2018–19 (Wave 2) in a highly scientific manner, using univariate, bivariate analysis along with logistic regression model. The results revealed that 40.1 per cent of all currently pregnant adolescents and young adult females reported their pregnancy as unintended (mistimed and unwanted) in Uttar Pradesh at Wave 1 of the survey, which decreased to 34.2 per cent at Wave 2. On the contrary, almost 99 percent of all currently pregnant adolescents in Bihar reported their pregnancy as unintended at Wave 1, which decreased to 44.8 per cent at Wave 2. The socio-demographic factors like age, caste, religion, education, wealth, media and internet use, knowledge and effective contraception highly impacted unintended pregnancies in Bihar and Uttar Pradesh.

Millions of residents of Montana, Arizona, Missouri, Nebraska, Colorado, Florida, Maryland, Nevada, New York, and South Dakota are keen to express how the state they live in, should regulate issues of abortion. Most of the initiatives in these 10 states would allow abortion until fetal viability, if given a chance, which is generally considered about six weeks, or later only in instances when the health of the pregnant woman is at risk.

Freedom of choice advocates' strategy possibly is that if people directly decide to include issues of abortion in their respective state laws, by campaigning, maybe with legislative initiatives, they can bypass the courts. In any case the cause of abortion has a useful political purpose to serve at the time of election. It has already been found that by placing issues of abortion on the ballot, the voter turnout possibly serves the purpose in every state. According to the strategy of political parties, more people will vote who stand for abortion rights as it is always a celebrated election

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[38] The Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971).

[39] *X* v**.** *The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi*, MANU/SC/1257/2022.

[40] Himani Sharma and Shri Kant Singh, "The Burden of Unintended Pregnancies among Indian Adolescent Girls in Bihar and Uttar Pradesh: Findings from the UDAYA Survey (2015–16 & 2018–19)" 81 *Archives of Public Health* 75 (2023).

issue, till the right to access abortion services of American women has not been restored appropriately. It is a human right issue for their wellbeing and development, consequently the development of the country. Let us hope and pray that soon American women's rights of discretionary motherhood would be granted.

X. CONCLUSION

The abortion debate in the United States has moved far beyond a simple question of policy, becoming a defining measure of political identity, governance philosophy, and constitutional morality. The ensuing debates revealed how deeply intertwined reproductive rights are with the nation's political pulse. Donald Trump's shifting approach—from championing the repeal of *Roe v. Wade* to softening his rhetoric under electoral pressure—exposed the tension between ideological purity and political survival. In contrast, Kamala Harris maintained a consistent, vocal defence of abortion access, framing it as a matter of women's autonomy, equality, and healthcare.

The issue's emotional weight was intensified by real tragedies: women denied timely medical care, doctors fearful of prosecution, and the re-emergence of century-old laws like the Comstock Act as tools for federal restriction. These human costs stripped away political abstractions, showing that restrictive laws do not merely shape policy—they change lives, sometimes fatally.

Public sentiment remains divided, but polling shows abortion rights resonate powerfully, particularly with women and younger voters. In swing states, the presence of abortion-related measures on ballots has mobilized turnout, making reproductive rights both a moral cause and a strategic electoral factor. For many, the matter is not just about access to a medical procedure, but about the right to make deeply personal decisions free from governmental overreach. Yet, the country remains fractured, with some states moving to enshrine abortion rights in law and others seeking to ban them almost entirely. This disjointed legal landscape ensures that abortion will remain a battleground for years to come.

What emerges from this turbulent picture is an America at a crossroads: one path leading toward a reaffirmation of reproductive freedom as a national standard, the other toward further fragmentation and restriction. The outcome will not be decided solely in courtrooms or legislatures but at the ballot box, shaped by voters' priorities and values.

Ultimately, the fight over abortion is about more than politics—it is about the nation's commitment to individual liberty, healthcare equity, and the principles enshrined in its Constitution. Whether those commitments will be upheld or eroded will depend on the choices Americans make in the critical years ahead.

FROM TRADITION TO TECHNOLOGY: EXPLORING THE FEASIBILITY OF A PAPERLESS JUSTICE DELIVERY SYSTEM IN INDIA

Zuber Ali[*]
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I. INTRODUCTION

"*Technology is not something for the pandemic. Technology is here to stay for the future, forever*."
- Justice DY Chandrachud, ex-CJI[1]

With the advent of digitization in India, internet connectivity has reached even the remotest of villages, bringing smooth connectivity at the fingertips of the common man. Post the COVID-19 outbreak, technology has seamlessly outstretched to various sectors like education, electronic retail, online FIRs, judiciary, and so on, thus introducing a more efficient way of pulling things around. The pandemic propelled the digitisation of Indian Courts. The judiciary, led by the Hon'ble Supreme Court, the Hon'ble High Courts, and Learned Subordinate Courts, embraced e-courts for filing cases and frequently conducted hearings *via* video conferencing. With the ever-growing pendency of cases, the Indian judiciary continues to grapple with over 4.5 crore cases pending in the courts[2]. The digitisation of the Indian Judiciary not only presents the courts with the golden opportunity to resolve the plethora of pending cases at a click but also enables speedy trial for the same by fast-tracking justice.

The Constitution of India is the supreme law of the land and serves as the cornerstone of Indian democracy. The judiciary, as one of the three organs of the state, plays a crucial role in shaping and interpreting the Constitution. The Judiciary has its roots growing in almost every nook and corner across the country, with a disposal rate between 55%-59% in the Supreme Court, 28% in the High Courts, and 40% in Subordinate Courts.[3] With the legal system being a sine qua non of the Indian democracy, it is undoubtedly an indispensable part of its citizens and the government at large, and functions as the "watchdog of democracy", Justice Ranjan Gogoi, former CJI.[4] The role of judiciary is sacrosanct and needs to evolve with time which brings us to the question this paper is majorly trying to answer, whether paperless transaction is feasible in Indian Courts given the diverse population the judiciary

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[1] Krishnadas Rajagopal, "Virtual Court Technology is here to Stay Now and Forever: CJI Chandrachud" *The Hindu*, Feb. 14, 2023, *available at*: https://www.thehindu.com/news/national/virtual-court-technology-is-here-to-stay-now-and-forever-cji-chandrachud/article66505427.ece (last visited on May 22, 2024).
[2] Omir Kumar and Shubham Dutt, "Vital Stats: Pendency and Vacancies in the Judiciary", Oct. 11, 2021, *available at*: https://prsindia.org/files/policy/policy_vital_state/Vital%20Stats_Pendency%20and%20Vacancies%20in%20the%20Judiciary_Final.pdf (last visited on May 20, 2024).
[3] Roshni Sinha, "Pendency of Cases in the Indian Judiciary", PRS Legislative Research, July 25, 2018, *available at*: https://prsindia.org/policy/vital-stats/pendency-cases-judiciary (last visited on May 18, 2024)
[4] Shivangi Misra, "The Bar Rises: Public Meeting on Independence of Judiciary and Implications for Democracy - A Report" *The Leaflet*, May 17, 2018, *available at*: https://theleaflet.in/the-bar-rises-public-meeting-on-independence-of-judiciary-and-implications-for-democracy-a-report/ (last visited on May 21, 2024).

caters to, the lack of infrastructure, not to mention the absence of an adequate amount of equipped hands to operate the much needed encrypted data management system?

In light of these challenges, the digitisation of the judiciary emerges not just as a solution but a necessity. Article 129 of the Constitution of India declares the Supreme Court a court of record, and it further provides that the Supreme Court shall have all the powers of such a court, including the power to punish for contempt of itself[5]. It simply means that all the judgments made by this court shall be preserved for future reference by its subordinate courts, and its decisions shall be admitted as pieces of evidence. This responsibility brings with it the enormous task to preserve such a hefty number of records leads to cluttering, and the mismanagement, if any, will lead to the loss of essential pieces of evidence. The paper trail is difficult to keep track of. This has led to overburdened storage, poor record-keeping, and frequent loss and misplacement of important documents. For instance, it becomes impossible to produce an affidavit that was filed several years ago and is now untraceable, leading to the adjournment of the said matter, thereby delaying justice.

The mere lack of documents lost in the rugged old files leads to the acquittal of convicts, thereby causing a juncture in the course of justice. Ample time is lost in summoning records from lower courts to higher courts in cases of appeal. The shift to digital systems addresses these very gaps and not only fast-tracks justice but also enables its accurate delivery without any hassle. It is easier to file cases on the portal, and copies of orders and judgments can be obtained only by a click of the keypad. This transformation not only helps prevent delays but also ensures accountability and transparency, allowing justice to be delivered more efficiently. In essence, 'Paperless' seeps its way through the columns of the Hon'ble Apex court, reaching even the last man of the society.

II. IMPLEMENTATION OF DIGITISATION IN THE INDIAN JUDICIARY

While digitization moves towards full-fledged growth in India, the need for the Judiciary to go paperless had already been realised in developed nations such as the United States and the United Kingdom.

Bundledocs, in its article, published on March 26, 2012, questions the dire need of the hour - "Are paperless Courts the future for the legal sector?" This transformation aims to replace 'bundles of paper' with devices in an attempt to create a paperless court. Marilyn Stowe argues that the transition into a paperless system could help overcome the "days of carrying heavy lever arch files into the court", which, when unveiled, only reveals misplaced documents[6]. To come up with an ease of working, the Jordanian Government commissioned the feasibility of paperless courts *via* three projects, *viz*., Electronic Document Archiving, Electronic Filing, and Video Hearing.[7] A similar approach is being adopted by the Indian Government to further the digitisation of courts.

As India also moves steadily towards a digital justice system, several key concepts and tools have been developed to support this transformation. These initiatives aim to make

[5] The Constitution of India, art. 129.
[6] "How Will Paperless Courts Affect Legal Document Preparation?", *Bundledocs Blog* (Bundledocs, Apr. 18, 2012), *available at*: https://www.bundledocs.com/blog/2012/4/18/how-will-paperless-courts-affect-legal-document-preparation.html (last visited on May 22, 2024).
[7] USAID, "Business Case Feasibility Study for Electronic Court Modernization" *USAID* (Oct. 2006), *available at*: https://pdf.usaid.gov/pdf_docs/PNADM237.pdf (last visited on May 27, 2024).

the legal process more transparent, faster, and accessible to everyone. From virtual courts to AI-based translation tools and case management systems, each element plays a crucial role in reducing reliance on paper, improving efficiency, and empowering both the legal fraternity and citizens. The following concepts highlight the core components driving this digital shift in the Indian judiciary:

A. Digitization Encompasses the Following Concepts

i) Virtual Court

With the continuous upsurge in internet users, India is presently the second-largest internet user base in the world, with half of India's population having access to the internet in the year 2020[8]. The Hon'ble Prime Minister of India claimed that India turned the COVID-19 crisis into an opportunity. The nationwide lockdown forced the doors of all courts across India to open their doors only virtually. The virtual court embodies a concept aimed at negating the physical presence of the litigant or attorney in the court, and instead adjudicating the cases on a virtual platform. The virtual courts act as an effective means to conduct court proceedings by dismantling geographical barriers and elevating the court's efficiency. It not only makes the legal system more accessible to individuals who might have difficulty attending in-person proceedings but also increases safety by reducing the risk of exposure to diseases (such as the pandemic itself). Further, it significantly reduces the cost of trials borne by an individual, and simultaneously improves evidence presentation through enhanced digital tools easily accessible to parties involved in the trial.

ii) Case Management Systems

"Technology has become a powerful tool in the legal system in improving efficiency, accessibility and accuracy in the administration of justice. However, the success of any initiative and innovation, whether in law or in technology depends on the ability to collaborate with stakeholders and incorporate critical feedback of those who will be using it," the former CJI said.[9]

The Case Management System provides a single interface to facilitate seamless and collaborative working within teams/parties to a case, with real-time updates on the set database. It ensures prompt access to, and easy sharing of, data by using a dedicated cloud database.

iii) Court Digitisation Project

The practicality of paperless courts could be truly accessed in its true essence only by the digitisation of courts in terms of management, accessibility, visibility, and control is achieved. This simply means, with online information replacing paper, everyone involved in a case has simultaneous access to the entire set of documents once they are filed. The project

[8] Sandhya Keelery, "Internet Usage in India - Statistics & Facts" *Statista*, July 07, 2020, *available at*: https://www.statista.com/topics/2157/internet-usage-in-india/ (last visited on May 24, 2024).
[9] Outlook Web Bureau, "Technology a Powerful Tool in Legal System to Improve Efficiency, Accessibility: Chandrachud" *Outlook India*, Jan. 25, 2023, *available at*: https://www.outlookindia.com/national/technology-a-powerful-tool-in-legal-system-to-improve-efficiency-accessibility-chandrachud-news-256517 (last visited on May 27, 2024).

minimises the possibility of adjournments due to missing documents, information, or parties themselves, consequently maximising the effectiveness of the system in general.

The courts' digitisation further reduces the dependency upon physical documents and ensures much better case tracking while minimizes any delays. These reforms characterise an important step toward a Justice delivery system that is faster as well as more efficient. However, technology's advantages seem clear. This transformation does also pose challenges for citizens. Citizens who lack access to internet services or the necessary digital literacy may struggle to participate fully in the process. Concerns regarding data privacy, cybersecurity, and the reliability of online platforms also persist. Most importantly, there is an ongoing debate over whether virtual courts compromise open courts justice's foundational principle is a pressing concern, a question demanding careful reflection as courts continue to modernize.

III. Does Virtual Court Pose a Threat to Open Courts?

The temporary phase of virtual hearings does not pose a challenge to the provision of open court proceedings, as various constitutional and legal provisions require judgments to be delivered in open court. Article 145(4) of the Constitution of India[10] states that no judgment can be delivered by the Supreme Court of India unless it is delivered in an open court. Similarly, section 366 of the *Bharatiya Nagarik Suraksha Sanhita*, 2023[11] (corresponding to section 327 of the Code of Criminal Procedure, 1973) mandates that criminal courts should be open to the public, with certain exceptions such as rape cases. Additionally, section 153B of the Code of Civil Procedure, 1908[12] stipulates that trial locations should be considered "open courts" accessible to the public, except at the discretion of the presiding judge. However, the virtual court upholds the principle of openness as well as improve upon it in some ways. The transition to virtual courts does not evade the idea of open justice; instead, it adapts it to the digital age. Virtual courts ensure transparency and participation by allowing lawyers, litigants, and even the general public to observe proceedings online. Moreover, media access is often easier and less restricted in digital formats, providing them with more comprehensive and accurate reporting. This, in turn, will help the media to fulfill its vital role of holding the judiciary accountable and informing the public.

Virtual courts will also help increase public engagement and understanding the judicial process, which will maintain the trust in the legal system. For example, the live streaming of constitutional cases by the Hon’ble Supreme Court has made landmark judgments directly accessible for citizens because it reinforces transparency and public trust within the judiciary. These developments show that virtual courtrooms can preserve the core values of Indian open court tradition if designed as well as implemented considerately. They do not weaken the concept of open court, but rather strengthen accessibility, fairness, and public scrutiny. With this growing confidence in digital justice, it becomes essential to look at how digitisation has been practically implemented in the Indian judiciary - from policy initiatives to on-ground infrastructure and digital tools.

IV. Implementation of Digitisation in the Indian Judiciary

[10] *Supra* note 5, art. 145.
[11] The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act No. 46 of 2023), s. 366.
[12] The Code of Civil Procedure, 1908 (Act No. 5 of 1908), s. 153B.

In 2007, the National e-governance plan commenced the e-courts project for the implementation of Information and Communication Technology (ICT) in the Indian judiciary. Since then, more than 18,700 districts and subordinate courts have been computerised.[13] The National Informatics Centre took up the project of implementing the e-courts initiative through different phases *viz*., Phase I, Phase II, and Phase III[14]. With the initiation of PHASE I in 2007, the National e-court Portal and National Judicial Data Grid became operational, enabling litigants and attorneys to keep track of cases, cause lists, daily orders, final orders, judgments, case registration, etc. Within the ambit of Phase I of digitisation, laptops were provided to judicial officers, video conferencing was started in courts and jails, and computerised infrastructure was developed massively in Court complexes. A large number of district courts launched their websites for the convenience of stakeholders. Therefore, Phase I concluded on 30th March 2015.

PHASE II of the digitisation of courts was approved by the former CJI, P. Sathasivam, in January 2014 and sanctioned by the government in August 2015. According to the e-committee report of the Supreme Court on the E-Courts Mission Mode Project[15], "the covered courts are provisioned for additional hardware with (1+3) systems per Court Room, the uncovered Courts of Phase-I and the newly established Courts with (2+6) systems per Court Room and the Court Complexes are provisioned for hardware, LAN etc." The courts have switched to Cloud Computing Architecture, transforming Server rooms into Network rooms and Judicial Service centres into Centralised Filing Centres. Phase II has provided for the establishment of Digital Libraries, and further improvised platforms for the dissemination of information *via* applications for mobile phones, SMS and emails, available in all local languages.

Over the years, various schemes and projects have been launched by the Indian Government, that have aided the cause of a paperless judicial system. One of the significant initiative in this regard is *SUVAS* expands to *Supreme Court Vidhik Anuvaad Software*[16] an Artificial Intelligence (AI) tool trained for translation, having the capability of translating English Judicial Documents, Orders or Judgements into nine vernacular languages and vice versa. By overcoming language barriers, SUVAS makes the judiciary more accessible and inclusive, especially for litigants and legal practitioners who are facing the language barrier.

Another important innovation is *e-Prisons* Application[17]. This is a prison and prisoner management application that outlays a citizen centric portal showing statistical data of various jails in the country and functions as a portal for showcasing and selling products manufactured in different jails across the country by the inmates. This not only streamlines prison administration but also encourages rehabilitation and vocational engagement of prisoners.

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[13] Department of Justice, Ministry of Law and Justice, Government of India, "The National Judicial Data Grid (NJDG)", *available at*: https://doj.gov.in/the-national-judicial-data-grid-njdg/ (last visited on May 30, 2024).

[14] The eCourts Mission Mode Project, is a Pan-India Project, monitored and funded by Department of Justice, Ministry of Law and Justice, Government of India for the District Courts across the country.

[15] *Ibid.*

[16] PIB India, "Action Plan for Simple, Accessible, Affordable and Speedy Justice", Aug. 10, 2023, *available at*: https://www.pib.gov.in/PressReleasePage.aspx?PRID=1947490 (last visited on May 21, 2024).

[17] e-Committee, Supreme Court of India, Information and Communication Technology in Indian Judiciary, *available at*: https://ecommitteesci.gov.in/e-prison/ (last visited on May 22, 2024).

The *NSTEP* which stands for *National Service and Tracking of Electronic Processes*[18] initiative is a service-tracking application that enables the service of notices/Summons in electronic form. It keeps track of posting and recording of real-time updates from remote locations helping reduce inordinate delays in process service, thus significantly reducing the time spent via post. This system enhances accountability and saves crucial time in the legal process.

To make the benefits of digitalization available to all sections of society *e-SEWA Kendra*[19] has been established in court complexes. These centers help to overcome the digital gap for litigants and advocates that may not be technologically equipped provide services like e-filing, checking of case progress, and access to other electronic court resources through these Kendra out to reduce digital divide in the judiciary.

The integration of different components of the criminal justice system has been facilitated through the *Inter-Operable Criminal Justice System (ICJS)*[20]. This system enables seamless data exchange between the police stations' servers and courts and reduces the courts' data entry work. Metadata exchange of FIR and Chargesheet through ICJS has been implemented in 21 High Courts, which is contributing to faster processing and better coordination between law enforcement and the judiciary.

Judicial officers have also been equipped with digital tools like the *JustIS Mobile App*[21]. The apps allows them to monitor pendency and disposal of the cases at their fingertips. This helps improve case management and enables judicial officers to prioritize their workload more efficiently.

A key driver behind these many reforms is the e-Committee, which through its various initiatives has laid down Model rules of video conferencing, e-filing, live streaming of court proceedings, digital preservation of judicial records. These initiatives not only promote transparency and reduce physical paperwork but also bring uniformity and accountability into judicial functioning.

PHASE III of the project is still to be launched. With an aim to overcome challenges of connectivity issues, digital literacy, privacy concerns, hacking and cyber security, Phase III envisions a digital court beyond simply replicating offline processes digitally. It encompasses the use of technology guided by two facets central to Gandhian thoughts - access and inclusion. "It is designed to take an ecosystem approach that leverages the existing capacities in different stakeholders such as civil society leaders, universities, practitioners, and technologists to realise this future", Vision Document released by e-Committee, Supreme Court of India.[22]

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[18] Department of Justice, *available at*: https://doj.gov.in/national-service-and-tracking-of-electronic-processes-nstep/ (last visited on May 25, 2024).

[19] e-Committee, Supreme Court of India, Information and Communication Technology in Indian Judiciary, *available at*: https://ecommitteesci.gov.in/service/e-sewa-kendra/ (last visited on May 25, 2024).

[20] Ministry of Home Affairs, "Inter-operable Criminal Justice System (ICJS)", *available at*: https://www.mha.gov.in/en/commoncontent/inter-operable-criminal-justice-system-icjs (last visited on May 26, 2024).

[21] e-Committee, Supreme Court of India, Information and Communication Technology in Indian Judiciary, *available at*: https://ecommitteesci.gov.in/court-management-tool-justis-app/ (last visited on May 25, 2024).

[22] "Vision Document for Phase III of eCourts Project", e-Committee Supreme Court of India, *available at*: *https://ecommitteesci.gov.in/document/vision-document-for-phase-iii-of-ecourts-project/* (last visited on May 19, 2024).

Phase III proposes to mitigate challenges that may be faced due to this gradual transition by ensuring:

(i) *Access to relevant hardware* such as encrypted broadband connectivity.

(ii) *The creation of needed digital infrastructure* such as digital case repositories with a unique case number and case type, enabling easy navigation through cases. Intelligent scheduling, *i.e.*, coordinating the availability and schedules of different users: judges, lawyers, and litigants. Thus, leveraging technology to create an infrastructure that can optimise and unlock significant capacities for justice administration and overall bring greater efficiency to the system.

(iii) *Access to critical services* becomes mandatory in order for the above-described infrastructure to function. This includes a Digital Case Management System, e-filing, CLASS (Courtroom Live Audio-Visual Streaming System), Transcriptions, Service of Notice, e-Sewa Kendra, Help desk for digital assistance, administration of Legal Aid, and Virtual Courts.

The Phase III of judicial digitization initiative is dedicated to the issues of transition into a completely paperless system which we strengthen in terms of infrastructure and access. It put forward the need for secure and reliable internet access, robust digital case storage systems, and intelligent scheduling which in turn coordinates the availability of judges, lawyers and litigants. These elements are the key to smooth judicial workflow and better case management. But also, it is important to note that the success of this phase is not only in the technology itself but how well it is integrated and made available to all stakeholders. We have in Orissa High Court a great example of these concepts put into practice which has become a model for paperless functioning and which other courts in the country are looking to follow.

V. ORISSA HIGH COURT- A SUCCESSFUL PAPERLESS MODEL

"The Orissa High Court has set a new benchmark for record digitisation, a process critical to keeping courts running quickly and smoothly, creating a "win-win" situation for not only the bar and bench, but also the public", as reported by Ashutosh Mishra from *The Wire*.[23]

The digitization of records in the Orissa High Court was initiated in 2018, but it gained substantial traction when Justice S. Muralidhar assumed the role of Chief Justice. Having been an advocate for the idea of a paperless court during his tenure as a judge in the Delhi High Court, Justice Muralidhar infused new energy into the digitization initiative. Following the inauguration of the High Court's advanced Record Room Digitisation Centre (RRDC) near the Odisha Judicial Academy building in Cuttack on September 11, 2021, by Justice D.Y. Chandrachud, the chairperson of the Supreme Court's e-Committee, a remarkable total of 156,723 legacy records or "disposed-of" case records were scanned and digitized by the end of the previous year.

The RRDC serves as a comprehensive facility that combines storage, digitization, preservation, and retrieval services for disposed-of case records or legacy records. This centralized location allows convenient access to these records from the courtroom or any

[23] Ashutosh Mishra, "The Orissa High Court is Leading the Way in Digitising the Judiciary" *The Wire*, Feb. 08, 2022), *available at*: https://thewire.in/law/the-orissa-high-court-is-leading-the-way-in-digitising-the-judiciary (last visited on May 07, 2024).

bench through a secure and closed network. While the digitization process is being carried out extensively for the existing legacy records, a dedicated area within the RRDC has been allocated for fragile records. These records are of such antiquity that opening and scanning them is not feasible. The Fragile Record Room specifically houses legacy records dating back to the early 1800s from the High Courts of Patna, Calcutta, and Madras. With a strong commitment to harnessing the potential of advanced technology, Justice Muralidhar has introduced various initiatives such as e-filing of cases and e payment of court fees.

Additionally, efforts have been made to provide practical training to advocates, enabling them to become familiar with the associated technology. "It saves both time and money and makes life easy for all of us,"[24] said Shashi Kant Mishra, a Rourkela resident who has seen many litigants suffer because of inordinate delays in the finalisation of cases.

This circulates one back to the question of 'whether the paperless transaction is feasible in Indian courts? 'Looking at the Orissa High Court model, the answer is in the affirmative. Via *All India Association of Jurists v. Uttaranchal High Court*[25], the petitioner, through a writ petition, claims to seek the intervention of the Hon'ble Supreme Court "to effectuate the right of access and the freedom of practicing the noble profession of law irrespective of geographical location", thus outlining virtual courts a facet of the fundamental right guaranteed under the Constitution of India.

VI. CONCLUSION

The Indian judicial system journey towards a paperless is going through a major transformation, rolling by the need to improve efficiency, transparency and equal access to justice reaching last man of the society. From everything discussed above, it is evident that the Indian judiciary has made a commendable progress in embracing technology. It is clear that the digitisation is helping the Indian courts become faster, more available and well oraginsed.

Initiative like e-filing, virtual hearings, *JustIS* app, case management system, and translation software like SUVAS are already making a big difference in the India judicial system. A great example is the Orissa High Court, which has gone almost completely paperless and has become a model for other courts to follow. So yes, making Indian judicial system paperless is possible but it needs a proper infrastructure, good training of judicial officers as well as staff, and strong support for everyone involved.

However, the said transition has not been without obstacles. In many places, courts still continue to require mandatorily both digital copies as well as physical copies despite e-filing, digital literacy gaps among litigants and court staff, and the costs associated with both paper-based and digital processes, leading to unnecessary delays and additional costs.

And we must acknowledge that technology can be mixed blessing. Not everyone, especially those in rural areas or the ones without the access to technology, can take the full advantage of the digitised system yet. This can lead to the exclusion of those who are already facing barrier in the judicial system. For the technology truly serving justice, it must

[24] *Ibid*.
[25] WP (C) No. 941 of 2021, dated Sep. 06, 2021.

be built with accessibility and inclusion as its foundational core. But with the right steps, these problems can be fixed.

Importantly, the view that virtual courts may undermine the openness was found to be unfounded, and in fact, technology in many ways has the potential to expand access, enhance public scrutiny by allowing people to watch judicial proceedings, and make judicial processes more inclusive and approachable if implemented thoughtfully. The answer to whether a paperless system is possible in Indian judicial system is cautious, but 'Yes'. Both practical experiences and technological advancements already in place, such as e-filing, virtual hearings, case management apps, and translation software like SUVAS, have shown that Indian courts can function effectively in a digital environment. The example of the Orissa High Court, which has successfully implemented large-scale digitisation and moved towards a nearly paperless model**,** further demonstrates that the transition is not only possible but sustainable. However, this transformation can succeed on a wider scale only if guided by the principles of accessibility, inclusivity, and accountability. It is not enough to simply introduce technology; what is equally essential is the strong infrastructure, closing the digital divide, improving lawyer-litigants interference, and building trust in digital processes through transparency and public engagement. Taken together, these factors make the vision of a paperless system both realistic and more achievable for pan-India.

In conclusion, moving towards a paperless judiciary is not just about using less paper, it is more about making justice serve and seem to be served for everyone. It should not be seen as a mere technological upgrade, but as a larger cultural and institutional transformation. And if done in a right manner, it can lead to a faster, more inclusive, and more transparent judicial system that will truly meet the needs of Modern India.

Biotechnology and Intellectual Property Rights: Legal and Social Implications. By Dr. Kshitij Kumar Singh, Springer, New Delhi, 2015, Pp. x- 250, Price: $99.00 (Handbook), ISBN: 978-81-322-2059-6.

Recent development in biodiversity, biotechnology, and bioinformatics has paved the way for commercial innovations and investments juxtaposing the regime of the global patent system and public welfare. As biodiversity provides the basic material for the apparatus of biotechnology for research and innovation to be used in bioinformatics, where such biological research data and information are stored, analyzed, and procured with the help of genetics and information technology. Increased commercialization of biological material, biotechnological research and bioinformatics tools has stimulated the research and business community to think seriously about monetary investments and intellectual property protection. In this context, this selected book offers an important contribution in recent literature on biotechnology and intellectual property rights (IPRs) interfacing law and technology.

This book has altogether seven chapters focusing on legal, social, and policy implications of patentability in biotechnological developments. In the introduction, the chapter sets out the background for biotechnology and IPR interface, providing legal developments. Then, chapter two makes a comparative and critical study of patentability of biotechnological innovations in the four jurisdictions, *i.e.*, USA, Canada, EU, and India. The third chapter tries to examine the legal norms for the patentability of biotechnological innovations under TRIPs, the Substantive Patent Law Treaty, and other international instruments. The fourth chapter deals with the humane genomes and related issues such as patentability, patent quality, and impact on public health. Fifth chapter discusses the IP protection of bioinformatics tools and databases, along with recent trends of open bio-development. The sixth chapter deals with the aspects of ownership, access, and benefit sharing (ABS) and prior informed consent (PIC) in relation to patenting of genetic inventions. The last chapter provides conclusion and further suggests certain innovative reforms at the end. Above all, the author has drawn attention towards these difficult and complicated issues, providing proper legal and technological background related to intellectual property and biotechnology with the aim of providing legal and policy implications in the contemporary age.

First chapter outlines the interaction of biotechnology and intellectual property protection which has posed unprecedented challenges before the established law and ethics. The author states that “the existing intellectual property laws struggle to cope up with challenges posed by biotechnology legal advances as they were framed in an age when such advances were not foreseen by the framers.” He points out that “the traditional doctrines of IPRs laws have been extended to new subject matters such as genes, proteins, and other molecular living organisms,” which has become beyond the purview of law. Because of this, there have been certain disputes and dissents arising in recent times due to “certain ambiguities and potential gaps in the existing laws, administrative decisions, and case laws.”

Chapter two provides “the patent approaches of the USA, EU, Canada and India on the basis of patent law, administrative decisions and case laws bringing common points and differences among and between them.” He finds that the common differences basically depend upon the socio-economic conditions of these countries. Finally, he concludes that

"patent laws in these four jurisdictions struggle to cope with new biotechnological inventions." He henceforth demands a comprehensive review of the existing patent legal regime to address the gene-related invention or innovation in this digital age.

Chapter three provides analysis of "international patent legal regime relating to biotechnology", and thus highlights the potential gaps and ambiguities in TRIPs text. The global patent regime dealing with biotechnology has been analyzed in the light of the differentiation and harmonization approach in the current scenario. The author also explores "the impacts of such uncertainties and difficulties for developing nations in view of their slow pace of scientific and technological development." He concludes that such uncertainties and ambiguities have a great impact and implication in arriving the "harmonisation of patent law" and setting up a "uniform patent system" in the present technological age.

Chapter four discusses the imperatives of patenting the research tools and techniques in the name of genetic innovations. It relates the issues of accessibility and quality for public health from legal, social and policy prospects. The emphasis has been made on "patenting of the genetic tests for diagnostic purposes and its impacts on the rights of patients, researchers, and other stakeholders." The author points out that "the social and policy implications of patents on genetic research tools and genetic testing cannot be adequately addressed only by making change in the patent system and patent laws." Such laws have not been formulated to provide solutions to broad and dimension social and policy problems of different countries. Thus, the author insists upon preparing specific policies and enacting legislation for patent on gene research to regulate the patent practices in specific countries.

Chapter five further examines the interests and synergies involved with intellectual property protection to bioinformatics and genomic databases. It discusses the transition of biotechnology to bioinformatics, genetics to genomics, stimulating to legal protection under intellectual property rights law. He suggests further that "a comprehensive review of existing intellectual property laws in the light of the present information age is urgently required". Keeping an account of the collaborative nature of biotechnological research, bioinformatics tools innovation, and genomics database, there has been evaluated scope and merits of open biotechnology with certain examples in the Human Genome projects. The author finds that the IP protection to bioinformatics and genomic databases has to be provided in a balanced way so that it should not be only helpful for inventors, creators, and intermediaries, but also ensure the collaborative and open nature of research to promote innovation in public welfare especially in developing nations.

Chapter six extends the debate for the extension of patent protection under the IPR regime to human gene in view of ownership, informed consent, and benefit sharing. The author expresses that the ownership issue on human genetic materials used in research has been raised from the beginning on social and ethical grounds. It has been considered a global genetic common, which is now converted into private property due to extension of IPR over them. The author suggests that "ownership rights on research subjects in their extracted genetic material must be recognized." The author has also mentioned certain international legal instruments such as 'International Agreement on Access of Human Genetic Resources and Benefit Sharing', the CBD and TRIPs, in this regard. Further, the author highlights the issue of access and benefits sharing (ABS) by advocating that "if researchers and sponsors conducting the research, gain the benefits, the equitable sharing of that benefits must also be provided under the law." The author at the end suggests possible solutions on these issues

through benefit sharing clauses, certificates of origin options and certain modifications in the existing patent system. Chapter seven concludes the overall observations and possible suggestions derived from the book.

Above all, this book gives fresh insights regarding biotechnology and law interface providing inter-disciplinary approach in current technological age. The author maintains that wider implications of biotech patents on society cannot be addressed by patent law exclusively, but it can be properly addressed by curving out significant legislative and administrative steps, streamlining licensing strategies and formulating effective public policies. However, the book's coverage on biotechnology patenting and relevant issues in four jurisdictions (EU, USA, Canada, India) is highly ambitious, which has not been balanced evenly and handled properly. The patenting of biotechnological innovations in USA and Canada has been analyzed heavily in twenty-five pages and eighteen pages respectively, compare to EU and India in around six and eight pages only. Even, author has not given adequate reasons for choosing those diverse countries European Union, Unities States America, Canada including India to this multi- jurisdictional comparative review on biotechnological patents. Besides, the book does not provide a case law index, as lots of cases has been cited on several times, which would have been quite useful for broad research community. Despite its weakness, this has been fair effort by the author to discuss the issues relating to biotechnological innovation and patent protection which would help the reader to know the national and international legal development in this regard. It will be quite useful for board readerships including law scholars, legal professionals, researchers, policy makers and those doing interdisciplinary studies.

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